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A Wolf in Sheep's Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes

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Abstract

If international atrocity crimes are acts so egregious that their impunity cannot be legally tolerated, why don't we punish States that commit them? The rise of international criminal law is celebrated as an achievement of the international rule of law, yet its advance effectively may come at the expense of holding States accountable for their role in mass violence. Transitional justice has emerged as the dominant normative framework for how the international community responds to mass violence. Liberalism strongly influences transitional justice, which has produced individual criminal accountability as the desired form of legal accountability for atrocities. Transitional justice rejects punishing States for atrocities as illiberal (collective punishment) and illegitimate (lack of positive law). In fact, transitional justice theorization of justice largely ignores legal accountability for States. Without legal accountability, States enjoy moral and legal impunity for their crimes. States escape their legal obligations to repair the injury they cause and to institute reforms that secure a fuller measure of justice and peace. This Article examines how international law and transitional justice have developed conceptually to effectively prevent legal accountability for States that commit atrocity crimes, and argues that a new politics of transitional justice is necessary to harness the productive potential of State legal accountability to achieve a fuller measure of international justice.

KEYWORDS: International Crime, Transitional Justice, Liberalism, Accountability

ARTICLE

A WOLF IN SHEEP'S CLOTHING? TRANSITIONAL JUSTICE AND THE EFFACEMENT OF STATE ACCOUNTABILITY FOR INTERNATIONAL CRIMES

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ABSTRACT

If international atrocity crimes are acts so egregious that their impunity cannot be legally tolerated, why don't we punish States that commit them? The rise of international criminal law is celebrated as an achievement of the international rule of law, yet its advance effectively may come at the expense of holding States accountable for their role in mass violence. Transitional justice has emerged as the dominant normative framework for how the international community responds to mass violence. Liberalism strongly influences transitional justice, which has produced individual criminal accountability as the desired form of legal accountability for atrocities. Transitional justice rejects punishing States for atrocities as illiberal (collective punishment) and illegitimate (lack of positive law). In fact, transitional justice theorization of justice largely ignores legal accountability for States. Without legal accountability, States enjoy moral and legal impunity for their crimes. States escape their legal obligations to repair the injury they cause and to institute reforms that secure a fuller measure of justice and peace. This Article examines

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how international law and transitional justice have developed conceptually to effectively prevent legal accountability for States that commit atrocity crimes, and argues that a new politics of transitional justice is necessary to harness the productive potential of State legal accountability to achieve a fuller measure of international justice.

INTRODUCTION

Referring to the violence in Syria, Navi Pillay, then UN High Commissioner for Human Rights, declared: "It's the Government that is mostly responsible for the violations and all these perpetrators should be identified and can if there is a referral to the International Criminal Court."[1] This logic is as familiar as it is constructed. Ever since the Nuremberg trials, the international community has embraced individual criminal accountability as a value and goal necessary to achieve justice for international atrocity crimes—acts that are now recognized as war crimes, crimes against humanity, genocide, and

1. United Nations, *UN/Syria Update*, UNIFEED (Apr. 8, 2014), http://www.unmultimedia.org/tv/unifeed/asset/U140/U140408d/ (last visited May 26, 2015); *see also UN Rights Chief: Syria Government Abuses 'Far Outweigh' Rebels*, JURIST: PAPER CHASE (Apr. 9, 2014, 12:40 PM), http://jurist.org/paperchase/2014/04/un-rights-chief-syria-government-abuses-far-outweigh-rebels.php.

crimes of aggression.[2] Justice punishes wrongdoers, removes bad leaders, and aims to stop the bloodshed. Therefore, it is foreseeable that as the civilian casualties and death toll mount in the Syrian crisis, international consternation will move from hand wringing to proposals for intervention. In May 2014, the UN Security Council considered a French proposal to refer the situation in Syria to the Prosecutor of the International Criminal Court ("ICC"), who would investigate and bring perpetrators to justice.[3] Predictably, Russia and China vetoed the resolution.[4] Also unremarkable was that despite acknowledgment that the Syrian State was committing international crimes,[5] the resolution contained no calls to punish the Syrian State for these acts or to impose legal consequences for its involvement in atrocities. Such measures might include compensation for the victims; the establishment of a truth commission; or more muscular interventions like ensuring free elections, redrafting the constitution, or reform of state institutions. There is no supranational criminal court of justice akin to the ICC, to which the Security Council could refer the Syrian State for criminal sanction. In fact, few likely considered the absence of international calls for State legal accountability remarkable.

The permanent criminal court stands as the normative pinnacle of the international community's response to mass violence. Prosecution by the ICC arguably confers the highest form of international opprobrium and demonstrates the commitment of the international community to provide justice for the crimes committed. The Court stands as a symbol to punish leaders who have orchestrated widespread and illegal destruction and functions as an institution to normalize accountability for international crimes. Yet we are missing

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2. International atrocity crimes refer to acts prohibited by states and criminalized by international treaties or custom for which individuals may be prosecuted by international criminal courts or by states that have jurisdiction over alleged wrongdoers. André Nollkaemper, *Systemic Effects of International Responsibility for International Crimes*, 8 SANTA CLARA J. INT'L L. 313, 332 (2010) [hereinafter *Systemic Effects of International Responsibility*]. These crimes include the crime of aggression, crimes against humanity, genocide, torture, and terrorism. *Id.* In this Article, the terms "international atrocity crimes" and "mass atrocities" will be used interchangeably.

3. UN Security Council, The Situation on the Middle East, U.N. Doc.S/PV.7180, 3/18 (May 22, 2014); S.C. Res. 348, ¶ 2 U.N. Doc. S/2014/348 (May 22, 2014) [hereinafter Proposed Syria S.C. Resolution 348].

4. UN Security Council, The Situation on the Middle East, U.N. Doc. S/PV.7180, 4/18 (May 22, 2014).

5. *Id.* ¶ 1.

an important discussion about legal accountability of the sovereign State for its perpetration of mass violence. Ironically, as the technologies of State violence become increasingly sophisticated and brutally lethal (the use of chemical weapons against Syrian civilians, targeting of civilians and assaults of towns in Libya, aerial bombing of villages in the Sudan, etc.), international institutions have narrowed their targets of legal responsibility to a handful of individuals. In other words, the legal response to atrocities has downsized its unit of attention even though the legal and factual basis for State accountability persists, if not grows stronger.

State-sponsored mass violence, such as that in Syria, is a result of State policy, also referred to as "system criminality."[6] This means that collective structures of the State become the instruments of criminal terror and may be most obvious when Syrian armed forces are deployed to attack civilians. Less visible when examining specific violations, but critical to understanding the involvement of the State in such horrors, are the ways in which the State infrastructure is used as an instrument to contribute to and enable State policies of mass violence. Just as Nazi extermination policies rested on discriminatory laws, an authoritarian political structure, an economy geared toward war, etc., so too is the Assad regime's campaign against civilians an escalation of the authoritarian State's response to peaceful demands for democratic reforms.[7] State policies shape and maintain structural inequalities that in turn produce and maintain political, social, and economic marginalization, which contribute to conflict.[8]

The Allies' defeat of Germany and Japan made possible the imposition of extensive measures of accountability. The terms of surrender for both States laid out a series of principles, which included democratization, disarmament, justice for war criminals, as well as economic reforms and reparations.[9] Taken as a whole, these

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6. Andre Nollkaemper, *Introduction, in* SYSTEM CRIMINALITY IN INTERNATIONAL LAW, 1 (Andre Nollkaemper and Harmen van der Wilt, eds. 2009) [hereinafter SYSTEM CRIMINALITY].

7. Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, ¶¶ 27-40, U.N. Doc A/HRC/S-17/2/Add.1 (Nov. 23, 2011); Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. Doc A/HRC/30/48 (Aug. 13, 2015).

8. Pablo de Greiff, *Introduction, in* TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS, 1 (Pablo de Greiff and Roger Duthie, eds. 2009).

9. Protocol of the Proceedings of the Berlin (Potsdam) Conference, Aug. 2, 1945, 3 Bevans 1207 [hereinafter Potsdam Protocol], http://avalon.law.yale.edu/20th_century/decade

initiatives may be understood as a comprehensive approach to accountability for the unprecedented scale of destruction and mass crimes perpetrated by the two vanquished States. Prosecution of individuals for international crimes, while innovative, was only one component of accountability. The Allies imposed democratization, demilitarization, elimination of armaments industries and reparations to prevent Germany and Japan from regenerating politically or economically as threats to world peace. These measures aimed fundamentally to disrupt and refashion the structural foundations of State policies that produced the war to prevent another one. They also signaled important normative commitments of the emerging international system: unequivocal condemnation and repudiation of the German and Japanese State ideologies that championed the war.

There are two aspects to the international accountability the Allies imposed on Germany and Japan that have escaped the current international justice discourse: (1) measures that conveyed normative culpability of States that perpetrated atrocities and (2) the remedial consequences of this judgment. The victors were not content merely to have their enemies pay for their losses—the *what* of the war—but they also sought to resolve the underlying factors that produced the violence—the *how* and *why* of State criminality. Eradicating the structural contributors to State criminality was linked to international opprobrium of the Nazi regime, of which criminal accountability was an extension, not a substitute. In the intervening years, although accountability has become the rallying cry for the international justice movement, this discourse does not encompass the full measures of State legal accountability the Allies imposed, but has focused exclusively on individual criminal accountability for such bloodshed.

There is a value to naming States culpable for their role in mass violence which we have lost. Acts which the international community recognizes as international crimes—genocide, crimes against humanity, and war crimes—are elevated as such because of their gravity. By their nature, when perpetrated by State actors, these crimes are committed in furtherance of State policy. A moral case can be made for finding such States legally culpable for such acts. Doing so inscribes moral condemnation and repudiation of offending State polices. It also lays a legal foundation for appropriate remedies

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17.asp. In the case of Germany, the Allies also required the dissolution of all Nazi institutions and influences.

against the State; remedies that address the *what, how, and why* of State criminality. Without State culpability, we have effective State impunity. While perhaps one day Syrian President Bashar al-Assad might stand trial in The Hague, there is no mechanism to ensure that the Syrian State will fulfill its legal duties to provide reparations to all victims, institute democratic reforms, rebalance political power, and other undertake other initiatives to address the structural foundations of the State that enabled it to slaughter its residents. If part of the rationale for individual accountability is that no one should be able to commit egregious international harms without consequence, why do we tolerate a different standard for States? It is curious that international criminal law has assumed the moral apex of international condemnation for mass atrocities to the exclusion of punishing States for the same conduct. How has this come about and what are the consequences of this approach?

The first and most obvious roadblock to punishing States for their role in atrocities is that, despite efforts toward codification, State crimes do not exist in international positive law.[10] Nevertheless, international law does establish legal consequences for State perpetration of acts that constitute international crimes through the law of state responsibility. The law of state responsibility involves a legal determination of a breach of international obligations attributable to a State and the legal consequences of such a breach.[11] While States may not as a formal matter "commit crimes," they may be legally responsible for acts for which individuals also may be held legally responsible as international crimes. The twin types of legal responsibility—individual and State—for the same underlying act is a concept referred to as "dual responsibility."[12] This lack of positive law for State crimes is not a conceptual roadblock for State accountability since international law already establishes principles of

10. Positive law is a "uniform order of social norms." Frauke Lachenmann, *Legal Positivism*, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum ed., 2011). As an "expression of basic social laws in the development of society," positive law prescribes the conduct of "legal persons." Alexander Orakhelashvili, *Natural Law and Justice*, THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (R. Wolfrum ed., 2007).

11. SYSTEM CRIMINALITY, *supra* note 6, at 23; Jutta Brunée, *International Legal Accountability through the Lens of the Law of State Responsibility*, 36 NETH. Y.B. INT'L. L. 3, 21 (2005).

12. *Systemic Effects of International Responsibility*, *supra* note 2, at 337. While states and individuals may each bear legal responsibility, pursuit of one form of responsibility does not automatically trigger pursuit of the other.

legal responsibility of States for their breaches. Nevertheless, State sovereignty and the absence of a positive law of State crimes pose challenges to creating processes of State accountability for system criminality.

State responsibility for acts that are also international *crimes* is an available tool through which international acknowledgment of State wrongdoing can be achieved. The lack of codification of State crimes is not an insurmountable barrier to establishing a process of functional State culpability. As a formal matter, the nature of State responsibility is not criminal and therefore the legal inscription of culpability cannot attach to State responsibility for acts that are also international crimes. Nevertheless, legal formalism will not mask the normative judgment that State responsibility will convey. A finding of State responsibility for acts that constitute genocide or crimes against humanity effectively does the normative work that a formal finding of criminal culpability achieves, which may explain, in part, why States have not advanced its use.

The material consequences of State responsibility open the possibility to develop a more robust reparations practice. State responsibility triggers the duty of the State to repair the injury caused by the breach. It is in this area that the Allies' terms of surrender should be understood as examples of the nature and extent of measures culpable States should assume as a legal consequence of State criminality: democratization, economic restructuring, institutional reform, disarmament, etc.[13] To prevent recurrence of the violence, the structural contributors to state criminality should be redressed under the rubric of State reparations.

The legal tools exist in international law to implement State responsibility for international crimes. Yet State responsibility for mass violence has not captured the discourse of international justice. That pride of place belongs to individual criminal responsibility. Birthed with the Nuremberg Principles in the aftermath of the Second World War, "anti-impunity" and individual "accountability" for atrocity crimes have been the rallying cries of the international justice movement. States are called upon to fulfill their duties to execute or facilitate individual criminal justice, but the international discourse of accountability has not made State culpability for mass violence a separate target of legal action. In fact, the discursive use of

13. *See* Potsdam Protocol, *supra* note 9.

accountability is somewhat at odds with the law of State responsibility and injects a degree of confusion when considering State criminality.[14] Additionally, Gabriella Blum argues that since the interventions by the Allies in Germany and Japan, the trend in international law has been to move away from punishing States for their bad acts and attributes this to an international preference for prevention rather than punishment.[15] This Article examines the lack of interest in State culpability from a different perspective and argues that the elision of State wrongdoing from the conceptualization of legal accountability for international crimes helps to explain the neglect of State criminality.

Thus, a second, and less obvious, roadblock to addressing State culpability for international crimes is transitional justice. Transitional justice is the field that dominates discussions of appropriate responses to mass violence. Transitional justice as a field has absorbed the normative, liberal,[16] premise of the Nuremberg Principles, that individual criminal accountability is necessary to condemn individual

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14. Legal responsibility is a narrow concept, while legal accountability is broader and refers to the process by which states are determined to be legally responsible for international crimes and the consequences they should bear. As noted by Jutta Brunée, there is no fixed meaning of "accountability" in international law, but it generally refers broadly to the processes of determining whether an actor has met agreed standards of conduct and if there is a breach of such standards, the consequences that the responsible party should bear. Brunée, *supra* note 10, at 21-22, 24. For purposes of this discussion, the term "international legal accountability" is adopted to refer a broader range of processes for determining the legal wrongfulness of state behavior and appropriate consequences than the law of state responsibility.

15. Gabriella Blum, *The Crime and Punishment of States*, 38 YALE J. INT'L L. 57 (2013).

16. For purposes of this discussion, the concept of liberalism is located in legal philosophy and political theory in that it refers to a basic legal and political commitment to individual rights and freedoms and a system of government designed to curtail abuse of state power on individual rights. Of particular relevance is that one of the core individual rights in a liberal system include the individual right to be free from arbitrary arrest and punishment. Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal* Justice, 26 MICH. J. INT'L L. 1013 (2005). A key principle of liberal legal systems is that individuals may be punished only for individual acts and therefore collective or un-individuated attribution of responsibility is antithetical to respect for individual autonomy and freedom. Liberal assignation of criminal guilt for mass atrocities is perhaps most famously captured by German philosopher Karl Jaspers. Writing in the aftermath of the Second World War, Jaspers reasoned that the German 'people' could not be legally guilty for the acts of German leaders, but had moral or metaphysical guilt. KARL JASPERS, THE QUESTION OF GERMAN GUILT 32, 51-52, 73-74 (E.B. Ashton Trans., 1947). Thus in this discussion "liberal" conceptions of criminality refer to attribution of legal responsibility to individuals for violating legal norms.

leaders and spares the people from collective guilt. Debates about accountability endogenous to transitional justice focus on the priority that should be given to criminal trials.[17] However, these debates are bound together with debates about the role of law and the extent to which legalism[18] and legal solutions should guide the field. Legal accountability is understood to mean individual criminal responsibility and State responsibility disappears from transitional justice theorizations of legal justice.

A third factor that contributes to this blinkered approach to international accountability for mass violence is the law itself. The modern international legal system developed to disaggregate consideration of individuals and States as culpable actors in international law. The conventional understanding of how international individual criminal responsibility became the central feature of international justice draws a straight line from the Nuremberg Principles and trials to the ICC. In other words, liberal theories of retributive justice and deterrence captured the conceptions of international justice. Yet taking into account the full range of responses of the Allies to Germany and Japan and the broader developments of international law that emerged from the war, we see that other conceptions of accountability and legal responsibility for mass atrocities were circulating and taking shape in positive law and international institutions. The Allies not only established the Nuremberg tribunal, but also exacted war reparations from Germany, and instituted sweeping reforms of its State institutions. In the immediate postwar period, nations invested heavily in developing a new international legal system that built on normative aspects of this response. Yet nations undertook efforts to codify and develop the international legal framework as separate international branches of law: international criminal law, international human rights law, and

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17. Naomi Roht-Arriaza, *Editorial Note*, 7 INT'L J. TRANS. JUST. 383, 388-90 (2013); Jaime Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, *in* STATE CRIMES: PUNISHMENT OR PARDON 71-88 (1988).

18. Legalism is a key concept associated with liberal thought. As articulated by Judith Shklar in her defining work on the topic, legalism is "the ethical attitude that hold moral conduct to be a matter of rule following, and moral relationship to consist of duties and rights determined by rules." JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 1 (1986). Shklar argued that legalism defines a system of thought, a political ideology, which understands law as apart from the social world in which it operates. *Id.* at 2. Within the field of transitional justice, scholars have questioned the prevalence of legalism as manifest by a preference for legal (as opposed to non-legal) solutions to the legacies of mass violence. *See infra* Part II.

the law of international State responsibility. These branches have assumed varying levels of legal and institutional development. More importantly for purposes of this discussion, these branches are not integrated conceptually into a theory and discourse of international justice. One result is that it is the Nuremberg legacy and not the measures of State accountability that has become entrenched in transitional justice; State measures of legal responsibility lie outside the ambit of international justice.

Without a discourse that includes State culpability under the banner of international justice and accountability, transitional justice cedes important conceptual and practical ground in addressing atrocity crimes. A justice discourse that included calls to address State wrongdoing has legal purchase. While positive law does not admit of State crimes, nonetheless legal recourse against States is possible through the doctrine of State responsibility. Remedies for State breaches could extend to the robust measures imposed on Germany and Japan by the Allies after World War II, including reparations to victims for the harms caused by State, loss of territory, international administration, or other reforms of State institutions.

Structural reforms of State institutions are familiar as part of peace negotiations. However, pursuing such measures as legal obligations pursues important normative as well as material goals. Linked with an international determination of breach of obligations *erga omnes*, legal remedies would convey culpability and blameworthiness, central values of individual criminal responsibility. It is also possible that structural reforms may more muscular if *legally* grounded as remedies for justice measures than if such efforts were pursued as peacekeeping or policy options. However, to change its conceptualization of accountability, transitional justice needs to overcome its mistakenly liberal objections to State culpability and promote a new politics of international accountability. International law does not run afoul of liberal tenants by treating States as singular entities of political governance and attributing legal responsibility to them for breaches of international rules. Attribution of *wrongfulness* to a State is a political, not legal, resistance. Change may begin with new conceptual clarity that understands State culpability not as collective punishment but as part of a process of holding the State accountable for its involvement in international crimes as an artificial, politically constructed entity distinct from "the people." This perspective would allow an international justice discourse and

practice to emerge, recognizing that individual and State responsibility co-exist comfortably and may be pursued, as appropriate, as a holistic and legitimate responses to mass atrocities.

At the outset, it is important to clarify the parameters of this project. This analysis concentrates on international legal processes of accountability and determinations of legal responsibility for atrocity crimes. While domestic legal systems are also capable of—and many have been—implementing justice for international crimes and addressing the role of the State in perpetrating atrocities, this Article limits its examination to the international system. The content and circulation within domestic contexts of concepts of international legal accountability and responsibility are indeed critical to a comprehensive understanding of the global implementation of justice. However, the primary goal of this Article is narrower: to identify how conceptions of international accountability have developed to exclude State culpability and some of the effects of this theorization. Similarly, while States are not the only entities that perpetrate international crimes, this analysis does not consider non-State actors or organizations as targets of legal responsibility for their wrongdoing. The positive law regarding non-State actors continues to evolve, but the differential treatment of non-State and State entities under international law means that a separate analysis of accountability for non-State actors is required. Finally, this piece does not advance a definitive prescription for how international legal responsibility should be implemented. A thorough treatment of that question lies beyond the scope of this Article. However, by way of example, this Article illustrates one existing mechanism to pursue international State legal accountability: the UN Security Council.

The first Section of this Article reviews the relevant legal developments of international norms and mechanisms from the end of the Second World War to the present. This illustrates the conceptions of accountability circulating in international law at the time, as well as how these branches developed with distinct trajectories, legal instruments, and enforcement mechanisms. The second Section turns to an examination of how accountability is conceptualized in transitional justice and reveals the ways in which transitional justice submerges legal accountability of the State. The third Section considers some of the effects of the status quo. The recent examples of Security Council referrals to the ICC illustrate how the political organ of international accountability, the best current option to

enforce State responsibility, performs the transitional justice meme of Nuremberg by insisting on individual criminal accountability while ignoring State criminality. This Section identifies conceptual challenges to transitional justice that illuminate the vise grip of liberalism on the field and a new transitional justice politics is imagined. The final Section concludes by calling for transitional justice to marshal the full international law commitment to accountability. Attending to distinct roles and responsibilities the individual and State in the commission of atrocities furthers the values of international rule of law and activates remedies commensurate with the challenge to ensure a sustainable peace.

I. *THE POSTWAR DEVELOPMENT OF INTERNATIONAL BRANCHES REGULATING ACCOUNTABILITY FOR MASS CRIMES: INTERNATIONAL CRIMINAL LAW, STATE RESPONSIBILITY, AND HUMAN RIGHTS*

The response of the Allies to atrocities committed during the Second World War spawned two new branches of law: international human rights law and international criminal law. The Allies also relied on longstanding interstate obligations to exact war reparations from Germany.[19] A brief review of these developments reminds us of the exceptional legal growth during this period. It also reminds us that the legal foundations for a robust, holistic approach to dual responsibility exist.

We can consider the Potsdam Protocol,[20] the instrument laying out the principles that would control the Allies' transition of Germany and Japan from enemies to allies, as a conceptual blueprint for what pursuit of dual accountability might look like. With this in mind, we see that the postwar developments of international law differentially advanced the document's commitment to accountability for individuals and States. If the Nuremberg prosecutions served as the prototype for international criminal trials, the reparations provisions along with the legal, economic, and political reform mandated by the Potsdam Protocol offered a model for legal consequences to be imposed upon States that violate *jus cogens* norms to commit mass

19. Ariel Colonomos & Andrea Armstrong, *German Reparations to the Jews after World War II: A Turning Point in the History of Reparations*, *in* THE HANDBOOK OF REPARATIONS 390-419 (Pablo de Greiff ed., 2006).

20. Potsdam Protocol, *supra* note 9.

atrocities.[21] International criminal law has assumed an advanced form with establishment of a permanent criminal court. However, normative development of the law of State responsibility stalled, and State responsibility for human rights violations developed as a new branch of international law with its own treaties and enforcement mechanisms. The end result is that we have a fully articulated system of international criminal law, while there is no parallel system to enforce State responsibility for the same violations. The human rights system offers a partial response but is not conceived of normatively or structurally as a legal redress mechanism for system criminality. Such a system requires the ability to tie legal responsibility to States with commensurate remedial action.

The provisions of the Potsdam Protocol, while not conceived as measures of reparation for state responsibility by its drafters,[22] fit within this legal category. These initiatives offer inspiration for the type of systemic change that could be implemented as part of legal accountability. To understand the conceptual distance that must be traveled to come to this point, it is necessary to understand how the seeds of the international justice movement developed wholly apart from attention to system criminality and the problem of dual responsibility for international crimes. This Section reviews the development of international criminal law and enforcement mechanisms from Nuremberg to the establishment of a permanent International Criminal Court. It then examines the evolution of the law of State responsibility and human rights over the same period. We see how these latter two branches took shape such that they house the legal potential for State accountability for atrocity crimes, but are unable to fully realize the Potsdam model. All three legal branches of international law developed centrifugally in relation to mass violence

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21. *See* Potsdam Protocol, *supra* note 9, §§ (a)(II)(A)-(B).

22. The first mention of structural, legal, and/or policy reforms as a legal remedy for state violations, known as a guarantee of non-recurrence or non-repetition, within the international human rights system was in a 1993 report. Theo van Boven, (U.N. Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental), *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN.4/Sub.2/1993/8, ¶¶ 47, 48, 55, section IX, principle 11; Pablo de Greiff, (Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence), *Report to the Human Rights Council*, ¶ 15, n.4, U.N. Doc. A/HRC/30/42, (Sept. 7, 2015) [hereinafter de Greiff Report].

so that normatively and institutionally they work against a holistic response to global horrors that call out for our full attention.

A. *International Criminal Law*

After a period of internal disagreement, at the Potsdam Conference in July 1945, the Allies agreed to conduct criminal prosecutions of major war criminals. Two years earlier, the Allies had established a commission to collect evidence of war crimes.[23] Initially, the British favored the arrest and immediate executions of a small group of top identified war criminals.[24] The contrary views of US Secretary of War Henry Stimson eventually carried the day.[25] Justice Robert H. Jackson, the prosecutor at Nuremberg, argued that rule of law and adherence to liberal accountability were necessary to deal with the Nazi leaders. He reasoned that retribution for large-scale suffering required piercing State sovereignty to reach the individuals responsible for ordering war crimes: "The idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons . . . . [I]t is quite intolerable to let such a legalism become the basis of personal immunity."[26]

A month later, the Allies concluded the Nuremberg Charter in what commentators have heralded as a critical pivot point in international law.[27] These documents created an international tribunal

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23. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent Criminal Court*, 10 HARV. HUM. RTS. J. 11, 22-23 (1997) [hereinafter *From Versailles to Rwanda*].

24. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 29 (1992); GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 306-09 (4th ed. 2013).

25. Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOREIGN AFF. 179 (1947). He argued that prosecutions rather than a night of the long knives would better reflect on Allies as civilized nations in comparison to the barbarism of the Nazi regime. U.S. Secretary of State Hull supported Stimson in this regard and argued that establishing the truth of Nazi crimes before a world audience via a legal process would ensure the Germans could not later evade the moral and political implications of the verdict as they had with Versailles treaty. ROBERTSON, *supra* note 24, at 307-08. The German government later had claimed that the admission of German guilt in the treaty had been exacted under duress. *Id.* at 354.

26. Justice Robert H. Jackson, *Opening Speech at the Nuremberg Tribunal*, THE JACKSON CENTER (Nov. 21, 1945), http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/ [hereinafter *Opening Speech*]; *see also* Benjamin B. Ferencz, *Tribute to Nuremberg Prosecutor Jackson*, 16 PACE INT'L L. REV. 365, 365-69 (2004).

27. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 66-67, 112-13 (2d ed. 2013) [hereinafter INTRODUCTION TO INTERNATIONAL CRIMINAL LAW].

to prosecute the Nazi architects of mass destruction of Jews and other targets of persecution. The unprecedented scale and nature of Nazi atrocities prompted the powerful States to create an exception to the Westphalian notion of international law as a system of interstate regulation. The sovereign immunity that had shielded individuals from direct sanction yielded to the demands that those responsible be punished. The Nuremberg judgment, reached a little over a year later, solidified the principle that individuals have duties that "transcend the national obligations of obedience imposed by the individual state" for which they may be prosecuted notwithstanding orders of superiors.[28] At the same time, the Allies prosecuted members of the Japanese High Command in trials that lasted from May 1946 to November 1948,[29] and national trials of war criminals that took place in Allied countries in the immediate aftermath of the Second World War signaled a new international commitment to justice.

The newly created UN General Assembly embraced this liberal concept of international justice. In 1946, it unanimously adopted a resolution affirming the principles of the Nuremberg judgment as international law principles thereby essentially ratifying the existence of international criminal law[30] and moved toward codifying international crimes and creating a mechanism to enforce them. As part of the UN's broader efforts to develop an international legal system, the UN General Assembly created the International Law Commission ("ILC" or "Commission"), a body of experts charged with promoting the development and codification of international law.[31] At the request of the General Assembly in 1947, the ILC undertook to formulate the Nuremberg Principles and prepare a draft code of international offenses.[32] The ILC prepared a first text of the Draft Code of Offenses Against the Peace and Security of Mankind

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28. Judicial Decisions, *International Military Tribunal (Nuremburg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 221 (1947).

29. ROBERTSON, *supra* note 24, at 365; *see From Versailles to Rwanda*, *supra* note 24, at 31-37.

30. G.A. Res. 95 (I), Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal, U.N. Doc. A/RES/1/95 (Dec. 11, 1946); G.A. Res. 177 (II) (Nov. 21, 1947)..

31. G.A. Res. 174 (II) (Nov. 21, 1947).

32. G.A. Res. 177 (II), *supra* note 30. The UN General Assembly called on the ILC predecessor organization, the Committee on the Codification of International Law, to formulate the Nuremberg Principles and prepare a draft code. The Committee began this work, which the ILC inherited and completed. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 27, at 579.

("Draft Code") in 1951, followed by a revised version in 1954.[33] Concurrently, formulation of a draft statute for establishing a permanent criminal court was delegated to another special rapporteur, who argued that the task of developing a substantive criminal code and a statute for an international criminal code should complement one another.[34] Yet these two projects remained purposefully separated.[35] The General Assembly constituted a Special Committee to prepare a draft statute for a permanent criminal court ("Draft Statute").[36] However, the completion of both the Draft Code and Draft Statute was ultimately tabled until the UN had arrived at an agreed definition of the crime of aggression.[37]

The Cold War largely froze further development and enforcement of international criminal law.[38] Certainly there continued to be atrocities committed in international armed conflicts—the

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33. *Report of the International Law Commission to the General Assembly*, U.N. GAOR Supp. No. 9 at 133-37, U.N. Doc. A/1858 (1951), *reprinted in* [1951] 2 Y.B. Int'l L. Comm'n 123, U.N. Doc. A/C.4/48; *see also* LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 8-10 (1997). The title of the Draft Code was changed to the "Draft Code of Crimes Against the Peace and Security of Mankind" in 1988. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 27, at 579. Note the ILC only drafted principles but did not discuss the evolution of international criminal law principles from positive law. *See* Ruti Teitel, *Transitional Justice: Postwar Legacies*, 27 CARDOZO L. REV. 1615, 1619 n.2 (2006) ("The dilemma raised at Nuremberg relating to the rule of law catalyzed a debate on the nature of international norms and the extent to which these could be considered consistent with positive law. Ultimately, Nuremberg would imply a move away from support of positivist principles of interpretation and towards an endorsement of natural law principles."); *see also* Quincy Wright, *Legal Positivism and the Nuremberg Judgment*, 42 AM. J. OF INT'L L. 405, 406-14 (1948).

34. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 27, at 580.

35. *Report of the Committee on International Criminal Court Jurisdiction*, U.N. Doc. A/2135 (1952). Bassiouni attributes the separate tracks of developing a code and a court to the reluctance of powerful states to establish an international criminal justice system: "the lack of synchronization was not entirely fortuitous: it was the result of a political will to delay the establishment of an international criminal court, because that was a time when the world was sharply divided and frequently at risk of war." INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 27, at 583.

36. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 27, at 581.

37. M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 8 (2d rev. & updated ed., 1987); SUNGA, *supra* note 33, at 15, 40-45.

38. After the World War II criminal tribunals, there were no internationally-sponsored criminal trials until the UN established the ad hoc criminal tribunal for the former Yugoslavia. However, there were a handful of national criminal trials against perpetrators of crimes committed during the Second World War, notably the Israeli prosecution of Adolf Eichmann. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (2006)*; see also From Versailles to Rwanda, supra* note 23, at 38-39.

unsuccessful war of secession in Biafra, the ultimately successful but bloody war of independence in Bangladesh, and the My Lai massacre by American forces in South Vietnam. Yet the geopolitical impasse of the Communist bloc and the West assured that no international consensus could be reached that would rise above ideology to punish those responsible for mass atrocities.[39]

The fall of the Berlin Wall ushered in a new era in international criminal justice. Many heralded the post-Cold War realignment as bringing democracy's freedom and prosperity to former Communist states.[40] The breakup of Yugoslavia loosened the restraints of Tito's communist State, which the leader had secured through an ideology of "Brotherhood and Unity."[41] The rise of nationalism across the ethnically mixed Balkan republics sparked the violent breakup of the Yugoslav federation. From 1991-1995, fighting in Croatia and Bosnia took the form of violent ethnic cleansing of civilian populations, the epitome of which was Bosnian Serb forces overrunning the UN-protected hamlet of Srebrenica and slaughtering 8,000 Bosniak men and boys;[42] literally committing genocide under the nose of United Nations peacekeeping forces.

Aided by the 24-hour news cycle, the Balkan conflict unfolded in the full gaze of the international community. Diplomats and world leaders took notice and action. In the midst of the fighting, in May 1993, the UN Security Council acted under its Chapter VII powers to establish an international criminal tribunal to prosecute perpetrators of war crimes, crimes against humanity, and genocide.[43] International criminal justice continued to gain momentum. In November 1994, the Security Council created another criminal tribunal, this time to prosecute perpetrators of genocide and other international crimes committed in Rwanda.[44] Unleashed after the plane carrying Hutu President Juvénal Habyarimana was shot down on April 6th, organized

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39. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 27, at 565-66.

40. *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

41. Tone Bringa, *The Peaceful Death of Tito and the Violent End of Yugoslavia*, *in* DEATH OF THE FATHER: AN ANTHROPOLOGY OF THE END IN POLITICAL AUTHORITY 148-200 (John Borneman ed., 2004).

42. Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro, 2007 I.C.J 43, 83-84, 155-56 (Feb. 26)).

43. S.C. Res. 827, (May 25, 1993).

44. S.C. Res. 955, (Nov. 8, 1994).

ethnic militias called the Interahamwe rampaged throughout the Rwandan capital and countryside, targeting ethnic Tutsis for gruesome killing.[45] In the end, Interahamwe forces killed approximately 800,000 Tutsis over 100 days; the bloodshed halted by the Tutsi rebel invasion in July 1994.[46] With UN involvement, the conflicts in Kosovo, East Timor, and Sierra Leone were followed by the establishment of specialized criminal tribunals to prosecute perpetrators of international crimes.[47]

This trend toward international criminal accountability as a component of post-conflict peace reached a new level in 2002, when the world's first permanent international criminal court began operating. Its creation owes a debt to the postwar efforts at the UN to codify international criminal law. The General Assembly considered creating a draft code of international crimes again in 1981.[48]

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45. *Genocide in Rwanda*, UNITED HUMAN RIGHTS COUNCIL, http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm (last visited Feb. 1, 2016).

46. *Id*.

47. In 2000, the UN Transitional Administration in Timor-Leste ("UNTAET") passed a law that established a Serious Crimes Panel within the new country's national court system. On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses, UNTAET/REG/2000/15 (June 6, 2000); *see also* INT'L CTR. FOR TRANSITIONAL JUSTICE, THE SERIOUS CRIMES PROCESS IN TIMOR-LESTE: IN RETROSPECT 1, 12-14 (2006). That same year, the UN Interim Administration in Kosovo ("UNMIK") passed Regulation 64, which created international panels to prosecute international crimes within the Kosovar court system. On Assignment of International Judges/Prosecutors and/or Change of Venue, UNMIK/REG/2000/64 (Dec. 15, 2000). In 2003, three different courts prosecuting international crimes were established. First, a special agreement between Sierra Leone and the United Nations established the Special Court for Sierra Leone. The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (Oct. 4, 2000). Second, the Extraordinary Chambers in the Courts of Cambodia was founded by an agreement between the United Nations and Cambodia to prosecute perpetrators of crimes committed during the Khmer Rouge regime of 1975-1979. G.A. Res. 57/228 (May 22, 2003). Third, the Bosnian War Crimes Chamber was established by the Office of the High Representative in Bosnia-Herzegovina as a division of mixed international and national judges and prosecutors within the national Bosnian legal system. *See* Press Release, Security Council, Security Council Briefed on Establishment of War Crimes Chamber within State Court of Bosnia and Herzegovina, U.N. Press Release SC/7888 (Oct. 8, 2003). Most recently, in 2007, a UN Security Council Resolution established the Special Tribunal for Lebanon. S.C. Res. 1757 (May 30, 2007).

48. In 1981, the General Assembly passed a resolution requesting the ILC to resume its prior work on the Draft Code. SUNGA, *supra* note 33, at 9*; see also* G.A. Res. 36/106 (Dec. 10, 1981). By this time, a definition for the "crime of aggression" had been adopted (in 1974), removing the reason for tabling progress on the Draft Code. SUNGA, *supra* note 33, at 79-80. Additionally, efforts by a number of governments and NGOs had forced the issue back onto the General Assembly's agenda. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 27, at 582.

However, revival of international criminal accountability really gained momentum in 1991 when, against the backdrop of fighting in Croatia, the ILC generated an official version of a new Draft Code.[49] A year later, the General Assembly requested the ILC to prepare a draft statute for a permanent criminal court.[50] Thus the drafting of a code of international crimes and a mechanism for their enforcement proceeded on separate tracks.[51]

Preparations for a permanent court got underway in earnest in 1994, when the General Assembly constituted an ad hoc committee to develop a process to establish a court based on the ILC's Draft Statute.[52] Over the next four years, State representatives negotiated a treaty to establish a permanent court,[53] the final text of which, the

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49. In 1991, the ILC adopted a comprehensive catalog of crimes, the scope of which far surpassed that of the 1954 draft code. SUNGA, *supra* note 33, at 11. The Draft Code comprises the classic Nuremberg and Tokyo Charter violations (crimes against peace, war crimes, and crimes against humanity), as well as the crimes of genocide and intervention. *Draft Code of Crimes against the Peace and Security of Mankind*, [1991] 1 Y.B. Int'l L. Comm'n 186, U.N. Doc. A/CN.4/L.459/Add. 1 (Jul. 5, 1991).

50. In 1989, efforts at codification accelerated after the General Assembly considered a proposal by Trinidad and Tobago to establish an international court to prosecute drug traffickers and other international crimes. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 27, at 585; *see also* SUNGA, *supra* note 33, at 15.

51. This had the somewhat anomalous effect that the work on the draft statute came to fruition with the creation of the Rome Statute in 1998, while work on the Draft Code continued on a different track, and the final draft that the ILC produced in 1996 contained definitions of crimes that differ from those in the Rome Statute. *See* John Allain & John R. W.D. Jones, *A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind*, 8 EUR. J. OF INT'L L. 100 (1997). The Special Rapporteur leading the drafting put forward a severely truncated version, eliminating the following categories of violations from the Code's coverage: threat of aggression; intervention; colonial domination and other forms of alien domination; apartheid; mercenary activity; terrorism; drug trafficking; and willful and severe damage to the environment. This left only the crime of aggression, genocide and war crimes, and added crimes against the United Nations and associated personnel and crimes against humanity, and incorporated specific reference to rape in provisions prohibiting crimes against humanity and war crimes. *See Draft Code of Crimes against the Peace and Security of Mankind: Titles and Texts of Draft Articles*, U.N. Doc. A/CN.4/L.522 of 31 (May 1996); *see also* Int'l Law Comm'n, Draft Rep. on the Work of its Fourty-Eighth Session, U.N. Doc. A/CN.4/L.527/Add. 10 (July 16, 1996); SUNGA, *supra* note 33, at 13-14.

52. U.N. General Assembly, Sixth Comm., Establishment of an International Criminal Court: Draft Resolution, U.N. Doc. A/C.6/49/L.24 (Nov. 23, 1994).

53. Following the work of the Ad Hoc Committee, the General Assembly set up the Preparatory Committee on the Establishment of an International Criminal Court ("PrepCom"), which would meet twice in 1996 and prepare "consolidated texts" for a draft international criminal court statute. U.N. GAOR, 50th Sess., 87th plen. mtg., U.N. Doc. A/RES/50/46 ¶ 2 (Dec. 11, 1995); INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 27, at 589.

Statute of the International Criminal Court ("ICC"), was adopted in Rome in 1998 on a vote of 120-7 (with 21 abstentions).[54] Four years later, with the requisite 60 State ratifications, the treaty entered into force. UN officials, State leaders, representatives of NGOs, and international commentators hailed the ICC as fulfilling the unstated promise symbolized by the Nuremberg and Tokyo tribunals almost 50 years prior:[55] as part of its commitment to value human dignity, the rule of law, and peace, the international community would confront mass atrocities through individual criminal responsibility. Equipped with a standing international court with jurisdiction over the most serious crimes, "never again" would not be a trope but a serious commitment to guide international efforts to end impunity for those who waged large-scale, illegal, and brutal campaigns.

The power of the idea of international criminal justice is manifest in its fruition. With the ICC, international criminal responsibility is now a permanent feature of the international legal order. The legal form this takes is the criminal trial. Like domestic criminal law, it is quintessentially a liberal exercise in retributive justice. However, as conceived in international law by the Allies who initiated criminal trials, international criminal responsibility is further justified by liberalism's aversion to collective punishment. German philosopher Karl Jaspers theorized this idea as a categorical rejection of the possibility that the German "people" could be legally guilty for the acts of German leaders.[56] The more recent propulsion of international criminal sanctions in response to mass violence has been

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PrepCom published its final report leading up to the plenipotentiary conference in Italy in 1998. *Id*. at 591-94.

54. *About the Court*, INTERNATIONAL CRIMINAL COURT, https://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Feb. 1, 2016).

55. Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203 (1998); *The International Criminal Court: 2007-2008 Fact Sheet One*, AMNESTY INTERNATIONAL USA, http://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court.pdf (last visited Feb. 1, 2016) ("For more than half a century since the Nuremberg and Tokyo trials, states have largely failed to bring to justice those responsible for genocide, crimes against humanity and war crimes. With the creation of the International Criminal Court (ICC), the world has begun to fulfill the post-World War II promise of 'never again.'").

56. KARL JASPERS, THE QUESTION OF GERMAN GUILT 32, 51-52, 73-74 (E.B. Ashton Trans., 1947).

aided by scholars who similarly argue that prosecutions of individual leaders are a vital tool to avoid collective guilt.[57]

Individual criminal responsibility has become *the* form of legal accountability for atrocities meted out by the international system. Thus the idea of State legal accountability for atrocities is implicitly excluded from the project of international justice. Yet at the same time that the Nuremberg Principles are being formulated, States are undertaking projects that understand States are actors capable of committing acts of grave harm and which seek to establish international regulations that will hold them accountable for such transgressions. These projects were not integrated into the conceptualization or institutionalization of international criminal law but demonstrate the doctrinal and institutional firewall of dual responsibility.

B. *State Responsibility and Human Rights*

While international criminal responsibility gains legitimacy from its liberal foundations, longstanding international principles of State responsibility establish State legal accountability for their breaches of international obligations without being discredited as illiberal. Partly, this is due to conceptions of sovereignty under international law which treat states as singular actors and not "the people;"[58] also, the rejection of State crimes in positive law means that States may violate legal obligations but such violations are not formally criminal. Thus it is possible to speak of State legal violations and breaches but not of State legal guilt and culpability.

Yet, there is an element of legal fiction to this distinction. Postwar developments to codify international law, in particular in the areas of State responsibility and human rights, indicate that preventing State atrocities and holding States legally responsible for such abuses were central to efforts establishing this new world order. Furthermore, the reparations measures imposed against the defeated

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57. For a discussion of the argument that international trials avoid collective guilt *see* Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,* 24 HUM. RTS. Q. 573 (2002); *see also* Antonio Cassese, *Reflections on International Criminal Justice,* 61 MOD. L. REV. 1, 6 (1998); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 20-26 (2000).

58. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 141-42 (8th ed. 2012).

Germany certainly conveyed moral condemnation and the normative optics of the interventions blurred the traditional line between civil and penal sanctions. As remedies for State breaches, these measures included monetary payments and restitution.[59] The political goals of the Allied occupation of postwar Germany were to refashion the defeated enemy into a pacific, democratic State.[60] The principles of the Potsdam Protocol should be understood as defining the type of initiatives that can be pursued as legal measures of accountability for State criminality insofar as these are directed to prevent State repetition of the abuses. Thus the Allied response to Nazi criminality included not just international criminal liability but also aimed to realign the State institutions and reform the structures of the Nazi State that enabled its violence.

The political and economic reforms of the German State outlined in the Potsdam Protocol did not become a blueprint for international law and practice as did the war crimes prosecutions of Nazi leaders. The postwar codification efforts of State responsibility and human rights developed separately from each other as well as international criminal law and did not result in a set of legal regulations or a mechanism that could address individual and State wrongdoing together. The next section outlines the rise and fall of State crimes in the effort to develop international law for a new age. It then turns to the development of the international human rights regime where State responsibility takes a particular legal form, which at best offers a partial substitute for the Potsdam Protocol model. As a result, the international legal system permits legal guilt to attach only to individuals and not to States, and largely leaves enforcement of the international law of State responsibility for mass atrocities to the human rights regime. The conceptual untethering of State guilt and legal responsibility from international justice has drained transitional justice of important tools to address mass violence in a holistic manner. Nevertheless, the legal concepts necessary to do so exist.

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59. Richard M. Buxbaum, *A Legal History of International Reparations*, 23 BERKELEY J. INT'L L. 314, 322-24 (2005).

60. Potsdam Protocol, *supra* note 9, § (a)(II)(A)(3)(iv) ("The purposes of the occupation of Germany by which the Control Council shall be guided are . . . [t]o prepare for the eventual reconstruction of German political life on a democratic basis and for eventual peaceful cooperation in international life by Germany.").

1. Codification Efforts of State Responsibility

The Holocaust and other mass horrors require State policies and structures to perpetrate. How did the new international order wish to address accountability of States for such acts going forward? The establishment of the United Nations brought States into a formal collective, but one which, by design, accepted State sovereign equality as a founding principle. It thus relied on State agreement to accept regulation of its conduct except in narrow circumstances.[61] Given the backdrop of World War II, it is not surprising that strengthening the international law of State responsibility was one of the earliest topics taken up by the ILC, for this would clarify how State breaches of international obligations are determined as well as the legal consequences for such conduct. Nor should it be surprising that this effort addressed responsibility for State "crimes." However, the fact that the Commission took over 45 years to complete its work and that the final document makes no explicit mention of State crimes indicates the difficulty of achieving State consensus on this issue. Over time, consensus on this point dissipated, and in the end, the final document only indirectly acknowledges State crimes.

a. Efforts to Define State Responsibility for International Crimes

The ILC began its work in 1955 to prepare a draft of international law principles that would govern State responsibility, and Francisco García-Amador was appointed as the Special Rapporteur leading the effort.[62] A total of six Special Rapporteurs shepherded the process, generating multiple reports (styled as reports, these documents served as proposed drafts of principles which the ILC would consider for further action), and which concluded in 2001 when the ILC adopted the draft articles on the Responsibility of States for Internationally Wrongful Acts ("Draft Articles" or "Draft Articles on State Responsibility").[63] The drafting process saw substantial

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61. The power to authorize military force, the ultimate exercise of coercive state action, is reserved to the UN Security Council in circumstances necessary to maintain or restore peace and security. U.N. Charter art. 39.

62. Int'l Law Comm'n, Rep. on the Work of its Seventh Session, U.N. Doc. A/CN.4/94, at 42 (1955).

63. The ILC, composed of international legal experts drawn from various segments of the international legal community, forwarded its proposals for codification to a subgroup of state representatives (the Sixth Committee of the General Assembly), which then deliberates and may reject or forward drafts to the General Assembly. In this way, ILC's work to develop

changes to key concepts over time, including State crimes, reflecting the evolution of available legal common ground. The Commission's first Special Rapporteur, García-Amador, included State crimes in his reports on the subject,[64] and this principle remained a live issue through decades of drafting, though subject to frequent debate. The arguments advanced by proponents and opponents of State crimes reflect divisions in thought over fundamental questions about the nature of international law as well as its utility in regulating State behavior.

Throughout the drafting history, there appeared to be broad consensus that not all State breaches were of the same character; in other words, there was a difference between a merely "wrongful" State action and State offenses that were particularly egregious or "criminal."[65] Partly, this reflected a postwar acceptance of the need for international law to respond to State-sponsored violence like that unleashed by the Nazi regime. This view was also consistent with the traditional international law principle that States are responsible for reparations for any wrongful breach. This principle reflects a tort, or civil, liability model of State accountability, which includes the possibility of punitive sanctions for "wrongful" State acts as a form of reparation.[66] Through subsequent years of reports and discussion, the concept of State crimes took hold and was reflected in acceptance of a bifurcation of state breaches—those that were delicts, or merely wrongful, and those that were crimes. This framework was reflected in the first draft of the instrument formally adopted by the

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and codify international law is ultimately controlled by states in this exercise of positive law generation.

64. *See, e.g.,* F.V. García-Amador (Special Rapporteur on State Responsibility), *First Rep. on Int'l Responsibility*, ¶¶ 46-53, U.N. Doc. A/CN.4/96 (Jan. 20, 1956).

65. James Crawford, *The System of International Responsibility*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 17, 22 (James Crawford et al. eds., 2010).

66. *See, e.g.,* F.V. García-Amador (Special Rapporteur on State Responsibility), *Sixth Rep. on Int'l Responsibility*, ¶¶ 56, 145. U.N. Doc. A/CN.4/134 and Add.1 (Jan. 26, 1961) ("[B]oth in diplomatic practice and in the case-law of the claims commissions, the reparation of an injury caused to an alien individual is fairly often frankly 'punitive' in character. Its purpose—namely, to punish or at least reprove a State for its conduct—either explicitly or implicitly, and thereby to try to prevent a repetition of such acts in the future, is in fact the most characteristic and distinctive feature of this mode of reparation."). In this view, accepting sanctions for egregious behavior did not necessarily introduce the municipal notion of "criminal" sanctions into international law because the purpose of sanctions was reparative rather than punitive and thus did not distort traditional conceptions of regulation of interstate relations.

Commission in 1980.[67] Article 19 recognized a distinction between "delicts" and "international crimes" (exceptionally grave breaches of international law).[68]

Although there was agreement regarding a hierarchy of breaches, there was disagreement about how to identify which breaches constituted crimes—in particular whether all peremptory norms qualified as crimes[69]—as well as what should be the consequences for such breaches.[70] States had categorical objections to

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67. *See* Int'l Law Comm'n, Rep. on the Work of Its Thirty-Second Session, ¶¶ 34-48, U.N. Doc. A/35/10 (1980).

68. *See id*. ¶ 34, art. 19 ("International crimes and international delicts—(1) An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached. (2) An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.").

69. *See* Int'l Law Comm'n Rep. on the Work of Its Twenty-Eighth Session, ¶¶ 75-122, U.N. Doc. A/31/10 (1976) (including Draft Article 19 and accompanying commentary); Marina Spinedi, *International Crimes of State: The Legislative History*, *in* INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19, 21-22 (Joseph Weiler, Antonio Cassese & Marina Spinedi eds., 1989). In coming to his conclusion, Ago analyzed relevant provisions of the United Nations Charter, resolutions of the General Assembly, and international case law, including in particular the ruling of the ICJ in the *Barcelona Traction Light and Power Company, Ltd.* case. *See* Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5).

70. *See, e.g.,* Roberto Ago (Special Rapporteur on State Responsibility), *Second Rep. on State Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/233 (Apr. 20, 1970); Gaetano Arangio-Ruiz (Special Rapporteur on State Responsibility), *Fourth Rep. on State Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/444 and Add.1-3 (1992); Gaetano Arangio-Ruiz (Special Rapporteur on State Responsibility), *Third Rep. on State Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/440 (July 19, 1991); Gaetano Arangio-Ruiz (Special Rapporteur on State Responsibility), *Second Rep. on State Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/425 & Corr.1 and Add.1 & Corr.1 (1989); Willem Riphagen (Special Rapporteur on State Responsibility), *Fifth Rep. on the Content, Forms and Degrees of Int'l Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/380 and Corr.1 (Apr. 4, 1984); Willem Riphagen (Special Rapporteur on State Responsibility), *Fourth Rep. on the Content, Forms and Degrees of Int'l Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/366 and Add.1 & Add.1/Corr.1 (1983); Willem Riphagen (Special Rapporteur on State Responsibility), *Third Rep. on the Content, Forms and Degrees of Int'l Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/354 and Corr.1 and Add.1 & 2 (1982); Willem Riphagen, (Special Rapporteur on State Responsibility), *Second Rep. on the Content, Forms and Degrees of Int'l Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/344 and Corr.1 & Corr.2 (May 1, 1981); Roberto Ago (Special Rapporteur on State Responsibility), *Fourth Rep. on State Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/264 and Add.1 (1972); Roberto Ago (Special Rapporteur on State Responsibility), *Third Rep. on State Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/246 and Add.1-3 (1971); Robert Ago (Special Rapporteur on State Responsibility), *Second Rep. on State Responsibility*, Int'l Law Comm'n, U.N. Doc. A/CN.4/233 (Apr. 20, 1970).

State crimes and the concept of penal sanctions;[71] many representatives of States opposed codification based on fears that powerful States would use State crimes to coerce less powerful,[72] and others raised procedural objections regarding how and who would define State crimes and what and whether procedural safeguards could be sufficient to ensure States would not be unfairly punished.[73] Undergirding these debates was a debate about the nature of international law itself and whether "wrongs" in international law could be conceptualized properly according to municipal law, whether as torts or crimes, or whether wrongs in international law were of another character entirely.[74]

b. Differentiation of International Legal Responsibility

Ultimately, the objections to State crimes carried the day. States relegated criminal accountability for mass violence the exclusive domain of international criminal law. The final bargain that the Draft Articles struck was recognition of State responsibility for *jus cogens* violations and *erga omnes* obligations but dropped explicit reference to State crimes, their definition, consequences for their commission, and a mechanism to enforce them. Interestingly, this took place contemporaneous to the drafting of the statute for the ICC—an undertaking that required States to address these same issues with

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71. JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 393 (Cambridge Univ. Press ed. 2013); Georges Abi-Saab, *The Uses of Article 19*, 10 EUR. J. INT'L L. 339, 341-42 (1999); Gilbert Guillame, *Overview of Part One of the Articles on State Responsibility*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 65, at 187, 190. In addition, state practice did not support recognition of state crimes since at that time, no state had ever been accused of criminal conduct before an international court. Abi-Saab, *supra*, at 345.

72. Int'l Law Comm'n, Comments and Observations Received from Governments, U.N. Doc. A/CN.4/488 and Add.1-3, 112-23 (1998). For instance, "absence of institutional control over interpretive disagreements would play [into] the hands of the powerful States." Martti Koskenniemi, *Doctrines of State Responsibility*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 65, at 45, 49.

73. *See* James Crawford (Special Rapporteur on State Responsibility), *First Rep. on State Responsibility*, Int'l Law Comm'n, ¶¶ 84-86, U.N. Doc. A/CN.4/490 and Add.1-7 (1998) [hereinafter *First Rep. on State Responsibility*].

74. *See Draft Convention on "Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners" Prepared by Harvard Law School* (1929), *reprinted in* [1956] 2 Y.B. Int'l Law Comm'n at 229-30, U.N. Doc. A/CN.4/SER.A/1956/Add.l; Alain Pellet, *The Definition of Responsibility in International Law*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 71, at 3, 3-16; Antoine Ollivier, *International Criminal Responsibility of the State, in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 65, at 703, 714.

regard to individual accountability. James Crawford, the sixth Special Rapporteur and the one who eliminated the controversial Article 19 from the draft, spearheaded the final effort to submit Draft Articles at the same time as the treaty negotiations for the International Criminal Court entered full swing.[75]

Opposition to Draft Article 19 stemmed in part from arguments that individual criminal accountability was the appropriate providence for sanctioning the commission of atrocities, and that recognition of State crimes would undermine prosecutions of individuals for such acts.[76] States also emphasized that the international system designated the Security Council as the appropriate body to consider how best to address acts that would be considered state crimes as threats to peace and security.[77] And in any case, the Draft Articles would not affect the Security Council's exercise of its powers.[78]

While a far cry from the explicit recognition of State crimes in the earlier draft, commentators point out that the final document is more flexible than it might seem and arguably creates "public interest" standing that allows any State to call for State accountability for breaches of peremptory norms,[79] and collective enforcement by States could include not only cessation and other forms of reparations but also countermeasures.[80] Scholars have argued that the Draft

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75. The PrepCom issued its final report in October 1996. INTRODUCTION TO INTERNATIONAL CRIMINAL LAW, *supra* note 27, at 594. Crawford dropped the language of state crimes from the draft in 1996, the same year states finalize the Rome Statute. *See* Vera Gowlland-Debbas, *Responsibility and the United Nations Charter*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 71, at 115, 120. Interestingly, in negotiations of the Rome Statute, states opposed a draft provision on reparations that arguably would allow the court to make reparations awards against states on the ground that the court was limited to individual accountability. THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 263-64 (Roy S. K. Lee ed., 1999).

76. *See First Rep. on State Responsibility, supra* note 73, ¶¶ 53(a) and (c), 88 ("The need for that notion may also be reduced by the development of institutions for prosecuting and trying individuals for international crimes, as exemplified by the proposed international criminal court.").

77. *See id.* ¶ 52 (c) and (e).

78. *Id.* ¶ 87.

79. James Crawford, *Overview of Part Three of the Articles on State Responsibility*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 65, at 931, 934.

80. *See* Int'l Law Comm'n, *Responsibility of States for Internationally Wrongful Acts*, art. 41 ¶ 3, *in* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001); *Responsibility of States for Internationally Wrongful Acts* art. 41 ¶ 3, U.N. GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter *Draft Articles on State Responsibility*], ("This article is without prejudice to the

Articles offer an important framework, upon which States can build. In 2001, the UN recognized the final proposed text but has not taken further action to turn the draft principles into a treaty.[81] And the ICJ has ratified the ILC position that State criminality is not part of customary or principles of international law.[82] In other words, the Draft Articles set a floor for agreement about State responsibility for peremptory norms (without limiting these further to those that might be "state crimes") and do not prevent States from generating a more robust set of norms through treaty law that would delineate what constitutes State criminal behavior and creating an enforcement mechanism.

The history of the Draft Articles illustrates how States jealously policed the boundaries of international criminal accountability. They curtailed acknowledgement that States may commit acts categorized as international crimes with the formal legal opprobrium that comes with criminal responsibility. If during the early postwar period it was conceivable that there would be an international accountability framework to implement legal responsibility of individuals and States that commit international crimes, the defeat of Article 19 and the completion of the Rome Statute meant the end of such ambition for a holistic approach. While breathing life into the Nuremberg Principles nearly 50 years after the fact with the creation of the ICC, States put the kybosh on State crimes even while recognizing that states may be implicated in international crimes. The normative condemnation that accompanies State culpability for system criminality is not available as a formal matter. Yet the international law remedies for State breaches offer a functional equivalent when accompanied by a finding of international legal responsibility for atrocity crimes.[83]

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other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.").

81. *See* G.A. Res. 56/83, ¶ 3, (Dec. 12, 2001) (taking note of the Articles and commending them to the attention of Governments, without prejudice to their future adoption as a treaty text or other appropriate action).

82. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), I.C.J. 43, ¶¶ 167-70 (Feb. 27, 2007); James Crawford, *International Crimes of State*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, *supra* note 65, 403, 413-14. However, the court did find that states could be legally responsible for genocide under the Genocide Convention. *See* Saira Mohamed, *A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice,* 80 COL. L. REV. 327 (2009).

83. Treaty law currently establishes some provision of state remedies for acts that are also international crimes, although these mechanisms are rarely used. The Genocide

Like the law of State responsibility, international human rights law establishes legal consequences for State violations of international obligations. Because of the overlap between acts that constitute international crimes and human rights violations, the conceptualization of State responsibility in human rights law bears on this inquiry.

2. Human Rights Law

If part of the impetus of the Allies for prosecuting members of the Nazi high command was to settle the score with Germany's leaders for their responsibility for the horrors they unleashed, the Allies also worked to create a postwar order that could prevent the recurrence of similar destruction. These goals proceeded along parallel tracks. While the Nuremberg trials set in motion the development of international criminal law, the creation of the United Nations sparked the emergence of an international human rights regime. This began at the end of the war when high-level officials from the United States, Soviet Union, United Kingdom, and China met at Dumbarton Oaks and pledged to create a new international institution that would serve to facilitate peaceful interstate relations—a bulwark against another disastrous world war.[84] Less than a year later, on June 26, 1945, representatives signed the United Nations Charter. The document includes in its preamble a commitment to human rights as one of the purposes of this new world institution.[85]

Convention and the Geneva Conventions establish that offending states are liable for reparations in the event of breaches. *Supra* note 68. The provisions for reparations under the Geneva Conventions are also part of customary law. Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law,* ICRC, Rule 149, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule149 (last visited Jan. 4, 2016); *id.,* Rule 150. Here as well, the lack of an enforcement mechanism hampers the utility of this norm. CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT, 33 (2012).

84. *History of the UN Charter, 1944-1945: Dumbarton Oaks and Yalta*, UNITED NATIONS, http://www.un.org/en/sections/history-united-nations-charter/1944-1945-dumbarton-oaks-and-yalta/index.html (last visited Feb. 1, 2016).

85. ROBERTSON, *supra* note 24, at 35; JACOB ROBINSON, HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS IN THE CHARTER OF THE UNITED NATIONS—A COMMENTARY (1946); *see* U.N. Charter prmbl. ("We the peoples of the United Nations have determined . . . to reaffirm faith in fundamental human rights."); U.N. Charter art. 1, ¶ 3 ("The purposes of the United Nations are . . . [to] promot[e] and encourage[e] respect for human rights and fundamental freedoms for all").

What were human rights and what conception of State responsibility do they embody? The Charter set out the structure to elaborate their content, but their animating idea was to universalize rights-based protection of the individual from abuse by the State. The Charter established the Economic and Social Council with power to set up a Human Rights Commission. Chaired by Eleanor Roosevelt, the Commission set out to give content to the Charter's lofty language of human rights. The Commission worked from April 1946 to December 1948 to draft an international instrument that established the "fundamental human rights" the Charter invoked.[86] The result was the Universal Declaration of Human Rights ("UDHR"), which together with subsequent two human rights treaties is referred to as the International Bill of Rights. As the delegates hashed out what fundamental guarantees states should honor, the record of the horrors of the Nazi regime played in the background. According to Geoffrey Robertson:

> The most profound influence on the Commission was the evidence from the trial of the Nazi leaders, which lasted from Justice Jackson's opening on 20 November 1945 to the judgment on 30 September 1946 . . . . The evidence upon which the judgment was based would provide the rationale for many of the clauses of the Universal Declaration.[87]

Delegates received reports from the trials, which disclosed Nazi tactics of mass persecution. These served as cautionary tales for just how terrifying the power of State violence can be when the State apparatus is organized to target groups. Details about Einsatzgruppen massacres (German units deployed specifically to target and kill Jews, Gypsies, other civilians, and Soviet political commissars), the implementation of the Final Solution via a network of concentration camps, Dr. Mengele's cruel "medical" experiments on Jewish prisoners, and other tactics of the Third Reich helped solidify the determination of delegates to establish universal principles to protect individual dignity.[88] In particular, after receiving one such report, delegates drafted Article 2 of the UDHR which inscribes the State duty of non- discrimination based on "race, colour, sex, language, religion, policy or other opinion, national or social origin, property,

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86. Drafting of the Universal Declaration of Human Rights: A Historical Record of the Drafting Process, UNITED NATIONS (Dec. 8, 2015), http://research.un.org/en/undhr.

87. ROBERTSON, *supra* note 24, at 40.

88. *Id.* at 41-42.

birth or other status."[89] The record of the brutal depredations inflicted by the Nazis mounted and underscored the moral imperative to establish a framework for state recognition and guarantee of individual rights.

The UDHR served as a statement of the fundamental individual rights that States in the modern era recognized and pledged to achieve. It also marked the beginning of a period of standard setting and formalization of these principles as legal obligations of States at the international level as well as through new regional organizations formed to facilitate and promote interstate cooperation. In a decades-long process protracted by rising Cold War politics, in 1966 the Commission finalized two treaties, the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Cultural and Social Rights ("IECSR"). These instruments elaborated the rights in the UDHR in a legally binding framework that for signatory States established a mechanism for independent experts to monitor State compliance. Since that time, the United Nations has generated additional human rights treaties focused on specific abuses, like torture[90] and race discrimination[91] or on particular groups like women,[92] children,[93] migrants,[94] and the disabled.[95] The international treaty system is complemented at the regional level by additional human rights treaty-based mechanisms, some of which, like the European and Inter-American, have stronger

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89. *Id*; *see* JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT (1999); Johannes Morsink, *World War Two and the Universal Declaration*, 15 HUM. RTS. Q. 357 (1993). Other rights were also drafted with the vivid memory of how the Nazi regime subverted individual rights through a system of control over public and private life including core principles like judicial independence, rule by popular consent, and the rights of families to have choice in their child's education. ROBERTSON, *supra* note 24, at 42.

90. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85.

91. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 12, 1969, 660 U.N.T.S. 195.

92. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S 13.

93. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

94. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, *opened for signature* Dec. 18, 1990, 2220 U.N.T.S. 3.

95. Convention on the Rights of Persons with Disabilities, *opened for signature* Dec. 13, 2006, 2515 U.N.T.S. 3.

enforcement procedures than those provided through the UN treaties and have generated significant and binding judgments.[96]

The conception of international accountability of States that violate human rights guarantees reflected in the UN treaty regime is consistent with the law of State responsibility: States may be legally responsible for acts that qualify as human rights violations and which are also international crimes but such breaches are not of a *criminal* nature. Such soft-pedaling is also indicative of the reluctance of States to agree to a strong enforcement regime. At the drafting of the UN Charter, States rejected proposals to make their commitment to protecting human rights legally binding or to include an enforcement mechanism like an international court.[97] Equally telling is that powerful States defeated such initiatives, motivated by self-interest to insulate themselves from justice demands at home.[98] These same debates resurfaced at the Commission during the drafting of the UDHR. Again, States turned down proposals to make the document a legally binding instrument and to establish a court to enforce it. Supporters of stronger measures argued these were needed to ensure that States could no longer look on as they did when Nazi Germany engaged in wholesale persecution of its own citizens, and argue that those were internal issues not of international concern.[99] Yet, such statements failed to persuade the postwar great power States to agree to greater oversight.

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96. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 114-41 (2d ed., 2005).

97. ROBERTSON, *supra* note 24, at 38-39.

98. *Id.* European colonial powers did not want to confer rights on colonial subjects, the United States sought to insulate its "Jim Crow" laws from international scrutiny, and Stalin had no desire to extend rights to prisoners in the Soviet gulag. Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT'L L. 903, 907-08 (2008) ("The allied powers, however, never had intended to grant the protection of human rights a central role in the institutional set up of the new world organization. Washington had an unfavourable domestic non-discrimination record, not just regarding African Americans; Moscow had established a highly repressive régime; and London had no interest in closer international scrutiny of its policies in the colonies.").

99. French delegate Rene Cassin supported article 28, which guaranteed a just international order "in the hope of avoiding a repetition of what happened in 1933, when Germany began to massacre her own nationals and when other nationals refused to consider this a matter of international concern." Quoted in ROBERTSON, *supra* note 24, at 43; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 28 (Dec. 10, 1948) ("Everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized.").

In other words, States may violate individual human rights, but the enforcement system at the international level is relatively weak.[100] In this context, UN treaty bodies and other international instruments interpreting the content of State human rights obligations and the legal consequences for their breach have developed jurisprudence on the State duty to investigate and prosecute individuals responsible for committing human rights violations that are also codified as criminal acts.[101] This "duty to prosecute and punish" is now firmly established in human rights law.[102] Normatively powerful, it dovetails with international criminal law's liberal focus on individual culpability for atrocities. In this regard, the objective of both human rights and international criminal law is to punish individuals. Because legal culpability or guilt is reserved exclusively for individual actors, the role of the State in perpetration of mass violence is not characterized as criminal. In fact, the logic of the duty to prosecute is that it will end impunity of individual wrongdoers and promote rule of law. In so doing, States may burnish their image as law-abiding nations and the determination of their own guilt is not the object of legal investigation and justice discourse.

Nevertheless, unlike international criminal law, under human rights law State responsibility attaches to the State's separate breach of its human right obligations that occur in the commission of State-perpetrated atrocities. In other words, State responsibility attaches for a State's violation of the victims' substantive human rights protections (e.g. prohibition of torture) as well as the State's failure to investigate, prosecute, and punish offenders.[103] Human rights

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100. This is not to say the UN treaty system is *ineffective* and many have chronicled its success in spurring changes in state behavior as well as contributing to an international culture respectful of human rights and the rule of law. *See e.g.*, PHILIP ALSTON, THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (1995).

101. These acts may be criminalized in domestic law, like murder, or prosecuted as international crimes where states have incorporated such crimes into domestic law, or, in theory under principles of universal jurisdiction, which give states the right to prosecute certain international crimes. *See* G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶¶ 3(b), 4, 5 (Dec. 16, 2005) [hereinafter Basic Principles].

102. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, ¶¶ 5-8, U.N. Doc. S/2004/616 (Aug. 23, 2004).

103. *Id.* These breaches are of obligations to the individual and not to the international community as a whole, which undercuts the normative value of pursuing state responsibility

remedies for such violations offer opportunities to address structural aspects of the State institutions that enabled the violations in the first place. Remedies available to victims include measures of satisfaction and guarantees of non-repetition.[104] These remedies do important work insofar as they address the contributing factors to State abuses and generate a jurisprudence regarding the scope of State responsibility for State acts that are also international crimes. However, their application is inadequate when compared to the scale of what is needed to remediate the harm caused by State-sponsored mass violence and to eradicate the defects in the State institutions and structures responsible.

International criminal law and human rights law are hampered by the normative limitations of dual responsibility to name and acknowledge State culpability for acts that constitute international crimes and reflect liberalism's insistence on individual and not collective guilt. State legal responsibility for such acts is available within human rights, but this recourse reinforces legal accountability as individual. The transitional justice movement, which incorporates human rights and international criminal law, frames the international justice discourse on mass atrocities to exclude State culpability.[105] The next section examines how this state of affairs has come to pass.

II. *THE RELATIONSHIP OF LEGAL ACCOUNTABILITY TO TRANSITIONAL JUSTICE*

Transitional justice is the dominant normative framework within which international accountability for atrocities is discussed. While debates within the field have been lively and dynamic, the concept of State crimes does not figure in the discussion. More importantly, the extent to which State accountability is raised, it emerges as a criticism

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for human rights violations as opposed to state responsibility for violations of *erga omnes* obligations.

104. Satisfaction includes state apologies and other forms of acknowledgment of its failure to uphold human rights. Measures of non-repetition include reforms of state institutions responsible for the abuses, etc. Dinah Shelton, *Reparations*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 28 (2009); Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351 (2007-08).

105. In addition, the liberal frame of the human rights regime, conceived as a regime of individual rights realization, places limitations on its ability to fully respond to state criminality. Such limitations include the individualized nature of human rights adjudication, which places limits on its suitability to address mass violence.

of international criminal accountability. Given that international criminal accountability is part of a more general movement of international justice that incorporates redress for broader social and economic marginalization, it is a puzzle that the concept of State crimes and State legal responsibility is absent from the discourse. State culpability serves the accountability and rule of law agenda that has driven the transitional justice field[106] and the remedies for State breaches could include measures to dismantle State institutions and structures that enabled mass violence, which many transitional justice advocates argue are necessary components of justice.[107] Part of the answer lies in the ways that transitional justice has theorized accountability.

The dominant definition of transitional justice is that it refers to the "conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes."[108] International criminal accountability has emerged as the guiding principle for how transitional justice conceives of legal accountability, with the ICC as its leading institution. However, international criminal accountability is only one tool among many that societies may employ as part of transitional justice. Other initiatives include truth commissions, vetting or lustration, locally based alternative dispute resolution mechanisms, memorials, etc. While international criminal law and transitional justice are related areas of law and practice, their relationship has evolved over time and remains subject to heated debate. Because transitional justice started out as an accountability project and has come to dominate discussions about how societies and the international community should respond to mass violence, it is important to examine the role of legal accountability in transitional justice.

What does accountability mean, how it is prioritized, and why is it important? This Section reviews the development of transitional justice and then identifies how the concept of legal accountability which includes but is larger than legal responsibility, operates within

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106. *Rule of Law and Transitional Justice*, *infra* note 124.

107. See *infra* note 211.

108. Ruti Teitel, *Human Rights in Transition: A Transitional Justice Genealogy,* 16 HARV. HUM. RTS J. 69, 70 (2003) [hereinafter Teitel, *Human Rights in Transition*].

transitional justice discourse.[109] This enables us to see how legal accountability in transitional justice has come to mean processes that lead to criminal responsibility. Those who argue that transitional justice should pay greater attention to structural violence and drivers of conflict have largely ignored pursuit of States as legally accountable actors outside of the human rights regime. Although positive law currently excludes penal sanctions against States, reconceptualizing international State legal responsibility to discursively acknowledge State culpability for mass violence would align international remonstration against States with its treatment of individuals. It would also invite renewed attention to how existing remedies of State responsibility could be applied to reform or to dismantle State institutions implicated in the perpetration of international crimes.

This Section begins with a brief review of the origins and development of transitional justice as the dominant frame to address mass atrocities and repressive regimes. It then turns to characterizing three primary strands of transitional justice thinking and how these regard international criminal law. As the contours of the debates within transitional justice become clear, the Section shifts to a discussion of the implications for the state of the field.

A. *Transitional Justice: An Overview*

Transitional justice emerged as a concept in the late 1980s as dictatorships in Latin America fell and the breakup of the Soviet Union raised the question of how States transitioning to democracy should address the past.[110] Nuremberg was the legacy that transitional justice supporters invoked to legitimate their goals; criminal trials were thought to promote deterrence of mass bloodshed, represent the triumph of law over violence, and symbolize the commitments of a new regime to rule of law, and help consolidate emerging democracies.[111]

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109. Legal responsibility refers to the determination of a breach of an international obligation while legal accountability refers to the broader processes by which a breach and appropriate legal consequences are determined. *See supra* note 12 and accompanying text.

110. ASPEN INSTITUTE, STATE CRIMES: PUNISHMENT OR PARDON: PAPERS AND REPORT OF THE CONFERENCE, NOVEMBER 4-6, 1988 (1989).

111. Christine Bell, *Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field,"* 3 INT. J. TRANS. J. 5, 22 (2009) ("The word 'justice' in transitional justice and the term's origins in an attempt to develop legal accountability during transitions to

In his opening speech at the Nuremberg trials, Justice Jackson linked the liberal (individual) model of accountability with the goals of deterrence and peace: "This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace."[112] The link between criminal accountability and peace gained traction and was consistent with the policy preferences of early transitional justice proponents. In her analysis of the origins of transitional justice in the late 1980s, Paige Arthur argues that intellectuals guiding policy in successor regimes in Latin America embraced a top-down, institutional reform approach in part because alternative theories of democratization had been the discredited: Marxism and the socio-economic development theories of the 1960s.[113] Transitional justice was associated with the goals of rule of law, institutional reform to consolidate democracy, deterrence, and social reconstruction.[114]

However, individual criminal accountability might not always be feasible, for example where members or supporters of the former regime held sufficient power to threaten the peace should trials occur.[115] In Eastern Europe, where State abuses were characterized not by mass violence but by State surveillance, secrecy, and decades of Communist governments that stifled dissent, the preferred policy was to open up State archives and purge State bureaucracies of

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democracy, have made law's predominance difficult to disrupt."); Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,* 31 HUM. RTS. Q. 321, 332 (2009). Arthur dates the birth of transitional justice to the 1988 Aspen Institute conference and argument by Jaime Malamud-Goti, one of the "chief architects" of Argentine president Alfonsin's prosecution policy, who summarized the thinking at the time as follows: "We agreed with the view that trying the perpetrators in the military of the worst crimes would contribute to the consolidation of democracy by restoring confidence in its mechanism" (citation omitted). *See also* Teitel, *Human Rights in Transition, supra* note 108, at 70.

112. *Opening Speech*, *supra* note 26.

113. Arthur, *supra* note 111, at 337-38; Teitel, *Human Rights in Transition, supra* note 108, 84-85 ("Even as the disparities between rich and poor associated with the free market economy have grown, the impetus has been to resort increasingly to the transitional justice discourse and a project that is to some extent backward-looking and limited to restoration. Presently, the extent to which transitional justice has displaced other justice projects signals chastened political expectations responding to the failed experiments of a not so distant past.").

114. Fletcher & Weinstein, *supra* note 57.

115. For example, in Argentina, fear of the military led the new government to halt further trials after a handful of former members of the military junta had been prosecuted, and it passed amnesty laws in 1986 and 1987 that remained in place until 2005. George C. Rogers, *Argentina's Obligation to Prosecute Military Officials for Torture*, 20 COLUM. HUM. RTS. L. REV. 259, 262-67 (1989).

officials who were implicated in repression.[116] Yet criminal accountability was the gold standard, and alternatives like truth commissions and vetting were second best.

Initially, truth commissions were hailed as offering a measure of state reckoning with the past in situations in which criminal trials were not possible.[117] Activists supported truth commissions, in part, out of the belief that they provided an opportunity for the collection of evidence that could be used eventually in criminal prosecutions.[118] South Africa's choice to forego pursuit of criminal trials and establish a truth commission in 1995[119] challenged the idea that the pursuit of criminal accountability was the highest expression of transitional justice. The South African model prioritized truth and reconciliation over criminal accountability, in a political bargain justified in terms of the country's cultural values of *Ubuntu*, and expressed as restorative justice.[120] The South African example prompted new thinking about which transitional justice mechanisms best supported social reconstruction. Supporters of truth commissions pointed out that these authoritative bodies performed work that fostered some of the goals of transitional justice better than criminal trials. Truth commissions could examine a wider range of issues than permitted by criminal charges, for example the structural dimensions that contributed to the bloodshed.[121] In addition, they also could offer victims the opportunity to narrate their experiences in ways not possible in a criminal court, and to recommend measures to foster social and political change, including reparations to victims. Many understood that criminal trials and truth commissions were not necessarily in a binary relationship; they each prioritized different goals and had

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116. UNITED NATIONS, WHAT IS TRANSITIONAL JUSTICE? A BACKGROUNDER 1 (2008), http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf.

117. *See* PRICILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2nd ed. 2010).

118. Laurel E. Fletcher, *Editorial Note,* 9 INT'L. J. TRANSITIONAL JUSTICE 1 (2015); Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, at 4-6 *in* TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE (Naomi Roht-Arriaza & Javier Mariezcurrena, eds. 2006) [hereinafter BEYOND TRUTH VERSUS JUSTICE].

119. Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.).

120. DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS (1999).

121. BEYOND TRUTH VERSUS JUSTICE, *supra* note 118, at 4; MARTHA MINOW, BETWEEN JUSTICE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1999).

distinct roles to play.[122] Similarly, in some countries, like Rwanda and East Timor, State authorities employed alternatives to criminal trials as a means to provide a way for lower-level offenders to make amends for their wrongdoing and be accepted back into local communities.[123]

By 2004, transitional justice practices had proliferated and become a widely accepted feature, if not fixture, of international policy. The UN Secretary-General released his report "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies."[124] The title reflects a broadening of temporal span for transitional justice mechanisms.[125] Indeed, the first ICC indictments were issued against Ugandan rebels in an on-going armed conflict.[126] The report endorses a pluralistic approach to mechanisms of transitional justice and cautions against "one-size-fits-all formulas."[127] While the report affirmed a commitment to criminal accountability, the ineligibility of amnesties for international crimes, and the rights of victims, it also accepted that transitional justice interventions required local legitimacy to contribute to peace, stability, and the rule of law. The document ratified the essential paradigm and mechanisms of

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122. Roht-Arriaza, *The New Landscape of Transitional Justice*, at 8-13 *in* BEYOND TRUTH VERSUS JUSTICE, *supra* note 118.

123. *See* Patrick Burgess, *A New Approach to Restorative Justice: East Timor's Community Reconciliation Process, in* BEYOND TRUTH VERSUS JUSTICE, *supra* note 118, at 176; Timothy Longman, *Justice at the Grassroots? Gacaca Trials in Rwanda*, *in* BEYOND TRUTH VERSUS JUSTICE, *supra* note 118, at 206. Scholars have also criticized these initiatives for not meeting their goals to promote social reconstruction and, in some instances, of exacerbating tensions. *See also* Janine Natalya Clark, *Reconciliation through Remembrance? War Memorials and the Victims of Vukovar,* 7 INT'L J.TRANS. JUST. 116 (2013).

124. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *Rule of Law and Transitional Justice*].

125. The International Criminal Tribunal for the Former Yugoslavia was established during the conflict in the Balkans, and the International Criminal Court ("ICC") issued its first arrest warrants against the leaders of the Lord's Resistance Army, a rebel organization operating at that time in northern Uganda and notorious for kidnapping children and attacking villages. INTERNATIONAL REFUGEE RIGHTS INITIATIVE, A POISONED CHALICE? LOCAL CIVIL SOCIETY AND THE INTERNATIONAL CRIMINAL COURT'S ENGAGEMENT IN UGANDA (Oct. 2011) [hereinafter A POISONED CHALICE?].

126. In fact, the issuance of ICC arrest warrants was subject to sharp criticism that the court derailed on-going peace negotiations. A POISONED CHALICE?, *supra* note 125, at 1.

127. *Rule of Law and Transitional Justice*, *supra* note 124.

transitional justice and this framework for policy and intervention has not changed significantly.[128]

B. *Conceptions of Accountability in Transitional Justice*

Thus the question remains: what is the relationship of legal processes of accountability to transitional justice? Three strands of thought or models for this relationship emerge from the transitional justice literature and will be referred to, respectively as "the Nuremberg" or "absolutist accountability" model, the "hybrid accountability" model, and the "grafted accountability" model. These various approaches are loosely chronological, reflecting the evolution of thinking on transitional justice over the last 20 years. But these strands should not be taken as a precise chronology or historiography of the topic as traces of concepts that are dominant in early periods appear in later conceptualizations and vice versa. These various conceptualizations are intertwined or coexist, rather than being neatly segregated along a linear trajectory. Nevertheless, each of these ideas has been more prevalent during certain periods over this timespan. Moreover, the models outlined below are presented in their idealized forms to identify their theorized relationships of accountability to transitional justice and thus should not be taken as descriptions of their operation.

The contestation of the proper place for criminal accountability in addressing mass atrocity and repression has led to three primary, and currently co-existing ideas about the relationship of international criminal law to transitional justice. Yet each model eschews state legal responsibility, either because understands legal accountability as individual criminal responsibility (Nuremberg/absolutist) or because it excludes state legal responsibility in favor of victim-centered, or process-based initiatives (hybrid and grafted). Hybrid accountability and grafted accountability embrace a broader conception of accountability beyond individual international criminal accountability and do so from a so-called victim-centered approach. This perspective views legalism and legal solutions skeptically. These models rely on state accountability as a policy goal to promote good governance or, as configured by human rights law, as a remedy. These debates also

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128. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2011/634 (Oct. 12, 2011).

obscure the potential that pursuing explicitly an agenda of state legal accountability could deliver discursively and, ultimately, practically.

1. Nuremberg/Absolutist Accountability Model

As Ruti Teitel observed, the Nuremberg trials reflect the "triumph of transitional justice within the scheme of international law."[129] Societies would not simply "turn the page" on a violent past, they would forthrightly reckon with it through the prism of international criminal law. Accountability in the Nuremberg model is specifically individual criminal accountability. And this form of legal accountability is justified by universal moral and legal principles as well as the instrumental goals of supporting peace, democratization, and human rights. In other words, accountability is both a means and an end to be pursued. Mass violence in an increasingly globalized world makes a moral demand on the international community to respond not just because bloodshed may threaten world peace, but also because such acts are an affront to humanity, a threat to universal values. As captured in the Secretary-General's report on transitional justice, the rise of international criminal accountability represents "a growing shift in the international community, away from a tolerance for impunity and amnesty and towards the creation of an international rule of law."[130]

Legal accountability gains considerable traction because positive law frames the violence as international *crimes,* which trigger legal obligations of retributive justice. This approach is perhaps most clearly laid out in Diane Orentlicher's 1990 article in the Yale Law Journal, "*Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*."[131] At the time of her writing, the state duty to investigate and prosecute individuals for perpetrating certain international crimes was codified in international humanitarian law as grave breaches in the Geneva Conventions, the crime of genocide under Genocide Convention, and torture in the UN Convention Against Torture.[132] These treaty obligations predate the rash of post-

129. Teitel, *Human Rights in Transition*, *supra* note 108, at 70.

130. *Rule of Law and Transitional Justice*, *supra* note 124, ¶ 40.

131. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

132. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) art. 50, 51, 130, 147*,* Aug. 12, 1949, 75 U.N.T.S. 287 (referring to grave breaches); Convention on the Prevention and Punishment of the Crime of Genocide

Nuremberg international criminal tribunals and courts, and serve as an important reminder that individual accountability is embedded in the international rule of law framework.

Nevertheless, the ad hoc criminal tribunals and the ICC have supplied an even more elaborate legal articulation of international criminal law relative to other interventions. The international criminal justice institutions are not outliers within the international system, but rather mascots of its transitional justice approach. The UN transitional justice policy, numerous statements of principle, and the institutional commitments to human rights affirm criminal accountability as a state duty and bedrock value.[133] Moreover, with the creation of a standing international criminal court, justice for Rome Statute violations may be pursued during conflict. This development blurs the temporal boundaries of transitional justice (justice begins with the violation, not with the political transition) and raises the question of whether transitional justice and individual criminal accountability fuse as a practical matter.[134]

The Nuremberg accountability model relies on legal positivism to legitimate prosecutions and is associated with those who argue in favor of international relations and policy based on adherence to principles and rules. The justice supporters or "idealists" argue that accountability is not a policy option, but a universal obligation; in contrast "realists" hold that justice should not be an absolute value but that achieving stability should be the primary goal in ending conflict and that there may be prudential reasons to compromise justice to achieve peace.[135] Thus the international criminal prosecutors have defended their pursuit of justice in the face of criticism that doing so

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art. 1, Dec. 9, 1948, 78 U.N.T.S. 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7, Dec. 10, 1984, 1465 U.N.T.S. 85.

133. *Rule of Law and Transitional Justice*, *supra* note 124, ¶¶ 38, 49; Diane Orentlicher (Independent Expert to Update the Set of Principles to Combat Impunity), *Promotion and Protection of Human Rights: Impunity*, U.N. Doc. E/CN.4/2005/102 (Feb. 18, 2005); G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005); Pablo de Greiff (Special Rapporteur on the Promotion of Truth, Justice, Reparations and Guarantees of Non-recurrence), *Report of the Special Rapporteur to the Human Rights Council*, U.N. Doc. A/HRC/27/56 (Aug. 27, 2014).

134. *Rule of Law and Transitional Justice*, *supra* note 124, ¶ 2 (noting that the purpose of the report is to highlight lessons learned of the UN's pursuit of justice and rule of law in conflict as well as post-conflict situations).

135. Leslie Vinjamuri & Jack Snyder, *Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice*, 7 ANN. REV. POL. SCI 345, 346 (2004).

risked igniting conflict[136] or jeopardizing ongoing peace negotiations.[137]

Accountability in this model also is related to the larger goal of ending impunity for serious violations of human rights and international humanitarian law. This goal applies more broadly than transitional justice contexts, as such acts do not always occur as part of armed conflict or as part of governance by authoritarian regimes. Nevertheless, within transitional justice, the absolutist model of accountability serves as a principled sword forging calls for criminal accountability as well as a shield to block efforts to compromise on justice.[138] For example, the duty to prosecute serious human rights violations may not be defeated by amnesties and so advocates may rely on this obligation to expose efforts by governments to justify the pursuit of reconciliation or restorative justice models as a cynical attempt to evade redress of any kind.[139]

Finally, the Nuremberg model of accountability excludes collective forms of sanction. Remember that part of the reason the Allies decided to criminally prosecute the Nazi leaders was to decouple the Nazi regime from the German state and to demonstrate

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136. Luis Moreno-Ocampo, ICC Chief Prosecutor, Statement at the ICC on Indictments of LRA Commanders During UN-Brokered Peace Negotiations 8 (Oct. 14, 2005), http://www.icc-cpi.int/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda_LMO_Speech_141020091.pdf ("The International Criminal Court was established to demonstrate the determination of the international community to put an end to impunity for the perpetrators of the most serious crimes. Civilians in Northern Uganda have been living in a nightmare of brutality and violence for more than nineteen years. I believe that, working together, we will bring justice, peace and security for the people of Northern Uganda.").

137. For example, ICTY prosecutor Richard J. Goldstone was criticized for indicting the self-styled Bosnian Serb President Radovan Karadzic and General Ratko Mladic on the eve of peace negotiations. INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, PURSUING JUSTICE IN ONGOING CONFLICT 3 (May 2007).

138. Kieran McEvoy*, Letting Go of Legalism: Developing a "Thicker" Version of Transitional Justice, in* TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE 15, 24 (Kiernan McEvoy & Lorna McGregor, ed. 2008) [hereinafter TRANSITIONAL JUSTICE FROM BELOW] (observing the movement of accountability in transitional justice as follows: "In an environment where politically-constructed notions of 'pragmatism' and related offshoots such as reconciliation are often viewed as slippery bywords for impunity, 'human rights as retribution' provides an understandably comforting terra firma for many lawyers."); Kieran McEvoy & Lorna McGregor, *Transitional Justice from Below: An Agenda for Research, Policy and Praxis, in* TRANSITIONAL JUSTICE FROM BELOW, at 18-19 [hereinafter McEvoy & McGregor, *An Agenda for Research*].

139. Diane F. Orentlicher, "*Settling Accounts" Revisited: Reconciling Global Norms with Local Agency,* 1 INT'L J. TRANSITIONAL JUST. 10, 21 (2007); *see also* Bell, *supra* note 111, at 16-17.

that the German *people* as a whole were not on trial.[140] The Nuremberg theories of collective liability aimed to criminalize associations (the Nazi party) and corporations have largely been discarded in the 21st Century resurgence of international criminal accountability.[141] Notwithstanding the Allies' pursuit of war reparations, which from the perspective of the vanquished state have a sanctioning character, the legal distinction between exacting collective reparations and punishment seems to have held sway in the Nuremberg theorization of accountability. Individual criminal accountability defines accountability for past wrongs as a matter of international law and morality.

2. Hybrid Accountability Model

With the South African Truth and Reconciliation Commission, the goals of transitional justice self-consciously broadened beyond pursuit of justice and the role and shape of accountability underwent a rethinking in the field.[142] The second conceptualization of accountability fits within what is termed a 'holistic' approach to transitional justice. In this framework individual criminal accountability is only one of many goals that transitional justice aims to accomplish. State responsibility for human rights obligations figures as a justification for a victim-centered approach. In the holistic model, laid out in the 2004 Secretary-General report, pursuit of justice is not necessarily the only or highest goal, but is one that needs to be pursued in a balanced way along with truth recovery, reparations for victims, preserving the peace, and building democracy and the rule of law.[143] The oft-quoted tagline from the Secretary-General's report

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140. *See supra* note 16.

141. Nina H.B. Jorgensen, *Criminality of Organizations Under International Law, in* SYSTEM CRIMINALITY, *supra* note 6, at 201-02.

142. *See* Bell, *supra* note 111, at 9, 13-24 (arguing that transitional justice grew to cover *more than* human rights accountability in democratic transitions "to a broader conception of transition involving a range of legal regimes and mechanisms, as well as a complex set of goals beyond those of 'accountability' and 'democraticization' . . . "); Pablo de Greiff, *Theorizing Transitional Justice*, *in* TRANSITIONAL JUSTICE, NOMOS, vol. LI, 31, 32 (2012). Teitel identifies this period as phase II in her transitional justice genealogy, in which transitional justice is characterized as having an expanded aim of promoting reconciliation and thus justice is instrumental to facilitate this desired result. In turn this meant adopting a more capacious view of amnesty policies. Teitel, *Human Rights in Transition*, *supra* note 108, at 77-82.

143. *Rule of Law and Transitional Justice*, *supra* note 124, ¶ 25; Vinjamuri & Snyder, *supra* note 135, at 352-53 (arguing that realists do not have a principled attachment to justice

frames this approach as: "We must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation, and national needs and aspirations."[144] Accountability is valued, but must be pursued in an appropriate way, at an appropriate time.[145]

Thus the model of accountability associated with holistic transitional justice is hybrid accountability: criminal prosecutions are understood as legitimate, but non-retributive mechanisms are also validated. The choice of interventions will depend on the context. Hybrid accountability places criminal responsibility within the broader influence of legalism in transitional justice and becomes subject to critique as such. There is a line of transitional justice scholarship that questions the pursuit of legal accountability as part of a larger critique of the hegemonic influence of legalism in the field.

Adherence to legalism prioritizes the pursuit of legal solutions after mass violence blind to the power of political and social contexts. Political philosopher Judith Shklar elaborated this concept, drawing insights by theorizing law as a faith-based system. She characterized the root of this dilemma based on the fact that law as "an ideology [is] . . . too inflexible to recognize the enormous potentialities of legalism as a creative policy, but exhausts itself in intoning traditional pieties and principles which are incapable of realization."[146] For Shklar, adherence to legalism required trials at Nuremberg, but the real value of prosecutions was not in applying rule of law in the abstract but that in so doing, the trials contributed to consolidating political and social support in postwar Germany for law rather than violence as a tool to resolve social conflict.[147]

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because "[i]n the evaluation of outcomes, the consequences of trials for the consolidation of peace and democracy trump the goal of justice per se, since the future prospects for justice depend on the establishment of social peace and unshakeable democratic institutions."); Teitel, *Human Rights in Transition*, *supra* note 108, at 77 (noting that in this period, transitional justice moved beyond retributive justice and "included questions about how to heal an entire society and incorporate diverse rule-of-law values, such as peace and reconciliation, that had previously been treated as largely external to the transitional justice project. Accordingly, the move away from judgment associated with the more complex and diverse political conditions of nation-building.").

144. *Rule of Law and Transitional Justice*, *supra* note 124, summary.

145. *Id.* ¶ 21.

146. JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 112 (1986).

147. *Id.* at 145 (stating that trials "promote legalistic values in such a way as to contribute to constitutional politics and to a decent political system"); Samuel Moyn, *Essay-*

In the hybrid accountability model, legalism assumes a more negative character. Kieran McEvoy lays out a trenchant analysis of the effects of legalism in transitional justice that includes but goes beyond pursuit of accountability. Not only does legalism manifest as individual criminal accountability, but, with it, the discourse of human rights overshadows the contributions of other perspectives to solving the complex problems of social reconstruction. Thus, legalism

> lends itself to a "Western-centric" and top-down focus; it self-presents . . . as apolitical; it includes a capacity to disconnect from the real political and social world of transition through a process of "magical legalism"; and finally it suggests a *predominant focus upon retribution as the primary mechanism to achieve accountability*.[148]

A groundswell of criticism of criminal prosecutions emerged together with a more general resistance to legal approaches as the dominant transitional justice response. Practitioners and researchers working with or studying the effects of trials exposed the gaps between the promise of international criminal justice and the instrumental goals that prosecutions were supposed to achieve: rule of law, reconciliation, healing to victims, etc. Studies chronicled problems in implementation of justice that had unintended effects, for example on victims who participated in proceedings but did not find the promised "closure" or healing but rather disappointment.[149] Research also offered a decidedly mixed empirical record as to whether trials had a positive effect on reconciliation.[150] The empirical

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Review, Judith Shklar verus the International Criminal Court, HUMANITY: INT'L J. HUM. RTS., HUMANITARIANISM & DEV. 473, 481 (2013).

148. Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J. L. & SOC. 411, 421 (2007) (emphasis added). Kieran McEvoy and Lorna McGregor also link the presence of positivism and legalism in transitional justice scholarship in part to the institutionalization of transitional justice through tribunals and truth commissions. "It is also perhaps precisely because transitions from conflict shine a harsh light on the political and contingent nature of legality that legal formalism become the defensive default position for many lawyers working in this field." McEvoy & McGregor, *An Agenda for Research, supra* note 138, at 18-19.

149. *See generally* ERIC STOVER, THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE (2007).

150. The Human Rights Center at the University of California, Berkeley has completed several population-based surveys in conflict and post-conflict settings that indicate that affected populations hold nuanced views of criminal accountability. *See, e.g.*, P. VINCK & P. PHAM, BUILDING PEACE SEEKING JUSTICE: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT ACCOUNTABILITY AND SOCIAL RECONSTRUCTION IN THE CENTRAL AFRICAN REPUBLIC (2010); P. PHAM & P. VINCK, TRANSITIONING TO PEACE: A POPULATION-BASED

evidence buttressed skeptics of individual accountability, many of whom advanced alternative visions of transitional justice that re-centered the enterprise on victims.

An early advocate of this approach, legal scholar Martha Minow, argued for victim-centered approaches to transitional justice and understood that processes to foster reckoning with the past should look beyond retribution for perpetrators and reframe attention on the experience and needs of victims.[151] Minow theorized this relationship by comparing criminal trials to truth commissions, which reinforced seeing these mechanisms as a binary choice between legal accountability and its alternatives.[152] The holistic framework and experiences with how transitional justice mechanisms worked in practice tempered this distinction. Supporters of a victim-centered approach promoted the idea that *all* transitional justice mechanisms should be responsive to victims' experiences. Truth commissions, often touted as victim-centered, could exclude or devalue the experiences of categories of victims, or frame their experiences in ways that elided important dimension of their victimization,[153] just as criminal courts could.[154]

Proponents of victim-centered transitional justice frequently rely on human rights and other international positive law obligations to argue that transitional justice mechanisms should be more responsive to a whole range of victims' demands.[155] What adherents to this conceptualization gain by this is to foreground the victim within what

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SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND JUSTICE IN NORTHERN UGANDA (2010); *see also* LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE (Rosalind Shaw & Lars Walford, with Pierre Hazan eds. 2010).

151. MINOW, *supra* note 121; Vinjamuri & Snyder, *supra* note 135, at 357 (noting that proponents of the model advocate for "a conception of justice that is centered on the survivors and victims, not on retribution against the perpetrator.").

152. MINOW, *supra* note 121.

153. For example, the South African Truth and Reconciliation Commissions have been criticized for hearing testimony from women that spoke only selectively about their experiences of political violence. FIONA C. ROSS, BEARING WITNESS: WOMEN AND TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA (2003).

154. Harvey M. Weinstein, *Victims, Transitional Justice and Social Reconstruction: Who is Setting the Agenda?, in* JUSTICE FOR VICTIMS: PERSPECTIVES ON RIGHTS, TRANSITIONS AND RECONCILIATION (Inge Vanfraechem et al. eds. 2014); NICOLA HENRY, WAR AND RAPE: LAW, MEMORY, AND JUSTICE (2011).

155. Wendy Lambourne, *Transitional Justice and Peacebuilding After Mass Violence*, 3 INT'L J.TRANSITIONAL JUST. 28 (2009); *Special Issue, Transitional Justice and Development*, 2 INT'L J. TRANSITIONAL JUST. (2008).

is largely a State-centered approach to transitional justice by speaking the language of the duties of States to individuals.[156] Human rights treaties generate duties of the States to individuals and in the context of transitional justice, these include the duty to generate the truth,[157] investigate, and punish gross human rights violations or serious violations of humanitarian law,[158] and to provide victims of such acts with reparations.[159] It is in the area of reparations that proponents of victim-centered approaches most visibly rely on the international legal standards to ground demands for transitional justice processes to compensate victims, although other forms of reparations like rehabilitation and institutional reform are also promoted.[160] The rise of victims' rights within transitional justice is helped by the international justice scheme established by the Rome Statute. The ICC elevates attention to victims as right-bearers within international

156. Lorna McGregor, *International Law as a "Tiered Process": Transitional Justice at the Local, National and International Level*, *in* TRANSITIONAL JUSTICE FROM BELOW, *supra* note 138, at 47, 64 [hereinafter McGregor, *International Law as a "Tiered Process"*].

157. Diane Orentlicher, *Report: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Addendum)*, U.N. Doc. E/CN.4/2005/102/Add.1 12 (Feb. 8, 2005); UN Human Rights Council, Res. 21/7: Right to the Truth, U.N. Doc. A/HRC/21/L.16 (Sept. 24, 2012); G.A. Res. 60/147, Annex, ¶ XI 22(b), Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, (Dec. 16, 2005) [hereinafter G.A. Res., *Principles and Guidelines on the Rights to a Remedy*].

158. Committee on Civil and Political Rights, *General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) [hereinafter Committee on Civil and Political Rights, *General Comment No. 31*]; Commission on Human Rights, *Question of the Impunity of Perpetrators of Human Rights Violations*, ¶ 7, U.N. Doc. E/CN.4/Sub.2/1997/20 (June 26, 1997); Pablo de Greiff (Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence), *Rep. of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, ¶ 100, U.N. Doc. A/HRC/27/56 (Aug. 27, 2014); Human Rights Committee, *Concluding Observations of the Human Rights Committee, Serbia and Montenegro*, ¶ 9, U.N. Doc. CCPR/CO/81/SEMO (2004).

159. Committee on Civil and Political Rights, *General Comment No. 31, supra* note 158, ¶ 15; G.A. Res., *Principles and Guidelines on the Right to a Remedy, supra* note 157, ¶ I(2)(c); G.A. Res. 60/34, Annex, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, ¶ 4, U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); *see also* Diane Orentlicher, *Report: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Addendum)*, 12, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

160. THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS (Ruth Rubio-Marín ed. 2009); REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING (Carla Ferstman et al. eds. 2009)*; see also* ELAZAR BARKAN, "THE GUILT OF NATIONS": RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000).

justice, within a legal scheme that incorporates elements of restorative justice alongside retributive justice.[161]

Thus, Rosalind Shaw and Lars Waldorf noted that adherence to accountability as retributive justice occurred simultaneously with a commitment to take victims seriously.[162] Yet they observe that the normative fealty to accountability that grounded transitional justice resisted challenges that would seriously displace accountability as the driving principle of the field.

This phase of transitional justice is marked not only by a fascination with locality, but also by a return to Nuremberg's international norms against impunity and a UN prohibition against granting amnesties for war crimes. Although policymakers and scholars now routinely recognize the importance of adapting mechanisms of transitional justice to local circumstances, such adaptation tends to be conceptualized in ways that do not modify the foundational assumptions of transitional justice.[163]

The holistic model of transitional justice supports thinking about accountability in a hybrid fashion. On the one hand, individual criminal accountability remains an accepted fixture, anchored in support of legal justice and law as the plumb line for societies recovering from violent pasts. On the other hand, the holistic model accommodates critics of criminal trials and legalism by expanding what transitional justice includes. Yet even with this accommodation, legal accountability remains present but in a new guise. Now, through the pursuit of victim-centered transitional justice, the shortcomings of State-centric and criminal accountability approaches are to be addressed within a liberal framework that confers individual rights on victims with concomitant duties of States.

3. Grafted Accountability Model

A new model of transitional justice is emerging. Although this vision of transitional justice, or "transformative justice" as some of its proponents have coined it,[164] is the least developed, nonetheless its

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161. Rome Statute of the International Criminal Court, U.N. Doc A/Conf.183/9, arts. 68, 75, 79 (1998).

162. Rosalind Shaw & Lars Waldorf, *Introduction: Localizing Transitional Justice, in* LOCALIZING TRANSITIONAL JUSTICE, *supra* note 150, at 14, 17.

163. *Id.* at 24.

164. Paul Gready & Simon Robins, *From Transitional Justice to Transformative Justice: A New Agenda for Practice,* 8 INT'L J. TRANSITIONAL JUST. 339 (2014); *see also* Erin

essential contours are legible. This vision of accountability answers Shaw's and Waldorf's challenges by offering a conception of transitional justice based not in individual criminal accountability, or primarily western liberal law, but in peacebuilding, restorative justice, and development.[165] In this third model, accountability is further transformed. Accountability features primarily discursively and operates to mobilize local, community-based action rather than as a judicial enforcement strategy. It is focused on the State rather than on individuals and is grafted onto a vision of broad, societal transformation. Individual criminal accountability all but falls away, and in its place social justice becomes the end goal of transition. The hybrid model accepts criminal accountability and legal solutions as legitimate, if flawed, initiatives that do some, but not all, of the work transitional justice desires. Transformative justice starts from a different premise. It looks first and primarily to local priorities and processes to drive the form of transitional justice: law and international law are not principles to which social responses should hew.

Holding States accountable for the underlying acts of violence, through its duty to prosecute individuals, is not the primary focus or an acknowledged coterminous goal in transformative justice. In this model, transitional justice ceases to be a State-centric project but one that is bottom-up, participatory, endogenous, and designed to address societal exclusion and marginalization. To some extent, transformative justice is the outgrowth of victim-centered transitional justice. In this iteration, however, the deployment of human rights arguments is a strategic choice, born of opportunity. One gets the sense that if non-legal tools could achieve similar ends, human rights and law language would be dispensable. Criminal accountability is not pursued as a matter of principle or even for its promised consequential value as a State-building tool. If criminal accountability for past violence emerges as a priority from a participatory and consultative process it will be pursued, grafted onto a larger social justice agenda.

Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSPECTIVES 73 (2002).

165. Gready & Robins, *supra* note 164, at 350; Dustin N. Sharp, *Interrogating the Peripheries: The Preoccupation of Fourth Generation Transitional Justice*, 26 HARV. HUM. RTS. J. 149 (2013); McEvoy & McGregor, *An Agenda for Research, supra* note 138; James L. Cavallero & Sebastian Albuja, *The Lost Agenda: Economic Crimes and Truth Commission in Latin America and Beyond, in* TRANSITIONAL JUSTICE FROM BELOW, *supra* note 138.

In their article, *From Transitional Justice to Transformative Justice: A New Agenda for Practice*, Paul Gready and Simon Robins lay out this new vision of transitional justice, which is an unabashed effort to radicalize transitional justice politics and practice.[166] While they are not the only ones promoting a similar alternative, theirs is a full-throated defense and emblematic of this approach. The authors argue that transitional justice suffers from its limits as a set of legally based, State-centric approaches, which aim to establish a liberal peace after times of political violence or repression.[167] Universal norms are "too remote" and the holistic approach does not allow for truly bespoke solutions. There is no mechanism to order priorities among various options and attempts to address root causes and socio-economic inequities are too narrow.[168]

Transitional justice praxis cannot break free of these limits without offering a substantive critique of "the globally dominant practices of which it is a part . . . ."[169] The authors do so and seek to address these constraints by promoting practices that will support what they term transformative justice. They define transformative justice as "transformative change that emphasized local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level."[170] Thus transformative justice seeks to shift the focus of transitional justice from the attention to the legal dimensions of transition to the social and political; from the State and its institutions to the everyday experiences of residents; and to have change driven by a bottom-up understanding and analysis of the lives and needs of affected populations.[171] Its tools will be broad and beyond trials and truth commission to "comprise a range of policies and approaches that can impact on the social, political and economic status of a large range of stakeholders."[172]

Gready and Robins share with others the push against the dominance of criminal accountability for international crimes on the

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166. Gready & Robins, *supra* note 164, at 340 (arguing that transformative justice seeks to "radically reform [transitional justice] . . . politics, locus and priorities").

167. *Id.*

168. *Id.* at 350.

169. *Id.*

170. *Id.* at 340.

171. *Id.*

172. *Id.*

grounds that this approach privileges violations of physical integrity (mass killings, torture, rape, etc.) and sidelines systemic violence and socio-economic inequities that drive conflict.[173] But the authors broaden the frame in which they examine criminal accountability, asking about its consequences not just for deterrence but also for the impact that criminal prosecutions may have on the ability of fragile States to deliver services.[174] This model's rejection of legalism allows for a reconceptualization of transitional justice. In place of a norm-driven and pluralist approach to the mechanisms of the holistic model, the authors argue for a process-based, deliberative approach to determining which mechanisms to adopt. Transformational justice is inductive in developing policies and mechanisms, and includes communities and affected populations in deliberations about priorities and what is needed to redress systemic power imbalances that undergird social injustice.[175] Transformative justice does not presume that application of individual criminal accountability for serious past crimes is necessary as a matter of principle or that it will generate desired long term change.

Consistent with a view of transitional justice as participatory and reliant on and supportive of civic mobilization, judicial enforcement of State accountability to victims as a matter of principle does not drive transformative justice in the way that anti-impunity drives the absolutist accountability model. Transformative justice draws support from scholars who advocate for greater attention to economic violence, economic justice, and structural drivers of conflict.[176] While human rights provide a universal, rights-based vocabulary and framework for analysis of these issues, enforcement of the legal obligations of the State *as such* is not always the goal of this model.

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173. *Id.* at 345-48; Sharp, *supra* note 165, at 169-71.

174. Gready & Robins, *supra* note 164, at 345 ("A transformative approach will need to balance pursuing wrongdoers with whatever best institutionalized peace and effective service delivery, and as such it is likely that principle and pragmatism will cohabit in approaches to institutions.").

175. *Id.* at 357-58 (arguing that transitional justice needs to be holistic but beyond the current tool kit to "use a far wider range of approaches, and will expressly integrate both social and economic policy that promotes social justice, as well as grassroots-driven approaches that impact directly on communities"); McEvoy & McGregor, *An Agenda for Research, Policy and Praxis, supra* note 138, at 3; McGregor, *International Law as a "Tiered Process"*, *supra* note 156, at 47.

176. *Special Issue, Transitional Justice and Development*, 2 INT'L J.TRANSITIONAL. JUST. (2008) (this issue includes articles that examine the relationship of non-legal frames to transitional justice including economic and social inequalities and peacebuilding).

Generating political pressure for policy reform is the avenue for change. Some practitioners and researchers advocate that truth commissions, the transitional justice mechanism generally tasked with providing an authoritative account of the past violence, should provide an explanatory account of how economic injustices contributed to the violence and make recommendations for structural reforms to cure these systemic defects.[177] Similarly, Gready and Robins argue that the human rights-based approach to development, which is used as a prescriptive guide to a bottom-up process to generate policy and practice in this area, should be incorporated as a site of transformative justice.[178]

This approach is not, strictly speaking, advocating for legal incorporation of economic rights as defined by international law.[179] It is an effort to draw attention and generate political support to attack systemic inequalities in transitional justice contexts. This human rights discourse is one used to diagnose and redress economic violence. It possesses a rights-based sensibility and adopts a more expansive understanding of "justice" than that defined by criminal accountability. Here the concept of State accountability is not figured as legal accountability for human rights obligations but as political and moral accountability, in the sense of democratic political theory that understands States as accountable to their citizens for securing their welfare.

However, legal accountability is not wholly absent in this grafted model of accountability. It presents itself primarily in calls for reparations. Transformative justice overlaps with victim-centered approaches to transitional justice in that both justify reparations for victims by appeals to human rights law and the duty of the State to provide an effective and adequate remedy.[180] However, transformative justice finds unsatisfactory the legal remedy of restitution to victims, which is the most common form of

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177. Sharp, *supra* note 165; Cavallero & Albuja, *supra* note 165. Gready and Robins note with caution that truth commissions may be too limited in their discussion of root causes and note that the Kenyan Truth, Justice and Reconciliation Report limited its discussion to land reform and did not raise larger issues of redistribution and tenure reform. Gready & Robins, *supra* note 164, at 346-47.

178. Gready & Robins, *supra* note 164.

179. Evelyne Schmid & Aoife Nolan, "*Do No Harm"? Exploring the Scope of Economic and Social Rights in Transitional Justice,* 8 INT'L. J.TRANSITIONAL JUST. 362, 363 (2014).

180. Gready & Robins, *supra* note 164, at 347.

reparations.[181] Narrowly prescribed for selective violations and designed to restore the victim to her status quo ante, restitution as a legal remedy is a relatively anemic form of economic justice. Nevertheless, scholars argue that grassroots mobilization of victims around demands for reparations serves other important goals that support a broader social justice agenda including community empowerment, rights conscientization, and strengthening grassroots capacity to disrupt power imbalances.[182]

Transformative justice offers a wholesale reconfiguration of transitional justice practice that is process driven rather than norm driven. Aimed at addressing root causes of the violence, social marginalization, and fostering social justice, law and legal solutions are not presumed to provide the answers to achieving these goals. Criminal accountability is balanced not against peace, but against the capacity of the State to ensure the welfare of its citizens. Trials still may be a tolerated component of transformative justice, but certainly not a mainstay. Empowerment of subordinated groups is prioritized with the focus on the future and building a more just society rather than looking back at the past armed with retributive justice to settle accounts. State accountability is also future-focused and largely framed in the register of political theory of democratic government rather than enforcement of human rights obligations. In other words, unlike with the Nuremberg model, legal accountability is sidelined and no longer central to the transitional justice project.

C. *Implications of Transitional Justice Models of Accountability for State Accountability*

Transitional justice has constituted its views of accountability in ways that exclude State criminality and have a limited understanding of state accountability. The Nuremberg model is premised on the rejection of state crimes and collective punishment. Those trials served to identify the individual decision makers responsible for mass violence and their guilt was hypothesized to liberate the German people from the stigma of their former Nazi leaders. The liberal discourse of the Nuremberg Principles omits war reparations and the other interventions the Allies imposed on the German collective (e.g.

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181. *Id.*

182. REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY, *supra* note 160.

economic and political restructuring) that functioned as stigmatization or sanctioning of the State. Liberal accountability prevailed and became imbricated with building rule of law and democracy in post-conflict societies. Legalism so configured muzzles law's power to discipline states for their distinct role in mass violence.

Hybrid accountability imports the Nuremberg model but expands the accepted goals and mechanisms to achieve transitional justice to include non-retributive aims. The constraint or elision of State sanctions for international crimes carries forward and the holistic approach does not include any interventions to hold the State legally accountable for mass crimes. The emphasis on victims, prevalent in hybrid and grafted accountability, makes room for State legal accountability insofar as it justifies reparations based on human rights obligations. So why are reparations for human rights violations and acknowledgment of State crimes, for which the imposition of reparations could be as a consequence, not the same thing?

1. Human Rights Effaces State Responsibility to the International Community

There is a normative distinction between State responsibility for human rights violations and State responsibility for violations *erga omnes*. The explicit shaming function of identifying the behavior of the State as *wrongful* is missing from human rights reparations. Analogous to the distinction in municipal law between criminal law and civil law, actions to sanction the State for its role in the commission of mass violence through human rights reparations misses the moral opprobrium of penal sanctions. It is the lack of a normative link between state conduct regarded as penal and reparations that dilutes the power of reparations to instantiate a more robust, universal value of accountability. Thus, the distinction between the imposition of reparations as the result of action characterized as State criminality versus human rights violations is important. Additionally, although human rights principles influence and may be incorporated into transitional justice thinking and policies, these largely remain separate spheres of intellectual activity and practice. The hybrid model borrows from human rights to the extent that human rights principles supports victims' rights, but is not interested in developing the legal remedies of State responsibility further as a practice to vindicate the interests of the international community.

Moreover, the move in transitional justice toward a victim-centered approach undermines attention to State criminality. In the holistic model, scholars and practitioners identify and offer curative fixes to address the shortcomings in how transitional justice processes address the concerns and experiences of victims. At the same time, the expanded goals of transitional justice to promote truth recovery and social reconciliation are intertwined with victim-centeredness. This reformist agenda largely accepts the transitional justice toolkit but proposes ways that any particular initiative can better satisfy victims. Thinking within the field that questions the appropriate role and relationship of transitional justice to criminal accountability pushes in the direction of attending to the individual and community and away from the State. The reformist tendencies reject norms, legalism, and a focus on States, overlooking what revisiting State criminality might offer to the field. While this approach does not necessarily—and certainly not explicitly—absolve the State of its wrongdoings, it does not examine the contribution that State legal responsibility could make to achieve desired change. In questioning individual criminal responsibility, a revisiting of State accountability and the role for legal responsibility is certainly necessary.

2. Human Rights Effaces Remedies for State Violations of Duties to the International Community

Those writing in the field critique legalism but argue that transitional justice should address the underlying causes of injustice that produced the violence. They have a somewhat ambivalent relationship to State accountability and State criminality. Transformative justice looks to communities and individuals to overcome the State-centric foundation of transitional justice. It is not concerned with State criminality. More attractive is the human rights framework, with its inclusion of participatory rights and substantive protections, which offers a discursive lens that makes visible and offers a framework to address structural violence. But the rights-based approach in this area tends toward policy advocacy and political mobilization and away from legal enforcement. This means that a human rights perspective on economic harms can inform the work of top-down mechanisms like truth commissions or community-based interventions as policy guidance. But "hard" legal accountability of the State figures only at the periphery. Scholars note that transitional justice mechanisms, even when they frame economic injustice in

terms violations of human rights, do not carry through on their analysis by calling for legal remedies like individual or collective reparations or structural reforms.[183]

Human rights establish remedies to victims. Yet victims do not have universal opportunities to pursue judicial enforcement of remedies for conflict-related human rights violations. There is no international human rights court comparable to the ICC in which victims might assert their rights—both civil and political rights as well as economic and social rights—that States violate in perpetrating mass violence. Even where human rights law provides for structural remedies for human rights violations as a form of reparations called "guarantees of non-repetition," human rights courts have ordered these comparatively rarely.[184] Moreover, even the more muscular forms of structural remedies ordered by the Inter-American Court of Human Rights are weaker than the wholesale State reforms of the Potsdam Agreement.[185] To be clear, these are important differences of practice rather than law; international principles allow for structural remedies to prevent recurrence of State-perpetrated atrocities.[186] But transitional justice's theorization of remedies as human rights violations shortchanges the power of international law. Remedies for State violation of obligations owed to the international community would arguably justify stronger measures than those drawn from human rights practice. Moreover, enforcing remedies for *erga omnes* violations align with the normative rule of law values of the international community. Despite the call by the UN Special Rapporteur on transitional justice for States to apply human rights norms to craft policies that will address structures of marginalization as part of transitional justice policy, enforcement of State responsibility for perpetrating conflict crimes is an underdeveloped area in transitional justice.[187]

In short, although accountability and the drive against impunity for serious human rights violations and violations of international

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183. Schmid & Nolan, *supra* note 179, at 376; Amanda Cahill-Ripley, *Foregrounding Socio-Economic Rights in Transitional Justice: Realising Justice for Violations of Economic and Social Rights,* 32 NETH. Q.HUM. RTS. 183, 186, 207 (2014).

184. Gready & Robins, *supra* note 164, at 347. Yet transitional justice scholars who argue for greater attention to addressing economic injustice in general do not justify these claims on human rights obligations. *See* Sharp, *supra* note 165, at 171.

185. Antkowiak, *supra* note 104*,* at 351.

186. *See* discussion *infra* Part III.A.

187. de Greiff Report, *supra* note 22.

humanitarian law remain central to the field of transitional justice, the contestation and debates over the relationship of accountability to the goals of the transitional justice has generated particular dynamics. Among the three models of transitional justice, legal accountability is associated with individual criminal accountability and rises and falls with support for state-focused solutions. Evolution of the field has generated alternatives to the Nuremberg model of an absolutist, principled, application of international criminal accountability. But neither the hybrid nor the grafted model lends itself to considering State criminality. Attention to victims has entailed sharp critique of top-down approaches, which draws attention away from the State as legally responsible for redressing mass violence.

Despite tendencies away from state-centric and legal solutions, transitional justice rests within the international, State-centric, world order. The push toward victims and grounded solutions apparent in the hybrid and grafted accountability models arises in the context of State-generated international law and policy. This leads to questions about the implications of turning our backs on the State as a focal point of accountability when we look to formulating approaches to restoring a full measure of justice in the face of mass atrocities. To investigate this issue, the next Section examines current approaches among international law scholars to state accountability for mass violence. What can we glean from how scholars and States conceive of State legal accountability and the role of the State in committing atrocity crimes?

III. *TOWARD STATE ACCOUNTABILITY FOR MASS VIOLENCE*

We return briefly to reconsider the opening frame of this Article: the Security Council vote defeating the proposed referral of the situation in Syria. An ICC referral encapsulates the absolutist accountability model: the available evidence suggests the Assad regime is carrying out widespread and lethal persecution of civilians, which constitute crimes in international law, and those responsible should be brought to justice.[188] At the same time, the systematic and organized nature of the violence points to the involvement of organs of the State in the commission of these crimes. The armed forces likely are the most visible, but civilian branches responsible for governance, administration, and enforcement (or lack thereof) of State

188. *Supra* note 1.

protection of residents also are implicated in furthering the State's persecutory policy against (perceived) political opponents and their (perceived) supporters. The proposed referral makes no mention of legal measures against the State for its role in perpetrating mass violence.[189] This should concern us. For the elision of State legal responsibility for mass violence means nothing less than State impunity for acts that are considered criminal under international law. The rule of law values of the international legal order are undermined and the legitimacy of its institutions weakened by their glaring failure to address the legal responsibility of its most consequential actors.[190]

This Section considers this State of affairs and asks what can be done to bring international attention and action on legal accountability for State propagation of mass violence. This exercise serves as an invitation to transitional justice scholars and practitioners to consider the value of legalism to advance State, as opposed to individual, accountability. This Article does not propose a mechanism for enforcement of State responsibility. Rather, it uses the Security Council's treatment of dual responsibility in the case of atrocities committed in Sudan to illustrate how the prevailing theories of accountability operate and how the Security Council as one international institution could advance state legal responsibility.

This analysis suggests that the theorization of legal accountability in transitional justice undercuts State accountability. Legal accountability for State atrocities poses a challenge to the absolutist accountability model by insisting that there is a collective dimension to international crimes that the law should not ignore. At the same time, deployment of international law to promote State accountability challenges the hybrid and grafted accountability models of transitional justice. To the extent that these two models reject legalism for its inability to address structural dimensions of mass violence, State responsibility offers a fuller legal response than either of these models contemplates. Given the weak level of development and enforcement of the international law of State

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189. Rep. of the S.C., at 2-3, U.N. Doc. S/2014/348 (2014) ("condemn[ing]" Syrian authorities' "widespread violations of human rights and international humanitarian law" and "urg[ing] all States . . . to cooperate fully with the Court and the Prosecutor").

190. *See* Antonio Augusto Cançado Trindade, *Complementarity Between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited*, *in* INTERNATIONAL RESPONSIBILITY TODAY 253, 269 (Maurizio Ragazzi ed. 2005).

responsibility,[191] the argument advanced here is that international law regarding the responsibility of States for mass violence should be cultivated by transitional justice for its conceptual and rhetorical value. Doing so has the potential to change the international politics surrounding debates on international accountability for mass violence. The past 25 years have shown the power of international justice discourse to change international responses to mass violence. Expanding the discourse to including State accountability could lead to a more integrated theory and enforcement strategy of dual responsibility for atrocities.

This Section proceeds as follows: First, international law scholarship regarding the law of state responsibility for State crimes is mined for its conceptual contributions to advancing State accountability for these acts, namely acknowledgement of State criminality within international law, thinking about appropriate remedies for State crimes, and illustrating the problem of enforcement. Second, the effects of the status quo are outlined in an effort to juxtapose the costs of today's equilibrium against the need to revise current thinking. Finally, the Section considers how transitional justice might incorporate state accountability for mass violence into its agenda.

A. *The Contribution of International Law Scholarship to State Accountability for Mass Violence*

International legal scholars have studied the problem of mass violence from the perspective of the legal responsibilities of States, as opposed to the legal responsibilities of individuals. In so doing, they offer transitional justice a set of ideas regarding legal accountability that the field has not adequately considered. Mass violence creates a dilemma in international law, of which its difficulty to address State involvement in such horrors is, perhaps, its most visible symptom. Nuremberg rejected collective guilt. Nevertheless, as an empirical matter, the apparatus of the State will be utilized in the commission of State-perpetrated mass violence. Under the concept of "dual responsibility," States may be legally responsible for such crimes and their legal responsibility is distinct from criminal sanctions against

191. *See supra* Part I.

individuals for their role in the same events.[192] This legal responsibility of States is not of a penal nature as technically States do not commit crimes.[193] Making system criminality more difficult to address is the fact that although the international law of State responsibility establishes rules to determine breaches and the legal consequences of these act, the *processes* of enforcement—a system of legal accountability—are underdeveloped.[194] Transitional justice drove the momentum to establish mechanisms of accountability for international criminal law, but has not incorporated calls for State legal accountability. Many international law scholars have acknowledged this state of affairs as a shortcoming of positivist law and have offered conceptual contributions that deepen an understanding of the nature of this gap as well as ideas for reform.[195]

Andre Nollkaemper develops the idea of system criminality to capture "the phenomenon that international crimes—notably crimes against humanity, genocide and war crimes—are often caused by collective entities in which the individual authors of these acts are embedded."[196] He shares with others a concern that the "current fashionable focus"[197] on international criminal law neglects that for most international crimes, either by definition (crimes of aggression)[198] or as a practical matter,[199] the State is directly involved

192. Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 116, ¶ 173 (Feb. 26) [hereinafter ICJ Genocide Case].

193. *Id.* ¶ 170; Prosecutor v. Blaskic, Judgment on Request of Rep. of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, ¶ 25 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997) ("Under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems.").

194. Outside of Genocide Convention, and the Geneva Conventions, there is no treaty law regarding state accountability for international crimes. These treaties are multi-lateral, relying on the state that suffered the injury to pursue a remedy and thus do not develop a law or practice for violations of *ergo omnes* obligations.

195. *See generally* SYSTEM CRIMINALITY, *supra* note 6.

196. *Id.* at 1.

197. Andre Nollkaemper & Harmen Van Der Wilt, *Conclusions and Outlook*, *in* SYSTEM CRIMINALITY, *supra* note 6, at 338.

198. ICC, Resolution RC/Res.6, The Crime of Aggression (June 11, 2010).

199. SYSTEM CRIMINALITY, *supra* note 6, at 4 ("when [state authorities] have a powerful apparatus at their disposal charged with protecting the security of the state, and when they have identified groups that are defined as enemies of the state, collective entities themselves can turn into actors that commit, or further the commission of, international crimes"); Nigel D. White, *Responses of Political Organs to Crimes by States*, *in* SYSTEM

in their commission.[200] And as a normative as well as instrumental matter, States should be held to account for their actions, including being *punished* for breaching established norms.[201] The work of these scholars prompts an important discussion about how and under what conditions international State legal accountability addresses system criminality and its relationship to international criminal law. However, these debates are largely confined to discussions among international law and international criminal law scholars.[202] Transitional justice scholars, even those who are most concerned with a holistic approach to reconstruction after mass violence, are not considering the contribution of State responsibility.[203] Thus the differentiated development of the relevant branches of international law is mirrored in transitional justice. Cross-fertilization—or more precisely, integrating international law into transitional justice—yields new insights into the nature of the accountability gap and the way in which transitional justice contributes to it. What international law adds is a legal (as opposed to political) understanding of State responsibility and individual criminal responsibility as complementary systems, both of which are needed to promote a fuller measure of accountability for atrocity crimes.[204] Transitional justice has focused on legal accountability for individuals and needs to consider what State responsibility offers both as a normative and practical matter.

CRIMINALITY, *supra* note 6, at 315; *System Effects of International Responsibility*, *supra* note 2, at 314-17.

200. G.P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002).

201. Gerry Simpson, *Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law*, *in* SYSTEM CRIMINALITY, *supra* note 6, at 69, 74; White, *supra* note 199*,* at 315; Cançado Trindade, *supra* note 190, at 268 (arguing that international law without legal recognition of crimes of state "will be depriving the State—hostage of a deformed structure of repression and impunity—of its proper end, the realization of the common good").

202. A good example of this is the list of contributors to and the discussion topics of the recent *System Criminality* edited volume. SYSTEM CRIMINALITY, *supra* note 6.

203. *See infra* Part II.

204. S*ystem Effects of International Responsibility*, *supra* note 2, at 337 (2010) (citing Cançado Trindade, *supra* note 190, at 259: "compartmentalized conception of international responsibility— of States and individuals—leads . . . to the eradication of impunity in only a partial way"); White, *supra* note 199, at 315; Brunée, *supra* note 11, at 42 (noting that absent primary norms that are *erga omnes* or treaty rules that create them, states have few options to hold other states accountable for human rights violations).

1. The Normative Contribution of State Responsibility to Transitional Justice

From the perspective of transitional justice, international law scholars have addressed two aspects of particular interest: (1) the conceptualization of State responsibility and (2) concomitant international law remedies that address the underlying or systemic drivers of mass violence. The Draft Articles of State Responsibility recognize guarantees of non-repetition and measures of satisfaction as some of the legal consequences for States that breach international obligations.[205] Scholars have observed that such measures afford the opportunity to advance as a normative, if not as a formal legal matter, state *culpability* for atrocity crimes.[206] For example Antonio Cançado Trindade has argued that non-pecuniary obligations like reforming police or the judiciary "can be regarded as being endowed with a character at a time compensatory and punitive (containing elements of both a civil and a penal nature)."[207] Andrea Gattini, looking at historical practices of guarantees of non-repetition, argues that the demilitarization and redrawing of national territory of Germany technically may be guarantees of non-repetition (and therefore non-punitive and forward looking) but their very imposition suggests State criminality. In other words, why else would the Allies have imposed such measures if not because of the Nazi horrors were of such an egregious nature as to justify these severe consequences?[208] Thus the remedies for State responsibility, in particular guarantees of non-repetition, convey the moral opprobrium against States akin to the penal sanction of individual international criminal responsibility.

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205. Draft Articles on State Responsibility, *supra* note 80, arts. 30 (b) and 34; *see* Andreas Zimmermann & Michael Teichmann, *State Responsibility for International Crimes, in* SYSTEM CRIMINALITY, *supra* note 6, at 298-313 (analyzing legal responsibility for "state criminality" as serious breaches of peremptory norms).

206. Andre Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT'L COMP. L.Q. 616, 625 (2003) (arguing that the systemic nature of breaches of peremptory norms may need to have consequences for the type of remedies: "It would be odd were the international community to consider that a president of a state should have to be imprisoned for many years, whilst leaving in place the structures that made possible and facilitated his acts.").

207. Cançado Trindade, *supra* note 190, at 266; *see also Systemic Effects of International Responsibility*, *supra* note 2, at 341.

208. Andrea Gattini, *A Historical Perspective: From Collective to Individual Responsibility and Back, in* SYSTEM CRIMINALITY, *supra* note 6, at 101; *see also Systemic Effects of International Responsibility*, *supra* note 2, at 343.

The fusion of international normative judgment with consequent remedies for system criminality offered by pursuit of State responsibility for atrocity crimes furthers the aims of transitional justice in important conceptual and practical ways. Accountability for international crimes is a bedrock international principle around which the United Nations has organized international transitional justice policy.[209] Rule of law ideals—that no one should be above the law—have thoroughly infused the international justice discourse. Yet international rule of law ideals apply equally to States. In fact, international rule of law is arguably *the* organizing principle of the postwar international legal system. So when, in the name of accountability for international crimes, transitional justice effectively ignores State legal responsibility, transitional justice undermines the international commitment to rule of law.

In the case of dual responsibility, States commit not just wrongful acts, but violate norms of the highest order—genocide, crimes against humanity, war crimes—and obligations owed to the international community as a whole. Such transgressions deserve to be acknowledged as such. State-perpetrated mass slaughter of civilians is conducted in furtherance of a State policy, and relies on multiple collective dimensions of the State to advance this criminal pursuit. To the extent that transitional justice pursues international criminal sanctions, these acts when carried out by States also should be identified as *wrongs*, and offending States should be held accountable.[210] Further, the symbolic value of international justice for mass atrocities should not be underestimated: it is an international legal acknowledgment of wrongdoing and an enactment of the international commitment to rule of law and justice. Instead of pursuing State legal responsibility, transitional justice pursues legal justice as accountability for individual crimes. The final version of the Draft Articles, while stripped of formal acknowledgment of State crimes, leaves a normative and legal framework upon which transitional justice can build.

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209. *Rule of Law and Transitional Justice*, *supra* note 124.

210. These reasons are typically retribution, truth recovery, promotion of rule of law, reconciliation, and responding to needs of victims. Fletcher & Weinstein, *supra* note 57, at 586.

2. The Remedial Contribution of State Responsibility to Transitional Justice

In addition to the normative importance of promoting State accountability, the international law on State responsibility offers transitional justice a legal basis to pursue remedies advocates have argued need to be secured to ensure victims a full measure of justice and post-conflict societies a sustainable peace. Remedies for State violations of international obligations include compensation and guarantees of non-repetition. The legal obligation of States to provide compensation to victims of atrocity crimes has received considerable attention from transitional justice advocates[211] and dovetails developments in human rights norms that advance enforcement of individual rights.[212] The remedy of compensation, however, does not attend to the collective dimensions of the State that furthered atrocity crimes.

Guarantees of non-repetition are forward-looking remedies, which can include measures that dismantle State institutions, laws, and systems that contribute to and make it possible for the State to institute mass violence. However, as developed in the postwar international legal order, the types of measures international judicial bodies have ordered bear little resemblance to the far-reaching political, legal, and economic reforms that the Allies imposed on Germany and Japan. The International Court of Justice has ordered guarantees of non-repetition rarely[213] and its practice in this regard pales in comparison to that developed by human rights courts, notably the Inter-American Court of Human Rights. Human rights norms offer a legal source for the types of measures that could be used in an interstate context to address collective dimensions of mass violence, for example, measures to promote public memory of the victims,[214] reform laws to prevent military jurisdiction over civilians,[215] but these have not been used in the judicial resolution of interstate disputes.[216]

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211. *See infra* notes 197-200 and accompanying text.

212. Basic Principles, *supra* note 101.

213. Gattini, *supra* note 208, at 110.

214. Arturo J. Carrillo, *Justice in Context: the Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, *in* THE HANDBOOK OF REPARATIONS (Pablo de Greiff ed., 2006); Antkowiak, *supra* note 104.

215. Castillo Petruzzi et al. v. Peru, Inter-Am. Ct. of H.R. (ser. C.) No. 4, ¶ 166 (May 30, 1999).

216. *Id.* at 123; Cançado Trindade, *supra* note 190.

The consensus among international law experts is that the law and practice of State responsibility is underdeveloped in this regard.[217]

But the postwar practice in this regard should not define the parameters for the ways in which guarantees of non-repetition can be used as a remedy for system criminality. UN Special Rapporteur on transitional justice Pablo de Greiff, the top UN expert advancing international transitional justice law and policy, incorporates this remedy as one of the four pillars of transitional justice.[218] De Greiff proposes a range of measures that States should pursue to address system criminality that has produced mass violence including, ratification of human rights treaties and treaties pertinent to serious violations of humanitarian law; domestic legal reforms to criminalize offenses of international criminal law; judicial reforms to promote an independent and effective judiciary; and, constitutional reforms necessary to promote individual rights, prohibit discrimination, advance civilian control of the armed forces, and ensure separation of powers.[219] Of these, the constitutional reforms are the most ambitious proposals and in these one sees the echoes of measures imposed on Germany. The Allies' immediate aims were to dismantle the discriminatory laws of the Nazi regime, revamp the judicial system, and reestablish a representative democracy.[220] Similarly, De Greiff recommends States strike down discriminatory laws, adopt bills of rights, and limit excessive executive powers.[221]

We see in both examples an attention to remedy the *what, how,* and *why* of system criminality. Discriminatory laws create and entrench disparate treatment, fueling social unrest; weak judiciaries mean that residents cannot seek enforcement of rights; and abuse of power by other branches of the State or the unchecked power of criminal enterprises facilitate systemic abuse and State policies of

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217. Andre de Hoogh has argued for more robust remedies for state crimes, favoring an obligation of offending state "to change its government, to change its constitution to the extent necessary, and to hold free elections so as to prevent the recurrence of criminal acts." ANDRE DE HOOGH, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES 195, 197 (1996); *Systemic Effects of International Responsibility*, *supra* note 2, at 343; Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocities,* 99 NW. U. L. REV. 576 (2005). *But see* Andreas Zimmermann & Michael Teichmann, *State Responsibility for International Crimes*, *in* SYSTEM CRIMINALITY, *supra* note 6, at 298, 301.

218. The others are the rights to truth, justice, and reparations. de Greiff Report, *supra* note 22.

219. *Id.*

220. Potsdam Protocol, *supra* note 9, at II.A. 4, 8, 9.

221. de Greiff Report, *supra* note 22, ¶¶ 63, 65, 69.

violent persecution. Thus, reversing constituent aspects of system criminality serves to (re)create the institutional conditions for social justice and respect of human rights. These are vital components and goals of transitional justice. More to the point, these are remedies that international criminal justice and international human rights mechanisms cannot provide.[222]

3. Evaluation of International Transitional Justice Remedies: Law Versus Policy

The Special Rapporteur's focus on guarantees of non-repetition draws attention to the aspects of the transitional justice agenda that seek to remedy "root and branch" problems that contribute to mass violence and hamper peace. However, the expert proposal is cast as one of *policy*, not law, and relies on human rights rather than international (interstate) law practice and principles to advance its claims.[223] States are being *asked* to adopt systemic interventions to prevent recurrence of mass violations, but international law and commitments to rule of law arguably *requires* them to do so. Leaving aside consideration of whether law or policy is the better tool, the relevant question for this inquiry is what does it mean for transitional justice to omit the international law of State responsibility?

One effect is that human rights law and mechanisms are used as the examples and conceptual building blocks for transitional justice policy in this area. Caution is warranted. Human rights law is being asked to address collective dimensions of State-sponsored violence through a system designed for another purpose: protection of individual rights. Despite broad interpretations of the human rights duties of the state to effect a system of governance so that it is capable of "juridically ensuring the free and full enjoyment of human rights,"[224] this is not universally accepted, let alone elaborated with regard to dual responsibility. Additionally, in many parts of the world victims do not have access to an international judicial enforcement mechanism for human rights, even if this branch of international law and practice were to become the universal site for redress of mass

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222. Regional human rights courts do not provide a universal approach and their practice, with notable exceptions, is modest in this regard. *See infra* notes 224-26 and accompanying text.

223. de Greiff Report, *supra* note 22, ¶14, et seq.

224. Velasquez Rodriquez v. Honduras, Inter-Am. Ct. of H.R. (ser. C) No 4, ¶ 166 (July 29, 1988).

violence.[225] Regional human rights mechanisms play a vital role in norm diffusion with regard to state duties to prosecute international crimes,[226] yet there are other important considerations that militate in favor of keeping the development and enforcement of state remedies for mass violence outside of the human rights system.

4. Location and Enforcement of State Responsibility

Where should transitional justice law and policy be located within the international system? In the main, transitional justice scholars and advocates focus on the discursive and legal spaces of international justice rather than on human rights. The international community as a whole acts through the ICC Prosecutor to enforce international criminal law. Similarly, as a normative matter, violations of State obligations owed to the international community as a whole should not depend on enforcement by individual victims within the human rights system, but should be enforced on behalf of the international system. As a practical matter, leaving enforcement of State responsibility for system criminality to human rights mechanisms further bifurcates dual responsibility into separate legal and institutional spheres. To the extent that the human rights regime, with the individual as the subject, is understood to be an exception to international law of interstate relations, transitional justice risks losing some of its potency by investing in human rights to address what is fundamentally an international law problem.

This raises the larger issue of enforcement mechanisms for State system criminality. While this Article does not advance a prescription in this regard, a few observations are in order to provide context for the conceptual contribution that State accountability can offer transitional justice. Simply put, under the current international structure, there is no juridical mechanism to hold States legally accountable to the international community for system criminality.[227]

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225. The Inter-American system has the most developed practice with regard to ordering measures of non-repetition. There is no regional human rights mechanism for Asia through which individuals may petition for judicial relief, and the African system is regarded as weak relative to the European and Inter-American systems. *See* Thomas Buergenthal, *The Evolving International Human Rights System,* 100 AM. J.INT'L L. 783, 800 (2006).

226. *See* KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING THE WORLD (2011).

227. While there is an overlap between serious breaches of human rights obligations and state violations of *erga omnes* obligations and violations of humanitarian law, the interstate system of enforcement for international human rights treaty bodies is one of

The system is a product of the power and preferences of States to maintain sovereign equality and to address State involvement in mass violence through political organs, with the Security Council being the most powerful actor.[228] Although the Security Counsel possesses a variety of tools to address State violence,[229] its overarching purpose is to maintain peace not to impose international legal accountability. However, as scholars have noted, the Security Council does make legal determinations of international responsibility of States for their involvement in atrocity crimes and acts against States pursuant to its powers to respond to threats to international peace and security.[230] For example, the Security Council authorized military action against Iraq for its invasion of Kuwait and subsequently created a claims tribunal for Iraq to compensate injured parties for their losses.[231] And under

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reporting and monitoring; the compliance system is more "nuanced" and not based on "wrongfulness" as is state responsibility. Brunée, *supra* note 11, at 51-52. "Nonetheless, once a state is subject to the [interstate human rights treaty] system, a degree of accountability is generated by publicly measures the state party's conduct against the international standard, and by the attendant pressure on it to comply." *Id.* at 49; *see also Systemic Effects of International Responsibility*, *supra* note 2, at 347 (noting that the practical effect of the law of state responsibility is limited by "legal power of courts to give effect to the law" and therefore political organs at international and regional levels will have a dominant role in implementation).

228. Nollkaemper & van der Wilt, *supra* note 197, at 338 (arguing that an accountability system for state criminality would require a different international system and offering suggestions for reform); Ian Scobbie, *Assumptions and Presuppositions: State Responsibility for System Crimes*, *in* SYSTEM CRIMINALITY, *supra* note 6, at 296; White, *supra* note 199, at 317; Brunée, *supra* note 11, at 55.

229. White, *supra* note 199; *Systemic Effects of International Responsibility*, *supra* note 2, at 336-49. The Security Council, after determining there has been a threat to peace, may demand the offending state cease its behavior, impose sanctions, demand non-forcible measures like disarming militias, refer the situation to the ICC, in addition to authorizing military intervention. White, *supra* note 199, at 323.

230. *Systemic Effects of International Responsibility*, *supra* note 2, at 349 (noting that the Security Council often combines determinations of a threat to the peace with determination of a breach of an obligation. Such findings provide the basis for legal sanctions that are similar to consequences of state responsibility); Simpson, *supra* note 201, at 85.

231. White, *supra* note 199, at 318 (observing that the security council also has considerable powers under Chapter VII and distinct from any overlap with law of state responsibility to address state crimes including to impose sanctions, take military action, establish international tribunals or compensation commissions, target individuals, or "more controversially promulgate international legislation binding on all states."). Nollkaemper notes several measures the Security Council has taken as a consequence of determining that international crimes have been committed involving wrongful acts by states that resemble human rights measures of non-repetition including calling for the invalidity of laws that provide the conditions for international crimes; demobilization and reintegration of members of armed forces; restructuring of security forces; military training in human rights standards,

the Rome Treaty, the Security Council plays a role in the enforcement of international criminal justice.[232] Thus the Security Council serves an as example to explore how the international system might take up State accountability for atrocity crimes.[233]

B. *The Disappearance of State Accountability in UN Security Council Referrals*

The imposition of international individual criminal accountability is rightly considered a testament to the strength of international accountability and anti-impunity as a set of normative commitments capable of galvanizing international action. The Security Council referrals of the situations in Darfur and Libya, respectively, to the ICC are examples of this phenomenon.[234] These actions should be understood as part of the resurgence of international criminal accountability from its origins at Nuremberg. Yet in its current incarnation, individual criminal responsibility is untethered from consideration of State accountability. In fact, State legal accountability virtually disappears from consideration. While not undermining the significance of the ICC, it is important to probe what this lacuna means for the international rule of law and for how the international community of nations responds to State crimes. One question that the neglect of international State accountability raises is whether international criminal accountability is a mere distraction or decoy drawing attention away from addressing the role of States in perpetrating atrocity crimes and in maintaining structures that may threaten peace, even after responsible leaders have been prosecuted in The Hague.

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and developing capacities of police forces and strengthening of the judicial system. *Systemic Effects of International Responsibility*, *supra* note 2, at 351.

232. Rome Statute of the International Criminal Court, art. 13(b).

233. There are good reasons to be skeptical of the ability of the Security Council to serve as an effective enforcement mechanism for state responsibility. Scholars concede that while the Council has the authority to adopt a more robust approach to international state accountability, the political power dynamics of this body create obstacles to change. White, *supra* note 199, at 316 (arguing that the horizontal and consensual nature of international law impeded states' ability to confront state crimes effectively).

234. *See* U.N. SCOR, 66th Sess., 6491st mtg. at 6, U.N. Doc. S/PV.6491 (Feb. 26, 2011); U.N. SCOR, 60th Sess., 5158th mtg. at 3, U.N. Doc. S/PV.5158 (Mar. 31, 2005).

1. Finding but Not Acting on State Responsibility

The Security Council referrals of Sudan and Libya to the ICC illustrate the theory of international accountability for mass violence as one of individual criminal responsibility exclusive of actions to hold the state legally accountable. In each case, the Security Council predicated its referral on findings that state authorities were involved in gross human rights abuses and violations of international humanitarian law.[235] This legal determination ineluctably led to the need to impose individual criminal sanctions. The logic operating is that "accountability" and an end to "impunity" are necessary as normative matters to promote justice as well serve instrumental aims of achieving peace and reconciliation.[236] Although the role of the state in perpetrating atrocities is an explicit basis for the referrals, the only legal consequence the Security Council imposed on the offending states was to seek an ICC prosecution of responsible individuals.[237] The French proposal for a Security Council referral for Syria similarly contemplated only individual criminal sanctions.[238]

In the case of Sudan, the International Commission of Inquiry,[239] which preceded the Security Council referral, recommended that the

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235. S.C. Res. 1593, pmbl. (Mar. 31, 2005) (based on Rep. of the Int'l Comm'n of Inquiry on Darfur to the United Nations Secretary-General (2005) Pursuant to Resolution 1564 (2004) at 3, U.N. Doc. S/2005/60 determining the government of Sudan and the Janajweed as responsible for international crimes [hereinafter ICID Report]); S.C. Res. 1970 pmbl. (Feb. 26, 2011).

236. Both referrals are based on the Security Council's Chapter VII powers to protect threats to international peace and security and the Security Council meeting discussions reflect the views of state representatives that call for criminal accountability for perpetrators to strengthen peace and security. *See* U.N. SCOR, 66th Sess., 6491st mtg. at 6, U.N. Doc. S/PV.6491 (Feb. 26, 2011); U.N. SCOR, 60th Sess., 5158th mtg. at 3, U.N. Doc. S/PV.5158 (Mar. 31, 2005) (reflecting the views of state representatives that call for criminal accountability for perpetrators to strengthen peace and security during Security Council meeting discussions when using Chapter VII powers).

237. The Security Council includes other state-centric actions—its Sudan referral includes a recommendation for the creation of restorative justice mechanisms and its Libyan referral includes an arms embargo and travel ban. S.C. Res. 1593, *supra* note 235, ¶5 (also recommending to Sudan the creation of restorative justice mechanisms); S.C. Res. 1970, *supra* note 235, ¶¶ 4-14. However neither of these measures is based on attribution of state responsibility for atrocity crimes.

238. *Proposed Syria S.C. Resolution 348*, *supra* note 3, pmbl.

239. S.C. Res. 1564, ¶ 12 (Sept. 18, 2004) (finding that that the ongoing violence in Sudan constituted a threat to international peace and security); *see also* S.C. Res. 1556 (Jul. 30, 2004). As impetus for Resolution 1564, the Security Council found that the ongoing violence in Sudan constituted a threat to international peace and security. The Secretary-General gave the Commission three months to investigate and report its findings, requesting that it report

Security Council establish a State compensation commission for victims.[240] The Commission determined that the duty to provide individual reparations, originating in human rights law had migrated to State responsibility for violations of humanitarian law, was now a customary obligation:

> [W]henever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as de jure or de facto organs, to make reparation (including compensation) for the damage made.[241]

However, in its referral, the Security Council makes no mention of the Commission's recommendation. The idea simply disappears. Although the Security Council acknowledges findings in both referrals that these States committed international crimes and so violated *erga omnes* obligations (obligations owed to the international community), it does not consider State responsibility for these acts. And without discussion of State responsibility there is no attention to any special forms that such breaches might entail—think of postwar Germany—like loss of territory, new elections, or reform of State institutions—or constitutional and legal reforms like security sector reform, separation of powers, and civilian control of the armed forced recommended by the UN Special Rapporteur on transitional justice—to bring a fuller measure of justice to the countries and lay the groundwork for a sustainable peace.

2. The Opportunity of Enforcing State Obligations to the International Community

The Security Council referrals put into sharp relief the uncoordinated and insufficient international system of State legal accountability for atrocity crimes. While there is factual and some legal overlap, the mechanisms for enforcement of dual responsibility

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back to the Security Council by January 25, 2005. The final report focuses specifically on events that occurred between February 2003 and January 2005. *See* ICID Report, *supra* note 235, at 2.

240. ICID Report, *supra* note 235, ¶ 601.

241. *Id.* ¶ 598 (emphasis added); *see also* Christine Byron, *Comment on the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, 5 HUM. RTS. L. REV. 351, 359 (2005).

for atrocities are largely distinct.[242] States established the ICC but have not been interested in creating a comparable supranational judicial mechanism to enforce *erga omnes* obligations.[243] Powerful States are reluctant to subject their actions to international legal oversight. Judicial human rights mechanisms, serve to develop the law of State responsibility in the context of duties to victims but this system is not a substitute for an accountability system to enforce State responsibility for international crimes. Judicial enforcement of human rights obligations puts the burden on individuals to bring complaints,[244] and while in theory human rights mechanisms could function to enforce robust measures of State responsibility for atrocities, they have not done so.[245] The interstate human rights mechanisms rely on dialogue with States, and their decisions are non-binding. While the human rights regime is doing important and effective work, it is not an international accountability system.

In fact, international criminal courts and human rights mechanisms reflect liberal conceptualizations of international justice and may serve to obscure the lack of international legal accountability for violations of obligations to humanity. Justice Jackson's opening statement at Nuremberg is oft-quoted for its eloquent argument for international criminal liability: "Of course, the idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons."[246] But the next sentence, a restatement of international law, is not valorized: "*While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability*, it is quite intolerable to let such a legalism become the basis of personal immunity."[247] International justice and State accountability for gross human rights violations has come to apply the first sentence of the passage and

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242. BEATRICE I. BONAFE, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES 28 (2009).

243. White, *supra* note 199, at 324-27.

244. Gerry Simpson attributes this development to the trend in international law after Nuremberg to recognize the individual. Simpson, *supra* note 201, at 75. "The move to individual responsibility, then, in international criminal law, modifies this tendency [of nonenforcement] and has been hailed as a way of giving human rights law the bite it was thought to lack." *Id*. at 76.

245. Human rights mechanisms generally prefer compensatory remedies for victims of human rights violations and have not developed measures of mass compensation or guarantees of non-repetition that extend to large-scale institutional and structural reforms.

246. *Opening Speech, supra* note 26.

247. *Id.* (emphasis added).

ignore that Nuremberg was not intended to change the pre-existing international law of State liability. However, recognition of individual criminal liability has been misinterpreted to equate collective liability with collective guilt, and thus antithetical to the liberal premise of the new international legal order. And transitional justice has continued to carry this banner.

State crimes are violations of duties owed to the international community, but the development of the relevant branches of international law has meant that the international community has not seen fit to establish a judicial enforcement mechanism.[248] The results of States' preference for addressing State crimes through the political organ of the Security Council can be seen in the ICC referrals. The Security Council, without any hint of irony, effectively insists on a fractured and partial application of international rule of law. On the one hand, the Council emphasizes the importance of enforcing individual criminal responsibility. On the other hand, it elides any discussion of State culpability for the commission of international crimes and appropriate measures to punish the offending States.[249]

3. The Challenge to Enforcing State Obligations to the International Community

What are some of effects of ignoring State legal accountability? From the perspective of international relations, it preserves political flexibility. The singular focus on legal accountability of individuals allows offending States, like Serbia, to sacrifice their (former) "bad" leaders to international criminal justice to gain benefits of interstate cooperation, like membership in the European Union. The "good" third-party States are seen to do justice by siphoning off the bad actors to international courts while they maintain or rehabilitate the offending State as a stable partner.[250] And separate from the multi-

248. *Systemic Effects of International Responsibility*, *supra* note 2, at 336 ("The fact that, largely due to the jurisdictional limitations, neither the ICJ nor any other court was able to identify a collectivity that was responsible for the genocide illustrates the shortcomings of the law of international responsibility in dealing with such entities in system crimes and the need for rethinking of the connection between international law and system criminality.").

249. The status quo also preserves political flexibility in how the international community chooses to respond, or not, to state crimes. As Nigel White argued: "Reference to the International Criminal Court is not putting justice first, it is using a mechanism of justice for not taking any action that would restore peace but also prevent further crimes from being committed." White, *supra* note 199, at 323.

250. SYSTEM CRIMINALITY, *supra* note 6, at 11.

lateral benefits, powerful States are served by observing State sovereignty in these circumstances lest they set a precedent and find themselves subject to similar scrutiny. While international power will undoubtedly manifest in which States are selected for accountability, with weak States more likely to be subject to enforcement, this should be weighed against the rule of law values promoted by recognition of State responsibility. Not only does the current system deny legal enforcement of State obligations to remedy harms to victims and society more generally, it also creates the illusion of international criminal accountability as the full measure of justice the international community can and should deliver. Residents of States that have committed atrocity crimes against their own populations are the direct beneficiaries of remedies for State responsibility.[251] The affected populations stand in urgent need of adequate legal protections, an independent judiciary, security forces that respect human rights, and measures to promote social justice—all of which fall within guarantees of non-repetition.[252] While not to minimize the challenges to fair enforcement, these are second order problems. Currently, transitional justice is not talking about State legal accountability and its consequences. The legal obligations of States for failing to prevent atrocity crimes or for their direct involvement in their perpetration are not surfaced. The ICC becomes the measure of international punishment and state accountability is not a feature of this discussion.

C. *Changing the Politics of International Justice*

Transitional justice colludes in this submergence of State accountability. Within the field, the absolutist model of legal accountability is hegemonic: punishment of the State is rejected normatively as a form of collective punishment. Yet the aim of advocates making this claim was to *support* international criminal trials, not to argue *against* state liability. However, this framing together with the formal rejection of State crimes has served to efface State legal responsibility as an international response to mass violence. Versailles is flouted as the cautionary tale of collective guilt: Nuremberg its anodyne corrective. But what if we treated Versailles as merely a bad case of State responsibility, while the

251. de Greiff Report, *supra* note 22, ¶ 20(c).
252. *Id*.

Potsdam framework is understood as an example of a more measured and balanced application of remedies for dual responsibility?

1. Transitional Justice's Conception of Law and State Liability

The calls within transitional justice for remedying the structures of State violence ignore the law of State responsibility and the purchase it offers. These voices come from the periphery of transitional justice, raising the need for social justice *against* the hegemony of legal (criminal law) and top-down solutions. The hybrid and grafted accountability models implicitly recognize the problem of system criminality and its legacy for social reconstruction but do not look to address these from the perspective of State legal accountability and do not seek the framework of state responsibility as a source of leverage.

The transitional justice accountability models recognize State responsibility in two regards: (1) the State duty to prosecute and (2) the duty to provide reparations to victims. These underserve the field. The guarantees of non-repetition developed in human rights jurisprudence and at the ICJ pale in comparison to the muscularity that is needed. The more extreme State-focused measures the Allies imposed on Germany and Japan and the more ambitious initiatives of the Special Rapporteur on transitional justice provide more fertile examples of what legal remedies could be contemplated.

When States target groups for bloody attack based on sectarian, ethnic, or racial divisions, it is reasonable to assume that striking down discriminatory laws that constituted State policy, creating bills of rights, and establishing constitutional courts to enforce these protections are prudent measures to dismantle offending State structures and to prevent recurrence of State violence. We can advance international rule of law by identifying these as *legal* obligations owed not just to victims but to the international community as a whole based on the role of the State in perpetrating atrocities.

The Special Rapporteur's policy approach to guarantees of non-repetition is important, but transitional justice can and should go further to enlist international law in this regard. The Special Rapporteur's is a soft law mandate.[253] Transitional justice scholars

253. *See Special Procedures of the Human Rights Council*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, http://www.ohchr.org/EN/HRBodies/SP/

and advocates could seek to leverage the international law of State responsibility. By way of example, proponents could seek to harness the Chapter VII authority of the Security Council. The Security Council could adopt an approach to accountability for State-sponsored atrocities that encompasses dual responsibility. In other words, the Security Council could, as appropriate, refer situations to the ICC *and* direct States to fulfill their legal obligations for State responsibility through providing compensation, undertaking constitutional reforms, etc. This begs the question of what would be required for transitional justice to make this intellectual shift and move from a politics of accountability understood only as criminal accountability to a politics of accountability that seeks to address both the individual leaders as well as the structural and collective dimensions of mass atrocity crimes?

The elision of State accountability in transitional justice shapes the type of politics of accountability that are possible. Politics in this case refers to the character of the debate among competing ideas about what the international community should do to respond to mass violence. Currently, the politics of international accountability are framed by transitional justice, which in turn relies on legalism exclusively to justify individual international criminal accountability. The transitional justice conceptualizations of accountability contribute to a politics of liberalism insofar as transitional justice confines sanction to individuals and takes our eyes off of the role of State structures in perpetrating international crimes.

This limited view of State legal accountability is also galvanized by the development of the modern international legal system that has seen the maturation of human rights norms and mechanisms relative to State responsibility. Robert Meister and Samuel Moyn each offer histories of the rise of human rights movements as bound up with the death of revolutions.[254] Liberalism and human rights have triumphed over other emancipatory projects that focus on more radical redistributive and structural reform projects. Furthermore, human rights and its advocates strengthen international criminal law by

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Pages/Introduction.aspx (last visited Feb. 1, 2016); *see also* Allehone Mulugeta Abebe, *Special Rapporteurs as Law Makers: The Developments and Evolution of the Normative Framework for Protecting and Assisting Internally Displaced Persons*, 15 INT'L J. HUM. RTS. 286 (2011).

254. ROBERT MEISTER, AFTER EVIL: THE POLITICS OF HUMAN RIGHTS 21 (2011); SAMUEL MOYN: THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 170 (2010).

insisting on the State duty to prosecute. These two legal branches share their origins in the horrors of the Second World War, are intellectually consistent with one another, and practically mutually reinforcing. Individuals are the objects of attention in each, as rights-bearers, and the aim of both areas is to ensure human flourishing through a normative regime.

So configured, the Nuremberg/absolutist model of accountability and the aspects of the hybrid and grafted models that accept criminal prosecutions understand accountability as a liberal exercise, which works against seeing the need for collective liability to address State atrocities. Jackson's call to pierce sovereign immunity to hold war criminals accountable extinguishes his caveat that the legal fiction of the State *must* remain for purposes of imposing collective liability. Hence the Nuremberg Principles reach their full expression with the International Criminal Court and the Draft Articles of State Responsibility artfully camouflage State crimes as violations of higher order norms, where they lay in wait for future expression. Transitional justice has colluded in the international preference for liberal justice by omitting State accountability from its discourse. This leaves the question of how to address State breaches of these norms to international political, rather than legal, processes. The result may serve sovereign States but certainly not the affected populations. And the persistence of State structures and institutions unrepentant, unchanged, and legally unchallenged after mass violence, threatens peace and security.

What liberalism offers is fealty to rule of law values. This can be drawn upon to call for invigorating international processes to vindicate the collective interests of humanity through State accountability. State accountability and adherence to international law obligations *is* part of international rule of law. Identifying State transgressors as responsible for their involvement in international crimes and insisting on commensurate legal remedies advances rule of law values and offers a potentially potent legal tool to secure structural remedies that can promote sustainable peace. The conditions under which pursuit of State legal accountability is warranted deserve further study. The debates among realists versus idealists regarding whether pursuit of justice for war criminals would jeopardize peace, are similarly pertinent to the question of State responsibility. Without resolving those questions here, the point is that this is a discussion that transitional justice should welcome.

Without it, transitional justice colludes with the status quo in which state legal accountability for atrocity crimes is invisible.

2. Overcoming Transitional Justice's Elision of State Legal Accountability

What would it mean for transitional justice to incorporate calls for State accountability? Current conceptual barriers need to be addressed, a sketch of which is offered here. For purposes of discussion, the Security Council is taken as an example of an existing international institution that could instigate State accountability.[255]

First, transitional justice needs to incorporate the conceptual contribution of dual responsibility that international law offers. The State and the individual may both violate international norms in the commission of atrocities. Transitional justice should look past the philosophical objection of Jaspers to collective guilt and see that collective liability of the State rests comfortably with pursuit of individual criminal responsibility. All three transitional justice models of accountability adopt the inherited logic of Nuremberg that rejects collective legal guilt as illiberal and dangerous. This is a false trap. Proponents of international criminal law were happy to accept, if not advance, Jaspers' critique in pursuit of enforcement of international criminal sanction of individuals. Yet individual sanction and State liability are two separate concepts and international law helps to see that promotion of one does not need to come at the expense of the other. This is the conceptual contribution that dual responsibility in international law offers to transitional justice. Transitional justice could understand the State entity as a governance structure (the legal sovereign) and not as the legal personality of "the people." The principle that a State, like an individual, that breaches its international obligations is liable for the consequences of its actions is the basis of international law, as Justice Jackson understood. Embracing the legal fiction of the State as a collective entity does not displace individual criminal liability. Understanding the State as separate from the people legally and normatively would help to shed the false shackles of

255. International legal scholars have suggested that the UN Security Council can serve as a site for the functional equivalent of a legal mechanism dedicated to international enforcement of state responsibility for atrocities. *Systemic Effects of International Responsibility*, *supra* note 2, at 352. The question of whether the Security Council is the appropriate international mechanism is beyond the scope of this article.

collective guilt that have hampered recognition of State crimes as part of international justice discourse and practice.

Next, State culpability needs to be intellectually authorized by transitional justice. Here, the full history of the international community's flirtation with State crimes should be excavated to capitalize on international principles that recognize that State violation of obligations *erga omnes* has special consequences. The formal distinction between fault and wrongfulness in international law is slippery and borders on sophistry when it comes to atrocity crimes. The drafting history of the Draft Articles on State Responsibility shows how penal sanction at one point was uncontroversial. As the international commitment to a collective, humanitarian world order receded from its high-water mark in the immediate aftermath of the Second World War, the normative scope of State responsibility shrunk to exclude penal sanction. Yet the essential rule of law values that promote fair application of shared norms, apply equally to individuals and to States that perpetrate atrocity crimes.

Transitional justice gains much of its legitimacy from advancing these normative justice claims. Given the scope and nature of State-perpetrated mass violence, advancing State legal responsibility for such acts has the functional normative equivalent of acknowledging state conduct as wrongful and reprehensible. In other words, transitional justice need not argue for a positive international law of State crimes. To bring States to account for their mass bloodshed, it can simply promote existing State legal responsibility for acts that are also criminalized under international law. Unfortunately, transitional justice has absorbed the rationale of the Nuremberg trials and ignored the precedential value of the imposition of structural reforms on criminal States offered by the examples of the Potsdam Protocol and Agreement.[256]

Transitional justice has expanded to include demands that States adopt holistic approaches to repair the structural drivers of mass violence like discrimination, structural poverty, and lack of rights protection. State responsibility offers a way to identify and acknowledge these demands as legal justice remedies, rather than as

256. This phenomenon is illustrated by the recent report by the UN Special Rapporteur on transitional justice, in which the human rights remedies for mass violations are offered as examples for transitional justice policy and the measures adopted for Germany and Japan are not mentioned.

policy options.[257] This will be aided if the field embraces the full historic record of the international response to the crimes of Germany and Japan, which included legal, political, and economic reform alongside criminal accountability. Doing so would allow transitional justice to reconceptualize accountability as consisting of two aspects existing in a horizontal relationship: individual and State responsibility. Each aspect attends to different dimensions of justice after mass violence.

Finally, transitional justice needs to reconcile itself to legalism. Currently, international criminal law diverts the gaze of transitional justice from the laws, institutions, and state practices that give rise to, sustain, and may endure after States commit international crimes. International criminal justice may be politically expedient but it does not substitute for other measures of justice—striking down discriminatory laws, particularly those that generate economic and social exclusion that drive violence; establishing constitutional guarantees of individual rights and mechanisms for their enforcement; conducting institutional reform of police and armed forces, etc.—that may be required to repair the harm inflicted by State violence and to ensure peace. The international law on State responsibility and human rights offer legal norms that legally bind the State in service of these justice aims.

Calling for enforcement of legal obligations of the State that could address system criminality will not constitute all that societies may need to do ensure a sustainable peace. But currently, transitional justice is not making full use of the legal tools available. The hybrid and grafted transitional justice accountability models recognize the lacuna of redress for system criminality but implicitly or explicitly address this by deprioritizing not just criminal justice but legalism as the metric for accountability. Seeing the value in pursuing State accountability would awaken transitional justice to the lost opportunity of the Sudan Commission of Inquiry. Its recommendation for victim compensation and a truth commission is an example of what State accountability for international crimes can look like. Guarantees of non-repetition could also be crafted to address root causes of the conflict. For example, in the case of Darfur these lie in

257. de Greiff Report, *supra* note 22; discussion *supra* Part II.

disputes about local governance and land, which result in economic and social marginalization of residents in the region.[258]

To be sure, the hybrid and transformative models of transitional justice accountability bring needed attention to grounded and bottom-up perspectives on what measures are needed to repair society. But the State, as a unit of analysis, is a vital component to eradicating the "root and branch" problems that transformative justice in particular seeks to accomplish. The structural reforms like new constitutions, institutional reform, local control, and reparations to victims—the kinds of root and branch problems that transformative transitional justice wants to fix—fit within what the UN advocates for transitional justice policy. These initiatives would be more legally potent if advanced as remedies of State responsibility.

In addition to these practical effects, the absence of a discourse about State wrongdoing submerges the fact that current approaches enable State impunity for atrocities. States are charged with guaranteeing the welfare of their residents. When States violate this basic compact by directing the institutions of the State to commit mass violence, State culpability should be acknowledged and legal consequences imposed. International law uniquely is able to convey the necessary and appropriate opprobrium for behavior that offends global values.

In order for transitional justice to incorporate this perspective, the transitional justice critics of legalism would need to accept that law is not the enemy of the changes they seek to promote. In fact international law theoretically is capable of delivering much of their demands. To be sure, the law of State responsibility is not a magic bullet. The arrested development of the Draft Articles and State practice in imposing special measures against States that commit international crimes point to the latent state of international legal accountability of States. The problem is that the preoccupation of transitional justice with individual criminal accountability prevents the field from seeing how this debate occupies its legal imagination. The inability to see how the focus on international criminal accountability distracts attention from state accountability may be the biggest threat we face to adopting an adequate and holistic response to international atrocity crimes.

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258. ICID Report, *supra* note 235, ¶¶ 61-62.

CONCLUSION

It is a dilemma for international law that State authorities carry out international crimes through the instrumentality of State systems. The development of the international legal order after the Allies' defeat of Germany and Japan has favored individual criminal responsibility as its highest form of sanction. Transitional justice as the current body of thought and practice regarding how the international community should respond when States are responsible for the commission of mass atrocities adopts this thinking and ignores that States may also be legally responsible for such acts. This approach reflects a misguided repudiation of collective guilt that the Nuremberg trials have come to symbolize. It overlooks that State liability is a bedrock principle for State violations of international law. It also ignores the remedies for State liabilities the Allies imposed on Germany and Japan to refashion the defeated States, which included extensive corrective structural measures. Thus transitional justice inherits and remembers a fragmented history.

This partial incorporation of history is reflected in how the field conceptualizes legal accountability. A fuller review of the development of the postwar international legal system reminds us that State crimes were an uncontroversial proposition in the early decades of the UN system. International law relevant to addressing mass atrocities has developed into disparate branches, with international criminal law assuming the lead. This Article has argued that transitional justice has incorporated individual criminal responsibility as its primary conception of what constitutes international legal accountability for atrocities. Transitional justice has three competing models of accountability and none of them recognizes the importance of State legal accountability. As a result, transitional justice fails to capitalize on the rule of law values that undergird the international system to press for more robust measures against States that have committed international crimes. The failure of transitional justice to call out offending States does damage. It cloaks mass suffering in a false veil of sovereignty. It enables an international system in which criminal states are able to maintain compromised governance systems by offering up individuals to criminal prosecution. And powerful States shield themselves from scrutiny for any role they may play in being complicit with perpetrator States.

Currently, individual criminal accountability occupies the center of the politics of transitional justice. To change the status quo to

enable State accountability to assume equal prioritization and harness its legal potential to redress State structures and promote sustainable peace, transitional justice needs to reconsider its relationship to law and to legal accountability. Doing so is risky. It will be important that the recognition of State accountability does not mean that the field loses sight of the limits of law or the perspective of communities and individuals on transitional justice responses. Yet the failure to respond is even greater. The capacity of states to inflict mass suffering appears nearly unlimited. The international community can develop greater tools to redress such abuses. To see that international criminal justice is not the full measure of legal justice does not denigrate its contribution. It helps us to see that States enjoy impunity for international crimes, and invites us to redouble our efforts to ensure accountability for both the State and individual dimensions of international atrocity crimes.