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INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

A Strategic Choice: The State Policy Requirement in Core International Crimes

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Abstract
The article focuses on one of the most intriguing and, at the same time, controversial issues of international criminal law: whether the state policy requirement should be considered as a constitutive element in core international crimes. Adopting a criminal policy perspective, my intention is to contribute to the ongoing discussion by offering a doctrinal and criminological corroboration of the position that answers in the affirmative. Nevertheless, I am not necessarily promoting a normative choice entailing the amendment of the definition of core international crimes, but I rather call for a policy choice of focusing on cases that presume a state policy component.

Key words
core international crimes; international criminal court; international criminal policy; state criminality; state policy element

1. THE LEGAL ARTICULATION AND FUNCTION OF A CRIMINAL POLICY ISSUE

It would be redundant to review in detail the arguments and the authorities invoked by the supporters and the opponents of the state plan or policy requirement in core international crimes. The gist of the debate is captured in the question of whether the contextual elements provided for in each criminal type of the core international crimes (Articles 6–8 Rome Statute (ICCSt.)) point explicitly or implicitly to the existence and implementation of a plan or policy emanating from a state or at least a state-like entity. In other words, even if in genocide the context of crime is articulated as an additional specific intent, in crimes against humanity as a widespread or systematic attack against any civilian population, and in war crimes as a nexus with an armed conflict, in all three cases the commission of multiple individual criminal acts should constitute both the consequence and the verification of an organizational policy elaborated and carried out by a state or state-like entity. This is how otherwise

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ordinary crimes (e.g. murder or killing) turn into 'the most serious crimes of concern of the international community as a whole' (Preamble and Article 5 ICCSt.), i.e. universally condemned offences.[1] What is more, Professor Schabas, comparing core international crimes with other international or treaty-based crimes finally excluded from the jurisdiction of the ICC, concludes that:

> These are generally crimes of State, in that they involve the participation or acquiescence of a government, with the consequence that the justice system of the country concerned is unlikely to address the issue. Hence, obviously, the need for internationalization, be it in the form of a truly international institution or through the mechanism of universal jurisdiction.[2]

On the other hand, my intention is not to examine the legal foundation of Schabas' position scrutinizing the *travaux* of the Preparatory Committee for the Establishment of an International Criminal Court, but simply to revisit it from a criminal policy perspective. This latter term refers to the conception and analysis of the criminal phenomenon (here in its international dimension) as well as to the design and implementation of a strategy dealing with it, which usually includes a range of social, educational, legal, etc. measures.[3] In this broader context, the question of whether state policy is a necessary element of core international crimes or not is strictly connected with the role the ICC aspires to play in the puzzle of international justice, since its establishment is widely evaluated as a hallmark in the history of international criminal justice.[4] Schabas has eloquently summarized the whole problem by drawing an analogy with fishing: the type of net you use depends on your target. If you want to catch big fish you need a net with big holes, but if you are going for the sardines you opt for a net with small holes.[5] In a nutshell, the means

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1 See W. A. Schabas, 'Crimes Against Humanity: The State Plan or Policy Element', in L. N. Sadat and M. P. Scharf (eds.), *The Theory and Practice of International Criminal Law. Essays in Honour of M. Cherif Bassiouni* (2008), 347–64; W. A. Schabas, *Genocide in International Law. The Crimes of Crimes* (2009), at 241ff., 491ff.; W. A. Schabas, 'State Policy as an Element of International Crimes', (2008) 98 *Journal of Criminal Law and Criminology* 953. Counter-argumentation for the case of crimes against humanity where the element of 'state or organizational policy' is explicitly stipulated: M. Halling, 'Push the Envelope – Watch It Bend: Removing the Policy Requirement and Extending Crimes against Humanity', (2010) 23 LJIL 827; G. Werle and B. Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a "State-like" Organization?', (2012) 10 JICJ 1151. For a reaction to the former article, see W. A. Schabas, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the ICC: Closing the Loopholes', (2010) 23 LJIL 847. See also, G. Mettraux, 'The Definition of Crimes Against Humanity and the Question of a "Policy" Element', in L. N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (2011), 142–76.

2 W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), at 40.

3 M. Delmas-Marty, *Les grands systèmes de politique criminelle* (1992), at 13-4. C. Lazerges, *Introduction à la politique criminelle* (2000), at 7.

4 It is posited that 'the discussion on the policy requirement echoes deeper existential questions on the nature and limits of international criminal law and additionally on the role of the International Criminal Court as the predominant instrument of international judicial intervention': L. van den Herik and E. van Sliedregt, 'Removing or Reincarnating the Policy Requirement of Crimes against Humanity: Introductory Note', (2012) 10 LJIL 825, at 826. See also C. Kreß, 'The International Criminal Court as a Turning Point in the History of International Criminal Justice', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), 143–59. K. Ambos, 'International Criminal Law at the Crossroads: From Ad Hoc Imposition to a Treaty-Based Universal System', in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (2010), 161–77.

5 Schabas, *supra* note 1, 'Prosecuting Dr Strangelove', at 853.

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should be adequate to serve the ends, which further entails that the latter should be somehow identified within the former.

Under this theoretical model, the state policy requirement may function as a filter that will refine the end-result by removing what is superfluous and proceeding with what is crucial; and what is crucial depends on the way one perceives the phenomenon of international criminality: is it the mere reflection of national criminality at the international level or is it something different and perhaps unique? It becomes awkward that someone should keep repeating the obvious: the international criminalization of only a few acts and the establishment of a direct enforcement system of international criminal law, ensuring their criminal prosecution and punishment, stems from the historical necessity to deal with crimes constituting the expression of an abusive perception of sovereignty, also known as 'state criminality'.[6] Thus, the appeal to the international level was (and is) imposed by the simple fact that some serious or gross violations of fundamental human rights are endowed with impunity at the national level, a situation that dooms even further victimized populations and infringes common values pertaining to the international community as a whole.[7] This is obviously not the case with corporate crimes, terrorism, or crimes committed by guerrilla or paramilitary groups, etc., but it is first and foremost the case in relation to state-sponsored international crimes.

A clarification should be made at this point, especially in relation to the allegation that the historic configuration of power has changed and states may no longer represent the prevalent actor in the commission of international crimes. Although nobody could doubt the emergence of new powerful actors at national, transnational, and international levels (e.g. terrorist organizations, multinational corporations) materially capable of engaging in mass atrocities, none could reasonably question the assertion that it is only the institution of the state whose *raison d'être* is strictly linked to its capacity to offer security (and ideally well-being) to its inhabitants. Suffice it to say that the social contract theory and generally the whole political theory on the modern state presuppose a distinction between the state and civil society, concern the regulation of their relationship, and aspire to achieve a balance between the dual demand for *security* and *freedom*.[8] Thus, in stark contrast with any other actor, whose operational objective could vary from making profit (corporations) to seizing power (guerrilla or paramilitary groups) or spreading fear for religious, political, or ideological goals (terrorism), it is only the state whose *legitimacy* depends on the effective delivery of security (human, social, national, etc.) and other basic political goods to its citizens with parallel due respect for their rights and

6 P. Gaeta, 'The History and the Evolution of the Notion of International Crimes', in R. Bellelli (ed.), *International Criminal Justice. Law and Practice from the Rome Statute to Its Review* (2010), 169–80. D. Luban, 'State Criminality and the Ambition of International Criminal Law', in T. Isaacs and R. Vernon (eds.), *Accountability for Collective Wrongdoing* (2011), 61–91.

7 A. Chouliaras, 'The Victimological Concern As The Driving Force In The Quest For Justice For State-Sponsored International Crimes', in R. Letschert, R. Haveman, A.-M. de Brouwer, and A. Pemberton (eds.), *Victimological Approaches to International Crimes: Africa* (2011), 35–63.

8 See, e.g., N. Bobbio, *Stato, Governo, Società. Per una teoria generale della politica* (1985). D. Held, *Political Theory and the Modern State* (1989).

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freedoms.[9] When a state falls short of this primary duty, then it is qualified as a 'failed state'.[10]

In this framework, a state-sponsored international crime consists of the illegitimate exercise of state violence amounting to a flagrant assault on the most fundamental human rights, accompanied in principle by impunity. Under the first component, the state violates gravely the collective conscience of a society, composed of the most fundamental sentiments that comprise the psychological link between their members (human dignity, solidarity, etc.),[11] bringing additionally into question its most basic institutions that guarantee its peaceful continuity (justice, rule of law, etc.). The complete lack of penal intervention, or, more broadly, the inept or corrupt state response – impunity in this context – corroborates the organizational, political, structural, and institutional dimension of the phenomenon, calling into question the legitimacy of the state and paving the way for the mobilization of international (criminal) justice institutions and mechanisms.

We have reached the core of the debate: to touch or not to touch even slightly the sacred figure of the state? The case law of the ad hoc international criminal tribunals has tended to downplay the role of state policy in international crimes, paying only lip service to the continuous demand to develop a sophisticated international justice discourse.[12] For example, we have witnessed the birth of the 'individual *génocidaire* acting alone without a state plan or policy', a scenario expressively rejected by Schabas as 'little more than a sophomoric *hypothèse d'école*, and a distraction for international judicial institutions'.[13] In this light, I submit that discarding the state policy requirement constitutes the last in a chain of efforts to divest core international crimes of their political dimension and, consequently, to disassociate completely individual from state responsibility for their commission. However, these are objectionable reductions that conflict with the doctrinal and criminological underpinnings of international criminal justice. Seen from this

9 According to Habermas, there is a legitimation crisis when structures are unable to demonstrate that their practical functions fulfil the role for which they were instituted, despite the fact that they still retain legal authority by which to govern: J. Habermas, *Legitimation Crisis* (1988), at 68ff; J. Habermas, 'What does a Legitimation Crisis Mean Today? Legitimation Problems in Late Capitalism', and J. Schaar, 'Legitimacy in the Modern State', both in W. Connolly (ed.), *Legitimacy and the State* (1984), 134–55 and 104–27, respectively. For the legitimating function of human rights in the Constitutional State, see J. Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (1996), at 82ff.

10 According to Rotberg, the inability of a state to provide security and political goods leads to its failure and consequently to the loss of legitimacy. R. I. Rotberg, 'The Failure and Collapse of Nation-States: Breakdown, Prevention and Repair', in R. I. Rotberg (ed.), *When States Fail. Causes and Consequences* (2004), at 2–4. See also, M. Silva, *State Legitimacy and Failure in International Law* (2014). N. Chomsky, *Failed States: The Abuse of Power and the Assault on Democracy* (2006). S. Patrick, '"Failed" States and Global Security: Empirical Questions and Policy Dilemmas', (2007) 9 *International Studies Review* 644.

11 E. Durkheim, *De la Division du Travail Social* (1983), available at: classiques.uqac.ca/classiques/Durkheim_emile/division_du_travail/division_travail.html (accessed 12 August 2015).

12 Analogous is the evaluation of the position adopted by the ICJ in the *Case Concerning the Application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 27 February 2007, [2007] ICJ Rep. 43. See A. Chouliaras, 'State Crime and Individual Criminal Responsibility: Theoretical Inquiries and Practical Consequences', in C. Burchard, O. Triffterer, and J. Vogel (eds.), *The Review Conference and the Future of the ICC. Proceedings of the First AIDP Symposium for Young Penalists in Tübingen, Germany* (2010), 191, at 206–14.

13 W. A. Schabas, 'Darfur and the "Odious Scourge": The Commission of Inquiry's Findings on Genocide', (2005) 18 LJIL 871, at 877.

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angle, the defence of the state policy requirement is subsumed within the broader struggle to link international criminal law's enterprise to humanity's collective experiences of injustice on realistic terms. The empirical findings of recent criminological studies on gross human rights violations and core international crimes, especially as they are capitalized on by the criminological theory of state crime, offer both a corroboration of such a need and helpful conceptual tools for its fulfilment. Hence, preserving and further developing the state policy requirement is one of the ways to communicate the historical reasons that brought about the basic institutions of international criminal law and to satisfy, although partly, criminology's urge to bring the state back in.

One more clarification is of value here: as there is an open debate – at least among sociologists and criminologists – about what mass atrocity is and who the parties to it really were,[14] I am arguing in favour of the state policy requirement as a *policy choice* in international criminal prosecutions and not necessarily as a normative choice entailing the amendment of the definitions of core international crimes. Although I personally disagree that only natural persons *should* be prosecuted before the ICC for the commission of international crimes, I am fully aware of the normative principles prevailing for the time being: proceedings *can* only be instituted against natural persons, not legal entities, like corporations, states, or international organizations. What I propose is that cases in which there is state involvement should have priority for the ICC, given that an institution of public governance allegedly has deviated radically from its *raison d'être*, committing 'unimaginable atrocities'. Consequently, my claim is primarily formulated *de lege ferenda*, while I invoke sources and authorities that could support it.

2. Doctrinal corroboration and gradual devaluation of the state policy requirement

It is a truism that states, being the sole legislators and the main recipients of international law,[15] have succeeded in not being put in the dock for the commission of core international crimes, whatever this might mean. However, the manner in which their part could be normatively configured permeates the long-lasting endeavour to build a system of international criminal justice. In what follows, I will schematically illustrate that the issue of the active role of the state in the phenomenon of international criminality has been a constant parameter of two parallel processes forming the building blocks of the system: the establishment of an international criminal jurisdiction and the codification of international crimes that could be prosecuted before it. Even though these two topics were treated separately and in an unsystematic fashion throughout the course of eight decades, nobody could realistically question their interdependence, arising from their functional relationship to common

14 See, e.g., M. Osiel, 'Who are Atrocity's "Real" Perpetrators, Who Are Its True "Victims" and Beneficiaries?', (2014) 28 *Ethics & International Affairs* 281.

15 See, e.g., L. Gross, 'States as Organs of International Law and the Problem of Autointerpretation' (1953), in L. Gross, *Essays on International Law and Organization* (1993), 167.

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objectives: the prevention and suppression of international criminality, the reduction of impunity, and the enhancement of accountability within the international order.[16] The effective protection of fundamental human rights and the safeguarding of peace and security of the world found the legitimating basis of the system.[17]

2.1. The establishment of an international criminal jurisdiction

The need to establish an international criminal jurisdiction emerges and is revived in specific contexts, with a view to tackling particular problems and the ambition to serve concrete objectives. In particular, the gradual recognition of the fact that the resort to war, or, broadly speaking, to force, does not exemplify the proper way to solve international controversies fuels a three-phase process: initially an enduring attempt to regulate war-making so as to limit its consequences (*jus ad bellum* and *jus in bello*),[18] afterwards its renunciation as a legitimate instrument of national policy,[19] and, finally, its total prohibition with the exception of self-defence and the UN Security Council's authorization.[20] In this context, the concept of peace becomes a dynamic one: it surpasses its negative configuration as the absence of war and is redefined in conjunction with positive values, such as international order and justice.[21]

The catchphrase in this process is collective security, which denotes the effort to create a permanent institutionalized universal system perceived as the only means to maintain international peace and security. This latter should be differentiated both from the traditional practice of alliances, bilateral agreements and ad hoc arrangements (balance of power), and the ideal system of the foundation of a 'world government' endowed with the monopoly of legitimate use of force on the international plane. On the contrary, it is based on the foundation of an international organization with the adequate infrastructure and the political power to prevent the danger or threat of war by offering alternatives for the peaceful settlement of international disputes and to suppress the eventual resort to force through the joint action of its members against the aggressor. The creation of the League of Nations and, in continuation, the UN, materializes such an endeavour. In this framework, the use of force becomes a truly international issue with collective effects.[22]

The outlawing of war is a necessary but insufficient precondition for international peace, which also calls for the establishment of institutions of international justice, given that it is made reality only through the functioning of law.[23] Again, the creation of an international court endowed with compulsory jurisdiction over

16 M. C. Bassiouni, *Introduction to International Criminal Law* (2003), at 1–2.
17 R. Bellelli, 'The Establishment of the System of International Criminal Justice', in Bellelli (ed.), *supra* note 6, at 5.
18 I. Brownlie, *International Law and the Use of Force by States* (1963); T. Meron, *The Humanization of International Law* (2006).
19 1928 General Treaty for the Renunciation of War (Kellogg-Briand Pact) 94 LNTS 57, Art. I.
20 1945 Charter of the United Nations, 1 UNTS XVI, Art. 2(4) and Chapter VII.
21 K. Skubiszewski, 'Peace and War', in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1982), Vol. 4, 74 at 75.
22 J. Delbrück, 'Collective Security', in Bernhardt, *supra* note 21, Vol. 3, 104–14. Ø. Undén, 'The Philosophy of Collective Security', (1955) 25 *Nordisk Tidsskrift for International Ret* 3.
23 M. Koskenniemi, 'The Place of Law in Collective Security', (1996) 17 MJIL 455.

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international disputes incarnates the ideal scenario.[24] The creation of the Permanent Court of International Justice (League of Nations system) and the International Court of Justice (UN system) offer the attainable alternative to that ideal. A separate and special place within this broader discussion on the judicial regulation of international relations is occupied by the delicate issue of aggressive war. The idea of inaugurating an international criminal jurisdiction, either as a criminal chamber of the ICJ or as an independent institution, constitutes the answer to the question of how to determine authoritatively the illegal and aggressive character of inter-state use of force and ascribe impartially the resultant liability.[25]

On the other hand, the establishment of international criminal investigation and adjudication bodies is strictly connected to the end of the wars that indelibly marked world history: the First World War (1918), Second World War (1945), and the Cold War (1991).[26] A twofold conclusion can be drawn from such a practice: the bodies were set up as a response to the public demand to cope with tragic events and shocking conduct carried out during armed conflict; every time human civilization was on the verge of total destruction, old and new proposals aspiring to safeguard international peace and security through law were put forward. What is more, the establishment of a permanent international criminal court typifies one of the instruments to maintain world peace and security and symbolizes a shift toward a rational world order.[27]

Hence, it is safe to allege that the driving force behind various events and proposals was the idea of constructing a universal or world public order. Judge Dautricourt differentiates this from both the national and international public orders on the basis of the crimes and criminals that infringe it:

> By their nature, by their dimension, and by the fact that they were committed by persons acting as heads, rulers, or agents of a state, some major crimes shatter all the provisions of the municipal criminal law with such force that universal social conscience demands the prosecution and the punishment of the perpetrators, even if under domestic law and the classical law of nations they are justifiable, because the dead or the omission is an act of state.[28]

In this framework, an international criminal jurisdiction, being an organ of the international community, may not exercise jurisdiction except for actions that run against its own interests, i.e. international peace and security, equating to disturbances of the universal legal order.[29] Accordingly, the discussion on the necessity and desirability of establishing an international judicial organ for the trial of certain

24 H. Kelsen, 'Compulsory Adjudication of International Disputes', (1943) 37 AJIL 397.
25 Brownlie, *supra* note 18, at 51. G. E. Hoover, 'The Outlook of "War Guilt" Trials', (1944) 59 *Political Science Quarterly* 40.
26 M. C. Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court', (1997) 10 *Harvard Human Rights Journal* 11.
27 B. B. Ferencz, 'International Criminal Court', in Bernhardt, *supra* note 21, Vol. 1, 99 at 101. B. B. Ferencz, *An International Criminal Court. A Step Toward World Peace – A Documentary History and Analysis* (1980), 2 Vols.
28 J. Y. Dautricourt, 'The Concept of International Criminal Jurisdiction – Definition and Limitation of the Subject', in M. C. Bassiouni and V. Nanda (eds.), *A Treatise on International Criminal Law* (1973), Vol. 1, 636 at 644.
29 L. N. Sadat, 'Understanding the Complexities of International Criminal Tribunal Jurisdiction', in W. A. Schabas and N. Bernaz (eds.), *Routledge Handbook of International Criminal Law* (2011), 197 at 197–8.

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crimes under international law is driven by a twofold argument: one of principle, focusing on the need for legal certainty with respect to the dictates and prohibitions of international law, and another of policy, which promotes law as the unique legitimate means to achieve security through justice.[30] If the sociological basis of such an approach consists of the need to foresee the action of states on the international scene, then its philosophical basis is composed of the desire to move from the state of nature to that of the politically organized community.[31] Essentially, all the above developments trigger a shift from the traditional concept of security (limited to the prohibition of the use of force and the adoption of collective measures), to a novel one, resulting from the gradual development of a multifaceted international legal system; part and parcel of the latter is the creation of an international criminal court, the statute and the case law of which will produce legal certainty, i.e. security through law.

Among the various issues raised in relation to the establishment, organization, and functioning of an international criminal court, one is of greater importance here: the subjects over which it might have jurisdiction, i.e. individuals or/and legal entities, particularly states.[32] Two tendencies are identified, reflecting practically two different perceptions of the criminal phenomenon in its international dimension. The first one, analysing it in terms of collective deviance, urges the institutionalization of the criminal responsibility of states (here portrayed as the principal actors of international criminality), without rejecting the concurrent criminal responsibility of individuals in charge of the implementation of a state policy.[33] The second, emphasizing the individual parameter of international criminality, or simply rejecting the idea of state criminal responsibility as legally and politically absurd, calls for the criminal responsibility of those individuals who are responsible for the design and implementation of a criminal state policy ('major criminals').[34]

The establishment and case law of the International Military Tribunals of Nuremberg and for the Far East mostly serve this second rationale in multiple ways: by rebuffing the act of state doctrine, by evaluating the high position of persons in the government apparatus as aggravating circumstance, and by neutralizing the defence of superior orders.[35] In other words, the activation of an international criminal

30 International Law Commission, *Historical Survey of the Question of International Criminal Jurisdiction (Memorandum Submitted by the Secretary-General)*, UN Doc. A/CN/4/7/Rev.1 (1949). V. V. Pella, 'Towards an International Criminal Court', (1950) 44 AJIL 37–50.

31 R.-L. Perret, 'Doctrinal Bases for International Penal Jurisdiction', in J. Stone and R. K. Woetzel (eds.), *Toward a Feasible International Criminal Court* (1970), 142–55.

32 For an overview see R.-M. Reeder, *The Establishment of an International Criminal Court. Some General Problems* (1962).

33 V. V. Pella, *La Criminalité Collective des Etats et le Droit Pénal de l'Avenir* (1926), at 163ff. Q. Saldaña, 'La Justice criminelle internationale', in Association internationale de Droit pénal, *Premier Congrès International de Droit Pénal, Actes du Congrès, Bruxelles (26–29 juillet 1926)* (1927), 392–409. A. Sottile, *Le Problème de la création d'une Cour Pénale Internationale Permanente* (1951), at 131, 161ff, 192ff.

34 N. Politis, *Les Nouvelles Tendances du Droit International* (1927), at 128ff. S. Glaser, 'L'Etat entant que personne morale est-il pénalement responsable?', (1948) 5 *Revue de Droit pénal et de Criminologie*, 425. G. Eustathiades, 'Les sujets du droit international et la responsabilité internationale: nouvelles tendances', 84 *Recueil des cours de l'Académie de Droit International de la Haye* (1953-III), 397 at 434–58.

35 I. A. Reshetov, 'Groundless of the Doctrine of Act of State' and 'Responsibility for the Execution of Criminal Orders', both in G. Ginsburgs and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990) 117–18 and 118–20, respectively.

jurisdiction leads to individual liability for the abusive exercise of state sovereignty, which threatens international peace and security and which it is highly doubtful can be prosecuted before a national court (impunity).

The post-Cold War political climate of the 1990s, favoured but also delimited the whole discussion on the possibility of establishing a permanent international criminal court: this could have jurisdiction over natural persons but not legal entities, especially states. In this new framework, there is no doubt that the role of the state, even if further refined with respect to the international criminal justice enterprise, remains crucial. The watchword in this process is complementarity,[36] which translates into concurrence of jurisdiction between the national states and the ICC, with the former bearing primary responsibility to investigate and prosecute 'the most serious crimes of concern to the international community as a whole' (Article 5 ICCSt.). In other words, the ICC jurisdiction is governed by the organizing principle of subsidiarity: it can be activated only when the protection of international interests is impossible or ineffective in the national legal order, a situation that amounts to a threat to the universal legal order (last resort court – *ultima ratio* jurisdiction).[37]

Consequently, the principle of complementarity serves the double function of acting as an incentive for national jurisdictions to prosecute the commission of core international crimes and as a safety valve in the struggle to eliminate the impunity that traditionally accompanies them through the activation of the ICC jurisdiction. In this light, it is important not to forget that impunity results historically from situations where crimes are committed in accordance with a state policy.[38] This is why the issue of impunity was originally raised and traditionally connected to state or state-like actors. On the contrary, as a general rule, states exercise their criminal jurisdiction when the occurrence of a crime harms their interests. As Schabas posits, 'most States are both willing and able to prosecute terrorist groups, rebels, mafias motorcycle gangs, and serial killers who operate within their borders', while international law facilitates their collaboration through the institution of mutual legal assistance.[39]

2.2. The codification of international criminal law: Core international crimes as a threat to peace, security and well-being of the world

One of the factors that hindered the establishment of a permanent international criminal jurisdiction for half a century was the lack of a *corpus* of international criminal law, on the basis of which perpetrators of international crimes would stand accused. This aspect should not be undermined, given that the principle of legality of

36 A. Klip, 'Complementarity and Concurrent Jurisdiction', in Association International de Droit Pénal, *International Criminal Law: Quo Vandis?, Proceedings of the International Conference held in Siracura, Italy, 28 November – 3 December 2002* (2004), 173–97.

37 H. Olásolo, *Corte Penal Internacional ¿Dónde Investigar? Especial Referencia a la Fiscalía en el Proceso de Activación* (2003), at 199ff.

38 C. Harper (ed.), *Impunity. An Ethical Perspective. Six Case Studies from Latin America* (1996); K. Ambos, *Impunidad y Derecho Penal Internacional* (1999); L. Joinet (dir.), *Lutter contre l'impunité* (2002); I. Delgado (ed.), *Impunidad y derecho a la memoria* (2002).

39 Schabas, *supra* note 1, 'State Policy as an Element', at 974.

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crimes and punishments constitutes the cornerstone of any criminal justice system aspiring to support the rule of law. Although there has been vivid debate concerning the content and applicability of this principle in the area of international criminal justice, it is now settled that after the Second World War the doctrine of substantive justice (*nullum crimen sine jure*), upheld by the Tribunals of Nuremberg and Tokyo, has been gradually replaced by the principle of strict legality of crimes (*nullum crimen nulla poena sine lege certa, praevia, stricta, scripta*), which is now stipulated as a general principle of (international) criminal law within the normative system of ICC (Articles 22–24).[40]

Seen from this angle, the broader issue of the mechanics of international criminalization[41] should be studied in conjunction with an effort to codify the international crimes, over which a permanent international criminal court would have jurisdiction. This approach is warranted on the dual premise that the advantages of the empirical/inductive method of studying international criminalization[42] should be connected with the crucial issue of formulating a coherent set of principles that will ensure the direct enforcement of international criminal law on behalf of the international community as a whole, a development that substantiates the emergence of an international criminal justice system. It is only against this background that one can comprehend the statement that 'at the international level, the criminalization of individual contacts is a recent phenomenon that evolved in the early 1990s'.[43] More in particular, the official codification process of international crimes comprises two separate but intertwined processes carried out within the UN system that resulted in the Draft Code of Crimes against the Peace and Security of Mankind (1996)[44] and the Rome Statute of the International Criminal Court (1998).[45]

The process resulting in the Draft Code of Crimes began essentially in 1947, when the UN General Assembly (GA) adopted a Resolution by which it directed the International Law Commission (ILC) to formulate the Nuremberg Principles and to prepare a draft code of offences against peace and security of mankind.[46] In his first report to the ILC, the special rapporteur J. Spiropoulos observed that the mandate given by the GA did not refer to the drafting of an 'international criminal code' that would include every crime in which there is an international element. On the contrary, the interpretation of the term 'offences against the peace and security of mankind' delimited the relevant task of the ILC in a dual manner: positively and negatively. Positively, by indicating that the draft code should focus

40 A. Cassese, *International Criminal Law* (2008), at 36–41. G. Werle, 'General Principles of International Criminal Law', in Cassese, *supra* note 4, 54 at 55.
41 Bassiouni, *supra* note 16, at 114ff.
42 R. Cryer, 'The Doctrinal Foundations of International Criminalization', in M. C. Bassiouni (ed.), *International Criminal Law* (2008), Vol. 1, 107 at 111–13.
43 And it is further explained that: 'Until that time, international law was instrumental in allowing states to better organize the joint repression of certain criminal offences, more specifically those that damages their collective interests and had a strong transnational dimension'. Gaeta, *supra* note 6, at 169.
44 UN General Assembly, Report of the International Law Commission on the work of its Forty-Eighth Session, UN Doc. A/RES 51/160 (1996).
45 Un Doc. A/CONF.183/9 (1998).
46 UN General Assembly, Formulation of the Principles Recognized in the Charter of the Nuremberg Trial and the Judgement of the Tribunal, UN Doc. A/RES 177(II) (1947).

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on acts that, if committed or tolerated by a state, constitute violations of international law involving international responsibility. As he characteristically observed, these are acts known as '*crimes interétatiques*' and their main feature consists of their highly political nature and the threat they incorporate to international peace. Negatively, by denoting that the draft code should not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters.[47] The rapporteur posited that the subjects of international criminal responsibility should comprise only individuals, not organizations, whereas 'the establishment of the criminal responsibility of States – at least for the time being – does not seem advisable'.[48]

These proposals were adopted by the ILC and served as an introductory note to the Draft Code submitted to the GA.[49] The Draft Code of 1951 as well as the one revised on the basis of the observations received from various governments of 1954 included four types of crimes: threats or acts of aggression, genocide, crimes against humanity, and war crimes. What should be emphasized here is that the first type of crime could be committed only by 'the authorities of the State', the second and the third by 'the authorities of the State or private individuals', whereas the fourth could be committed by 'private individuals'. Hence, the conceptual category of crimes against the peace and security of mankind presupposed their commission by state authorities or at least by individuals acting pursuant to a state policy.[50] Suffice it to say that the GA postponed consideration of the Draft Code until 1976,[51] when the solution had been found to the problem of the definition of aggression.[52]

This latter development inaugurated more or less the second period of the elaboration of the Draft Code, during which D. Thiam was assigned as special rapporteur. On his third report to the ILC, Thiam examined the distinction between 'authorities of the State' and 'private individuals' in an effort to delimit the scope *ratione personae* of a crime against the peace and security of mankind. He posited that in the four types of crime principal perpetrators can only be:

> persons of high rank in a political, administrative or military hierarchy who give or receive orders, who execute government decisions or have them executed. These are *individuals-organs*, and the offences they commit are often analyzed in terms of abuse of sovereignty or misuse of power.

Consequently, private individuals (i.e. not agents of the state) could not figure as perpetrators of these offences, but only as accomplices when they were used as 'tools' by the state. However, in this latter case we are concerned with a purely criminal

47 J. Spiropoulos, 'Draft Code of Offences against the Peace and Security of Mankind – Report by J. Spiropoulos, Special Rapporteur', UN Doc. A/CN.4/25, 1950 YILC, Vol. II, 253 at 257–9.
48 Ibid., at 260–1.
49 International Law Commission, 'Report of the International Law Commission on the Work of its Third Session, 16 May to 27 July 1951', UN Doc. A/CN.4/48 and Corr. 1 & 2, 1951 YILC, Vol. II, 133 at 134.
50 Ibid., at 134–7; International Law Commission, 'Report of the International Law Commission Covering the Work of its Sixth Session, 3–28 July 1954', UN Doc. A/CN.4/88, 1954 YILC, Vol. II, 149–52.
51 General Assembly, Definition of Aggression, A/RES 3314(XXIX) (1974).
52 General Assembly, Draft Code of Offences against the Peace and Security of Mankind, A/RES 897(IX) (1954).

issue, due to the absence of political motive from the part of the individual, which should be tackled at the national, not international level.[53]

The ILC interpreted the proposal of the rapporteur as the logical consequence of the general decision taken previously to limit the Draft Code to the criminal responsibility of individuals, without prejudice to the possibility of later considering the criminal responsibility of states. In this context, this distinction aspired to delimit the scope of the Draft Code only to acts of individuals who were agents of the state and excluded from its range all those who acted strictly in their private capacity and therefore 'had none of the power or, *a fortiori*, the means inherent in the exercise of governmental authority'. The ILC, assessing that it was not finally clear whether that distinction served any purpose, opted for a broader wording that depicted as a potential perpetrator 'an individual'.[54] This option was preserved until the final Draft Code of 1996 (Article 2)[55] with the exception of the crime of aggression that was typified as inter-state crime ('aggression committed by a State'); thus, it could be perpetrated only by individuals of high rank in the political, military, or economic hierarchy of the state, acting as 'leaders or organizers' (Article 16).[56]

The doubts about the usefulness and, finally, the rejection of this distinction directed the rapporteur to look for an equivalent alternative way to delimit the scope of the term 'offences against the peace and security of mankind'. Thiam elaborated on the idea of adopting a definition of this special category of international crimes on the basis of certain general criteria. In this context, he submitted that the condition of extreme seriousness constituted indisputably the common characteristic of all the crimes that had been prosecuted in Nuremberg and included in the Draft Code of 1954, although it suffered from inherent vagueness and subjectivity. Thiam attempted to improve it by incorporating an objective parameter; thus, he resorted to the (former) Article 19 of the Draft Articles on State Responsibility, which defined an international crime (of state) as a breach of an international obligation so essential for the protection of the fundamental interests of the international community that such a breach was recognized as a crime by that community as a whole. Additional objective criteria could be provided through the specification of the basic needs and concerns of the community as a whole, namely the maintenance of peace, the protection of fundamental human rights, the safeguarding of the right of self-determination of peoples, and the safeguarding and preservation of the

53 D. Thiam, 'Third Report on the Draft Code of Offences Against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/387 and Corr. 1 and Corr. 2, 1985 YILC, Vol. II(1), 63 at 65–66.

54 International Law Commission, 'Report of the International Law Commission on the Work of its Thirty-Seventh Session, 6 May – 26 July 1985', UN Doc. A/40/10, 1985 YILC, Vol. II(2), at 13–14.

55 In the commentary it is noted that 'individual' means natural person. What is more, 'the act for which an individual is responsible might also be attributable to a State if the individual acted as an "agent of the State", "on behalf of the State", "in the name of the State" or as a de facto agent, without any legal power. For this reason, Art. 4 (Responsibility of States) establishes that the criminal responsibility of individuals is "without prejudice to any question of the responsibility of States under international law"'. International Law Commission, 'Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, 1996 YILC, Vol. II(2), at 18–19.

56 Ibid., at 42–43.

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human environment.[57] Even this alternative method was finally abandoned by the ILC. Article 1(1) of the final Draft Code of 1996 states that 'the present Code applies to the crimes against the peace and security of mankind set out in part two', while in the commentary it is further explained that the ILC decided not to propose a general definition of crimes against the peace and the security of mankind, which should be left to practice.[58]

The solution adopted in the final Draft Code of 1996 was guided by the aspiration to provide an applicable instrument, which means that it should be aligned with the comments and observations made by governments.[59] In this framework, the 12 crimes provided for in the Draft Code of 1991 approved in first reading were reduced to five, while the delimitation of its scope was sought through the stipulation of specific clauses in each criminal type, indicating that the commission of crimes against peace and security of mankind did not require but only insinuated state involvement. Hence, with the clear exception of aggression, which was constructed as inter-state crime,[60] crimes against humanity should be 'committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group' (Article 18), crimes against UN and associated personnel (Article 19) as well as war crimes (Article 20) should be committed 'in a systematic manner or on a large scale', whereas genocide requires a specific 'intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such'. The existence of the required intent would be established though the knowledge of the genocidal plan or policy. According to the paragraph 10 of the commentary:

> The crimes covered by the Code are of such magnitude that they often require some type of involvement on the part of high level government officials or military commanders as well as their subordinates ... The definition of the crime of genocide would be equally applicable to any individual who committed one of the prohibited acts with the necessary intent. The extent of knowledge of the details of a plan or a policy to carry out the crime of genocide would vary depending on the position of the perpetrator in the governmental hierarchy or the military command structure.[61]

In 1989 the GA requested the ILC to address within the above described framework the question of establishing an international criminal court with jurisdiction over persons accused to have committed crimes covered by the Code.[62] The ILC adopted a draft statute in 1994,[63] which was further elaborated by the 1995 Ad Hoc Committee for the Establishment of an International Criminal Court and provided

57 UN Doc. A/CN.4/387 and Corr. 1 and Corr. 2 (1985), at 68–71. See also UN Doc. A/40/10 (1985), at 14–15.
58 UN Doc. A/51/10 (1996), at 17.
59 D. Thiam, 'Thirteenth Report on the Draft Code of Offences Against the Peace and Security of Mankind by Mr. Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/666, 1995 YILC, Vol. II(1), 33 at 35.
60 At para. 4 of the commentary it is noted that 'the words "aggression committed by a State" clearly indicate that such a violation of the law by a State is a *sine qua non* condition for the possible attribution to an individual of responsibility for a crime of aggression'. UN Doc. A/51/10 (1996), 43.
61 Ibid., 45.
62 General Assembly, International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking in Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities,UN Doc. A/RES 44/39 (1989).
63 International Law Commission, 'Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May–22 July 1994', UN Doc. A/49/10, 1994 YILC, Vol. II (part II), at 20–73.

the basis of the work of the Preparatory Committee on the Establishment of an International Criminal Court (1996–1998). The Rome Statute of the International Criminal Court adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (15 June 1998–17 July 1998), which is closest to a legislative body within the international legal order, echoes the basic choices already made by the ILC in the spirit of states' positions. What is more, their additional elaboration and final crystallization in a text drafted for direct enforcement delineates clearly the three co-ordinates that shape the uniqueness of core international crimes: (i) their general qualitative features provided for in the Preamble of the ICCSt., which differentiate them from the rest of the treaty-based or transnational crimes, (ii) the inclusion of contextual elements in each criminal type (Articles 5–8 ICCSt.), which distinguish them both from national and transnational crimes, and (iii) the provision of a gravity threshold that further restricts the jurisdiction of the Court to the most atrocious instances of international criminality (Article 17(1)(d) ICCSt.).

In particular, the Preamble of the ICCSt. underscores that the 'unimaginable atrocities' that imposed its creation are extraordinary crimes, provided that they endanger legally protected values of the international community as a whole, meaning 'the peace, security and well-being of the world'.[64] The connection to these values offered the 'international element' of core crimes, which required 'a context of systematic or large-scale violence', supported by a collective entity, 'typically a state'.[65] For that reason, humanity is clearly portrayed as the victim of international criminality ('shock the conscience of humanity') and it is in humanity's name that international criminal justice is mobilized: 'the most serious crimes of concern to the international community as a whole must not go unpunished'. This phrase is reiterated verbatim in the *chapeau* of Article 5 ICCSt. that defines the jurisdiction *ratione materiae* of the ICC, setting 'a quasi-constitutional threshold for the addition of new crimes'.[66] Hence, in the normative system of the ICC, international criminal law is clearly articulated as the criminal law of the international community.[67] By extension, this acknowledgment entails that international criminal law grants only subsidiary protection to values and interests that traditionally pertain to the domain of national criminal law, which becomes inoperative when the violations occur 'with the support or at least the silent tolerance of State organs or other State officials'.[68]

On the other hand, this common international element is further specified in each criminal type so as to outline the organizational context within which individual

64 It is observed that 'the need for an international court is the result of a broad, common, shared supranational basis of evaluations, principles, interests and rights of a "higher" nature'. L. Picotti, 'Criminally Protected Legal Interests at the International Level after the Rome Statute', in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001), at 259.

65 Werle, *supra* note 40, at 55.

66 Schabas, *supra* note 2, at 108.

67 R. Borsari, *Diritto Punitivo Sovranazionale come Sistema* (2007), at 93ff.

68 O. Triffterer, 'Preliminary Remarks. The Permanent International Criminal Court – Idea and Reality', in O. Triffterer (ed.), *Commentary on the Rome Statue of the International Criminal Court: Observers' Notes, Article by Article* (2008), 15–47.

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criminal acts transform into core crimes, violating both the interests of immediate victims and the international community.[69] The so-called 'contextual elements' represent a novelty of international criminal law and serve the need to connect the most extreme forms of organized and systematic violence manifested at the collective level (wars, armed conflicts, and widespread violations of fundamental human rights) with concrete criminal acts taking place at the individual/interpersonal level: the latter interest international criminal law only if they are linked on causal terms to the former.[70] Hence, in the case of genocide (Article 6), the required special intent will be proven by the objective fact that 'the conduct took place in the context of a manifest pattern of similar conduct directed against that group';[71] in crimes against humanity, the prohibited individual acts should be committed 'pursuant to or in furtherance of a State or organizational policy' (Article 7(2)(a) ICCSt.); and in war crimes, the ICC 'shall have jurisdiction in particular when committed as part of a plan or policy or as part of a large-scale commission' (Article 8(1) ICCSt.).

Finally, the gravity threshold provided for in Article 17(1)(d) ICCSt. constitutes a mandatory admissibility requirement that complements these international and contextual elements, further confining the jurisdiction of the ICC to the most serious cases of truly international concern. The gravity criterion is one of the three components in the system of admissibility determination of a case (the other two are complementarity and *ne bis in idem* principles) and plays an autonomous role resulting from its two foundations: pragmatist, imposed by the simple truth that the ICC has very limited resources and can proceed effectively with a small handful of cases; and normative, in that the establishment of the ICC aspires to the prosecution of 'the most serious crimes of concern to the international community as a whole'.[72] In other words, the gravity threshold is the moderating procedural articulation of the philosophical and policy considerations that brought about the ICC. Suffice it to say that the threshold is equally important in the context of the discretion given to the Prosecutor with respect to the initiation of an investigation (Article 53 ICCSt.).[73]

It is a truism that internationalization of criminal law enforcement is driven by two different rationales: one that is policy motivated and responds to the practical need to better organize state co-operation to deal with crimes affecting the interests of more than one state (transnational element); another that is principle-guided and corresponds to the demand to reckon with the most serious crimes affecting the interests of the international community as a whole (international element) by organizing an international criminal justice system.[74] On the other hand, it is also a truism that the ICC normative system epitomizes this latter rationale,

69 G. Werle, *Principles of International Criminal Law* (2009), at 32.
70 Cassese, *supra* note 40, at 54.
71 International Criminal Court, Elements of Crimes, Arts. 6(a)(4), (b)(4), (c)(4), (d)(4).
72 See R. Murphy, 'Gravity Issues and the International Criminal Court', (2006) 17 CLF 281–315. M. M. El Zeidy, 'The Gravity Threshold Under The Statute Of The International Criminal Court', (2008) 19 CLF 35.
73 W. A. Schabas, 'Prosecutorial Discretion and Gravity', in C. Stahn and G. Sluiter (eds.), The *Emerging Practice of the International Criminal Court* (2009), 229–46.
74 J. Y. Dautricourt, 'Le Droit Pénal dans l'Ordre Public Universel', (1948) *Revue de Science Criminelle et de Droit Pénal Comparé*, 483–519. B. M. Yarnold, 'The Doctrinal Basis for the International Criminalization Process', in M. C. Bassiouni (ed.), *International Criminal Law* (1999), Vol. 1, 127–52.

endowing international criminal law with a double subsidiary character: it should be activated only when all other legal possibilities seem unsuitable to guarantee certain values and interests, and also when national criminal justice systems have failed in protecting them,[75] which usually occurs in the context of state-sponsored criminality. What is more, the seriousness of core crimes and the repercussions of their commission indicate that a high level of organization is required, which, by and large, characterizes states or at least state-like entities. Inversely, it is difficult to envisage individual acts occurring out of the context of a state policy with such effects.

3. Criminological corroboration of the state policy requirement

The statistical verification of the contention that criminology has paid little or no attention to violations of international criminal law brought to the surface the need to explain this inertia[76] as a *sine qua non* for the development of a criminology of international crimes.[77] It came as no surprise that recent attempts to provide an answer point directly to specific constants that are empirically observed in every instance of genuinely international criminality: its collective and organizational dimension as well as its political nature. Actually, these elements taken separately, or even more in combination, are but exceptional features of the common or everyday criminality that constitutes the prevailing subject of the criminological enterprise.[78] What is more, these three elements form the building blocks of the unconventional criminological theory of state crime, introducing a micro-, meso-, and macro-level of analysis respectively, the combined study of which is considered as a prerequisite for the multifaceted scrutiny of the phenomenon of international criminality with potential utility in the realm of international criminal justice.[79]

More particularly, it is now acknowledged that international criminality subsumes the category of collective violence,[80] which is systematically juxtaposed with individual or interpersonal violence.[81] Generally speaking, the term 'collective violence' incorporates a quantitative criterion, referring to situations in which people

75 A. Gil Gil, *El Genocidio y otros crímenes internacionales* (1999), at 20–21.

76 G. E. Yacoubian, 'The (In)significance of Genocidal Behaviour to the Discipline of Criminology', (2000) 34 *Crime, Law and Social Change* 7.

77 A. Smeulers and R. Haveman (eds.), *Supranational Criminology: Toward a Criminology of International Crimes* (2008). C. Mullins and D. Rothe, *Blood, Power, and Bedlam. Violations of International Criminal Law in Post-Colonial Africa* (2008).

78 W. S. Laufer, 'The Forgotten Criminology of Genocide', in W. S. Laufer and F. Adler (eds.), *The Criminology of Criminal Law* (1999), 71–82; W. Morrison, 'Criminology, Genocide, and Modernity: Remarks on the Companion that Criminology Ignored', in C. Sumner (ed.), *The Blackwell Companion of Criminology* (2004), 68–88; R. Haveman and A. Smeulers, 'Criminology in a State of Denial – Towards a Criminology of International Crimes: Supranational Criminology', in Smeulers and Haveman, *supra* note 77, 3–15.

79 A. Chouliaras, 'Bridging the Gap between Criminological Theory and Penal Theory within the International Criminal Justice System', (2014) 22 *European Journal of Crime, Criminal Law and Criminal Justice* 249. See also D. Rothe and C. Mullins, 'Genocide, War Crimes and Crimes against Humanity in Central Africa: A Criminological Explanation', in Smeulers and Haveman, *supra* note 77, 135–58.

80 A. Ceretti, 'Collective Violence and International Crimes', in Cassese, *supra* note 4, 5–15; A. Smeulers (ed.), *Collective Violence and International Criminal Justice: An Interdisciplinary Approach* (2010).

81 S. E. Barkan and L. L. Snowden, *Collective Violence* (2001), at 1–4.

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are harmed by the joint contribution of others.[82] Additionally, what appears to be crucial is

> the instrumental use of violence by people who identify themselves as members of a group – whether this group is transitory or has a more permanent identity – against another group or set of individuals, in order to achieve political, economic or social objectives.[83]

This aspect of collective violence mirrors a qualitative criterion, i.e. the fact that it serves as a means to an end, consisting in the furtherance or deterrence of changes at the political, economic, and/or social levels.[84] Accordingly, Tilly analyses collective violence as a form of contentious politics. Such a position is justified on a twofold basis: collective violence results from collective claim-making that affects the interests of participants and, of course, their relationship to the government, representing a struggle for power.[85] This is why the shape and intensity of collective violence depends notably on the governmental capacity and democracy of each regime.[86]

These conceptual elements of collective violence materialize in concrete empirical findings that constantly accompany its occurrence:[87] the number of perpetrators and victims, that may range from a small group to the whole of society; its instances, that may vary from some ostensibly spontaneous acts to carefully planned mass killing projects; its extremely harmful consequences, as they appear in the short and the long run; its systemic and institutional nature, depending on whether or not collective violence is perpetrated by a legitimate authority under the pretext of the doctrine of state security. These findings led to the phenomenological categorization of core international crimes as an extraordinary and massive form of criminality, which further implied the need to develop criminological, victimological, and penological models of analysis capable of addressing the 'organic whole'.[88] Part and parcel of this process is the employment of a particular research methodology based on qualitative and quantitative analysis,[89] the results of which are extensively used

82 C. Summers and E. Markusen, 'Preface', in C. Summers and E. Markusen (eds.), *Collective Violence. Harmful Behaviour in Groups and Governments* (1999), at ix.

83 A. B. Zwi, P. Garfield, and A. Loretti, 'Collective Violence', in E. G. Krug et al. (eds.), *World Report on Violence and Health* (2002), at 215.

84 Barkan and Snowden, *supra* note 81, at 5–6.

85 C. Tilly, *The Politics of Collective Violence* (2003), at 26.

86 Governmental capacity refers to the control of resources, activities, and population within a territory, whereas democracy touches on the existence of broad and equal relations of communication and control between the population and the state, ibid., at 41.

87 Summers and Markusen, *supra* note 82, at ix.

88 M. A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', (2005) 99 *Northwestern University Law Review* 539 at 566ff.

89 C. Bijleveld, 'Missing Pieces. Some Thoughts on the Methodology of the Empirical Study of International Crimes and other Gross Human Rights Violations', in Smeulers and Haveman, *supra* note 77, 77–97; C. Bijleveld, A. Morssinkhof, and A. Smeulers, 'Counting the Countless. Rape Victimisation during the Rwandan Genocide', (2009) 19 ICJR 208. C. Bijleveld, 'On Research Methods for International Crimes – Methodological Issues in the Empirical Study of International Crimes', A. Hoover Green, 'Learning the Hard Way at the ICTY: Statistical Evidence of Human Rights Violations in an Adversarial Information Environment', both in Smeulers, *supra* note 80, 275–96, 325–52, respectively. S. Straus, 'How Many Perpetrators were there in the Rwandan Genocide? An Estimate', (2004) 6 *Journal of Genocide Research* 85.

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at the phase of criminal investigation of core crimes.[90] A series of empirical data verifies the worst scenarios and substantiates the lethal capacity of state-condoned collective violence.[91]

However, a vexing question looms: what kind of people are capable of perpetrating such atrocious crimes? A series of socio-psychological studies has firmly discarded the convenient scenario of the sadist, the mentally disordered, or generally the 'monster' that deviate substantially from the normal, concluding that mass atrocities are committed by ordinary people acting under extraordinary circumstances; that is, in situations where individual violence is neutralized, routinized, and in a way 'legitimized' as the necessary component of a widespread collective violence with structural and systemic characteristics.[92] In this context, individual action is better conceived and analysed in terms of conformity instead of deviancy, giving rise to the phenomenon of 'law-abiding criminal'.[93] Seen through this prism, collective crimes equate to crimes of obedience, in the sense that they confirm and consolidate authority, or at least they do not challenge it, as in the case of common criminality.[94]

This remarkable inversion of criminological analysis clearly indicates that a behavioural approach to the phenomenon would only offer a limited explanation. For this reason, an alternative model has been proposed that takes into account how relational mechanisms interplay with environmental and cognitive mechanisms.[95] The keyword of this approach is 'entitlement', i.e. the belief that someone has the right to act in a certain way, which is not founded on law, but results from the competitive relation and finally the enmity cultivated towards a concrete group of victims. We are dealing here with a relational concept that aspires to express the interaction developed between two further features: a sense of superiority on the part of the perpetrators that grants them the 'right' to kill, rape, etc., and an inattention to victims' reaction, deriving from the dehumanization or demonization of certain ethnic, religious, etc. groups. In other words, 'entitlement' is a kind of identity or subjectivity, which is socially constructed within very specific organizational, political, and ideological context as a result of interaction between different groups.[96]

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90 X. Agirre Aranburu, 'Methodology for the Criminal Investigation of International Crimes', in Smeulers, *supra* note 80, 353–79.

91 K. Turković, 'Overview of the Victimological Data Related to War in Croatia', (2002) 10 *European Journal of Crime, Criminal Law and Criminal Justice* 202; E. Kiza, 'Victimization in Wars – A Framework for Further Inquiry', in U. Ewald and K. Turković (eds.), *Large-Scale Victimization as a Potential Source of Terrorist Activities* (2006), 73–88; E. Kiza, C. Rathgeber, and H.-C. Rohne, *Victims of War: An Empirical Study on War Victimization and Victims' Attitudes towards Addressing Atrocities* (2006).

92 J. Conroy, *Unspeakable Acts, Ordinary People. The Dynamics of Torture* (2000); M. Huggins, M. Haritos-Fatouros, P. G. Zimbardo, *Violence Workers. Police Torturers and Murderers Reconstruct Brazilian Atrocities* (2002); F. Neubacher, 'How Can it Happen that Horrendous State Crimes are Perpetrated?', (2006) 4 JICJ 787; A. Smeulers, 'What Transforms Ordinary People into Gross Human Rights Violations?', in S. Carey and S. Poe (eds.), *Understanding Human Rights Violations: New Systematic Studies* (2004), 239–56.

93 A. Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in Smeulers and Haveman, *supra* note 77, 233–66. M. A. Drumbl, *Atrocity, Punishment, and International Law* (2007), at 23–45.

94 H. C. Kelman and V. L. Hamilton, *Crimes of Obedience. Toward a Social Psychology of Authority and Responsibility* (1989); M. J. Osiel, *Obeying Orders. Atrocity, Military Discipline and the Law of War* (1999).

95 Tilly, *supra* note 85, at 7. D. Foster, 'Rethinking the Subjectivity of Perpetrators of Political Violence', in Smeulers, *supra* note 80, 39–61.

96 D. Foster, P. Haupt, and M. de Beer, *The Theater of Violence. Narratives of Protagonists in the South African Conflict* (2005), at 68–69.

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Accordingly, recent criminological studies posit that grave human rights violations and core international crimes stand in a cause-effect relationship with the broader social setting in which they occur.[97] In this new framework, any trustworthy attempt at analysis should look for the structural conditions that trigger criminality, meaning it should focus on the political motivation and social organization of violence. The former implies that gross human rights violations and core international crimes are forms of political criminality, at least in the sense that they derive from an abusive conception of sovereignty and are firmly associated with the action of institutions of public governance.[98] In this line, use of the theory of 'the reason of state' (*la raison d'État*), developed in the field of political philosophy, has been proposed as an analytical tool for decoding the ambivalent role of state with respect to human rights, since it sheds light on the dark side of the relationship, where the former incarnates a continuous threat to the latter.[99]

On the other hand, the second characteristic brings to the surface the need to re-examine the relationship between 'structure' and 'agency', taking into consideration the unprecedented proliferation of organizations in modern societies. More particularly, if an organization is conceived as a formal mechanism that provides collective resources through which individual action turns into corporate agency, then it is safe to assert that the real action lies in the organizational matrix. It is the scrutiny of this matrix that supplies the necessary tools to connect macro-institutional forces and micro-processes and eventually reveal the complex mechanics of individual decisions and actions. The study of organizational, as opposed to individual, etiological factors and the employment of the concepts of organizational goals, structure, and process will redefine core international crimes as instances of organizational and not simply individual deviance.[100]

4. Judicial attitudes towards the state policy requirement

Although Article 5 ICTY St. and Article 3 ICTR St. do not contain a legal requirement equal to that of Article 7(2)(a) ICCSt., i.e. 'State or organizational policy', the case law of both tribunals sustains the conclusion that considerations of 'policy' (irrelevant to whether such a policy is deployed by a state, state-like organization, a private organization of any kind, or simply loosely-organized private individuals) may have evidential relevance for the presence of a 'systematic' attack against a civilian population, but on no occasion amount to a legal requirement of crimes against humanity. According to the Appeals Chamber of the ICTY:

97 J. J. Savelsberg, *Crime and Human Rights. Criminology of Genocide and Atrocities* (2010), at 51. A. Alvarez, *Genocidal Crimes* (2010), at 100–102.

98 S. Parmentier and E. G. Weitekamp, 'Political Crimes and Serious Violations of Human Rights: Towards a Criminology of International Crimes', in S. Parmentier and E. G. Weitekamp (eds.), *Crime and Human Rights* (2007), 109–44.

99 A. Chouliaras, 'The Reason of State: Theoretical Inquiries and Consequences for the Criminology of State Crime', in W. Chambliss, R. Michalowski, and R. Kramer (eds.), *State Crime in the Global Age* (2010), 232–46.

100 A. Chouliaras, 'Discourses on International Criminality', in Smeulers, *supra* note 80, 65 at 70–77.

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> Contrary to the Appellants' submissions, neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.[101]

Such a position, also confirmed in later judgments of both the ICTY[102] and ICTR,[103] does not constitute a legally-binding precedent for the ICC, which is not obliged to follow the case law of other courts and tribunals,[104] although nobody expects it to function in total isolation.

The latest development on the state policy requirement came about in the case law of the ICC, which could not reject it as the ICTY and ICTR had done, given the reference in Article 7(2)(a) ICCSt. to a 'State or organizational policy'.[105] By interpreting the concept of 'organization' within the meaning of 'organizational policy', the Pre-Trial Chamber ruled that 'organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population'.[106] The rationale supporting this conclusion is the following:

> Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether the group has the capability to perform acts which infringe on basic human values.[107]

Thus, the Pre-Trial Chamber has refused to adopt a rigid legal definition and opted for a functional approach, according to which a given group may be qualified as an organization for the purposes of Article 7(2)(a) ICCSt. on the basis of the following indicative criteria: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose;

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101 *Prosecutor v Kunarac et al.*, Judgment, Case No. IT-96-23 & IT-96-23/1-A, A. Ch., 12 June 2002, para. 98.
102 *Prosecutor v. Martic*, Judgment, Case No. IT-95-11-T, T. Ch., 12 June 2007, para. 49.
103 *Prosecutor v. Kajelijeli*, Judgment and Sentence, ICTR-98-44A-T, T. Ch., 1 December 2003, para. 872. *Prosecutor v. Muhimana*, Judgment and Sentence, Case No. ICTR-95-1B-T, T. Ch., 28 April 2005, para. 527.
104 Article 21(l)(a) ICCSt. obliges the Court to apply 'in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence'.
105 *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, Pre-T. Ch. II, 31 March 2010.
106 Ibid., para. 92.
107 Ibid., para. 90 (footnote omitted).

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(v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the aforementioned criteria.[108]

The dissenting opinion of Judge Kaul moves in the opposite direction and puts forward a restricted interpretation of the term 'organization', considering that the functional approach advanced by the majority tends to blur the separating line between crimes against humanity and serious ordinary crimes:

> I read the provision such that the juxtaposition of the notions 'State' and 'organization' in Article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State. Those characteristics eventually turn the private 'organization' into an entity which may act like a State or has quasi-State abilities. These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.[109]

The most interesting point here is that Judge Kaul does not limit his analysis to the wording of Article 7(2)(a) ICCSt. and the dictates of the principle of strict construction (a corollary of the principle of legality stipulated in Article 22 ICCSt.), but advances a teleological-historical interpretation that sustains the thesis that crimes against humanity were made possible only by virtue of an existing state policy.[110]

The ICC Chambers in subsequent decisions reiterated the broad interpretation of the term 'organization' adopted by the majority of Pre-Trial Chamber II or refrained from taking a position. Trial Chamber II, citing the jurisprudence of ad hoc tribunals on the issue, ruled that the Rome Statute does not exclude the possibility that a private entity assembling a group of individuals can carry out an attack against a civil population, especially in the context of an asymmetric war.[111] Pre-Trial Chamber I took note of both the position of the majority and the dissenting opinion of Judge Kaul, and concluded 'that the organization alleged by the Prosecutor and satisfactorily established by the available evidence would meet the threshold under either interpretation and that, accordingly, it is unnecessary for the Chamber to

108 Ibid., para. 93. For a critical appraisal of this teleological construction of the term 'organization' see C. Kress, 'On the Outer Limits of Crimes against Humanity. The Concept of Organization within the Policy Requirement. Some Reflections on the March 2010 ICC Kenya Decision', (2010) 23 LJIL 855.

109 *Situation in the Republic of Kenya*, Dissenting Opinion of Judge Hans-Peter Kaul, ICC-01/09, 31 March 2010, para. 51.

110 Ibid., paras. 54–70. See also Kress, *supra* note 108, at 863–6. M. Holvoet, 'The State or Organisational Policy Requirement within the Definition of Crimes Against Humanity in the Rome Statute: An Appraisal of the Emerging Jurisprudence and the Implementation Practice by ICC States Parties', *International Crimes Database*, October 2013.

111 *Situation en République Démocratique du Congo*, Affaire *Le Procureur c. Germain Katanga*, Jugement rendu en application de l'article 74 du Statut, ICC- 01/04-01/07, La Chambre de Première Instance II, 7 Mars 2014, paras. 1118–22.

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dwell any further on this point'.[112] Of course, the last word remains with the ICC Appeals Chamber. [113]

5. The need for policy-inspired international criminal jurisprudence

The broad interpretation of the concept 'organization' advanced by the ICC has been welcomed as a clear sign of the progressiveness and ability of the international criminal law to cope with the fact that 'large-scale violence today is no longer perpetrated only by states or other territorially organized entities', but by militias, paramilitary units, terrorist groups, and other criminal networks as well.[114] What is more, it has been perceived as a clear shift of focus from the criminal conduct of those acting on behalf of the state to the seriousness of the crime, a development that better serves the interests of international criminal justice, by providing a system of accountability for serious violations of international criminal law, and the related fundamental provisions of international human rights and international humanitarian law.[115]

Although nobody could deny the criminal capacity of such networks on realistic terms, or that the criminal conducts of individuals without a formal link to state officialdom could be qualified as a core international crime *de lege lata*, it is legitimate to question whether their prosecution before the ICC should take priority over instances of state criminality or even become its main objective. The distinctive characteristic of state criminality lies in the fact that it infringes both on individual human rights and legally-protected values of the international community as a whole. And if someone believes that state crimes have been sufficiently dealt with, so that we could turn our focus to other forms of organized violence, a growing number of case studies establish the opposite scenario. In the same vein, Judge Cançado Trindade asserts that 'crimes of State effectively do exist, and we know what that means'. Accordingly, he perceives the establishment of the ICC in its present form as the beginning of a long process culminating in the expansion of

112 *Situation In The Republic Of Côte D'Ivoire*, Decision on the Confirmation of Charges against Laurent Gbagbo, ICC-02/11-01/11, Pre-T. Ch. I, 12 June 2014, para. 217.

113 See also the arguments in favour of an amendment of Art. 7 ICCSt. in C. Chernor Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity', (2013) 28 *American University International Law Review*, at 435ff.

114 Werle and Burghardt, *supra* note 1, at 1167. In the same vein, T. Obel Hansen, 'The Policy Requirement in Crimes Against Humanity: Lessons from and for the Case of Kenya', (2011) 43 *George Washington International Law Review*, 31 at 31 ff.

115 C. Frances Moran, 'Beyond the State: The Future of International Criminal Law', *International Crimes Database*, September 2014. The problem with such an approach is that 'amounts to a misstatement of the proper relationship between international human rights law and international criminal law. While it is certainly possible to say that international criminal law has come to be an instrument to protect and enforce (a limited number of fundamental) international human rights there can be no presumption in favour of a broad teleological interpretation of international criminal law as a back door for a progressive development of international human rights law. The sequence can only be the other way round: only once the obligation of an organization to respect international human rights can be clearly established under general international law can a human-rights-inspired teleological argument to include such organizations in the policy requirement of crimes against humanity become available'. Kress, *supra* note 108, at 860–1.

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its jurisdiction in order to address the international responsibility of the states as well.[116]

Therefore, I tend to understand the aforementioned case law as another incidence broadening the gap between criminological theory and penal theory within international criminal justice. More particularly, according to the criminological discourse, core international crimes are perpetrated foremost by individuals acting on behalf of the state and in furtherance of its organizational goals, i.e. in the context of implementation of state policy. In other words, core international crimes are part and parcel of systemic, institutional, or state criminality and the state is considered the primary actor. As a result, criminology urges for an ethically and legally appropriate allocation of responsibility to different kinds of actors (individual, state, and state-like) for different kinds of offending conducts. In this framework, the state policy requirement represents a valid although not ideal option, as it constitutes a way of bringing the criminological findings on state criminality smoothly into the international criminal judicial discourse, without handling the hot potato of state criminal responsibility.

On the other hand, I am inclined to perceive the previous case law as one item in a chain of events bringing about the depoliticization of international criminal law. It is safe to argue that the institutions of international criminal law have been devised in order to facilitate the imputation of individual liability for crimes committed in the name of or at the behest of the state. The fact that the idea of state criminal responsibility was sidestepped and the state can be depicted at most as the 'shadow actor' of core international crimes does not render the state policy requirement illegitimate and doctrinally unfounded. On the contrary, its normative recognition epitomizes the *raison d'être* of international criminal justice: the need to reckon with state-sponsored international criminality, which should remain a priority and not become a subsidiary task. The reason is simple: international criminal justice is both a legal and political enterprise. If the former quality dictates the effective protection of human dignity and of the most fundamental human rights, the latter indicates that the limited resources of the ICC should be directed primarily to criminal failed states, i.e. institutions of public governance that have failed at some of their basic conditions and responsibilities because they engage in or tolerate the commission of core international crimes, also endangering international peace and security.

In this framework, the state policy requirement may function as a strategic choice inspired by deep historical knowledge of the doctrinal foundations of international criminal law and political realism with respect to the due role of the ICC. In my understanding, it is an alternative way to address the system of state criminality, which diachronically represents the most serious threat to the legally-protected values of the international community as a whole.

116 A. A. Cançado Trindade, *International Law for Humankind. Towards a New Jus Gentium* (2010), at 372.

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