

# Article

## State-Enabled Crimes

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*“It is a characteristic of the worst crimes of the period since 1930 that they have been committed within and with the assistance of State structures . . . .”*<sup>1</sup>

## INTRODUCTION

They call it *basat al-reeh* (flying carpet). It is a custom-built wooden cross with a hinge in the middle. As Syrian survivors describe it, those torturing the survivors would tie them down on the cross, then force the two halves of the cross together, crushing the detainee inside.<sup>2</sup> *Basat al-reeh* has been used systematically across state-run detention sites throughout Syria, with instructions on its use disseminated through the state apparatus and information on the implementation of those instructions sent back through a multi-nodal chain of command.<sup>3</sup>

The Syrian program of torture is just a recent example of what this Article calls State-Enabled Crimes. The term describes a subset of international crimes characterized by critical involvement of the state apparatus. While it is individuals who act, it is the integrated contribution of individual and state that is intrinsic to the commission of these crimes. In concrete terms, this means that in the Syrian example, for instance, even removing President Bashar al-Assad himself from power—let alone simply prosecuting some of the individual perpetrators below him—is unlikely to stop the torture. Unless the state policies and practices enabling these crimes are also addressed, the torture program will almost certainly continue, albeit with a different set of individual perpetrators.

Notwithstanding this reality, the international legal system rarely responds to such crimes by focusing on the state’s role in creating and maintaining such policies and practices. Moreover, it almost never attempts to address, in any coherent way, the dual responsibility of individual and state that is so characteristic of these crimes. Instead, the international enforcement system is structured so as to artificially isolate these two sources of responsibility. And when it comes to adjudicative mechanisms of enforcement, the system focuses almost exclusively on the responsibility of individuals. This generates a distorted picture of how these crimes are committed, with resulting inaccuracy and unfairness in the allocation of legal consequences. This in turn undermines the international legal system’s ability to deliver on its normative goals, regardless of one’s theory of justice.

The prosecution of individuals for international crime, made possible

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1. James Crawford (Special Rapporteur on State Responsibility), First Rep. on State Responsibility, U.N. Doc. A/CN.4/490/Add.3 (1998).

2. See HUMAN RIGHTS WATCH, TORTURE ARCHIPELAGO: ARBITRARY ARRESTS, TORTURE, AND ENFORCED DISAPPEARANCES IN SYRIA’S UNDERGROUND PRISONS SINCE MARCH 2011 (2012), <https://www.hrw.org/report/2012/07/03/torture-archipelago/arbitrary-arrests-torture-and-enforced-disappearances-syrias>.

3. See COMM’N FOR INT’L JUSTICE AND ACCOUNTABILITY, CRIMES AGAINST HUMANITY COMMITTED IN SYRIAN REGIME DETENTION FACILITIES (on file with author); HUMAN RIGHTS WATCH, *supra* note 2; Human Rights Council, Report of the independent international commission of inquiry on the Syrian Arab Republic, ¶¶ 92-93, U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011).

through the advent of international criminal law, has been lauded as one of the greatest advances in international law of the twentieth century.<sup>4</sup> Nonetheless, a significant body of scholarship has questioned the suitability of international criminal law as the “first-best” response to international crime.<sup>5</sup> This scholarship, however, has two major holes. First, although much of the power of its critique comes from its acknowledgement of situational factors – influences on individual action that stem from sources external to the individual,<sup>6</sup> this scholarship has thus far failed to focus on the state’s legal responsibility for establishing and maintaining the policies and practices that perpetuate these situational factors. Second, it has not seriously questioned the structure of the existing adjudicative system. The result has been an absence of consideration, let alone of concrete proposals, about whether and how the mechanisms for adjudicating individual responsibility could be adapted to also hold the state to account.

This Article introduces an analytical category, State-Enabled Crimes, to draw attention to the fact that, notwithstanding a deep interrelationship between individual and state in the commission of State-Enabled Crimes, the international legal system adjudicates the responsibility of each under two entirely separate structures. One side of the system deals with state responsibility, the other with individual criminal responsibility. After critiquing this bifurcated approach, this Article advances a proposed mechanism to break through this bifurcation and provide an integrated response to international crime.

To date, there has not only been uneven development in practice between the adjudication of each form of responsibility, but also an almost complete fracturing of the scholarly conversation, with a mainstream conversation focused on individual responsibility,<sup>7</sup> a critical conversation focused on state responsibility,<sup>8</sup> and precious little in the way of accommodations between the two.<sup>9</sup> By bridging this gap and bringing both sides concurrently into view, this Article illuminates the fundamentally flawed structure of the existing system.

To be clear, it is not that individual accountability is unimportant; advances made in prosecuting individuals under international criminal law must

4. See, e.g., FROM NUREMBERG TO THE HAGUE (Philippe Sands ed., 2002).

5. See, e.g., Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99(2) NW. U. L. REV. 539 (2005); Saira Mohamed, *Reconciling Mass Atrocity and the Criminal Law*, 124 YALE L.J. 1628 (2015); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COL. L. REV. 1751 (2005).

6. For an overview of social psychology research on situational factors that international criminal law scholars have drawn on to question the appropriateness of focusing so heavily on individual responsibility, see generally LEE ROSS & RICHARD NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* (6th ed. 2011); see also Philip G. Zimbardo, *Revisiting the Stanford Prison Experiment: A Lesson in the Power of Situation*, CHRON. HIGHER EDUC., Mar. 30, 2007, at B6.

7. See, e.g., M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW* (3d ed. 2008).

8. See, e.g., STATE CRIME: CURRENT PERSPECTIVES (Dawn Rothe & Christopher Mullins eds., 2011).

9. The one notable exception to this trend comes from a handful of Amsterdam-based scholars, led by André Nollkaemper, whose work appears in *SYSTEM CRIMINALITY IN INTERNATIONAL LAW* (André Nollkaemper & Harmen van der Wilt eds., 2009).

not be traded away in an effort to hold states responsible. Moreover it is not feasible, at least at this juncture, to resuscitate the notion of State Crime—the idea of holding the state criminally liable.<sup>10</sup> But it is also no solution to attempt parity between the mechanisms for holding individuals and states responsible. Any bifurcated structure, no matter how evenly balanced, will be unable to account for the integrated role of individual and state in the commission of these crimes. I argue instead for a wholesale re-imagining of the way we discuss and respond to State-Enabled Crimes.

This Article develops a proposal for integrating the existing law of state responsibility—the body of law enabling states to hold other states civilly liable for acts and the acts of state agents—into International Criminal Court (ICC) proceedings against individuals for international crimes where state policies and practices have played an essential role. While the details are fleshed out further below, the contours of the mechanism are straightforward. The trial court hearing the case would develop a factual record sufficient to adjudicate not only individual criminal liability, but also non-criminal state liability. If state responsibility is found, then the ICC would make a reparations order against the state. Such an order could take an array of forms, both monetary and symbolic, and could be specifically targeted toward reform of the policies and practices that enabled the crimes.

This Article focuses on *how* the international legal system responds to State-Enabled Crimes. The precursor to this, however, asks what the justification is for responding at all. The main justifications advanced can be categorized into three groups: peace and reconciliation,<sup>11</sup> prevention,<sup>12</sup> and retribution.<sup>13</sup> These goals—both their appropriateness and the degree to which they are or can be achieved—are highly contested, and the value of one goal over another is not central to this Article.<sup>14</sup> My goal, rather, is to argue that the existing system for responding to State-Enabled Crimes inadequately advances the goals that its proponents suggest and that an integrated response would advance their goals more effectively.<sup>15</sup>

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10. See *infra* page 310.

11. See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001). The possibility of creating an accurate historical record through the trial process is touted as a way of contributing to future peace and reconciliation. See, e.g., GARY BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 302-04 (2000).

12. See, e.g., M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. (1996). The expression of norms condemning such crimes is also thought to serve prevention. See, e.g., Margaret M. deGuzman, *Choosing To Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265 (2012).

13. See, e.g., Alexander K.A. Greenawalt, *International Criminal Law for Retributivists*, 35 U. PA. J. INT'L L. 969 (2014).

14. Indeed the trial chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) saw no need to limit itself in summarizing what it believed to be the United Nations Security Council's views on the objectives of the ICTY as "general prevention (or deterrence), reprobation, retribution (or 'just deserts'), as well as collective reconciliation . . ." Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 58 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996).

15. See, e.g., Mark A. Drumbl, *Accountability for System Criminality*, 8 SANTA CLARA J. INT'L L. 373, 381 (2010).

Two final points are in order before turning to the structure of the argument ahead. First, this Article focuses on the international adjudication of State-Enabled Crimes. As such, it is concerned with the response of international courts and tribunals, rather than quasi-judicial or political bodies like the United Nations Security Council. There are many ways of enforcing international law, and the characterization of the various mechanisms through which it is enforced vary depending on one's understanding of the nature of international law itself. Beyond the adjudicatory context, these mechanisms run the gambit from the ultimate threat of military intervention, to the imposition of sanctions, to the use of "soft power" tools to secure compliance. For reasons of space, this Article constrains its analysis to the adjudicatory settings through which the law on state responsibility is enforced. Crucially however, the exclusion of non-adjudicative mechanisms from the purview of this Article does not diminish the generalizability of its major descriptive insight: across all mechanisms of international law enforcement a bifurcated response to State-Enabled Crimes is the norm. And while this Article's prescriptive proposal is directed to an adjudicative mechanism, the ICC, its normative argument in favor of moving from a bifurcated to an integrated response to State-Enabled Crimes applies to any and all mechanisms of international law enforcement.

Second, this Article does not address crimes in which other types of organizations play a role analogous to that played by the state in State-Enabled Crimes. Such non-state entities exert an ever-increasing influence on the commission of international crime.<sup>16</sup> But because they have varying legal personalities under international law, any potential enforcement mechanism for an integrated response to the crimes that these entities enable deserves separate consideration.

Part I of the Article justifies the introduction of State-Enabled Crimes as an analytical category to unite a subset of international crimes in which the state has played an integral role and sets out a general description. I then provide a brief descriptive account of each side of the existing bifurcated structure for adjudicating State-Enabled Crimes: the mechanisms for adjudicating international criminal law on the one hand, and the law of state responsibility on the other. Part II presents an analysis of the problems with adjudicating State-Enabled Crimes under the bifurcated structure of the existing system, emphasizing the distorted picture it generates of both how these crimes are committed and where the balance of responsibility for them lies. Part III moves from problem to solution, presenting the argument for adopting an integrated response to State-Enabled Crimes, whereby the responsibility of both the individual and the state would be adjudicated by a single court. I demonstrate how an integrated response could mitigate unfairness and inaccuracy and achieve the objectives of peace and reconciliation, deterrence, and retribution at least as well, and in

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16. See, e.g., David E. Cunningham, Kristian Skrede Gleditsch & Idean Salehyan, *Non-State Actors in Civil Wars: A New Dataset*, 30 CONFLICT MGMT. & PEACE SCI. 516 (2013); James G. Stewart, *The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute*, 47 N.Y.U. J. INT'L L. & POL. 121 (2014).

most cases better, than a bifurcated response. I also address an important counterargument, explaining why an integrated response would not amount to the imposition of collective guilt on the population of a state found responsible for a State-Enabled Crime. Finally, I propose a modification to trials at the ICC as one example of a mechanism through which an integrated response to State-Enabled Crimes could be brought to life and respond to potential concerns about the feasibility of the proposal.

## I. THE BIFURCATED RESPONSE TO INTERNATIONAL CRIME

International crimes are committed by individuals, but many of them would not have been committed absent the integral role played by the state. In such instances, the state policies or practices that construct what social psychologists call situational factors had a significant influence on the course of action taken by the individual who committed the crime. Of course, all crime, whether domestic or international, is committed against the backdrop of some configuration of situational factors.<sup>17</sup> But what distinguishes most international crimes from most domestic ones is the political and/or organizational entity that constructs these factors.<sup>18</sup> And with many international crimes, this entity comes in the form of the state.

The role of the state permeates the work of courts and tribunals tasked with holding individuals responsible for international crimes. At the ICC, for example, the role of the state has been apparent in the Court's descriptions of how the crimes against hundreds of thousands of Sudanese citizens were committed in Darfur. When issuing an arrest warrant against the Minister of State for the Interior, Ahmad Harun, the ICC Pre-Trial Chamber focused on Harun's role in "coordinating the different bodies of the Government involved in the counter-insurgency, including the Police, the Armed Forces, the National Security and Intelligence Service and the Militia/Janjaweed."<sup>19</sup> And it is not only crimes committed by state officials where the state's role has been integral. In its decision to issue an arrest warrant against non-state militia leader Ali Kushayb, the Court was only able to make sense of his role in relation to the

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17. See, e.g., Roger V. Clarke, *Situational Crime Prevention: Its Theoretical Basis and Practical Scope*, 4 CRIME & JUST. 225 (1983).

18. This is a rough generalization. There are certainly domestic crimes, such as those conducted by members of the Mafia or by other gangs, in which the organizational context is crucial. And it may be that such crimes would also benefit from the kind of integrated approach advanced here. Unfortunately, fuller consideration of this possibility is beyond the scope of this Article. But the more general distinction is fair in that unlike most domestic crimes, the main international crimes require an organizational element as a practical matter and/or as an element of the crime. See, e.g., Rome Statute of the International Criminal Court art. 7(1), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (defining crimes against humanity as those committed as part of a "widespread or systematic attack"). The ICC Elements of the Crimes further clarifies that the "State or organizational policy" behind the attack must involve "the State or organization actively promot[ing] or encourag[ing] such an attack." SEC'Y OF THE ASSEMBLY OF STATE PARTIES TO THE ROME STATUTE OF THE INT'L CRIMINAL COURT, OFFICIAL RECORDS OF THE ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, FIRST SESSION, at pt. II.B.5 (New York, Sept. 2002).

19. Prosecutor v. Harun, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, ¶ 7 (Apr. 27, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc279860.pdf>.

way it served “the strategy of the Government of Sudan.”<sup>20</sup>

The contributory role of state policies and practices renders crimes such as these worthy of a description that unifies them, and of a response that distinguishes them from other international crimes. With State-Enabled Crimes, I seek to establish an analytical category that will fulfill this unifying function and illuminate the deep connection between state authority and individual action that is at the heart of so many international crimes. To be clear, I am not trying to define a new crime. Rather, my intent is to group together a subset of instances in order to draw attention to the commonalities among them. Only once the duality of individual and state in the commission of so much international criminal activity is highlighted does the bifurcated response of the international legal system, which addresses individual and state responsibilities in isolation, move from its current taken-for-granted status to something questionable and, ultimately, unsatisfactory.<sup>21</sup>

After describing State-Enabled Crimes and distinguishing the concept from other efforts to conceptualize the state’s role in international crime, I present a short descriptive section about each side of the bifurcated structure that currently exists for adjudicating international crime. The first of these focuses on international criminal law and the institutions that expound it, emphasizing the dominance of this side of the system for adjudicating State-Enabled Crimes. The second explains the lesser-known law of state responsibility that fills out the other side of the system.

#### A. State-Enabled Crimes

I use the term State-Enabled Crimes to describe a category that encompasses instances in which state authority, manifest through the policies or practices of state organs, was integral to the nature and scale of a crime that was committed. The description is neutral as to the type of individuals involved since, as the atrocities in Darfur demonstrate, State-Enabled Crimes can be committed by state officials and non-state actors alike. What matters is the degree to which the policies or practices of the state were integral to the commission of the crime.

Some examples falling inside the category of State-Enabled Crimes require state involvement as an element of the crime under their convention-based definitions. For example, under the U.N. Convention Against Enforced Disappearance, enforced disappearance entails “the arrest, detention, abduction or any other form of deprivation of liberty *by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State.*”<sup>22</sup> But under their international criminal law definitions, many of

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20. *Id.* ¶ 5.

21. *See infra* Section II.C.

22. G.A. Res. 61/177, art. 2, International Convention for the Protection of All Persons from Enforced Disappearance (Dec. 20, 2006) (emphasis added); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 17-18, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (Torture is that which is “inflicted by or at the instigation of or with the consent

those same offenses do not technically require state involvement as an element of the crime, even though they often do require the kinds of policies or organizational attributes that a state is particularly well-equipped to provide.<sup>23</sup>

These divergent definitions pose no problem, however, in determining whether or not a particular incident falls within the category of State-Enabled Crimes, since the categorization does not turn on the legal label that a given incident has been assigned. Rather, the question of whether or not a given incident constituted a State-Enabled Crime necessitates a factual inquiry into the circumstances of its commission. One cannot say, for example, that all instances of genocide constitute State-Enabled Crimes. Some instances of genocide, such as Janjaweed attacks in Darfur, will fall inside the category of State-Enabled Crimes because of the integral role played by Sudanese state policy and practice. Other instances of genocide, such as attacks by Islamic State of Iraq and Syria (ISIS) on the Yazidi population, will fall outside the category since the policies of a non-state entity lie behind the attacks.<sup>24</sup> Likewise, some instances of torture, such as those currently occurring in Syrian detention sites, will fall into the category of State-Enabled Crimes. Yet other instances, such as torture by a single rogue police officer in defiance of state policy and practice, would not constitute State-Enabled Crimes.

This latter example may strike some as counterintuitive. After all, the state bears some degree of responsibility for the actions of all those who wear its uniform, even when its officials are truly “bad apples” acting in contravention of the state’s policies and practices.<sup>25</sup> But State-Enabled Crimes is a category reserved to those instances in which the policies and practices of the state were integral, rather than incidental, to the nature and scale of the crime that was committed. It is only when a substantial source of wrongdoing lies in such policies and practices, that the international legal system should be troubled with its status quo approach that fails to adjudicate state responsibility for these policies and practices alongside its adjudication of the responsibility of individ-

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or acquiescence of a public official or other person acting in an official capacity.” (emphasis added)).

23. Under their Rome Statute definitions, the state requirements of many international crimes have been replaced by terminology that would account for a non-state entity fulfilling the same role. For example, enforced disappearance is that which is committed “with the authorization, support or acquiescence of, a State or a political organization.” Rome Statute, *supra* note 18, art. 77 (emphasis added); *cf.* International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 22, art. 2.

24. I am sympathetic to readers who are frustrated that an entity causing as much harm as ISIS is not covered by the proposal I advance here. But my purpose in this Article is not to expand the existing law of state responsibility to encompass entities which, while arguably having some of the characteristics of a state, are nonetheless not states under existing international law. See Montevideo Convention on the Rights and Duties of States art. 1, Dec. 6, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. Instead, I seek to explore what progress can be made within the parameters of existing law through the use of integrated adjudicative mechanisms. To the extent there is disagreement within international law over what entities do and do not constitute states, such disagreements remain unresolved by this proposal.

25. This includes legal responsibility under the law of state responsibility. Thus, states could be held responsible for the acts of the rogue police officer before the ICJ or the Inter-American Court of Human Rights, for example. For other examples, see *Velásquez-Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988); G.A. Res. 56/83, annex, art. 7, Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001) [hereinafter Articles on State Responsibility].

uals.

The easy determinations of what does and does not fall into the category of State-Enabled Crimes lie at the extremes of a continuum. Whenever the full force of a state's authority has been deployed in the service of an international crime, a State-Enabled Crime has been committed. The Holocaust represents the paradigmatic case. At the other extreme are cases in which, not only was there no state involvement in the crime, but the state's authority was actively directed toward preventing the crime. An example would be torture committed by rebels of the Revolutionary Armed Forces of Colombia (FARC).

The question that marks the boundary line between what is and is not a State-Enabled Crime is whether a crime of substantively the same nature and scale would have occurred if the relevant policy or practice of a state organ or organs had been different. When the answer is no, then state authority, whether manifest affirmatively or through deliberate omission, was integral to the commission of the crime, rendering it a State-Enabled Crime. When the answer is yes, then state authority was not integral, and thus it was not a State-Enabled Crime.

There is undoubtedly a grey zone in which reasonable people are likely to differ in their assessment of a given case, and in many instances the determination will be impossible to discern absent a full-fledged factual inquiry. If a handful of prison officers across the country have committed torture it may be that they are "bad apples" acting in contravention of the policy of the Department of Corrections and the practice of other officials within it.<sup>26</sup> On the other hand, if scores of prison officers across the country repeatedly commit torture, one might suspect the existence of a policy, or at least informal practice by the department that enables the crimes. But in either case, a factual inquiry into the existence of a policy or practice would likely be required to determine whether or not a State-Enabled Crime had occurred.<sup>27</sup>

With a working description of State-Enabled Crimes in hand, it is possible to distinguish the concept from previous efforts to home in on the state's role in international crime. First, State-Enabled Crime is different from the effort to establish a legal category of State Crime, which certain members of the International Law Commission (ILC) argued vehemently in favor of during debates that lasted from 1969 through to the end of the twentieth century.<sup>28</sup> Those looking to establish State Crime envisaged it as crime for which the state would be made the direct subject of criminal liability.<sup>29</sup> The case for state

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26. Of course, the prison officers could be prosecuted and their crimes brought to a halt, but this is not the same as saying that a different policy or practice by the Department of Corrections would have substantially changed the nature and scale of the crimes committed.

27. Those versed in U.S. domestic law will recognize the parallels here with a section 1983 "Monell claim." See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); see also Karen M. Blum, *Making Out the Monell Claim Under Section 1983*, *TOURO L. REV.* 829, 842-48 (2009) (discussing entity liability on the basis of deliberate omission).

28. See generally JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 1-60* (2002) (recounting the history of the discussion on State Crime at the ILC).

29. State-Enabled Crimes are also distinguishable from another semantically similar term,

criminality was eventually abandoned in favor of the law of state responsibility.<sup>30</sup> The concept of State-Enabled Crimes absorbs this development, seeking not to hold the state criminally liable, but simply to recognize its civil responsibility under existing international law for the policies and practices through which it enables individuals to commit international crimes.

Second, State-Enabled Crimes are distinguishable from André Nolkaemper's analytical concept of "system criminality," which considers the role of the state but which also incorporates the impact of systems more broadly.<sup>31</sup> Thus unlike State-Enabled Crimes, system criminality also accounts for the role played by entities such as political parties, corporations, and non-governmental organizations.

System criminality usefully highlights that the influence of situational factors on the commission of international crime is not limited to scenarios in which the state play a role. But the narrower focus of State-Enabled Crimes adds value for two reasons. First, while non-state groups are increasingly demonstrating their organizational capacity to be involved with crimes on the kind of scale that used to be reserved for the state (and here again the self-proclaimed Islamic State comes readily to mind), states nonetheless have a presumptive legitimacy with respect to the creation and enforcement of law that other entities lack. Second, when it comes to international adjudication, states alone are the only entities accorded a full legal personality.<sup>32</sup> This justifies addressing the state's role as a distinct scholarly endeavor since any prescriptive responses offered must account for the particularity of the state's legal personality.

### B. *International Criminal Law*

It is easy enough to take the dominance of international criminal law for granted. By 2020, law schools will be filled with students who never knew a world without the ICC. But the existence of international criminal law as a robust concept, let alone as a functioning system, can only be traced as far back as the aftermath of World War II.<sup>33</sup> Only in the post-World War II trials at Nu-

"crimes of state," which José Alvarez used in binary opposition to the term "crimes of hate" in a 1999 article. José Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999). Alvarez used the two terms as a rhetorical device to critique the primacy of the international, over local, response to the 1994 Rwandan genocide, but they do not have any content or life beyond that article. *Id.*

30. The long history of the State Crime debate is fully documented elsewhere. See generally INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (Joseph Weiler et al. eds., 1988); see also NINA JØRGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES 1-27 (2000) (arguing that the concept "took a back seat" to international criminal law, but has never actually gone away.)

31. See SYSTEM CRIMINALITY IN INTERNATIONAL LAW, *supra* note 9.

32. The distinctiveness of the state's legal personality is, however, contested. See, e.g., JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 3 (2003); Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L. J. 229 (2015).

33. There was, of course, the attempt of the Allies, post-World War I, to have the Kaiser, Wilhelm II, held individually responsible in an international criminal court, but this endeavor never came to fruition. See HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 132 (1959).

remberg and Tokyo was the veil of the state pierced for the first time to claim, in the words of Justice Jackson, who served as the Nuremberg Prosecutor, that “[c]rimes against international law are committed by men, not by abstract entities.”<sup>34</sup> Notwithstanding the myriad problems of the Nuremberg and Tokyo trials,<sup>35</sup> they opened the conceptual legal landscape to the potential for individuals to be held responsible for international crimes, even when those crimes were committed under the auspices of the state.<sup>36</sup>

Still, it took almost another fifty years for the international legal system to further develop the mechanisms to hold individuals accountable.<sup>37</sup> The first step came in 1993 when, in the wake of the atrocities that followed the break-up of the former Yugoslavia, the U.N. Security Council used its powers under Chapter VII of the U.N. Charter to establish the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>38</sup> The following year, after the Rwandan genocide left some 800,000 Tutsi and moderate Hutu dead, the Security Council again acted to establish an international justice mechanism, this time in the form of the International Criminal Tribunal for Rwanda (ICTR).<sup>39</sup>

The statutes establishing the ICTY and ICTR made the individual their exclusive concern,<sup>40</sup> and ensured that individuals alone would be held responsible, even for crimes that would not have been committed absent the state.<sup>41</sup> As American jurist (and future Presiding Judge of the ICTY and ICTR Appeals Chambers) Theodor Meron concluded in a 1995 speech evaluating the significance of the tribunals, “The moral importance of attaching guilt to individuals has been reaffirmed.”<sup>42</sup> This laser focus on the individual permeated the practice of the tribunals. In the words of ICTY Prosecutor Carla Del Ponte, in her opening statement to the court in the case against the former President of Yugoslavia, Slobodan Milosevic: “The accused in this case, as in all cases before this Tribunal, is charged as an individual: he is prosecuted on the basis of his

34. See *Judgment, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946: OFFICIAL DOCUMENTS 171, 223 (1947)*.

35. See, e.g., F.B. Schick, *The Nuremberg Trial and the International Law of the Future*, AM. J. INT'L L. 770 (1947) (questioning the legality of the Nuremberg trials).

36. See, e.g., P.M. Dupuy, *International Criminal Responsibility of the Individual and International Responsibility of the State*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1085-86* (Antonio Cassese et al. eds., 2002); David Scheffer, *Nuremberg Trials, in 2 ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 764, 771* (Dinah L. Shelton ed., 2005).

37. The reason for the delay had little to do with the law and everything to do with the politics of the Cold War era. See DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS 2-3* (2014).

38. S.C. Res. 827, Statute of the International Criminal Tribunal for the Former Yugoslavia (May 25, 1993) [hereinafter ICTY Statute].

39. S.C. Res. 955, Statute of the International Tribunal for Rwanda (Nov. 8, 1994) [hereinafter ICTR Statute].

40. See ICTY Statute, *supra* note 38, art. 6 (limiting jurisdiction to “natural persons”); ICTR Statute, *supra* note 39, art. 5 (same).

41. Article 7 of the ICTY Statute and article 6 of the ICTR Statute ensure individual responsibility no matter the individual’s relationship to the state, nor the role that orders from state officials played. See ICTY Statute, *supra* note 38, art. 7; ICTR Statute, *supra* note 39, art. 6.

42. THEODOR MERON, *Nuremberg and the Rule of Law: A Fifty-Year Verdict, in WAR CRIMES LAW COMES OF AGE 198, 202* (1999).

individual criminal responsibility. No state or organisation is on trial here today.”<sup>43</sup>

As the tribunals went about their business, work continued on drafting the statute for a permanent international court. The adoption of the Rome Statute was “heralded by many as a triumph for humanity.”<sup>44</sup> And in June 2004, the ICC opened its first investigation.<sup>45</sup> As with the ad hoc tribunals, the newly minted Court was designed to focus exclusively on the responsibility individuals.<sup>46</sup>

With 796 staff and an annual budget of €135 million, the ICC is now the largest in a constellation of internationalized courts and hybrid tribunals bringing international criminal law to all corners of the globe.<sup>47</sup> Undergirding this spectacular rise of international criminal law from virtual non-existence less than a century ago, to its position as the dominant response of the international legal system to international crimes today, has been a fervently-held belief in the potential of individualized guilt and punishment to achieve the objectives of prevention, peace and reconciliation, and retribution.<sup>48</sup> As Mark Drumbl has summarized, “[F]aith on the part of so many activists, scholars, states, and policymakers in the potential of international criminal justice has spawned one of the more extensive waves of institution-building in modern international relations.”<sup>49</sup>

The degree to which international criminal trials actually achieve the goals on which their development has been justified is a matter of intense debate. The relevant point here, however, is the overwhelming power these normative arguments have had in justifying the turn to international criminal law over the past two decades. As a result, any alternative vision for how the international legal system should respond to State-Enabled Crimes will have to demonstrate its potential to satisfy these goals at least as well, if not better, than the current system.

43. Feb. 12, 2002, INT’L CRIM. TRIBUNAL FORMER YUGOSLAVIA, [http://www.icty.org/x/cases/slobodan\\_milosevic/trans/en/020212IT.htm](http://www.icty.org/x/cases/slobodan_milosevic/trans/en/020212IT.htm) (last visited Apr. 4, 2016).

44. Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH Y.B. INT’L L. 249, 249 (2001).

45. Press Release, Office of the Prosecutor, The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation (June 23, 2004), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx).

46. Rome Statute, *supra* note 18, art. 25(1) (restricting the Court’s jurisdiction to “natural persons”).

47. See INT’L CRIMINAL COURT, PROPOSED PROGRAMME BUDGET FOR 2015 OF THE INTERNATIONAL CRIMINAL COURT, ICC-ASP/13/10, at 160 (Sept. 18, 2014), [https://www.icc-cpi.int/icc\\_docs/asp\\_docs/ASP13/ICC-ASP-13-11-ENG.pdf](https://www.icc-cpi.int/icc_docs/asp_docs/ASP13/ICC-ASP-13-11-ENG.pdf).

48. See generally Kathryn Sikkink, *From State Responsibility to Individual Criminal Accountability: A New Regulatory Model for Core Human Rights Violations*, in THE POLITICS OF GLOBAL REGULATION 121, 137 (Walter Mattli & Ngaire Woods eds., 2009) (describing the “striking agenda change from a state accountability model to a criminal justice model”).

49. Drumbl, *supra* note 5, at 547.

### C. Law of State Responsibility

When it comes to adjudicating State-Enabled Crimes, the law of state responsibility is the poor cousin to international criminal law. While the latter is salient in the public imagination, with a list of shiny new institutions that have facilitated its rise to prominence, the law of state responsibility has been developing with comparatively little fanfare.<sup>50</sup> The International Court of Justice (ICJ) and regional human rights courts have jurisdiction over the law of state responsibility for international crimes. But these mechanisms face significant limitations, both legal and political, when it comes to the adjudication of the state's role in State-Enabled Crimes.<sup>51</sup> Thus to the degree international law is enforced in adjudicatory settings, such settings skew responsibility for State-Enabled Crimes toward individuals, thereby sidelining the role played by the state.

The major codification effort with respect to state responsibility under international law began in 1956. But progress was slow and the resulting Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility or Articles) were not adopted by the ILC until 2001.<sup>52</sup> While the Articles have been noted by the U.N. General Assembly, they do not yet have the status of formal law.<sup>53</sup> Nonetheless, even in their present form, they are routinely treated by domestic,<sup>54</sup> regional,<sup>55</sup> and international courts<sup>56</sup> as though they had the formal status of law.<sup>57</sup>

The Articles on State Responsibility are a set of secondary rules establishing the consequences that follow when states breach their primary obligations under international law. The consequences vary in severity but they are all non-criminal. Nonetheless, the Articles provide a solid basis for holding a state re-

50. As one metric, the International Court of Justice (ICJ) issued its first judgment on state responsibility in 1949. Today it operates with less than one-sixth of the staff and just over one-third of the budget of the ICC. See INT'L CRIMINAL COURT, *supra* note 47; UNITED NATIONS GEN. ASSEMBLY, PROGRAMME BUDGET FOR THE BIENNIUM 2014-2015, U.N. Doc. A/68/6/Add.1 (Apr. 22, 2014) [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/68/6/Add.1](http://www.un.org/ga/search/view_doc.asp?symbol=A/68/6/Add.1).

51. See *infra* Section II.B.

52. CRAWFORD, *supra* note 28, at ix (2002).

53. The question of whether to turn the Articles into a treaty remains a matter of debate. See James Crawford & Simon Olleson, *The Continuing Debate on a UN Convention on State Responsibility*, 54 INT'L & COMP. L.Q. 959 (2005).

54. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 2 BvR 955/00, 1038/01, 26 Oct. 2004, *partially translated in* U.N. Secretary-General, *Responsibility of States for Internationally Wrongful Acts*, ¶ 98, U.N. Doc. A/62/63/Add.1 (Mar. 9, 2007); Cass., sez. un., 11 marzo 2004, n. 5044, 87 RDI 539 (2004), *translated in* 128 I.L.R. 658, 668 (2004); A v. Sec'y of State for Home Dep't (No. 2) [2006] 2 A.C. 221, 262-63 (appeal taken from Eng.).

55. See, e.g., *Ilasçu v. Moldova* (No. 48787/99), 2004-VII Eur. Ct. H.R. 179; *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R., (ser. A) No. 18, ¶ 70 (Sept. 17, 2003) (separate opinion by Cançado Trindade, J.).

56. See, e.g., *Jurisdictional Immunities of the State* (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 137 (Feb. 3); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Judgment) (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 173 (Feb. 26); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, ¶ 160 (Dec. 19).

57. For a critical view on this, see David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857 (2002).

sponsible for its role in a State-Enabled Crime by way of a chapter that addresses “serious breaches of obligations under peremptory norms of general international law.”<sup>58</sup>

Taking the different parts of this in turn, a “serious breach” involves a “gross and systematic failure” by the state.<sup>59</sup> All State-Enabled Crimes would readily constitute such a breach; the establishment and maintenance of policies and practices sufficient to enable the commission of international crimes would necessarily imply a gross and systematic failure by the state to uphold its obligation not to violate the norms prohibiting such crimes. Moving to “peremptory norms” (used interchangeably with its Latin counterpart, *jus cogens*), the Vienna Convention on the Law of Treaties describes these norms as those “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”<sup>60</sup>

The consequences flowing from a serious breach aim not only to provide reparations for victims but also to ensure that the serious breach is not repeated in the future. Specifically, offending states are obliged to cease the wrongful act,<sup>61</sup> offer guarantees of non-repetition where appropriate,<sup>62</sup> and make reparations,<sup>63</sup> which may include restitution,<sup>64</sup> compensation,<sup>65</sup> and/or satisfaction, such as through an expression of regret or formal apology.<sup>66</sup> Moreover other states are obliged to cooperate to “bring [the breach] to an end through lawful means”<sup>67</sup> and to neither recognize the situation created by the breach as lawful nor provide aid or assistance in maintaining it.<sup>68</sup>

Importantly, given that so many State-Enabled Crimes involve the re-

58. Articles on State Responsibility, *supra* note 25, ch. III. Of course, this is in addition to jurisdictional provisions in crime-specific conventions that states may have joined.

59. *Id.* art. 42.

60. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. As an evolving concept, it is hard to find an exhaustive compilation of the acts that violate peremptory norms. *See, e.g.*, Jordan Paust, *The Reality of Jus Cogens*, 7 *CONN. J. INT’L L.* 81, 83 (1991).

60. Int’l Law Comm’n, *Rep. on the Work of Its Eighteenth Session*, [1966] 2 *Y.B. Int’l L. Comm’n* 177, 248. However the ILC’s illustrative list of the “most obvious and best settled” *jus cogens* norms includes “[i]nternational laws that prohibit the performance of any other act criminal under international law.” *Id.* To take a source closer to home, the U.S. Third Restatement on Foreign Relations Law states that a state is in violation of international law if “as a matter of state policy it encourages, practices or condones” genocide, slavery, murder or enforced disappearance, torture or other cruel, inhuman or degrading treatment, prolonged arbitrary detention, systematic racial discrimination, or “a consistent pattern of gross violations of internationally recognized human rights.” *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, at 161. It is important to note that obligations *erga omnes* are not, as a theoretical matter, co-extensive with *jus cogens* norms. *See, e.g.*, Paolo Picone, *The Distinction Between Jus Cogens and Obligations Erga Omnes*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 411, 415 (Enzo Cannizzaro ed., 2011). The latter may incorporate acts more expansive than those covered under State-Enabled Crimes, but wherever the exact outer limits are drawn, the relevant point is that all State-Enabled Crimes would be covered.

61. Articles on State Responsibility, *supra* note 25, art. 30(a).

62. *Id.* art. 30(b).

63. *Id.* art. 31.

64. *Id.* art. 35.

65. *Id.* art. 36.

66. *Id.* art. 37(1)-(2).

67. *Id.* art. 41(1).

68. *Id.* art. 41(2).

sponsibility of a state for crimes committed against its own citizens, the law of state responsibility enables states that have no traditional ties to the crime, like territory or the nationality of the victims, to pursue action against the responsible state.<sup>69</sup> Finally, the Articles on State Responsibility specify that reparations for a serious breach are to be made “in the interest of the injured state or of the beneficiaries of the obligation breached.”<sup>70</sup> The inclusion of beneficiaries beyond the injured state itself opens the door for reparations to move beyond a traditional state-to-state system, extending to individuals who have suffered as a result of acts for which the state is responsible.

Overall, then, the Articles on State Responsibility establish that reparations, including restitution, compensation, and satisfaction for all State-Enabled Crimes, can be pursued against the state that is responsible, by any state, for the benefit of any entity or person injured by those crimes. Such a body of law, if fully implemented, would provide a comprehensive means for addressing the state’s role in State-Enabled Crime. It would provide restitution for the (backward-looking) effects on victims and mitigate the (forward-looking) risks of recurrence. Yet despite this body of law, the invocation of state responsibility for State-Enabled Crimes is very limited in adjudicatory settings, and inconsistently applied throughout the international legal system.<sup>71</sup>

## II. THE MISMATCH BETWEEN COMMISSION AND RESPONSE

The roles of the individual and the state are integrated with respect to the commission of a State-Enabled Crime, yet the international legal system bifurcates these two roles at the point of adjudication.<sup>72</sup> What results is a mismatch between the commingling of responsibility at the level of commission and the

69. When the obligation breached is “owed to the international community as a whole”—a term of art that overlaps with breaches constituting State-Enabled Crimes—then any state can pursue consequences against the offending state. *See id.* art. 48(1); *see also* Louis Henkin, *Inter-State Responsibility for Compliance with Human Rights Obligations*, in MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 383, 394 (Lal Chand Vohrah et al. eds., 2003) (elaborating that a state party to a human rights treaty may seek compliance by another state party, and that it can resort to remedies provided in the treaty itself).

70. Articles on State Responsibility, *supra* note 25, art. 48(2)(b).

71. *See infra* Section II.B. One might speculate that international criminal law stands in place of the law of state responsibility. Yet the occlusion of the state is by no means a necessary consequence of international criminal law’s dominance in adjudicatory settings. Certainly as a legal matter, international law is clear that individual responsibility cannot serve as a substitute for state responsibility. *See* Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, art. 58, cmt. 3, U.N. Doc. A/56/10 (2001); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 142 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998). The harms involved, while intertwined, are not identical. No number of individual prosecutions can fully account for the harm that flows from the misuse of state authority since that harm, if left unaccounted for, adheres to the structures of the state itself, extending beyond any individual present at the time of the crime. *See* Thomas M. Franck, *Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?* 6 WASH. U. GLOBAL STUD. L. REV. 567, 569-70 (2007).

72. In a rare article on the duality of individual and state responsibility for international crime, albeit limited to a consideration of genocide, Philippa Webb observes that even as international instruments recognize this duality, they provide no guidance as to how “overlaps, interplay or contradiction between the two regimes can be resolved.” Philippa Webb, *Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide*, in THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 177, 120 (Larissa van den Herik & Carsten Stahn eds., 2012).

bifurcation of responsibility at the level of adjudication. And although the existing literature has not recognized the connection, it is this mismatch that underlies several of the major problems that scholars of international criminal law are currently grappling with.

This section surveys the critical literature on challenges the international adjudication of State-Enabled Crimes faces and finds significantly more scholarship on the criminal law side of the system. This is not, however, due to an absence of challenges on the law of state responsibility side. An analysis of the mechanisms for adjudicating state responsibility—at the domestic, regional, and international levels—reveals the particular challenges of adjudicating State-Enabled Crimes under this body of law.

#### A. *Adjudicating State-Enabled Crimes Under International Criminal Law*

Alongside the rapid rise of international criminal law, a rich and interdisciplinary body of literature has developed to question its application.<sup>73</sup> With respect to State-Enabled Crimes, several of the most serious concerns scholars have raised can be understood as products of the existing bifurcated structure, in which individual responsibility must be adjudicated in isolation from any adjudication of state responsibility. The constraints of international criminal law adjudication under this bifurcated structure generate an inaccurate picture of how State-Enabled Crimes are committed, resulting in an allocation of responsibility and punishment that is unfair to defendants and victims alike. In a typical scenario, a select few perpetrators are over-punished while a much greater number are spared any punishment at all. And all the while the role played by the state is left unaccounted for.

Taking in turn the scholarly concerns that I argue are best understood as flowing from the bifurcated structure of the existing system, Saira Mohamed has recently described the first as “the deviance paradox.”<sup>74</sup> To understand the concern, it is useful to start from the perspective of an individual perpetrator. One might readily imagine that a person who committed genocide in Rwanda or Nazi Germany had an inherently different psychological profile from the rest of us. Yet case studies do not bear this out. As Christopher Browning character-

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73. A piece by Sanford Levinson is an early forerunner of this literature. He laments the “inverse relationship between the number of individuals involved” and “the efficacy of traditional legal analysis as a mode of comprehending it.” Sanford Levinson, *Responsibility for Crimes of War*, 2 PHIL. & PUB. AFF., 244, 245 (1973). And, he adds, “of no area is this more true than criminal law.” *Id.*; see also GERRY SIMPSON, *LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW* (2007); Drumbl, *supra* note 5; Osiel, *supra* note 5.

74. Mohamed, *supra* note 5, at 1639 (introducing the term “deviance paradox”). Although the term is new, the basic phenomenon it describes has been identified for some time. See, e.g., H.C. KELMAN & V.L. HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* 46 (1989). Scholars who have drawn attention to the deviance paradox cite to what are now well-known psychological experiments, in particular the “electric shock” obedience experiment run by Stanley Milgram in the 1960s and the Stanford Prison Experiment run by Philip Zimbardo in 1970s. Both experiments demonstrated, with chilling force, the influence of situational forces on behavior. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974); PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007).

ized the members of Reserve Battalion 101 who followed orders to kill some 1,500 Jews in their Polish village in 1942, they were “ordinary men.”<sup>75</sup> It was exactly this problem that Hannah Arendt encountered in writing her profile of Nazi SS Colonel Adolf Eichmann, “an average, ‘normal’ person,” and that led her to reflect on “the banality of evil.”<sup>76</sup> In a time and place in which all the usual sources of authority—from family and neighbors, through to the government and church—view the killing of a particular group as necessary, murder is reconfigured from an act of deviance to one of normalcy.<sup>77</sup> And it is just such a reconfiguration that is integral to most, if not all, State-Enabled Crimes.

To take an example from the so-called Global War on Terror, as much as it would be comforting to label members of the 372nd Military Police Army Reserve Company as “bad apples,” the reality is that on the night shift at Tier 1A of Abu Ghraib, their actions were not viewed as deviant. And while individual personalities played a contributing role, an independent panel review found that “the abuses were not just the failure of individuals to follow standards . . . [nor were they] the failure of a few leaders to enforce proper discipline.”<sup>78</sup> Rather, they flowed from the “structural features and operational policies” put in place by the United States.<sup>79</sup>

Conclusions like these should not be overly unexpected in light of the body of social psychology research on the influence of situational factors on individual behavior.<sup>80</sup> But such cases nonetheless present a profound challenge to a central premise of criminal law, namely that it punishes deviant behavior. Hence the paradox, whereby international criminal law instead finds itself deployed to punish ordinary people for behavior that is marked, at the point of its occurrence, by its un-remarkableness.

The acknowledgement of a deviance paradox triggers an inquiry into the nature of the situational factors that helped to shape otherwise deviant behavior into the norm. With respect to State-Enabled Crimes, the answer is found primarily in the policies and practices of the state. As Alison Des Forges observed with respect to leaders of the 1994 genocide in Rwanda, “[i]n order to carry through the genocide, they had to capture the state.”<sup>81</sup> But under a bifurcated structure criminal trials focus on individuals, sidelining the role state policies and practices played in establishing the conditions for a deviance paradox to

75. CHRISTOPHER BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* 3 (1992); *see also* JEAN HATZFELD, *MACHETE SEASON* (2005).

76. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 26, 287 (1963). *But see* BETTINA STANGNETH, *EICHMANN BEFORE JERUSALEM: THE UNEXAMINED LIFE OF A MASS MURDERER* (Ruth Martin trans., 2014) (arguing that Arendt’s portrayal of Eichmann was inaccurate).

77. *See* PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998).

78. *Final Report of the Independent Panel to Review Department of Defense Detention Operations, in THE ABU GHRAIB INVESTIGATIONS* 2 (Steven Strausser ed., 2004).

79. ZIMBARDO, *supra* note 74, at 378; *see also* S. REP. NO. 113-288 (2014) (detailing Senate findings on CIA detention and interrogation); *Final Report of the Independent Panel to Review Department of Defense Detention Operations, supra* note 78, at 1-106.

80. *See, e.g.,* ROSS & NISBETT, *supra* note 6.

81. ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY* 6 (1999).

arise. The net result risks unfairness to defendants who are often punished for a degree of deviance that their behavior did not reflect.<sup>82</sup>

This unfairness is compounded by a second concern that scholars have raised. At least 100,000 people are thought to have participated in The Holocaust.<sup>83</sup> Closer to 200,000 are estimated to have participated in the 1994 genocide in Rwanda.<sup>84</sup> When State-Enabled Crimes involve mass participation, no court—let alone an international one—can adjudicate the crimes of every individual who deserves to be judged.<sup>85</sup> What results is selective prosecution. As Heinz Steinert noted, “[A] key limitation of the ‘individualising juridical mode’ of imputing responsibility is . . . that it not only produces a handful of the officially guilty, but many more ‘false innocents.’”<sup>86</sup>

The problem of necessary selectivity has beleaguered the ICTY in particular. With crimes perpetrated both by and against different ethnic groups, the mere indictment of a perpetrator from one group has invariably been seen as both vindicating alleged perpetrators in other groups and undermining the legitimacy of claims of victimhood by others from the same group.<sup>87</sup> Different prosecutors have tackled the problem in different ways over time.<sup>88</sup> But ultimately the problem is inherent in the isolated use of individual criminal responsibility for State-Enabled Crimes involving mass participation.

A final concern raised by scholars that stems from a bifurcated structure is the possibility that thousands of people all committing the same crimes may in fact not be best conceptualized as individuals, but rather as a group. In the words of George Fletcher, “[w]hatever the pretense of liberal international lawyers, the crimes of concern to the international community are collective crimes.”<sup>89</sup> The ICC and the ad hoc tribunals have been conscious of this prob-

82. Saira Mohamed proposes a way out of the paradox by getting judges to acknowledge that the behavior was not deviant in the context it was committed, but still condemn the individual on the grounds that the law asks us to aspire to rightful behavior, even with situational factors acting upon us. See Mohamed, *supra* note 5, at 1633. But rather than addressing the deviance paradox squarely, this approach seems to deny its existence.

83. DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 167 (1996) (extrapolating from Goldhagen's figures on the number of camps and the ratio of guards to prisoners, a conservative estimate of 100,000 is readily obtained).

84. Scott Straus, *How Many Perpetrators Were There in the Rwandan Genocide? An Estimate*, 6 J. GENOCIDE RES. 85, 93-95 (2004) (estimating that 175,000-215,000 Rwandans participated in the genocide).

85. The ICTR for example, after 20 years in operation, has indicted 93 individuals. See *Key Figures of Cases*, UNITED NATIONS MECHANISM FOR INT'L CRIM. TRIBUNALS, <http://www.unictt.unmict.org/en/cases/key-figures-cases> (last visited Apr. 4, 2016).

86. Ruth Jamieson & Kieran McEvoy, *State Crime by Proxy and Juridical Othering*, BRIT. J. CRIMINOLOGY 504, 521 (2005).

87. A 2009 Serbia poll showed that ninety-six percent of the Bosniak population in Serbia thought Ratko Mladić was responsible for the crimes the ICTY charged him with, compared with only seventeen percent of the Serb population. See ORG. FOR SEC. AND COOPERATION IN EUROPE/BELGRADE CTR. FOR HUMAN RIGHTS, *PUBLIC PERCEPTION IN SERBIA OF THE ICTY AND THE NATIONAL COURTS DEALING WITH WAR CRIMES* 25 (2009), [http://www.law.indiana.edu/front/special/2010\\_milosevic/materials/belgrade\\_centre.pdf](http://www.law.indiana.edu/front/special/2010_milosevic/materials/belgrade_centre.pdf).

88. For an excellent review of the differing charging policies of the various prosecutors at the international tribunals, see Frederiek de Vlaming, *Selection of Defendants*, in INTERNATIONAL PROSECUTORS 542 (Luc Reydamts et al. eds., 2012).

89. George Fletcher, *Liberals and Romantics at War: The Problem of Collective Guilt*, 111

lem as well. In response, scholars and practitioners of international criminal law have developed theories that allow for the possibility of charging individuals for crimes committed by groups, such as joint criminal enterprise.<sup>90</sup> These efforts have sought to extend the reach of the law to yet more individuals, while leaving the bifurcated structure of the existing system intact.<sup>91</sup> But as with efforts to address the problem of selective prosecution, theories of group criminality have arguably generated as many problems as they have resolved.<sup>92</sup>

### B. Adjudicating State-Enabled Crimes Under State Responsibility

Relative to international criminal law, scholarship on the adjudication of international crime under the law of state responsibility is fairly scant.<sup>93</sup> This is not, however, due to a lack of challenges arising under the system of state responsibility. Indeed, as detailed below, there are significant limitations to the mechanisms available for adjudicating state responsibility for State-Enabled Crimes. And these limitations go some way to explaining the underutilization of this body of law with respect to adjudicating such crimes.

#### 1. Domestic Courts: The State Immunity Problem

The primary bar to state responsibility being pursued in a domestic forum is the law of state immunity (known domestically as foreign sovereign immunity). State immunity flows from the recognition under the Westphalian system that states are equal and independent.<sup>94</sup> With each state having, in equal measure to all other states, the right to conduct its sovereign affairs independently,

YALE L.J. 1499, 1514 (2002); see also SIMPSON, *supra* note 73, at 67.

90. See generally NEHA JAIN, PERPETRATORS AND ACCESSORIES IN INTERNATIONAL CRIMINAL LAW: INDIVIDUAL MODES OF RESPONSIBILITY FOR COLLECTIVE CRIMES (2014).

91. One scholar who has grappled with the possibility of assigning collective responsibility as an alternative to individual trials is Mark Drumbl. MARK DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 197-98 (2007). More generally though, scholars have looked instead to using theories of group criminality to reach individuals. In either case, the assumption of bifurcation has been retained.

92. See, e.g., George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 550 (2005) (arguing that some uses of joint criminal enterprise have "clearly violated the basic principle that individuals should only be punished for personal culpability"); see also Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005) (arguing for the reform of JCE in order to better serve the criminal law principle of culpability).

93. The exception to this generalization lies in the work generated by the ICJ decisions on genocide in the Former Yugoslavia. See, e.g., Ademola Abass, *Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur*, 31 Fordham Int'l. L.J., 871 (2008); Andrea Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment*, 18 Eur. J. Int'l L. 695 (2007); Mark Gibney, *Genocide and State Responsibility*, 7 Hum. Rts. L. Rev. 760 (2007). The one early exception to this generalization is in the work of Nina Jørgensen, who wrote her doctoral thesis in this area. See Jørgensen, *supra* note 30.

94. See G.A. Res. 2625 (XXV), annex, Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) ("All States enjoy sovereign equality," which includes the "political independence of the State . . .").

no state's domestic system can sit in judgment of another.<sup>95</sup>

By the end of the nineteenth century, however, the absolutist version of this doctrine began to come under pressure as the state's commercial activities expanded.<sup>96</sup> A commerciality exception emerged to protect the interests of private actors who did business with states. Legislators in nations across the globe began to adopt the so-called restrictive immunity doctrine.<sup>97</sup>

In the United States, the restrictive immunity doctrine formally entered into law through the 1976 Foreign Sovereign Immunities Act (FSIA).<sup>98</sup> The FSIA took restrictive immunity a step beyond the commerciality exception, however, by also carving out a territorial tort exception such that plaintiffs could sue a foreign state for money damages arising from even non-commercial activity if the state caused a tort in the United States.<sup>99</sup>

The abandonment of absolute sovereign immunity raised the possibility of further exceptions beyond the commerciality and territorial tort carve-outs. Human rights scholars argued that it should be possible to sue a foreign state in U.S. courts for violations of peremptory norms. Their theory was that the observance of such norms was a condition of statehood, and that since statehood was a precondition for state immunity, the violation of a peremptory norm constituted an implied waiver of state immunity.<sup>100</sup> But that argument has failed both domestically and internationally.<sup>101</sup> Thus despite efforts by plaintiffs and

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95. See HAZEL FOX & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* 25-28 (3d ed. 2013). The traditional maxim associated with these principles is *par in parem non habet imperium* (an equal has no power over an equal). The first case in U.S. law typically associated with this principle is *Schooner Exchange v. McFaddon*, 11 U.S. 116, 147 (1812).

96. See Third Session of the Committee of Experts for the Progressive Codification of International Law, 22 AM. J. INT'L L. (Supp. 1928).

97. Under the doctrine, sovereign immunity is retained for acts of sovereign authority (*jure imperii*), but no longer upheld for acts that are private or commercial (*jure gestionis*). See FOX & WEBB, *supra* note 93, at 32-38. The line-drawing between these two categories is much more complex in practice than the binary description suggests. See James Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 54 BRIT. Y.B. INT'L L. 75 (1983).

98. Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-11 (2012); see *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (describing FSIA as essentially codifying the restrictive immunity approach).

99. 28 U.S.C. § 1605(a)(5) (2012); see also *Letelier v. Republic of Chile*, 488 F. Supp. 665, 671-75 (D.D.C. 1980) (finding that a claim for money damages arising from the assassination of two Chilean nationals in Washington was not barred by sovereign immunity because it fell under the exception under § 1605(a)(5) of the FSIA relating to a tort committed on U.S. territory).

100. See, e.g., Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989).

101. The U.S. Supreme Court jettisoned this suggestion with its 1989 decision in *Argentine Republic v. Amerada Hess Corp.*, rejecting any peremptory norm exemption on the grounds that Congress had not provided for it in the FSIA. 488 U.S. 428, 443 (1989). Even after this decision, plaintiffs continued to argue that the violation of peremptory norms deserved a special carve-out, though the courts repeatedly denied this. See *Prinz v. Fed. Republic of Germany* 26 F.3d 1166, 1174 (1994). Plaintiffs also tried to secure responsibility for the violation of peremptory norms by trying to bring violations inside the commerciality exception. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993). In 1996, Congress removed foreign sovereign immunity for certain torts occurring outside the U.S., provided that the victim was a U.S. national, member of the armed forces, or employee or contractor of the U.S. government acting within their scope of employment, and that the state being sued had been classified by the State Department as a State Sponsor of Terrorism. See 28 U.S.C. § 1605(A) (2011). In 2012, the ICJ essentially closed the door to the argument that state immunity should be set aside for *jus cogens* viola-

human rights advocates alike, the best summation of the law as it stands is that save for those instances falling inside a commerciality or territorial tort exception, state responsibility for State-Enabled Crimes cannot be pursued in domestic courts.

## 2. *Regional Courts: Incomplete Coverage and the Fair Labeling Problem*

At the supra-national level, regional human rights courts have the ability to hold States responsible for State-Enabled Crimes. Two main limitations, however, undercut the utility of regional human rights courts. The primary problem is the limited geographical coverage of these courts. A secondary concern relates to limitations on the way these courts can characterize these crimes.

With respect to geographic limitations, only around one-third of the 193 states belonging to the United Nations are covered by combined jurisdiction of the European Court of Human Rights<sup>102</sup> and the Inter-American Court of Human Rights.<sup>103</sup> Even incorporating the soon-to-be restructured African Court on Human and Peoples Rights into the equation only adds twenty-six of the fifty-four states in Africa.<sup>104</sup>

Thus if any state in Asia or the Middle East, many states in Africa, or states in a significant segment of the Americas, including the United States, were responsible for State-Enabled Crimes, the regional human rights courts would not have jurisdiction over their actions.<sup>105</sup> Simply put, the regional human rights system is wholly inadequate from the perspective of the majority of the global population.

There is a further limitation related to what criminal law theorists describe as the “fair labeling” problem. The problem arises when the label attached to a defendant’s actions fails to accurately reflect the seriousness of

tions, rejecting an argument by Italy that the *jus cogens* nature of a norm violated by Germany against an Italian national during World War II trumped the rules on state immunity. See Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 93 (Feb. 3).

102. The court has jurisdiction over all forty-seven states of the Council of Europe who have all ratified the convention that established the Court. See *Chart of Signatures and Ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUR., <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures> (last visited Apr. 4, 2016).

103. At present, nine of the thirty-four countries belonging to the Organization of American States have not ratified the American Convention on Human Rights, and as a result the Court has no jurisdiction to issue an adjudicatory opinion on cases lodged against those States. See *B-32: American Convention on Human Rights*, INTER-AM. COMM’N ON HUM. RTS., <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited Apr. 4, 2016).

104. The protocol to the African Court on Human and Peoples Rights has been ratified by only twenty-six of the fifty-four countries in the African Union and is now going to be merged into the newly proposed African Court of Justice and Human Rights. At present the new court has only five of the fifteen ratifications needed for it to come into effect. See Protocol on the Statute of the African Court of Justice and Human Rights (July 1, 2008), art. 9(1).

105. The United States, along with eleven others in the Organization of American States, has not ratified the American Convention on Human Rights, which means that the Inter-American Court cannot adjudicate claims against it. See *B-32 American Convention on Human Rights*, INTER-AM. COMM’N ON HUM. RTS., <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited Apr. 6, 2016).

those actions.<sup>106</sup> Theorists have highlighted the expressive function of the label attached to a crime<sup>107</sup> and the need for a victim to feel the label accurately reflects what she or he suffered.<sup>108</sup>

While the fair labeling concern has been raised almost exclusively with respect to criminal law,<sup>109</sup> fair labeling concerns have particular salience with respect to the law of state responsibility for State-Enabled Crimes. As Christine Evans explains with respect to the Inter-American Court's docket, most of the applicants are family members of victims, rather than survivors; moreover, "[d]ue to the nature of the violations, restitution has often been impossible."<sup>110</sup> For such victims, fair labeling concerns are important because in the absence of full restitution, they seek public acknowledgement that accurately reflects what they and their families suffered.<sup>111</sup> And with respect to a number of State-Enabled Crimes, a human rights court is unable to fulfill this fair labeling concern.

To illustrate the problem, consider a 2004 decision by the Inter-American Court of Human Rights that found that on July 18, 1982, Guatemalan military forces massacred an estimated 268 members of the Plan de Sánchez community, most of them belonging to the indigenous Mayan population. In the aftermath of the massacre, government forces destroyed the dwellings in the village and stole the villagers' animals, food stores, and other items crucial for survival.<sup>112</sup> The Inter-American Commission on Human Rights explained to the Court that the massacre "was carried out within the framework of a genocidal policy of the Guatemalan state."<sup>113</sup> While not disputing this, the Court had to note that it does not have subject matter jurisdiction over genocide, so it could not consider the responsibility of the Guatemalan state for genocide as the victims had requested.<sup>114</sup> Instead it could only conclude that the state was responsible for violations of a multitude of rights ranging from the right to humane

106. See Andrew J. Ashworth, *The Elasticity of Mens Rea*, in *CRIME, PROOF AND PUNISHMENT: ESSAYS IN MEMORY OF SIR RUPERT CROSS* 45, 56 (1981) ("[T]he legal designation of an offence should fairly represent the nature of the offender's criminality.").

107. See, e.g., Victor Tadros, *Fair Labelling and Social Solidarity*, in *PRINCIPLES AND VALUES IN CRIMINAL LAW AND CRIMINAL JUSTICE* 67, 78 (Lucia Zedner & Julian Roberts eds., 2012).

108. See, e.g., James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 *MOD. L. REV.* 217, 235-37 (2008).

109. See James Goudkamp, *Defences in Tort and Crime*, in *UNRAVELING TORT AND CRIME* 208, 235 (Matthew Dyson ed., 2014).

110. CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 67 (2012).

111. See Graham Virgo, *Characterisation, Choice of Law and Human Rights*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 325, 335 (Craig Scott ed., 2001).

112. *Plan de Sánchez Massacre v. Guatemala*, Merits, Inter-Amer. Ct. H.R. (ser. C) No. 105 (April 29, 2004).

113. *Id.* at ¶ 2; see also *GUATEMALAN COMM'N FOR HISTORICAL CLARIFICATION, GUATEMALA: MEMORY OF SILENCE* 41 (1999), <https://hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf> (concluding that agents of the Guatemalan state conducted acts of genocide against groups of Mayan people).

114. *Plan de Sánchez Massacre v. Guatemala*, Merits, Inter-Amer. Ct. H.R. (ser. C) No. 105, ¶ 51 (April 29, 2004).

treatment to the right to equal protection.<sup>115</sup> Taking into account the fair labeling perspective, this decision failed to accurately reflect what the state was responsible for.

### 3. *International Courts: Disincentives and the Fact-Finding Problem*

With the pursuit of state responsibility largely precluded at the domestic level as a result of state immunity, and insufficient at the regional level, due to both limited geographical coverage and fair labeling concerns, the final question is how state responsibility fares at the international level. Here too, problems arise.

The ICJ is the principal judicial organ of the United Nations, and a forum in which, subject to its jurisdictional requirements, states—and states alone—can bring claims of state responsibility against each other on the basis of violations of treaty obligations or of customary international law.<sup>116</sup>

The vast majority of cases at the ICJ are brought by a state that alleges its rights, or the rights of its citizens, have been violated by another state. But the vast majority of State-Enabled Crimes involve the responsibility of the state for alleged violations against its own citizens. Since no state will bring a claim for responsibility against itself, the pursuit of state responsibility for State-Enabled Crimes at the ICJ necessarily depends on states that have no direct relationship to the alleged crimes bringing a case. And with one (arguable) exception, no such a case has ever been adjudicated with respect to State-Enabled Crimes.<sup>117</sup>

The absence of such cases at the ICJ is not due to any legal obstacle. To

115. *Id.* at para. 52(3).

116. See Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933. As with the coverage problems afflicting the regional mechanisms, the ICJ also has some limitations arising from the fact that roughly two-thirds of the states that are members of the United Nations have not lodged declarations to accept the compulsory jurisdiction of the ICJ. See *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L CT. JUST., <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Apr. 22, 2016). The Court does, however, have a further route to jurisdiction over states through the various U.N. treaties that grant to the Court jurisdiction. But a number of states lodge reservations to this jurisdictional article in the treaties they join. For instance, fourteen countries have entered reservations to the ICJ's jurisdiction under Article IX of the Genocide Convention. See *Convention on the Prevention and Punishment of the Crime of Genocide, Declarations and Reservations*, UNITED NATIONS, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt\\_dsg\\_no=IV-&chapter=4&lang=en#31](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mt_dsg_no=IV-&chapter=4&lang=en#31) (last visited Apr. 22, 2016). Overall, the ICJ's docket is dominated by territorial disputes, rather than human rights violations. See BERRY E. CARTER, PHILLIP R. TRIMBLE & ALLEN S. WEINER, INTERNATIONAL LAW 335 (5th ed. 2007).

117. See *Questions Relating to the Obligation To Prosecute or Extradite (Belg. v. Senegal)*, Judgment, 2012 I.C.J. Rep. 422 (July 20). In that case, Belgium bought a claim of state responsibility against Senegal on the basis of a number of Chadians who had allegedly been tortured under the regime of former Chadian President Habré, who was exiled in Senegal. Some of those Chadians were Belgian citizens, but the Court held that this connection was not necessary for Belgium to have standing. *Id.* ¶¶ 69. There has been one other case brought by a third-party state, wherein Portugal pursued state responsibility against Australia for the alleged violation of the rights of the Timorese to self-determination. However the Court declined to adjudicate because a decision would necessarily require the Court to rule on the legality of Indonesia's conduct and Indonesia had refused to consent to the Court's jurisdiction. See *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, ¶¶ 19-23 (June 30).

the extent that the Articles on State Responsibility reflect international law,<sup>118</sup> they are clear that any state can pursue the responsibility of another state when “the obligation breached is owed to the international community as a whole.”<sup>119</sup> And as noted above, that obligation covers all State-Enabled Crimes.<sup>120</sup> Even setting aside the Articles on State Responsibility, the ICJ has itself made clear that with respect to obligations owed to the international community as a whole, any state can bring a claim of state responsibility to the court.<sup>121</sup> Thus the primary barrier to the adjudication of state responsibility for most State-Enabled Crimes is not a legal one, but a political one.<sup>122</sup> With the exception of the state whose citizens are directly injured, a state pursuing responsibility for State-Enabled Crimes through this forum will face certain and significant diplomatic costs in terms of its relationship with the defendant state (and that state’s allies), without any accompanying benefit to its own citizens.<sup>123</sup>

Of course, with respect to the much narrower pool of cases in which the victims of a State-Enabled Crime belong to a different state than the one responsible for the violations, these diplomatic disincentives largely disappear. If State *A*’s citizens are harmed due to actions that State *B* is responsible for, then there may well be political benefits to State *A* pursuing a claim against State *B* at the ICJ. However, the limited experience of such bilateral cases brings a secondary problem into view; specifically, the ICJ’s impaired fact-finding capacity.

In *Bosnia v. Serbia*, the ICJ’s first case of a state responsibility claim for

118. See *supra* Section I.C.

119. Articles on State Responsibility, *supra* note 25, art. 48(1)(b). This phraseology is intended, according to the commentary to the Articles on State Responsibility, to take up the essence of what the ICJ first termed obligations *erga omnes*, originally advanced by the ICJ in a now famous paragraph of dictum in the Barcelona Traction case. Barcelona Traction, Light & Power Co. (Belg. v. Spain), Second Phase, 1970 I.C.J. Rep. 4, ¶ 33 (Feb. 5).

120. See *supra* Section I.C.

121. The Court’s most recent word on this issue came in its 2012 judgment in *Questions Relating to the Obligation To Prosecute or Extradite* (Belgium v. Senegal), Judgment, 2012 I.C.J. Rep. 422, ¶ 69 (July 20), although because both states were parties to the U.N. Convention on Torture the Court did not need to assess what Belgium’s standing would have been had it had to rely solely on customary international law. See generally Vera Gowlland-Debbas, *Judicial Insights into Fundamental Values and Interests of the International Community*, in THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS 327 (A.S. Muller, D. Raič & J.M. Thuránszky eds., 1997) (on the relationship between standing and *erga omnes* obligations at the ICJ).

122. See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 324 (2001) (describing the failed effort to get any state to pursue a claim against Cambodia at the ICJ for the atrocities committed under the Khmer Rouge).

123. The same diplomatic disincentives impact the pursuit of state responsibility at the regional level also, with the vast majority of cases against states being brought by individual applicants. In the rare instances in which a state has pursued a claim against another state under the regional human rights conventions, there has generally been an ethnic or national tie between the complaining state and the alleged victims. See, e.g., Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978). And there is only one case where states without such a connection have brought a case against another state. See Denmark, Norway, Sweden & Netherlands v. Greece (The Greek Case), App. Nos. 3321/67, 3322/67, 3323/67 & 3344/67, 1969 Y.B. Eur. Conv. on H.R. 5 (Eur. Comm’n of H.R.); see also James Becket, *The Greek Case Before the European Human Rights Commission*, 1 HUM. RTS. 91, 95 (1970) (describing the reason the Scandinavians brought the case as “a reason which might well be without precedent in international affairs . . . a belief it was their moral duty to act”); Henkin, *supra* note 69, at 395.

genocide, lodged some fifty years after the Genocide Convention came into force, the Court relied almost exclusively on the fact-finding done by the ICTY. This is problematic because it meant relying on a factual record developed by a tribunal tasked solely with adjudicating individual criminal responsibility; the parties brought evidence before the ICTY with the purpose of securing the guilt or innocence of a given individual, not with providing the tribunal with evidence needed to determine state responsibility.

Idiosyncratic factors, such as the untimely death of a defendant, the inability to secure a defendant's arrest, or simply a particular prosecutorial strategy, influenced what evidence did and did not make it to the tribunal. Such factors should not have been determinative of what evidence the ICJ assessed in fulfilling its task of assessing state responsibility. Indeed, after scrutinizing the Court's 171-page judgment, Justice Goldstone and I concluded that "the Court's fact-finding approach in this test case raises doubts as to whether, in practice, a state will ever be held responsible for genocide outside the parameters of the prior convictions of individual perpetrators."<sup>124</sup> And the *Bosnia v. Serbia* case was merely the latest instantiation of the more general meekness of the Court with respect to fact-finding.<sup>125</sup> Overall then, the international level is no more promising for the adjudication of state responsibility for State-Enabled Crimes than either the domestic or regional options.

### C. *Inherent Flaws of a Bifurcated Response*

To recap, both the system of individual criminal responsibility and the system of state responsibility struggle with adjudicating State-Enabled Crimes. With respect to individual criminal responsibility, there is a rich body of literature engaged with identifying these challenges and proposing ways through them. Still, the scholarship in this area tends to take the bifurcated structure of the existing system as given and thus fails to draw the connection between some of the challenges it has identified and the siloed system in which international adjudication takes place.

By contrast, the scholarship on the flipside of this coin—the challenges of adjudicating state responsibility for State-Enabled Crimes—is noticeably sparse.<sup>126</sup> This is not because the system of state responsibility does not face its own challenges. Indeed, an analysis of its operation at the domestic, regional, and international level reveals significant limitations in the implementation of what might otherwise be a useful body of law for holding states accountable for their role in State-Enabled Crimes.

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124. Richard Goldstone & Rebecca Hamilton, *Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia*, LEIDEN J. INT'L L. 95, 103 (2008).

125. See, e.g., SHABTAI ROSENNE, *ESSAYS ON INTERNATIONAL LAW AND PRACTICE* 235-37 (2007) (noting that not once in its history has the Court taken up the option open to it under Article 30 of its Statute to make its own investigation into the facts); see also *Pulp Mills on the Uruguay River* (Arg. v. Uru.), 2010 I.C.J. Rep. 18 (Apr. 20) (joint dissenting opinion by Al-Khasawneh & Simma, JJ.); Marko Milanovic, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT'L L. 669, 677 (2007).

126. See *supra* note 93 and accompanying text.

The disparity in attention to these challenges, relative to those faced within the system of individual criminal responsibility, is not by chance; it is a direct reflection of the disparities in the way the international legal system adjudicates State-Enabled Crimes. The adjudication of State-Enabled Crimes is not simply bifurcated; it is bifurcated in a deeply skewed manner. And whatever the particular balance of reasons for the current state of affairs, one thing is certain: absent an equally strong system of state responsibility, international criminal law functions to obscure the role of the state in State-Enabled Crimes. It does this to the degree it creates a historical record that focuses on the role of individual action without any comparable scrutiny of the state policies and practices undergirding that action, and to the degree it expresses the condemnation of the international community against individuals—and the individuals alone.<sup>127</sup>

At this point it becomes tempting to suggest that the way forward is to beef up the existing mechanisms of state responsibility, bringing them on par with those of individual responsibility. This would be a step in the right direction to the extent that it would increase the frequency with which the role of states in State-Enabled Crimes would be adjudicated. But it would leave intact a fundamentally flawed structure for responding to State-Enabled Crimes—one in which individual responsibility is adjudicated by one set of courts and state responsibility is adjudicated by another, generating a fragmented picture of how these crimes are committed and risking unfair outcomes to defendants and ultimately to victims.<sup>128</sup>

This bifurcated approach makes little sense. Although not previously framed in these terms, it is the attempt to isolate the individual's role from the state-constructed situational factors enabling his<sup>129</sup> behavior that underpins the problems with international criminal law described above. As a result, such problems would persist even if the existing mechanisms for holding states responsible were of uniformly equivalent strength to those holding individuals responsible.

In addition, State-Enabled Crimes often involve the most egregious violations imaginable, and by the time the case reaches a court there may be little

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127. Making this point in relation to the ICTY, Jelena Subotic observes, “[T]here is, of course, a reason that the Serbian government failed to address past violence or claim any responsibility for it. The nationalist ideological matrix that brought the policies of the 1990s has remained unchanged in Serbia.” Jelena Subotic, *Expanding the Scope of Post-Conflict Justice: Individual, State and Societal Responsibility for Mass Atrocity*, 48 J. PEACE RES. 157, 164 (2011). And as Gabriella Blum explains in an article on State Crime, “The project of international criminal law has channeled all explicit punitive urges to individuals, keeping the state protected from punishment.” Gabriella Blum, *The Crime and Punishment of States*, 38 YALE J. INT’L L. 57, 121 (2013).

128. The imbalance between individual and state responsibility in adjudicative settings may not hold true when taking into account the full panoply of mechanisms for international law enforcement. But what does remain true, no matter which mechanisms are considered, is that the response to State-Enabled Crimes takes place through a bifurcated structure in which assignments of individual and state responsibility are made in isolation.

129. I use the male pronoun to describe individual defendants in this Article on the grounds that most defendants that are adjudicated for their alleged role in State-Enabled Crimes are men. This does not, of course, mean that women are not also held responsible for their roles in such crimes. See, e.g., *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, Judgment and Sentence (June 24, 2011).

doubt about whether the violations actually happened.<sup>130</sup> Thus, the pressure on a court to impose heavy legal consequences on those it has jurisdiction over is immense.<sup>131</sup> As a consequence, one can readily imagine that even under a perfectly balanced structure, a court tasked with determining individual criminal responsibility would overemphasize the role of individual action relative to the contributory factors of state involvement, and that a court tasked with assessing state responsibility would overemphasize the state's role. By contrast, a court that is able to consider both sides of the responsibility coin concurrently would be better positioned to reach a more accurate understanding of what took place, assess relative responsibility in a way that is fair to both individual and state and, as a result, better serve the interests of victims in understanding the truth about what happened.

Finally, a bifurcated system, no matter how evenly configured, presents anyone with information about a State-Enabled Crime the possibility of playing one side of the system off against the other. To take a concrete example, there is strong evidence to suggest that a deal the Serbian government made with the ICTY to grant the tribunal secret and exclusive access to a treasure trove of state documents in its pursuit of its case against former President Slobodan Milošević, was done specifically to ensure that the ICJ would not be able to access those same documents in its case on Serbia's state responsibility.<sup>132</sup> Only an integrated response can prevent this kind of horse-trading.

### III. AN INTEGRATED RESPONSE TO INTERNATIONAL CRIME

The analytical category of State-Enabled Crimes highlights the existence of a significant subset of international crimes that entail the dual responsibility of individual and state. At the end of the previous Section I noted that the concerns that arise upon recognizing the interconnected role of individual and state in so many international crimes cannot be resolved simply by ensuring that accountability for the responsibility of individual and state are appropriately balanced within the bifurcated structure of the existing system. In this Section I advance the arguments in favor of moving to an integrated response, whereby individual and state responsibility would be adjudicated concurrently by a single court.

First, I explain how such a move would mitigate the inaccuracy and unfairness of the present system. I also describe and categorize the justifications

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130. This is not to say there are not complicated legal issues to resolve, or that the case does not still have to be proved, but simply that the violations are likely to have been subject to years of media and human rights reporting prior to their legal adjudication.

131. See, e.g., Shahram Dana, *Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY*, 4 INT'L CRIM. L. REV. 321 (2004).

132. See Marlise Simons, *Serbia's Darkest Pages Hidden from Court*, N.Y. TIMES, Apr. 8, 2007, <http://www.nytimes.com/2007/04/08/world/europe/08iht-serbia.4.5191511.html>. In the words of the Deputy ICTY prosecutor at the time, "There was no conceivable reason for making a deal with Yugoslavia. It served only one purpose: To keep Belgrade's responsibility from public scrutiny and, significantly, from the International Court of Justice." Geoffrey Nice, *Hidden From Public View; Campaign Finance Reform: The Tragedy of Iraq*, N.Y. TIMES, Apr. 16, 2007, <http://www.nytimes.com/2007/04/16/opinion/16iht-edlet.html>.

advanced for the international adjudication of State-Enabled Crimes and argue that no matter one's theory of international justice, an integrated response can achieve the goals of adjudication at least as well, and in most cases much better, than a bifurcated response. Second, I describe one way that an integrated response could be brought to life, explaining how the adjudication of state responsibility in the reparations phase of an ICC trial for State-Enabled Crimes would benefit individual defendants, victims, and states alike.

### *A. Benefits of an Integrated Response*

The international legal system *could* respond to State-Enabled Crimes in a way that more closely reflects the realities of their commission. State and individual responsibility are integrated when these crimes are committed, and if this integration were recognized and reflected in the way the international judicial system responded to these crimes, a more accurate picture and fairer set of consequences would result. Instead, the current system labors to parse state and individual responsibility out under bifurcated adjudicative settings.

Conceptual integration is not only possible in both legal and logistical terms but, as I argue in this section, an integrated response would help address some of the concerns that scholars have raised with respect to international criminal law and, crucially, would enhance the ability of the international legal system to deliver on the goals of prevention, peace and reconciliation, and retribution.

#### *1. Mitigating Inaccuracy and Unfairness in International Criminal Law*

International criminal law is currently the dominant approach to adjudicating State-Enabled Crimes. But as the scholarship in this area highlights, there are points of immense tension between the structure and function of an international criminal trial and the nature of many of the crimes that these trials adjudicate.

As explained above, individual trials often run into a deviance paradox: Judges are obliged to condemn individuals for behavior that may not in fact have been deviant under the circumstances in which it was committed.<sup>133</sup> This is unfair to defendants to the degree that it punishes them beyond what their individual culpability actually merits, and it fails to accurately reflect the role the state played in crafting circumstances conducive to the perpetration of the crime. Integrating state responsibility into individual criminal proceedings for State-Enabled Crimes offers the possibility of resolving the paradox by illuminating the state's role and, as a result, mitigating potentially unjust outcomes

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133. See *supra* Section II.A. Perhaps the most striking example of this occurred in the *Erde-mović* case at the ICTY. See Prosecutor v. Erdemović, Case No. ICTY IT-96-22-T, Sentencing Judgment, ¶ 23 (Int'l Criminal Trib. for the Former Yugoslavia Nov. 29, 1996).

for individual defendants.

When, through the policies or practices of its organs, a state constructs an environment that normalizes the individual's deviant behavior, a trial that reveals the details of that environment would provide the missing context needed to assess the defendant's true culpability. Moreover, a trial that could lead to the state being held accountable for its role would ensure that the context evidence introduced would not serve simply to provide some degree of exculpation to the defendant, but could also be used to heighten the responsibility of the state. The result would be an overall picture of accountability that reflects relative wrongdoing better than under a bifurcated structure in which these two contributing aspects, of situational factors and individual action, cannot be concurrently weighted.

Another concern raised about individual trials is that they face a selective prosecution problem in cases where there are more defendants than a court can ever hope to try. It is hard for prosecutors to navigate their way through this without encountering charges of bias, real or perceived. An integrated response cannot address the problem directly; it does nothing to increase the number of individual defendants prosecuted, so selective prosecution remains a reality. But it may help mitigate the perceptions of bias that often flow from these selective charging decisions. Although no other individual is singled out for accountability when the state is held responsible, the determination of legal consequences against the state does spread the responsibility—although, crucially, not the guilt—among everyone in the state.<sup>134</sup> Having a single court determine state responsibility and individual culpability in tandem situates the defendant's wrongdoing alongside the wrongdoing of others, reducing the implication that he is uniquely responsible.

## 2. Strengthening Prevention

Proponents of the international adjudication of State-Enabled Crimes argue that trials contribute to the goal of prevention at two levels. At a macro level the idea is that through the process of norm expression, the trials stigmatize the acts in question, making them more unpalatable in the future.<sup>135</sup> With global backing and media interest, international trials are well-suited to play this expressive role.<sup>136</sup> The question, however, is what content they express.<sup>137</sup>

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134. See *infra* Section III.A.3.

135. See, e.g., Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 CHL-KENT L. REV. 329, 345 (2008); Margaret M. deGuzman, *Choosing To Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 270 (2012) (describing expressivism as "the best justification for the ICC's work"); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 569, 576 (Samantha Besson & John Tasioulas eds., 2010); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39 (2007).

136. See, e.g., deGuzman, *supra* note 135, at 316 (arguing that the ICC can serve an expressive function even through "a small number of illustrative prosecutions").

137. See *id.* at 270 ("The expressive prescription raises questions about what global norms the ICC should seek to express.")

Those who defend criminal law by reference to expressivism argue that punishments draw a line in the sand, marking out the types of behavior that the community condemns.<sup>138</sup> Payam Akhavan, for instance, argues that holding individuals accountable contributes to “the transformation of a culture of impunity that has hitherto implied the political acceptability of massive human rights abuses.”<sup>139</sup> The hope then is that this signaling function will help prevent the recurrence of such crimes in the future.

But what if the norm expressed is in fact something else? What if, taking both the deviance paradox and the problem of selective prosecution into account, the norm expressed is that the international community will punish a select handful of individuals who may, in some cases at least, have behaved much like the others around them who are not on trial? Of course, this is a particularly uncharitable rendering. In their best form, individual criminal trials could narrate the potential for people, even in overwhelming situations, to choose to behave in a manner that is consistent with the standards the international community seeks to uphold.<sup>140</sup> But at present, such a conception remains aspirational, and even if it were achieved, it would pale relative to the power of a message that an integrated response could send: State-Enabled Crimes are unacceptable to the international community, and neither individuals nor states will be shielded from responsibility for their commission.

Accounting for the state’s role is a crucial element of any sensible prevention strategy for State-Enabled Crimes. If the state policies and practices that enabled the crimes to be committed in the first place are not documented and challenged, then there is little reason to believe the crimes will stop. While individuals who participated, or even those who oversaw the crimes may end up behind bars, others will likely take their place, provided the situational factors remain the same. In other words, individual criminal responsibility alone is a half-hearted and somewhat circuitous effort to prevent the recurrence of State-Enabled Crimes.<sup>141</sup>

By contrast, the remedies that a court can order following a finding of state responsibility provide potential mechanisms to tackle the situational factors behind State-Enabled Crimes more directly. Take, for example, an order of reparations. If citizens, particularly of a democratic state, have to contribute to reparations through their taxation system, it is likely that a least at segment of

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138. See, e.g., JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 98 (1970).

139. Akhavan, *supra* note 11, at 8.

140. See Mohamed, *supra* note 5, at 1631.

141. Even bringing non-adjudicative enforcement mechanisms against the state into view, such as those sometimes adopted by the U.N. Security Council, the overall picture is of a second-best approach. Non-adjudicatory mechanisms rarely illuminate in any detail the contribution that state policies or practices made to the commission of the crimes. Such details, which a court is well-equipped to document, can provide civil society advocates, including those inside the country where the State-Enabled Crimes have occurred, with valuable information for identifying and protesting such policies and practices in the future. Moreover, enforcement action against a state by the U.N. Security Council is, fairly or not, more likely to be seen as the product of power politics relative to action taken by a court following proceedings in which the state itself has had the opportunity to participate. Such perceptions are likely to matter when it comes to a state’s willingness to take measures to prevent further crimes.

them will pressure their government to ensure that the policies and practices that enabled the crimes are dismantled—if only out of the self-interest involved in not wanting to pay further reparations in the future. Indeed, a court could tailor its reparation orders to this specific end, requiring reparation payments to be continued only if and so long as the policies and practices that enabled the crime remain in place.

Even absent an order of reparations, a simple call by an international court for the state to issue an apology is likely to catalyze a conversation domestically about the policies and practices that led to the request. And these domestic pressures could, and likely would, be supported by human rights advocates outside the country, ensuring both internal and external pressure for reform.<sup>142</sup>

At the micro level, prevention is thought to operate through an individualized conception of deterrence. Unfortunately, the empirical case for international trials deterring would-be perpetrators is limited, partly because it is hard to prove a counterfactual. Moreover, deterrence can take time, and the rapid expansion of international criminal trials notwithstanding, they are still a relatively new phenomenon.<sup>143</sup> Nonetheless, it is far from clear that the theory of deterrence, developed in a domestic setting, is even applicable to international law, especially once the particular characteristics of State-Enabled Crimes are factored in. Two problems arise. First, domestic deterrence theories rely on a strong connection between the commission of a crime and the likelihood of punishment.<sup>144</sup> Yet very few perpetrators of State-Enabled Crimes are ever actually prosecuted. Proponents of international criminal law point to the historical baseline of impunity to argue that any advance on this baseline must improve deterrence.<sup>145</sup> But the move from there being no chance of punishment to there being very little chance of punishment still leaves us at a significant distance from the high likelihood of punishment thought to be needed to achieve deterrence. Even with the ICC in operation, those actually prosecuted for international crimes constitute just a fraction of those involved in their commission.

This is not to say that criminalizing the individual's action is unimportant; it may signal to others that, outside of their immediate setting, such actions are still deviant and this may deter some such actions. But again it suggests that the

142. See generally MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* (1998).

143. David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473, 474 (1999) (“[T]he connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption.”). But see Hyeran Jo & Beth Simmons, *Can the International Criminal Court Deter Atrocity?* 1 (unpublished manuscript) (on file with author) (concluding on the basis of extensive empirical research that the ICC “can deter some governments and those rebel groups that seek legitimacy”).

144. See, e.g., Charles R. Tittle, *Crime Rates and Legal Sanctions*, 16 *SOC. PROBS.* 409, 409-23 (1969).

145. Gerard E. O'Connor, *The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court*, 27 *HOFSTRA L. REV.* 927, 974 (1999) (“[I]t is clear that numerous massacres occurred this century without an ICC in place. Therefore, a permanent ICC would likely have a deterrent effect . . .”).

pursuit of the individual addresses only half the story. A bifurcated response could, of course, address the other half, pursuing state responsibility separately. But an integrated approach is better yet; by connecting state responsibility with individual action, the situational factors that enabled the crime's commission can be brought into plain sight. For deterrence at either the micro or macro level to stand the best chance, it makes sense to pursue both individual and state responsibility in an integrated fashion since both are integral to the commission of State-Enabled Crimes.

### 3. *Fostering Peace and Reconciliation*

Proponents of international adjudication believe that international trials can help achieve peace and reconciliation and they advance three non-exclusive mechanisms through which this occurs. First, trials can channel instincts of revenge into a legal process, thereby reducing the likelihood of retaliatory violence. While the fairly minimal level of retaliatory violence currently present in the two State-Enabled Crime situations where international adjudication has been most thoroughly tested (Rwanda and the former Yugoslavia) is potentially attributable to a range of factors, it at least does not provide substantial disconfirming evidence for the theory. To the degree trials serve this retaliation-limiting function, however, there is no reason to think that this function works any better for a judicial process that focuses solely on individual responsibility as compared to what it would do with a process that considered both individual and state responsibility.

Second, proponents argue that trials generate an unassailable historical record,<sup>146</sup> and that without such a record "the embers of yesterday's conflict can become the fire of tomorrow's renewed conflict."<sup>147</sup> The degree to which trials create such a record is contested. Some argue that because the purpose of a criminal trial is to establish the guilt or innocence of the individual defendant, asking the criminal process to also carry the burden of writing history misunderstands, and potentially distorts, its purpose.<sup>148</sup> But even accepting that a judicial process can build a historical record, only an integrated response, illuminating both individual and state responsibility, can hope to represent the truth about State-Enabled Crimes.

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146. See, e.g., BASS, *supra* note 11, at 302-04; Robert I. Rotberg, *Deterring Mass Atrocity Crimes: The Cause of Our Era*, in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES 1, 9 (Robert I. Rotberg ed., 2010) ("The establishment of the ICC can bring fabricated denials of the very existence of war crimes to a halt.").

147. BASSIOUNI, *supra* note 12, at 23. A related argument is that knowledge of the truth of what happened helps survivors, victims' families, and affected communities move forward. See, e.g., Ban Ki-Moon, *UN International Day for the Right to the Truth Concerning Gross Human Rights Violations and for the Dignity of Victims*, UNITED NATIONS, <http://www.un.org/en/events/righttotruthday/2015/sgmessage.shtml> (Mar. 24, 2015). But see Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L. REV. 295 (2005) (providing a typology of psychological effects of the trial process on victims, not all of which are positive).

148. See Saira Mohamed, *A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice*, 80 COLO. L. REV. 327, 360 n.144 (2009) (citing Danner & Martinez, *supra* note 92, at 95).

Finally, proponents believe that in the aftermath of inter-ethnic violence criminal trials can individualize guilt, thereby mitigating narratives of group criminality that could spur cycles of vengeance. As former Nuremberg prosecutor Hartley Shawcross argued in defense of the ICTY, “There can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs.”<sup>149</sup> Yet even assuming trials do make some headway in undermining group attribution, there is every reason to imagine that an integrated response would strengthen this function.

Imagine if a defendant from an ethnic group generally associated with the perpetration of violence is on trial: a Hutu defendant at the ICTR, for example. If the responsibility of the state is not accounted for in the trial, those watching may impute the defendant’s motivations to ethnic group characteristics when, in reality, the contribution made by the state is a better explanatory variable for the defendant’s behavior. And while under a perfectly balanced bifurcated structure, a trial on state responsibility could determine that the state played an important role, an integrated response is the best option for drawing out the influence of the state on the individual’s behavior, thereby reducing the space available for ethnic group characteristics to be blamed.

#### 4. *Advancing Retributive Goals*

Finally, retribution is the least commonly advanced of the justifications for the international adjudication of State-Enabled Crimes. The reason for its relative unpopularity is not hard to ascertain: it stretches credulity to imagine that the most common punishment that international criminal law offers—life imprisonment in a European jail cell—constitutes a “just desert” for those responsible for the worst crimes imagined by humankind.<sup>150</sup> The concern raised by Hannah Arendt in the aftermath of the Eichmann trial still rings true for many State-Enabled Crimes: “[N]o punishment is severe enough.”<sup>151</sup>

Of course, the kind of accountability that flows from state responsibility is not punitive, so it does not speak directly to retribution. Even so, an integrated response marks an advance over the existing system on two dimensions. First, in light of the fair labeling issue raised earlier, an integrated response retains a stronger connection between state responsibility and criminal liability than any response under a bifurcated structure can.<sup>152</sup> Second, retribution is not just about ensuring that all sources of responsibility are accounted for; it is also about ensuring that the disbursement of blame between the different sources

149. Hartley Shawcross, *Let the Tribunal Do Its Job*, N.Y. TIMES, May 22, 1996, at A17.

150. See *Luxury Prison for Bosnia’s Iron Lady*, TELEGRAPH CALCUTTA, June 7, 2013, [http://www.telegraphindia.com/1030607/asp/foreign/story\\_2044806.asp](http://www.telegraphindia.com/1030607/asp/foreign/story_2044806.asp); *Enforcement of Sentences*, UNITED NATIONS MECHANISM FOR INT’L CRIM. TRIBUNALS, <http://www.unmict.org/en/about/enforcement-of-sentences> (last visited Apr. 22, 2016).

151. HANNAH ARENDT & KARL JASPERS, CORRESPONDENCE 1926-1969, at 54 (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimber trans., 1992).

152. See *supra* Section II.B.2.

accurately reflects the responsibility of each—the “just” in just desert. And flowing from the enhanced accuracy already described, an integrated response presents the greatest likelihood for apportioning blame fairly on the individual subject to punitive measures.

*B. Concerns with an Integrated Response*

The benefits offered by an integrated response seem significant. Yet there is a troubling counter-argument. Would an integrated response be a retrograde move? Would it place the international legal system back to a pre-World War II era with the associated *bête noire* of collective guilt?

In order to answer these questions in the negative, it is first important to emphasize that the integrated response proposed here does nothing more than marry the existing law on state responsibility with international criminal law. To the extent there are concerns about the collective consequences of an integrated response, they already exist under the current law on state responsibility. All that the integrated proposal advanced here does is provide a unifying mechanism through which to enforce these two existing bodies of law.

In addition, it may be worth acknowledging that consequences for the state’s role in international crime have not been totally abandoned so much as selectively displaced into a political process. While a fuller consideration of this phenomenon is beyond the scope of the present Article, it suffices to say that powerful states regularly impose measures, from economic sanctions to military incursions, which are punitive in all but name.<sup>153</sup> Such enforcement mechanisms, conducted under the rhetorical rubric of prevention, are largely removed from the constraints of formal adjudication and typically fail to meet basic due process standards.<sup>154</sup> They increase the ability of the strongest states in the international system to selectively enforce measures against those who are disfavored, while leaving themselves and their allies free from sanction whenever they play a role in State-Enabled Crimes. As a result, citizens of the weakest states in the international order regularly absorb the costs of their state’s role in State-Enabled Crimes that citizens of powerful states do not. Relative to the status quo, bringing the remedies that flow from the assignment of state responsibility within a legal process may in fact be a progressive move.

State responsibility, of course, creates collective responsibility, but this should not be conflated with collective guilt. While guilt flows from culpability, responsibility flows from citizenship. And citizenship, as Michael Walzer explains, is “common destiny,” connecting the continuing entity of the state to citizens of the past, present, and future.<sup>155</sup>

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153. See generally Blum, *supra* note 127.

154. *Id.* at 98-103; see also Jeremy M. Farrall, *Rule of Accountability or Rule of Law? Regulating the UN Security Council’s Accountability Deficits*, 19 J. CONFLICT SECURITY L. 389 (2014). Of relevance to this Article is that such measures also do little to illuminate the state policies and practices underlying State-Enabled Crimes the way that a formal adjudication of state responsibility is able to.

155. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 297 (1977).

The idea that citizens would share the obligations of state responsibility is fairly intuitive under a democratic system. To the degree that citizens elect their representatives—and have the ability to have them removed from office—it seems reasonable to hold those citizens responsible for the actions of their representatives. And just as citizens receive benefits that flow from merely belonging to a state, such as access to courts and voting systems, so too should they bear the costs.

Under a totalitarian regime, the argument is less obvious, but it can be found by framing the acceptance of responsibility, and associated burden of costs, for State-Enabled Crimes as a positive act that *should* be attributed to the entirety of a state's people.<sup>156</sup> When a state, totalitarian or otherwise, accepts responsibility for a State-Enabled Crime, it signals the end of denial and the promise of a future without such crimes. To the extent this comes with costs, they may be a fair price to pay for citizenship in a country where state authority maintains an affirmative opposition to State-Enabled Crimes. And this is particularly so considering that many State-Enabled Crimes are committed against the citizens of the state involved.

Finally, any lingering concerns about collective guilt are mitigated by an integrated response because it adjudicates individual guilt alongside state responsibility. Thus an integrated response, in contrast to a bifurcated one, makes explicit the point that criminal guilt lies with particular individuals on trial, not with every citizen, even if the latter share the costs of state responsibility.

### C. *Integration in Practice: State Responsibility at the ICC*

Having assessed what an integrated response could offer over the existing bifurcated approach, the final question is what such a response might look like. In this Section, I present one possible mechanism, which is to integrate the adjudication of state responsibility into the reparations phase of any ICC trial involving State-Enabled Crimes. This is, however, just one of several possible mechanisms for providing an integrated response to State-Enabled Crimes. Others may argue for alternatives. There are several possibilities, even when just limiting the options to adjudicative mechanisms. Examples include conflict-specific options, such as integrating state responsibility into the reparations phase of the Extraordinary Chambers in the Courts of Cambodia, through to more general options, such as the addition of a criminal chamber to the ICJ to assess individual criminal responsibility concurrently with state responsibility. Another possibility is the creation of an entirely new international institution designed from the outset with an integrated response in mind.

More broadly, one might propose moving non-adjudicative mechanisms of enforcement, such as activity within the U.N. Security Council sanctions

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156. This solution has been offered in response to the challenge of assigning state responsibility for genocide. See Mohamed, *supra* note 148, at 395. In a related manner, Michael Walzer, in describing reparations paid through taxation, affirms that “[t]he distribution of costs is not the distribution of guilt.” WALTZER, *supra* note 155, at 297. See also Franck, *supra* note 71, at 570 (emphasizing that “a finding of state responsibility is not tantamount to a determination of the people’s collective guilt.”).

committee, toward an integrated approach to overcome the flaws of bifurcation, even if they retain some of the due process objections raised against mechanisms at the more politicized end of the enforcement spectrum. Regardless, my goal is not to argue that adjudicating state responsibility at the ICC is necessarily superior to these or other potential alternatives, but simply to demonstrate that there is at least one feasible mechanism for enforcing an integrated response.

The ICC is a criminal court with jurisdiction over natural persons. But at the end of every ICC trial is a reparations phase in which, drawing on the evidence presented during the criminal trial, the judges make findings on the harm suffered by the victims and order the defendant to pay damages or make other appropriate forms of reparation.<sup>157</sup> This phase uses a standard of proof lower than the 'beyond a reasonable doubt' standard that is used for the criminal part of the proceedings.<sup>158</sup>

The inclusion of this phase in the Rome Statute marked a novel development for international criminal law which had, up to that point, kept its distance from remedial claims.<sup>159</sup> Under pressure from victims of international crimes and their advocates, the drafters of the new statute decided to draw on procedures from civil law countries where victims of crime play a much more significant role than they do in common law systems.<sup>160</sup>

Reflecting the lead role that French delegates played in drafting the reparations provisions of the statute, the reparations phase functions much like a "civil attachment" proceeding to a criminal trial under the French domestic system.<sup>161</sup> In both systems, damages can be pursued at the end of a criminal trial, rather than having to hold a separate civil trial. Under the present ICC system, a reparations order can only be made against the convicted criminal defendant. But under the French criminal system, third parties that have civil, but not criminal, liability for the crime, such as the defendant's employer, can be

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157. Reparations owed by indigent defendants are paid through the Trust Fund for Victims, which is currently funded by the voluntary contributions of both state and non-state entities and individuals. See *Make a Donation*, TRUST FUND FOR VICTIMS, <http://www.trustfundforvictims.org/make-donation>. This mechanism would continue to operate as it currently does under the proposal advanced below. Any order for financial reparations against a state made after a finding of state responsibility would not come out of the Trust Fund for Victims, but would instead come directly from the state being held accountable.

158. See *Prosecutor v. Dyilo*, ICC-01/04-01/06-3129-AnxA, Order for Reparations, ¶ 22 (Mar. 3, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc1919026.pdf>. ("Given the fundamentally different nature of reparations proceedings, a standard less exacting than that for trial, where the prosecution must establish the relevant facts to the standard of 'beyond a reasonable doubt,' should apply.")

159. See, e.g., CONOR MCCARTHY, REPARATIONS AND VICTIM SUPPORT IN THE INTERNATIONAL CRIMINAL COURT 36-41 (2012).

160. Under the Rome Statute victims are assigned legal representation, which facilitates the inclusion of their views and concerns into the trial process, even going so far as giving them the right to present evidence to the court. See Rome Statute, *supra* note 18, art. 68. On the drafting history of the reparations phase, see generally THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 262 (Roy S. Lee ed., 1999).

161. See generally Jean Larguier, *Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV. 687, 694 (1965). For a more recent exposition see BERNARD BOULOC, PROCÉDURE PÉNALE 191-333 (2006) (in French).

brought into the civil attachment phase and the court can make a reparations order against them on the basis of a finding of civil liability.<sup>162</sup> The individual or entity brought in under the civil attachment process does not have to be present in the courtroom, but he or she can have legal representation throughout the proceeding if he or she so chooses.<sup>163</sup> This largely parallels what I am proposing the ICC could do by bringing a state, which likewise has non-criminal responsibility for the crime, into the reparations phase of the criminal proceeding.

Statutory guidance on the ICC reparations phase is barebones, leaving much scope for progressive development by the judges. With the reparations phase only occurring once criminal appeals and sentencing are complete, the ICC has only recently reached this phase in its first case.<sup>164</sup> This makes it an appropriate moment to consider using the reparations phase as a mechanism to advance an integrated response, since little is yet set in stone. Moreover, what groundwork that has been laid for the reparations phase is, so far, largely consistent with the possibility of introducing the adjudication of state responsibility into the process.

Nonetheless, the integration of state responsibility into the reparations phase would require an amendment to the Rome Statute. Through the amendment, States Parties would grant the Court jurisdiction over them for the purposes of adjudicating state responsibility.<sup>165</sup> Non-States Parties would have to give their express consent before the ICC could make any adjudication that affected their rights and responsibilities.<sup>166</sup>

What the integration of state responsibility into the reparations phase would look like in practice is fairly straightforward. First, during the criminal trial of an individual defendant, the judges, rather than artificially excluding evidence about the role of the state from the trial, would allow this evidence in. As a general matter, the ICC Appeals Chamber has already explicitly endorsed the idea of the trial chamber allowing in evidence that is not relevant for determining the guilt or innocence of the individual defendant. As explained in its February 2015 decision establishing the principles on reparations, judges in the reparations phase should be able to rely on evidence “presented during the trial

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162. *Id.* at 247 (explaining that the third party bearing civil liability can be summoned to the criminal court by either the public prosecutor or the *partie civile*).

163. *Id.*

164. See Prosecutor v. Dyilo, ICC-01/04-01/06-3129-AnxA, Order for Reparations (Mar. 3, 2015), <https://www.icc-cpi.int/iccdocs/doc/doc1919026.pdf> [hereinafter *Dyilo* Order for Reparations]. Moreover, legal proceedings regarding the implementation of reparations are ongoing at the time of publication. See Prosecutor v. Dyilo, ICC-01/04-01/06-3198 Ordonnance Enjoignant au Fonds au Profit des Victimes de Completer le Projet de Plan de Mise en Oeuvre (Feb. 6, 2016), <https://www.icc-cpi.int/iccdocs/doc/doc2199557.pdf> (requesting that the Trust Fund for Victims submit its final plan for reparations by December 31, 2016).

165. This would likely require the addition of an article 25(1) *bis*, adding States to the jurisdiction the court already has over natural persons and an article 75(2) *bis*, enabling the Court to make the same reparation orders against States as it is allowed to make against natural persons.

166. See *Monetary Gold Removed from Rome in 1943* (It. v. Fr., U.K. & U.S.), Preliminary Question, 1954 I.C.J. Rep. 19, 32 (1954); see also *Larsen v. Hawaiian Kingdom*, 119 I.L.R. 566, ¶ 11.17 (Perm. Ct. Arb. 2001) (extending the principle in *Monetary Gold* to international courts generally).

. . . only for the purposes of reparations and which was not relied upon for factual findings relevant to the conviction and sentence of the person.”<sup>167</sup> The state could choose to have a legal representative present to advance its position in this regard, just as in any other adjudication of state responsibility.

Second, judges in the reparations phase would draw on the factual record developed by the trial chamber in the criminal proceedings to adjudicate the responsibility of the state, using the lesser standard of proof that applies to the reparations phase—and which is closer to what the ICJ uses when it assesses state responsibility.<sup>168</sup> Third, in addition to making a reparations order against the convicted defendant for his role in the State-Enabled Crime, the judges could also make a reparations order against the state whenever it finds there has been state responsibility. And just as the court is at liberty to order reparations with a “symbolic, preventative or transformative value”<sup>169</sup> against an individual defendant, so too could it make such non-monetary reparation orders against a state. The court could order the state to issue an apology to victims, or to establish a memorial for example. It could go further and call for the state to launch an inquiry into the practices and policies that enabled the crimes. The result would be a factual record that reflects the role that both individual and state play in the commission of State-Enabled Crimes and a response from the international legal system that reflects this dual responsibility.

### 1. *Advantages*

The general benefits of an integrated response over a bifurcated one have been addressed above,<sup>170</sup> and all of them would apply to the specific proposal advanced here. In addition, there are distinct benefits to recommend the ICC proposal over alternative mechanisms one might imagine for achieving an integrated response.

First, the integration of state responsibility into ICC proceedings offers no significant disadvantage for individual ICC defendants, and may actually result in outcomes that are fairer to them than under the current system.<sup>171</sup> The explicit accounting of the role that state policies or practices played in enabling the defendant to commit a given State-Enabled Crime provides context to the defendant’s actions. This is likely to generate a more accurate picture of his individual culpability than what results under the current system.

Second, from the perspective of the victims to ICC cases, the integration of state responsibility expands the circle of sources from which reparations can be sought. One benefit of this is that it may provide an essential source of fi-

167. *Dyilo* Order for Reparations, *supra* note 164, ¶ 156 (Mar. 3, 2015).

168. *See id.*; *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Judgment) (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶¶ 208-10 (Feb. 26).

169. *Dyilo* Order for Reparations, *supra* note 164, ¶ 34.

170. *See supra* Section III.A.

171. The incorporation of the state’s role would probably slow the pace of an individual’s trial, so there are speed-of-trial issues for individual defendants to be worried about. But these are likely to be outweighed by the benefits they would derive from having the state’s role accounted for.

nancing for damages, relative to the alternative of a single defendant who may be judgment proof. Another is that the state can provide forms of satisfaction to victims that no individual can, such as an apology from the state, state-sponsored memorials, museums, or even recommendations about the development of educational materials, and ensuring the victims' experiences are captured for future generations.<sup>172</sup>

Beyond these concrete benefits, the symbolism arising from the world's permanent criminal court assessing the responsibility of the state may also be important for victims. As accounts of the civil attachment to French criminal proceedings explain, although the third party's liability is purely civil, it takes on a "coloration pénale" by virtue of the origins of the act that led to the liability.<sup>173</sup> In the absence of the criminalization of state behavior being possible under existing international law, this offers a "next-best" alternative. And from a fair labeling perspective it has the advantage of linking state responsibility to the exact crime, *qua* crime, it is responsible for.

Third, from the perspective of states, the adjudication of state responsibility at the ICC would offer an elegant way to overcome the political disincentives to bringing state responsibility claims in other forums. As noted above, there is no incentive for State *A* to incur the diplomatic headaches that result from bringing a claim of state responsibility against State *B* for Crime *X*, short of the rare instance in which State *A*'s nationals were the victims.<sup>174</sup> But the diplomatic challenges of state responsibility cases would be largely mitigated if states could delegate to the ICC prosecutor, in advance of any particular case, their rights to pursue state responsibility in cases where they have been unwilling or unable to pursue responsibility themselves. Thus if State *A*, in 2016, joins some hundred other States Parties ratifying an amendment to grant the ICC prosecutor jurisdiction to pursue state responsibility, then it is unlikely to face any diplomatic fallout should, in say 2020, the ICC prosecutor pursue State *B* over its responsibility for Crime *X*. Moreover, under the proposed complementarity approach detailed below, states would not lose their rights to pursue state responsibility in any other forum of their choosing; the ICC would be limited to those instances in which states have been unwilling or unable to pursue the case under the law of state responsibility themselves.<sup>175</sup>

Finally, from an institutional perspective, integrating state responsibility into the ICC is more efficient than alternatives that might require the establishment of a brand new judicial mechanism. It is also efficient in that the attribution of state responsibility could be made by drawing on findings of fact that are already being established in the court's criminal proceedings. And, perhaps counter-intuitively, it may be easier for the judges presiding over the criminal

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172. See also Andrea Bianchi, *Serious Violations of Human Rights and Foreign States' Accountability Before Municipal Courts*, in *MAN'S INHUMANITY TO MAN*, *supra* note 69, at 149, 181 (noting that in circumstances where "no remedy can make good" the harm suffered, "a declaratory judgment against the foreign State itself . . . may suffice for the purposes of doing justice").

173. BOULOC, *supra* note 161, at 274.

174. See *supra* Section II.B.3.

175. See *infra* Section III.C.2.ii.

trial to have evidence related to state responsibility enter into their record than it is to try and focus the record exclusively on individual responsibility for crimes in which the state has played such an integral role.

## 2. *Concerns*

While concerns about an integrated response in general have been addressed above,<sup>176</sup> there are five potential counter-arguments to the ICC proposal specifically that are worth considering. First is the selectivity of cases reaching the ICC and thus the selectivity of state responsibility that would flow from that; second is the potential for overlapping adjudication given that other forums exist for adjudicating state responsibility; third is the possibility that the proposal would reduce the number of self-referrals the Court receives; fourth is the question of enforceability; and the final concern relates to the political feasibility of the proposal in general.

### *i. Selectivity*

One serious concern is that state responsibility would only be incurred for the handful of cases reaching the ICC. And even then, the Court could only adjudicate the responsibility of states that have consented to its jurisdiction, whether through ratification of a statutory amendment or on an ad hoc basis. There are two elements to this concern, the second more problematic than the first.

The first element is that the proposal reaches only a fraction of the scenarios in which state responsibility *should* be incurred. In most instances the Court's jurisdiction is limited to crimes committed by the national of and/or on the territory of signatory states: a number currently totaling 123.<sup>177</sup> The Court can also be given jurisdiction over cases arising from states that have not joined the Court if the U.N. Security Council refers such a case to it.<sup>178</sup> Taking this Security Council mechanism into account, the Court currently has potential jurisdiction over crimes committed in the territory and/or by nationals of all 193 countries in the United Nations.

The alternative international forum for adjudicating state responsibility for State-Enabled Crimes, the ICJ, has jurisdiction over just the seventy-one countries that have joined its compulsory jurisdiction regime, with only one of those countries, the United Kingdom, being a permanent member of the Security Council.<sup>179</sup> Overall then, if the proposal advanced here were to come into effect, it would provide for significantly greater coverage than the existing alternative. So while it is true that, short of a U.N. Security Council referral, the ICC cannot reach all states, this is not a strong argument against the proposal

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176. See *supra* Section III.B.

177. See Rome Statute, *supra* note 18, art. 12.

178. See *id.* art. 13(b).

179. See *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Apr. 4, 2016).

per se as much as an argument in favor of additional mechanisms to strengthen or go beyond the proposal. In the tradition of not letting the perfect be the enemy of the good, any improvement upon the currently low baseline of state accountability for these crimes deserves support.

The second aspect of the concern, however, is more troubling. The cases that reach the ICC are—to a degree that is a subject of intense debate—selective. The most notorious critique of the ICC's selectivity is that it has an anti-Africa bias.<sup>180</sup> The charge carries some weight: the Court's current docket is full of cases arising out of countries in Africa, with the sole exception being the recent addition of an investigation in Georgia. But scratching the surface, this reality, while causing significant perception problems, does not actually belie any animus toward African countries on the part of the Court. Five of the situations on the Court's Africa docket were referred to the Court by those countries themselves,<sup>181</sup> two were referred to the Court by the U.N. Security Council,<sup>182</sup> and only in one situation, Kenya, did the ICC Prosecutor act under his *proprio motu* powers to pursue an investigation. Meanwhile out of the seven situations that the Court has under preliminary investigation, only two are in Africa.<sup>183</sup> Moreover, as the ICC prosecutor, Fatou Bensouda, has repeatedly noted, cases arising out of Africa not only prosecute African defendants, they also seek justice for African victims.<sup>184</sup>

Still, there is a further selectivity concern. Any of the five permanent members of the U.N. Security Council can veto a referral of a situation to the ICC. This means that, in practice, the Court's jurisdiction is skewed in favor of

180. See, e.g., Aislinn Laing, *International Criminal Court Is "Hunting" Africans*, TELEGRAPH, May 27, 2013, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/10082819/International-Criminal-Court-is-hunting-Africans.html>. But see *Is Africa on Trial?*, BBC, Mar. 27, 2012, <http://www.bbc.com/news/world-africa-17513065>; Robert Wanjala, *Kenya Victims Relieved By Refusal To Postpone ICC Cases*, ALL AFRICA, Nov. 18, 2013, <http://allafrica.com/stories/201311190492.html>.

181. Referrals were made by Uganda, Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC, (Jan. 29, 2004), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20Uganda%20refers%20situationOO%20concerning%20the%20lord%20s%20resistance%20army%20\\_ira\\_%20to%20the%20icc.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20Uganda%20refers%20situationOO%20concerning%20the%20lord%20s%20resistance%20army%20_ira_%20to%20the%20icc.aspx); DRC, Press Release, Int'l Criminal Court, Prosecutor receives referral of the situation in the Democratic Republic of Congo, (Apr. 19, 2004), [https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx); CAR, Press Release, Int'l Criminal Court, Prosecutor receives referral concerning Central African Republic, (Jan. 7, 2005), [https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/2005/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2005/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx); Ivory Coast, Reconfirming the Acceptance of the ICC Jurisdiction, Int'l Criminal Court (Dec. 14, 2010), <https://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf>; Mali, Referral letter by the Government of Mali, Int'l Criminal Court (Jul. 13, 2012), <https://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>.

182. See S.C. Res. 1593 (Mar. 31, 2005) (Sudan); S.C. Res. 1970 (Feb. 26, 2011) (Libya).

183. Preliminary investigations are underway with respect to Afghanistan, Colombia, Nigeria, Guinea, Iraq, Ukraine, and Palestine. See *Preliminary Examinations*, INT'L CRIM. COURT, [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx) (last visited Apr. 6, 2016).

184. See, e.g., David Smith, *New Chief Prosecutor Defends International Criminal Court*, GUARDIAN, May 23, 2012, <http://www.theguardian.com/law/2012/may/23/chief-prosecutor-international-criminal-court>.

impunity for these five permanent members and their allies. This is an important concern. But again, it would be a mistake to throw the whole proposal aside because of this concern. In light of the limitations facing legal mechanisms for effectuating the law of state responsibility, the primary approach for responding to the role states play in State-Enabled Crimes at present is an ad hoc political process run at the behest of the U.N. Security Council.<sup>185</sup> Criticisms of this process are widespread and well covered in the literature.<sup>186</sup> In some cases states are sanctioned without appropriate due process concerns being addressed; in other instances, the discussion is shut down before questions about state responsibility are even asked. Thus, even if the proposed ICC mechanism still allowed the permanent five members of the Security Council to give some cover to themselves and their allies, it may at least mitigate the existing ability of these powerful states to sanction their enemies without any due process constraints whatsoever and at least ensure that the question of state responsibility would be asked as a matter of course.

### *ii. Overlapping Jurisdiction*

There are existing courts tasked with adjudicating state responsibility. While domestic courts cannot fulfill this task against each other, regional human rights courts and the ICJ can and do. This raises the problem of how to deal with overlapping adjudication.<sup>187</sup>

To the degree one accepts the normative argument advanced in this Article, that an integrated response to State-Enabled Crimes is preferable to a bifurcated one, then an ICC adjudication of state responsibility should have primacy over the alternatives. This is a position that regional courts and the ICJ could adopt and implement through a policy of deference. But even if these other courts did not grant the ICC primacy, there are other options available to avoid concurrent adjudication.

Informally, the ICC could use existing statutory provisions to justify a decision not to pursue state responsibility, such as by reference to the principles of cooperation listed in Part IX of the Rome Statute. More formally, States Parties could pass a statutory amendment to ensure that the pursuit of state responsibility could be declined under the generic "interests of justice" provision that currently serves a catch-all function for prosecutorial discretion to decline criminal cases.<sup>188</sup> Finally, States Parties could amend the statute to implement a system of complementarity as exists at the ICC for criminal cases. There are a number of ways this could be configured, but the most straightforward would simply be to replicate the approach to criminal cases thereby ensuring that the ICC would not adjudicate state responsibility against a given state when there is

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185. See *supra* notes 153-154 and accompanying text.

186. See, e.g., *supra* note 154 and accompanying text.

187. But see Pamela Bookman, *The Unsung Virtues of Global Forum Shopping*, NOTRE DAME L. REV. (forthcoming 2016) (on file with author) (framing overlapping jurisdiction as a positive phenomenon).

188. See Rome Statute, *supra* note 18, art. 53(1)(c).

already a state responsibility case against that state for substantially the same conduct.<sup>189</sup>

### *iii. Undermining Self-Referrals*

A further concern is that many of the ICC's cases currently come from situations that States Parties have themselves referred to the Court, in which the state asks the Court to adjudicate acts committed on its territory (so-called "self-referrals"). If states knew that the ICC could hold not just individuals but also the state responsible for the State-Enabled Crimes committed on its territory responsible, they may be reluctant to make self-referrals.

Of course, states making self-referrals already know the ICC can, in theory at least, hold state officials, up to and including the head of state, criminally responsible for acts committed on the territory of the state making the self-referral. Thus one might argue that the additional possibility of non-criminal responsibility for the state would be unlikely to alter the existing calculus for those officials considering a self-referral. Yet an integrated response may nonetheless give state officials pause.

While the Court has been willing to seek the arrest of sitting presidents in Sudan and Kenya, neither of these situations were self-referrals. At present, state officials may be assuming that a self-referral provides an implied free pass for crimes in which the state was involved. And under an integrated system, whereby the role of the state is considered as a matter of course, such an assumption would become implausible. As a result, it is possible that the Court would receive fewer self-referrals under an integrated approach than it does under the existing system. But whether or not self-referral is a good way for the Court to obtain jurisdiction is itself a fraught topic.<sup>190</sup> As the debate over self-referrals plays out, the possibility of fewer self-referrals is not a strong reason to oppose an integrated response, and for some it may even be a reason to support it.<sup>191</sup>

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189. This test of "substantially the same conduct" is grounded in Article 17(a) of the Rome Statute, which precludes the court from admitting a case that is being pursued by a state with jurisdiction over it. See *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 16 (Sept. 25, 2009), <https://www.icc-cpi.int/iccdocs/doc/doc746819.pdf>. Initially, the Court interpreted the Article as covering instances in which the same person was being prosecuted for the same conduct. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/07, Decision on the Prosecutor's Application for Warrants of Arrest, art. 58, ¶ 31 (Feb. 10, 2006), <https://www.icc-cpi.int/iccdocs/doc/doc530350.pdf>. However, the Court subsequently modified the test to also exclude cases where the conduct being prosecuted by a national court is "substantially the same." See *Prosecutor v. Muthaura*, Case No. ICC-01/09-01/11 OA, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," ¶ 40 (Aug. 30, 2011), <https://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf> (emphasis added).

190. See, e.g., Darryl Robinson, *The Controversy over Territorial State Referrals and Reflections on ICL Discourse*, 9 J. INT'L CRIM. JUST. 355 (2011).

191. See, e.g., William A. Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 19 CRIM. L. F. 5 (2008) (arguing that the kind of cooperative relationship between the ICC and a state that is present in instances of self-referral is inconsistent with the underlying purpose of the Rome Statute).

*iv. Enforcement*

The ICC does not have its own police force. It relies on states to enforce its decisions. In this, the ICC is no different from other international or regional courts. But this lack of enforcement power can clearly be a problem, as evident in the difficulty the ICC has in getting some of its decisions on individual responsibility enforced.<sup>192</sup>

Still, whenever the ICJ or the regional human rights courts issue findings of state responsibility, they too rely on states to enforce any remedial orders they make. And there is no reason to think that it would be more difficult for the ICC to get its decisions on state responsibility enforced than it is for these other courts under the bifurcated structure of the existing system. Thus, enforcement of orders relating to state responsibility under the integrated mechanism proposed here would be no weaker than under the existing system.

Nonetheless, while one would not expect the rate of enforcement of state responsibility through the ICC to be markedly different from the enforcement of state responsibility in other forums, it is reasonable to be concerned with the risk of asymmetric enforcement at the ICC. That is to say, ICC judgments against states may be under-enforced relative to ICC judgments against individuals. There is no ready fix for this risk. At the end of the day, the enforcement of all international legal judgments takes place against a backdrop of state power. But this proposal would at least make the disparities between the enforcement of accountability against the individual relative to against the state visible. At present, when State-Enabled Crimes occur, individuals are pursued at the ICC without any mention of the state's role required. Thus, even if state responsibility at the ICC were under-enforced relative to individual responsibility, there would at least be light shed on the responsibility of the state as a matter of routine.

*v. Political feasibility*

Finally, skeptics may question the political feasibility of an amendment to the Rome Statute. Indeed, the procedural hurdles to the passage of an amendment are significant. A proposed amendment must first receive the blessing of two-thirds of the States Parties to the Statute.<sup>193</sup> And even then, the amendment will only come into force once seven-eighths of all the Parties have ratified it.<sup>194</sup> Still, these hurdles have not stopped two proposed amendments already moving forward, one to ensure the provisions on the use of chemical weapons as a war crime in situations of international armed conflict also apply to situations of non-international armed conflict,<sup>195</sup> and the other to define, and

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192. See, e.g., Norimitsu Onishi, *Omar al-Bashir, Leaving South Africa, Eludes Arrest Again*, N.Y. TIMES, June 15, 2015, <http://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html>.

193. Rome Statute *supra* note 18, art. 121(3).

194. *Id.* art. 121(4)-(5).

195. INT'L CRIMINAL COURT, AMENDMENTS TO ARTICLE 8 OF THE ROME STATUTE, Annex I,

thus operationalize, the crime of aggression.<sup>196</sup> Thus an amendment does not seem, *per se*, implausible.

Beyond the procedural requirements of an amendment in general terms however, one may still question the feasibility of this amendment in particular. The suggestion that states grant the Court jurisdiction to make findings of responsibility and order remedial measures against them seems both radical and naïve. Yet compared to giving the Court criminal jurisdiction over the crime of aggression, thereby enabling the Court to adjudicate actions so quintessentially associated with the state as the use of armed force is, the suggestion of a state responsibility amendment seems tame.<sup>197</sup> Of course, closer scrutiny of the aggression amendment suggests the matter is not quite so easily dismissed. The amendment ensures that the U.N. Security Council retains ultimate control over the determination of whether or not an act of aggression has occurred in the first place. Only once that bar is passed is the Court given free rein to adjudicate the matter. So while it is indeed true that the weakest States Parties, those who are not permanent members of the U.N. Security Council or allies of them, have ceded control over the adjudication of the crime of aggression, the same cannot be said for powerful states. The lesson here is that the ICC is no more immune than any other international institution from the observation that international law often replicates existing power hierarchies.<sup>198</sup>

The pursuit of an amendment to achieve the integrated enforcement mechanism proposed here would in all likelihood be subjected to these prevailing power dynamics. The probable end result is that weaker states would be held responsible for their role in State-Enabled Crimes more often than powerful states. This is unquestionably a problem. But the fact that this proposal cannot upend the power dynamics of the international legal order is not sufficient grounds to reject it. The benefits of an integrated response for victims and defendants remain, even if its application is imperfect.

#### CONCLUSION

The analytical category of State-Enabled Crimes draws attention to the convergence of individual and state responsibility in the commission of many international crimes. I have used State-Enabled Crimes to highlight the mismatch between the integrated responsibility inherent in the commission of these crimes and the bifurcated nature of the international legal system's response to them. And I have argued that this bifurcated approach generates a distorted pic-

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Proposed art. 8.2(e)(xiii)-(xv) (2010), [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.5-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf).

196. INT'L CRIMINAL COURT, THE CRIME OF AGGRESSION, Annex I, Proposed art. 8 *bis* (2010), [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).

197. See generally RATNER & ABRAMS, *supra* note 122, at 125-128 (detailing the historical reluctance of States to put "legal constraints of a criminal form on their use of force").

198. See Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 371 (2005) (describing the efforts of powerful states to "reshap[e] the international legal order so as to better reflect and accommodate superiority in power").

ture of how these crimes are committed and risks an unfair allocation of responsibility between individual and state.

In this sense, this Article supplements existing scholarship concerned with the unsatisfactory response of the international legal system to the worst crimes that humanity has to offer. For some, the task ahead is to extend the reach of international criminal law to more individuals through theories of group criminality, although existing efforts in this regard have had mixed results. For others, the state's role in international crime demands a revival of the conversation about holding states criminally liable. But as a matter of political realism, any such development seems a long way off, even for those convinced of its merits. Where this Article distinguishes itself is in the recognition that we already have at our disposal two bodies of law which, if enforced through the integrated mechanism proposed, or indeed through alternatives that others may suggest, would mark a significant improvement over the status quo, yielding benefits on the dimensions of prevention, peace and reconciliation, and retribution.

By proposing reforms to account for the various situational factors underpinning the perpetration of international crimes and holding the organizations responsible for perpetuating these situational factors to account, it may be possible to build a regime that addresses many of the prevailing critiques concerning the discord between international crimes and the mechanisms of accountability for them. This Article has focused on instances where the enabling organization is in the form of the state. And there are good reasons for starting with the state. But other entities—non-state armed groups, corporations, and even international organizations—should also be brought into view. The international legal system's approach to accountability for the enabling role played by these other organizations is an important topic for future research.