Leiden Journal of International Law, 18 (2005), pp. 795–828
 Printed in the United Kingdom doi:10.1017/S0922156505003018

Bridging the Conceptual Chasm: Superior Responsibility as the Missing Link between State and Individual Responsibility under International Law

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Abstract
Commonly accepted distinctions between state and individual responsibility have created a conceptual chasm between the two sets of legal rules, which is in turn reinforced by different underlying theoretical conceptions of the international system. As a result of this conceptual chasm, current understandings of responsibility fail to describe adequately either the sources of harm to individuals or groups within states, or the changing relationships between individuals, non-state groups, and states. The doctrine of superior responsibility, however, offers the possibility for reconciliation of state and individual responsibility rules, by providing a theoretical basis and a practical method of developing understandings of liability for breaches of fundamental norms that more accurately reflect the channels of responsibility in contemporary conflict situations.

Key words
command responsibility; criminal; individual; international relations; state responsibility; superior responsibility

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[1]
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> Under present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems.[2]

Contemporary international law is marked by two distinct, but not wholly incompatible, views of the international system, to which labels derived from international relations (IR) theory may be ascribed.[3] The 'institutionalist' view of international

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1. Judgment of the International Military Tribunal for the Trial of German Major War Criminals, 30 September–1 October 1946, 'The Law of the Charter', reprinted in His Majesty's Stationery Office, Misc. no. 12 (1946), at 41.
2. *Prosecutor v. Blaškić*, Judgment on the request of the Republic of Croatia for Review of the decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14-AR108 *bis*, App. Ch., 29 Oct. 1997 (hereafter *Blaškić* Interlocutory Appeal), para. 25.
3. While there are several possible models for analysing the international system, the two that are presented here – institutionalism and liberalism – find the strongest support in the scope, content, and contours of

law, labelled as such because of its focus on sovereign states as primary actors, posits that states operate in the context of a legal order, comprising rules, norms, and principles, which shapes and constrains state behaviour.[4] This conception is the traditional element of contemporary international law that underlies the doctrine of state responsibility: it is on states as primary actors that international legal obligations are imposed, and generally to states that these obligations are owed; the violation of these obligations incurs responsibility at the level of the state; and it is other states that may invoke this responsibility and demand remedial action on the part of the wrongdoer. The liberal view of international law, so named for the focus on non-state actors that it shares with international relations liberalism,[5] is evinced by much of the development in international law since 1945, which has seen the recognition of the individual as both subject and object of international law. To a large extent, it is the evolution and increasing sophistication of human rights law and humanitarian law, along with the methods and mechanisms for enforcement of the pertinent norms, that have driven the progressive development of international law since the Second World War.[6] International criminal law in particular has created a discrete responsibility regime,[7] which is invoked by the violation of norms protecting the physical integrity and dignity of the individual human person, and which imposes liability for that harm on individual wrongdoers in both their private and public roles.

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contemporary international law. Both theories emerged in response to realism, which was the dominant theory of international politics for much of the twentieth century. Many of the principles of international law are rooted in and, in fact, fit most easily with realism. Nevertheless, to the extent that it is possible to generalize, the trends in current and developing international law – particularly those in the areas of law that are the focus of this article – resonate much more with the two views discussed below. See A.-M. Slaughter, 'International Law and International Relations Theory: A Dual Agenda', (1993) 87 AJIL 205, at 206.

4. The notion that the principal actors in international relations are states does not originate with institutionalism, but rather is one of the central assumptions of both classical political realism and structural realism. See, e.g., H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1948), and K. Waltz, *Man, the State, and War: A Theoretical Analysis* (1959). What distinguishes institutionalism from realism are precisely the characteristics described above: instead of positing a zero-sum game in which actors' interests are necessarily conflictual, institutionalists argue that '"rules, norms, principles, and decision-making procedures" can mitigate the effects of anarchy and allow states to cooperate in the pursuit of common ends'. A.-M. Slaughter, 'International Law and International Relations', in Hague Academy of International Law, (2000) 285 *Recenil des Cours* 9, at 18 (citing S. D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables', in S. D. Krasner (ed.), *International Regimes* (1982), at 2).

5. For the pure IR theory view of liberalism, see A. Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', (1997) 51 *International Organization* 513; for the application of liberal IR theory to law, discussing the individualization of international law, see Slaughter, *supra* note 3; A.-M. Slaughter and W. Burke-White, 'An International Constitutional Moment', (2002) 43 *Harvard International Law Journal* 1, at 13–16. Unless otherwise specified, the term 'liberal' is used in this article to refer to IR liberalism.

6. See generally H. J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals* (2000), at v, vii–viii; H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', (1995/1996) 25 *Georgia Journal International & Comparative Law* 287; J. S. Gibson, 'International Human Rights Law: Progression of Sources, Agencies, and Law', (1990) 14 *Suffolk Transnational Law Journal* 41.

7. 'Regime' is not used here as a term of political science or international relations theory, and therefore is not meant to invoke Stephen Krasner's definition, 'sets of implicit or explicit rules, norms, principles and decision-making procedures around which actors' expectations converge'. See *supra* note 4. Under this definition, international law itself may be seen as a regime. Indeed, the term 'regime' has come to be replaced in international relations theory with 'institution', and the phenomena that it describes are the focus of institutionalist theory. Instead, 'regime' is used in the more limited (though related) sense of a *legal* regime, defined as 'a set of rules, policies, and norms of behaviour [within a legal system] that cover any legal issue and that facilitate substantive or procedural arrangements for deciding that issue'. *Black's Law Dictionary* (1999) at 1286.

These two regimes of responsibility are usually viewed as complementary and not competitive: violations of certain fundamental norms of international law may give rise to both individual and state responsibility (or 'double responsibility'),[8] and reliance on either regime depends on the political and legal context in which liability is assessed. One of the questions explored by this article, however, is whether the growth and progress of individual responsibility have come at the expense of the development of rules which directly impose heightened responsibility on states for the most grievous violations of international law.

Whatever view of international law and international relations one holds, however, it is indisputable that the parallel developments of the state responsibility and individual criminal responsibility regimes have occurred in relative isolation from each other, with little substantive overlap and few theoretical links. The regimes may share origins depending on the primary obligations concerned,[9] but they diverge when it comes to their practical content – the secondary rules for when and how responsibility may be imposed. This article argues that the commonly accepted division of labour between state and individual responsibility, with the attendant focus on the separateness of the regimes, has created a conceptual chasm between the two sets of rules, which is in turn reinforced by the different underlying theoretical conceptions of the international system. Because of the increasing complexity of international relations, however – including the multiplicity and heterogeneity of international actors, and the non-conventional nature of contemporary conflict – the consequence of the conceptual chasm is that academic and practical understandings of responsibility are insufficient. On one hand, these understandings do not adequately capture the sources of harm or violence to individuals and groups within states; on the other, they mischaracterize the texture of the changing relationships between individuals, non-state groups, and states.

One way to link the two kinds of responsibility – attempted though Article 19 of the Draft Articles on State Responsibility and unsuccessful because of the eventual rejection of that proposal – is to establish the criminal responsibility of states. The doctrine of superior responsibility in international criminal law, however, provides another bridge between individual responsibility and state responsibility, a link that is more likely to survive and be fully developed because it does not threaten to erase the distinctions that are maintained by the dominant theoretical conceptions of the international legal order.[10]

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8. See *infra* section 1.4.2.
9. See ibid.
10. The jurisprudence of the International Criminal Tribunal for the former Yugoslavia on Art. 2 of that Tribunal's Statute – pertaining to grave breaches of the Geneva Conventions – could also be read to establish some relationship between state and individual criminal responsibility. The Tribunal has repeatedly held that in order for the Geneva Conventions to apply to an armed conflict, that conflict must be international in nature. See, e.g., *Prosecutor v. Brđanin*, Judgment, Case No. IT-99-36-T, T. Ch. II, 1 Sept. 2004, para. 121; *Prosecutor v. Blaškić*, Judgment, Case No. IT-95-14-A, App. Ch., 29 July 2004 (*Blaškić* Appeal Judgment), para. 170. One way in which a conflict may be termed international, or may become internationalized, is if some of the participants in an internal armed conflict act on behalf of another state. The Tribunal applies three tests, each specific to the circumstances of the conflict, to determine the degree of control necessary to deem the participants in an internal conflict *de facto* state organs, i.e., acting on behalf of a state, and each relies on the rules of the state responsibility regime. See, e.g., *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A,

This article argues that the individual criminal responsibility of military and civilian superiors necessarily implicates the responsibility of the state, because the duties that are imposed on superiors to prevent and punish the crimes of their subordinates are in turn derived from the more general obligations that are imposed on states to prevent and punish certain violations of international law by individuals.[11] When viewed in that context, the theoretical and practical implications of superior responsibility become clear. First, if the principal distinction between individual and state responsibility – the source of the debate over Article 19 – is the difference between criminal liability and 'civil' liability,[12] the bridge of superior responsibility resolves the tension by establishing the two liabilities as linked, but nevertheless distinct. Once superior responsibility is established as a matter of international criminal law, it could subsequently be used to establish civil responsibility on the part of states, ensuring that the consequences of state responsibility may follow without the cognitive and political difficulties of labelling a state as criminal. Second, and more importantly, using the doctrine of superior responsibility ensures that state responsibility may still be assessed in the context of the type of contemporary conflicts that can lead to international crimes: situations like those in the former Yugoslavia, Rwanda, Sierra Leone, and East Timor, where both the perpetrators and their leaders may not be formal agents of the state or quasi-state organization, but the state (established or *in statu nascendi*) is nevertheless implicated. While the theoretical possibility of holding states liable for these violations already exists,[13] superior responsibility provides a developed practical mechanism for establishing such responsibility.[14]

1. Two separate regimes

1.1. State responsibility

From its origins in the principles relating to liability for injuries to aliens, the set of legal rules governing state responsibility has been a creature of the Westphalian system,[15] faithful to the positivist conception of international law as a consensual network of rights and obligations almost exclusively between sovereign states. Even as the benefit of the legal rules redounded on the individual victims of the wrong, the

App. Ch., 15 July 1999, paras. 118, 120, 124–131, 132–138, 141–144. The Tribunal's reliance on state responsibility principles, however, is restricted to the determination of whether the general requirements of Art. 2 have been satisfied, and the crime in question is therefore punishable as a grave breach. Since this limited use does not extend to the determination of an individual accused's culpability, it establishes no real theoretical link between the two responsibility regimes.

11. This argument applies not only to the highest leaders of a state – where it may seem intuitively evident – but also to lower-level military and civilian superiors. See *infra* section 3.
12. To the extent that state responsibility has a domestic analogue, it is civil liability. See *infra* note 73 and accompanying text.
13. See *infra* section 1.4.2.
14. See *infra* section 3.2.3.
15. The Peace of Westphalia was a set of European treaties, concluded in 1648, which brought to an end the Eighty Years War between Spain and the Dutch, and the German phase of the Thirty Years War. In its limitation of the power of the Holy Roman Empire, it is traditionally seen as the beginning of the modern state system, and is generally cited as the classic legal codification of an international political system based on sovereign states.

https://doi.org/10.1017/S0922156505003018 Published online by Cambridge University Press

obligation – and the consequent reparations – were owed to the state of nationality.[16] Moreover, under this early form of state responsibility, the state interest in protecting nationals who were present in other states was 'asserted even in opposition to the will of the individual, and [was conceived as] independent of the individual's interest'.[17]

Even though scholars as early as the 1940s and 1950s recognized that the embodiment in international law of an obligation to respect human rights might expand the liability of states from its focus on aliens to incorporate responsibility for injuries to all individuals,[18] the area of law known as 'state responsibility' has retained the state-to-state character of classic international law despite 'the growing importance of non-state actors as holders of international rights and obligations'.[19] The Articles on State Responsibility, adopted by the International Law Commission (ILC) in 2001,[20] largely reflect this traditional view of international law. That the legal regime of state responsibility is indicative of an institutionalist approach to international law is demonstrated first by its focus on states to the almost total exclusion of other international actors, but more importantly by its concern for creating rules that not only constrain state actions, but establish uniform and consistent standards of behaviour that reduce uncertainty and increase the importance of reputation in inter-state relations.[21]

Despite an early attempt to confine the ILC's study to the specific substantive topic of injuries to aliens,[22] the Articles were both broadened and limited in scope under the direction of the second Special Rapporteur for State Responsibility, Roberto Ago.

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16. See, e.g., L. Oppenheim, *International Law: A Treatise*, ed. H. Lauterpacht (1955) (hereafter Lauterpacht), § 164 ('International Law imposes the duty upon every State as far as possible to prevent its own subjects, and such foreign subjects as live within its territory, from committing injurious acts *against other States*') (emphasis added); L. F. Damrosch et al., *International Law: Cases and Materials* (2001) ('State responsibility for injuries to aliens . . . was not seen as creating rights for the alien under international law; he or she would benefit because the law sees an offense to the individual as an offense against the state whose nationality the individual bears; remedies for violation of those norms are accorded to the state').
17. P. C. Jessup, *A Modern Law of Nations* (1948), at 98.
18. See, e.g., ibid., at 97. But see J. L. Brierly, *The Law of Nations* (1954), at 217–31 (not discussing the nascent law of human rights in his treatment of state jurisdiction over aliens and the principles of diplomatic protection).
19. D. Bodansky and J. R. Crook, 'Symposium: The ILC's State Responsibility Articles, Introduction and Overview', (2002) 96 AJIL 773, at 775.
20. International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001) (hereafter ILC Articles).
21. See R. Keohane, 'A Functional Theory of International Regimes', in *After Hegemony: Collaboration and Discord in the World Political Economy* (1984), at 85. Professor Keohane's description of the key characteristics of regimes (now commonly called institutions in contemporary international relations theory, see *supra* note 7) seems particularly apt for the rules of state responsibility as they exist in customary international law:

> Regimes also resemble conventions: practices, regarded as common knowledge in a community, that actors conform to not because they are uniquely best, but because others conform to them as well. . . . What these arrangements have in common is that they are designed not to implement centralized enforcement of agreements, but rather to establish stable mutual expectations about others' patterns of behaviour and to develop working relationships that will allow the parties to adapt their practices to new situations. Ibid., at 89.

22. See generally F. V. García-Amador, First Report on International Responsibility, (1956) 2 *Yearbook of the International Law Commission* 173, UN Doc. A/CN.4/SER.A/1956/Add.1; F. V. García-Amador, Sixth Report on International Responsibility, (1961) 2 *Yearbook of the International Law Commission* 46, UN Doc. A/CN.4/SER.A/1961/Add.1.

Instead of undertaking the highly controversial task of drafting rules concerning liability for state actions such as appropriation or nationalization, Ago proposed to expand the Commission's attention to all of international law, but to restrict its work of codification and progressive development to what were termed 'secondary rules'.[23] According to his formulation, primary rules are those that identify the source, content, and scope of the positive or negative obligation imposed on states, while secondary rules prescribe the consequences of the breach of those obligations.[24] This restructuring of the Commission's approach greatly influenced the work of subsequent rapporteurs, and the Articles in their completed form maintain the character of secondary rules as described by Ago.[25]

The contemporary law of state responsibility therefore comprises general transsubstantive rules, which exist as basic principles, background law, gap-fillers, and points of departure for the creation of more specialized legal regimes.[26] Because the law of state responsibility is not defined merely by reference to the substantive obligations of a particular area of the law, to the extent that the rules codify customary or general international law, they lay bare the concepts and mechanics of violation and attribution that underlie traditional state-to-state international law. The rules are intended to be 'general propositions that can be applied more or less comprehensively across the entire range of international law'[27] and, as such, are an especially good manifestation of the particular assumptions and philosophical convictions of the institutionalist school.

Under customary international law as codified by the ILC Articles, state responsibility is invoked whenever the breach of an international obligation is attributable to a state; that is, liability and the obligation to make reparations to other states are occasioned by an internationally wrongful act by a state.[28] As explained above, the

23. See R. Ago, First Report of the Special Rapporteur, (1969) 2 *Yearbook of the International Law Commission* 306, para. 66(c), UN Doc. A/CN.4/217/Add.1. Professor Ago did not specifically use the terms 'primary' and 'secondary' to differentiate between the two types of rules; those denominations are how later scholars characterize his distinction. But see Bodansky and Crook, *supra* note 19, at 780–1 (summarizing academic critique about the difficulty of maintaining the difference between primary and secondary rules as a coherent or consistent distinction).

24. There are actually two kinds of secondary rules dealt with in the Articles: (i) the set of legal duties and rights that are peculiar to state responsibility (e.g., the obligations of cessation and reparation; the right of certain states to invoke the responsibility of the breaching state); and (ii) those governing the transition from general international law into the regime of state responsibility. In essence, the secondary rules determine when an obligation has been breached, and what the consequences of that breach are. See Bodansky and Crook, *supra* note 19, at 779. Note that this conception is different from H. L. A. Hart's secondary rules, of which the classic example was the provisions of the Vienna Convention on the Law of Treaties. See H. L. A. Hart, *The Concept of Law* (1961), at 91–2. Hart's secondary rules are closer to meta-rules ('rules about rules'), and do not comprise a distinct legal regime.

25. The focus on secondary rules is a key similarity between the law of state responsibility and the process by which individual responsibility is assessed in international criminal law, and forms part of the theoretical basis for the bridge between regimes. See *infra* Part 1.4.1.

26. See Bodansky and Crook, *supra* note 19, at 774–5. Note, e.g., the ILC's recognition in Art. 55 that such specialized legal regimes would be exceptions to the *lex generalis* of the Articles.

27. Ibid., at 781.

28. See ILC Articles, *supra* note 20, Arts. 1, 2. Note that this definition of state responsibility has been described as tautological on its face, but also indicative of the Commission's view that certain substantive elements that would determine whether or not an obligation has been breached – such as fault or injury – are addressed by the primary rules and are not the province of the ILC's secondary rules. See Bodansky and Crook, *supra* note 19, at 782.

bulk of the ILC's work on the articles was limited to interstate rights and obligations, a focus that has been criticised for its somewhat anachronistic flavour in modern international law:

> not only has international law become increasingly specialized and fragmented, but it increasingly focuses on the responsibility of non-state actors such as individuals and terrorist groups and on the obligations of states towards individuals. These legal relationships largely remain outside the scope of the ILC's study of international responsibility, which generally adopts a traditional state-to-state approach.[29]

Despite the traditional aspects of the Articles' approach, however, one area of progressive development in their text is particularly important for the task of establishing a link between state responsibility and individual criminal responsibility. Articles 26, 40, and 41 refer to a subset of international obligations, classified as peremptory or *jus cogens* norms of international law.[30] Some of these norms pertain to classic inter-state rules, such as the prohibition on the use of force codified in Article 2(4) of the UN Charter, but others involve obligations imposed on states to refrain from, prevent, and punish certain grievous harms to individuals. These latter rules include the prohibitions against genocide, slavery, torture, and crimes against humanity – the human rights-related peremptory norms.[31]

This area of state responsibility is concerned with neither bilateral nor multilateral obligations arising from contractual or quasi-contractual relations between states. Instead, its focus is on the set of obligations that are imposed on states by rules of customary international law relating, *inter alia*, to the physical integrity and dignity of the human person, albeit within the territorial jurisdiction of the state. The latter category of duties was denominated as obligations *erga omnes*, or obligations owed by states towards the international community as a whole, by the International Court of Justice in the *Barcelona Traction* case.[32] These rules, because of their substantive content and their recognition of the individual as an object of

29. Bodansky and Crook, *supra* note 19, at 775.
30. According to their terms, Arts. 40 and 41 apply only to 'serious breach[es] by a State of an obligation arising under a peremptory norm of general international law', where 'serious' is defined as involving 'a gross or systematic failure by the responsible State to fulfil the obligation'. ILC Articles, *supra* note 20, Art. 40. Although the Commentary to this Article does not so state, the Commission's formulation does seem to invoke the substantive elements of human rights-related peremptory norms: 'gross' may be a reference to either the numerosity or the nature of the offence, and 'systematic' is one of the two scope-related criteria for a crime against humanity. See *infra* note 31 and accompanying text.
31. Peremptory norms are understood here not as originating from the principles of natural law, but rather as functional aspects of the development of an international community governed increasingly by the rule of law. As such, peremptory norms form the basis for principles of public order within international law. See *infra* note 38 and accompanying text.
32. *Barcelona Traction, Light, and Power Company (Belgium v. Spain)*, Second Phase, Judgment of 5 Feb. 1970, [1970] ICJ Rep. 3 (hereafter *Barcelona Traction*), at 32. The ILC adopted the second formulation (obligations 'towards the international community as a whole') to avoid linguistic confusion, because multilateral treaty obligations are termed obligations *erga omnes partes* or *erga omnes contractantes*, or obligations owed to all [contracting] parties. See International Law Commission, 'Commentaries to Draft Articles on Responsibility of States for Internationally Wrongful Acts', in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) (hereafter ILC Commentaries), Commentary to Article 48, paras. (6), (9). For the purpose of brevity, however, the author will use the term 'obligations *erga omnes*' to describe these obligations to the international community.

international law, demonstrate an obvious potential for overlap with the rules of primary obligations in international criminal law.[33]

1.2. Individual criminal responsibility

Individual responsibility under public international law has always been assessed in the context of criminal, not civil, liability. Purely private persons who commit civil wrongs are generally subject to the municipal law of one or more states,[34] and when persons who are state agents (or whose actions are otherwise attributable to the state) commit international civil wrongs, it is the state that bears responsibility, not the individual.[35] This latter principle was recognized as a general rule of international law by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia:

> [State] officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries, restated many times since.[36]

The Chamber went on, however, to hold that personal responsibility for international crimes is an exception to the customary rule of functional immunity: individuals may be held liable for actions that violate rules of international criminal law, and 'cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity'.[37]

This limitation of the individual responsibility regime to criminal law is a function of the objects and purposes of public international law. Private international law, to the extent that it governs choice-of-law questions in international transactions, litigation, and arbitration, is indeed implicated in evaluations of the civil liability of non-state actors. Public international law, however, is chiefly concerned with the actions of individuals only when they threaten the public order system that has been developing in international law over the last few decades: when individuals breach the human rights-related peremptory norms, they both violate the rights of their individual victims and threaten the international legal order.[38]

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33. See *infra* section 1.4.2.
34. The Alien Torts Claims Act (ATCA) in the United States does impose civil liability on individuals for violations of customary international law, see *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d. Cir. 1980), but federal courts entertaining ATCA actions have been careful to base their jurisdiction on the US Constitution and federal statutes. See also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 776 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) (Edwards, J., concurring) (distinguishing *Filartiga* on the grounds that international law does not impose 'the same responsibility or liability on non-state actors, such as the PLO [Palestine Liberation Organization], as it does on states and persons acting under color of state law').
35. See ILC Articles, *supra* note 20, Arts. 4–11.
36. *Blaškić* Interlocutory Appeal, *supra* note 2, para. 38. See also Lauterpacht, *supra* note 16, § 164 (noting that international law places the obligation on the state – not the individual – to prevent or abstain from the commission of a civil international wrong).
37. *Blaškić* Interlocutory Appeal, *supra* note 2, para. 41.
38. The concept of public order, in contrast to the contractual and voluntary model of international law that dominated traditional discussions of state-to-state relations, covers two related subjects: first, the creation of

Out of a dual concern for the enforcement of these fundamental norms and the creation of an international rule of law, therefore, the interests of the international community as a whole are implicated.[39] Restriction of individual responsibility to criminal matters therefore does not undermine the individualization – liberalization, in international relations terms – of international law. On the contrary, it represents the strengthening of norms that were developed to protect individuals. The recognition that the fundamental human rights of individuals are crucial to the maintenance of international peace, security, and lawfulness is one of the most important innovations in international relations in the last several decades. This recognition is, in many ways, the triumph of a liberal approach to international law.[40]

While state responsibility has its roots in an international political system that is over 350 years old, individual criminal responsibility is a newer creation: linked in both concept and practice to the international tribunals set up in the aftermath of the Second World War, it is very much a feature of the international law of the last sixty years.[41] The idea of trying individuals for 'the greatest outrages against the laws and customs of war and the laws of humanity' was proposed at the end of the First World War,[42] but it was not until 1945 that international judicial processes were created to assess the responsibility of individuals for the commission of

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an international society or community, including but not limited to states, that is both peaceful and governed by the rule of law; and second, the development of 'international lawfulness', in that respect for the rule of law is the concern of all members of that international community regardless of whether there has been material harm to an actor's particular interests. See, e.g., S. Wiessner and A. R. Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity', (1999) 93 AJIL 316; N. Rostow, '"Who Decides" and World Public Order', (1995) 27 *New York University Journal of International Law & Politics* 577; International Law Commission, Report of the International Law Commission on the Work of Its Fiftieth Session, UN GAOR, 53rd Sess., Supp. No. 10, UN Doc. A/53/10 (1998), para. 283 (hereafter 1998 ILC Report) (noting that members of the Commission regarded the notion of objective responsibility – i.e., unrelated to harm or direct injury – in the Draft Articles as bringing the law of state responsibility closer to public order).

39. The invocation of the language of the International Court of Justice in *Barcelona Traction* is deliberate; as will be seen later in the discussion of state criminality, peremptory or *jus cogens* norms and *erga omnes* obligations on one hand are conceptually related to each other, and on the other are both implicated in the public-order aspects of international law. See *infra* note 92.

40. Additionally, the understanding that human rights violations can threaten international peace and security establishes a strong basis for a reconciliation of the potentially divergent goals of liberal and institutionalist views of international law – the protection of individual rights and the maintenance of order within the international system.

41. Individual criminal responsibility was accepted much earlier in theory than in practice. As Professor Brownlie notes, 'Since the latter half of the nineteenth century it has been generally recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals, and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals'. I. Brownlie, *Principles of Public International Law* (1998), at 565.

42. A commission created by the Preliminary Peace Conference at Versailles concluded that the instigation of an aggressive war did not violate then-extant international law, but individuals responsible for atrocities committed during the war should be subject to prosecution. See Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties (29 March 1919), (1920) 14 AJIL 95, at 113–16 (quotation at 116). The Allies eventually concluded that 'conducting international trials would destabilize the Weimar regime and risk revolutionary insurrection. The Germans ultimately were permitted to prosecute forty-five individuals before the Penal Senate of the Supreme Court (Reichsgericht). These proceedings, for the most part, focused on lower-level combatants'. M. Lippman, 'Humanitarian Law: The Uncertain Contours of Command Responsibility', (2001) 9 *Tulsa Journal of Comparative & International Law* 1, at 7 (internal citations omitted).

crimes against international law.[43] The jurisprudence of these tribunals and their contemporary successors in the area of superior responsibility is discussed below.[44] It is sufficient to note here that despite criticisms of victor's justice and years of relative neglect by legal scholars, the trials conducted by the international military tribunals in Nuremberg and Tokyo have undoubtedly influenced the development of the individual responsibility regime and the practical work of current and future international criminal tribunals.

The establishment of these tribunals therefore signalled a shift in international legal affairs, away from the conception of international law purely as an inter-state system built on the cornerstone of sovereignty, and towards the recognition that individuals may be both subjects and objects of law – the repositories of duties and rights. As human rights norms have strengthened and become increasingly enforceable under customary, conventional, and municipal law, the protections of sovereignty have necessarily weakened. Universal jurisdiction, defined as criminal jurisdiction that is exercised by national courts without regard for the location of the crime or the nationality of either offender or victim,[45] is one of the strongest examples of this liberalization of international law.

Under current customary international law, individual responsibility may be assessed for acts or omissions that constitute one or more of the following crimes:[46] genocide, war crimes, crimes against humanity, slavery, torture, piracy,[47] and crimes against peace, or aggression.[48] As members of the International Law Commission

43. See Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 Aug. 1945), available at http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm (hereafter London Agreement) (creating the International Military Tribunal to try 'Major [German] War Criminals'); Charter of the International Military Tribunal, 82 UNTS 279 (1945); Charter of the International Military Tribunal for the Far East (19 Jan. 1946), available at http://www.yale.edu/lawweb/avalon/imtfech.htm (establishing an International Military Tribunal to try Japanese war criminals).

44. See *infra* section 3.1.

45. See Princeton University Program in Law and Public Affairs, *Princeton Principles on Universal Jurisdiction* (2001) (hereafter *Princeton Principles*), at 28, Principle 1.

46. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda (hereafter the ad hoc international criminal tribunals or ICTs) have repeatedly discussed the potential problem of charging or convicting individuals for several crimes that arise out of the same underlying conduct. See, e.g., *Prosecutor v. Blaškić*, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, Case No. IT-95-14-AR108 *bis*, T. Ch. I, 4 April 1997, para. 32 (noting that 'the concept of concurrent legal characterizations has been identified and is known in national criminal law'); *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, T. Ch. I, 2 Sept. 1998 (hereafter *Akayesu* Trial Judgment), para. 468 (outlining the conditions under which it is 'acceptable to convict the accused of two offences in relation to the same set of facts').

47. But see E. V. Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', (2004) 45 *Harvard International Law Journal* 183 (arguing that international criminal law's reliance on piracy as the model for the exercise of universal jurisdiction is misplaced, as the reasons for its status as a crime subject to the jurisdiction of any state were more pragmatic than principled).

48. This list is derived from the following international instruments: Statute of the Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, Annex, UN Doc. S/25704/Add.1/Corr.1 (1993), reprinted in (1993) 32 ILM 1192 (hereafter ICTY Statute), Arts. 2–5; Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, UN SCOR, Annex, 49th Sess., 3453d mtg., UN Doc. S/RES/955 (1994), reprinted in (1994) 33 ILM 1598 (hereafter ICTR Statute), Arts. 2–4; *Princeton Principles*, *supra* note 45, Principle 2; Rome Statute of the International Criminal Court, entry into force 1 July 2002, UN Doc. A/CONF.183/9 of 17 July 1998, reprinted in (1998) 37 ILM 999 (hereafter Rome Statute), Art. 5.

noted during the debate over Article 19, several of these crimes are often the product of a policy formulated at the level of the state or organization, and there is a certain illogic inherent in punishing them only at the individual level.[49] Nevertheless, it is at the individual level that detailed legal rules for determining responsibility have developed, and it is there that any successful attempt to establish state responsibility must begin.

1.3. So what? Why state responsibility is still important

One necessary consequence of a legal regime that focused almost entirely on inter-state rights and obligations was the limited responsibility of states towards non-state actors for violations of international law, even when those persons were themselves the victims of the breach. In the 'injuries to aliens' model of state responsibility, for example, there was no question of holding a state's treatment of its own citizens to international standards, and even aliens whose claims were not espoused by their state of nationality were left without legal remedy under international law.[50] Indeed, in many respects, individual criminal liability was developed to remedy some of the grave injustices that attended an exclusive focus on the responsibility of states to other states.

If much of the impetus in the progressive development of international law over the last six decades has been provided by the liberal impulses of human rights law, then of what use is the effort to work with the institutionalist framework of state responsibility? If the triumph of international criminal law, among other innovations, has been to render the state transparent and to remove the shield of sovereign immunity,[51] what additional benefits for the enforcement of international law could the evaluation of state responsibility as linked to individual criminal responsibility afford?

Two responses are suggested. First, to the extent that the concern is the enforceability of human rights norms, state responsibility supplements – but does not replace – individual liability. International processes already exist that both declare state violations of international human rights law and require remedial action on the part of governments; the European Court of Human Rights and the Inter-American Court and Commission of Human Rights are the best-known and most effective of such mechanisms. For the most part, however, those mechanisms are treaty-based systems, although they occasionally apply and develop customary international law.

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49. See 1998 ILC Report, *supra* note 38, para. 276. Indeed, under customary international law as applied by the tribunals and codified in the Rome Statute, crimes against humanity in particular require knowledge by the individual that his or her actions are part of a widespread or systematic attack on a civilian population, a criterion that might be read to imply a policy designed or practice implemented at a level superior to that of the individual. See *Prosecutor v. Kunarac, Kovač, and Vuković*, Judgment, Case Nos. IT-96-23 and IT-96-23/1-A, App. Ch., 12 June 2002, para. 85; *Prosecutor v. Ntakirutimana*, Judgment, Case Nos. ICTR-96-10 & ICTR-96-17-T, T. Ch. I, 21 Feb. 2003 (hereafter *Ntakirutimana* Trial Judgment), para. 812; Rome Statute, *supra* note 48, Art. 7.

50. See Brierly, *supra* note 18, at 218–19. This result is by no means an artefact of hidebound conceptions of international law: the current work of the ILC on the Draft Articles of Diplomatic Protection recognizes that the assumption of the claim of an individual by a state is still at the discretion of the state; there is no obligation to adopt the claims of individuals. See generally J. R. Dugard, First Report on Diplomatic Protection, UN Doc. A/CN.4/506/Add.1 & Corr. (2000), paras. 61–75 (hereafter First Report on Diplomatic Protection).

51. See Slaughter and Burke-White, *supra* note 5, at 13–14.

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The recognition that state responsibility for violations of obligations *erga omnes* may be assessed and imposed under customary international law, coupled with the progressive development of custom in ILC Article 48(2),[52] would mean that the victims of such violations could receive redress (both dignitary and monetary) in situations that do not fall under the jurisdiction of treaty-based human rights regimes. An appropriate analogy may be drawn with the area of diplomatic protection. In his first report as Special Rapporteur on the subject, John Dugard argued that

> diplomatic protection remained an important weapon in the arsenal of human rights protection. As long as the State remained the dominant actor in international relations, the espousal of claims by States for violations of the rights of their nationals remained the most effective remedy for human rights protection. Instead of seeking to weaken that remedy by dismissing it as a fiction that had outlived its usefulness, every effort should be made to strengthen the rules that comprised the right of diplomatic protection.[53]

Professor Dugard's position is easily identifiable as informed by institutionalism, but his point remains important even for those who do not share this approach to international relations and law.

Second, to the extent that many (if not most) international lawyers and policymakers retain the view that states are the most important actors in international relations, the determination of state liability remains a useful symbolic tool to advance the protection of human rights.[54] State responsibility thus conceived is a point of pressure to be employed against states: as bad as it is that individuals from a state are labelled as criminal, the shaming factor of human rights adjudications is increased if the state itself is legally recognized as bearing some responsibility for those criminal actions. On a different level of analysis, if the concern of the institutionalist international lawyer is that the liberal-driven evolution of international law has come at the expense of developing rules imputing special responsibility to states for the most heinous violations of international law,[55] developing a mechanism whereby states are held civilly liable for international crimes would prevent state avoidance of responsibility through the devolution of blame to individuals.[56]

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52. ILC Articles, *supra* note 20, Art. 48(2) reads:

> Any State entitled to invoke responsibility [as an injured state or representative of the international community as a whole] may claim from the responsible State:
>
> (a) Cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
>
> (b) Performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

53. First Report on Diplomatic Protection, *supra* note 50, para. 32.
54. The protection and development of individual human rights, while originally more linked to a liberal conception of human rights, can also find purchase within an institutionalist framework, as long as the systematic violation of fundamental human rights is conceived of as a threat to peace and security – international order – the more traditional concern of institutionalism. See *supra* note 40.
55. See *infra* section 2.2.
56. Although the ILC Articles do contain provisions that make some moves towards ensuring that states are held liable for actions that constitute crimes when conducted by individuals or groups, see, e.g., ILC Articles, *supra* note 20, Arts. 10(2), 26, 40, 41, neither the text of the Articles nor the commentaries thereto present a mechanism for that process. This article proposes the superior responsibility doctrine as such a mechanism. See *infra* section 3.2.3.

1.4. A theoretical basis for the bridge between responsibility regimes

A rudimentary foundation for the establishment of a link between state and individual responsibility is immediately apparent: both types of responsibility seek to ensure the observance of international law by identifying and assigning blame to those actors responsible for its violation. This similarity is too vague to be useful, however, as it merely restates the fact that both regimes deal with the evaluation and imposition of liability for international legal wrongs. Before any possible bridge between the two sets of legal rules can be developed, substantial points of similarity must be identified, and any significant differences addressed and resolved.

Much of the development of the rules contained in each regime has come in the last ten years, with the work of the ILC on state responsibility and the ad hoc international criminal tribunals on individual criminal responsibility.[57] If the comparison is between the ILC's efforts at codification and progressive development on one hand, and the jurisprudence of the tribunals on the other, certain important observations may be made.

1.4.1. Primary and secondary rules

In the context of state responsibility, primary rules 'establish . . . particular standards of conduct'[58] by identifying the content and scope of obligations imposed on states by treaty or customary international law. The primary rules are derived from international law external to the Articles,[59] while the Articles themselves deal with secondary rules that determine when an obligation is breached, and the legal consequences of that breach.[60] In much the same manner, the primary rules for individual criminal responsibility are largely predetermined by the time of their application by international judges, because the crimes are defined by statute and customary international law.[61] As a result of their position and duties as triers of fact and law, the tribunals do play a role in determining the content of the law which they apply, at least with regard to the classification of given acts as within or without

57. This observation is perhaps stronger with respect to the international tribunals than for the ILC, which through its commentaries to the Articles acknowledges the customary roots of the rules and principles it codifies. See generally ILC Commentaries, *supra* note 32.
58. Bodansky and Crook, *supra* note 19, at 779.
59. See ILC Articles, *supra* note 20, Art. 3.
60. See *supra* notes 23–24 and accompanying text; see also ILC Commentaries, *supra* note 32, Introduction, paras. 2–4.
61. See, e.g., *Prosecutor v. Kordić and Čerkez*, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, Case No. IT-95-14/2, T. Ch. III, 2 March 1999, paras. 17–22; *Akayesu* Trial Judgment, *supra* note 46, paras. 604–608. One distinction between the two regimes is that the consequences of the breach are also largely external to the application of the responsibility rules in criminal law: once the fact of breach is established, the consequence is necessarily criminal sanctions. Although the particular result is determined by the tribunal, it is within a narrow range of possible sanctions – imprisonment for terms of varying length, not fines or death. The consequences of a civil international wrong attributable to a state, however, may vary widely, and are dependent for the most part on the nature of the breach and the remedies demanded by the injured state. See ILC Articles, *supra* note 20, Arts. 28–39. For textual support for this distinction between primary and secondary rules in international criminal law, see the codifications of these rules in different documents for the International Criminal Court: compare Rome Statute, *supra* note 48, with Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000), reprinted in Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, Official Records, UN Doc. ICC-ASP/1/3, at 112, also available at http://www.icc-cpi.int/docs/elements(e).pdf.

established categories of crimes.[62] Nevertheless, the general observation remains correct. The chief occupation of both regimes is the same two-part inquiry: (i) has the international obligation been breached? and (ii) to whom shall responsibility attach for violations of international law?[63]

The significance of this similarity is that it provides a partial basis for a bridge in the form of a legal doctrine that shares the same structure: in simple mechanical terms, there is a ready-made slot in both regimes for a set of legal rules that follows the same two-step model for the assessment of blame. Much of international criminal law is concerned with the first question: do the actions committed by the alleged perpetrator constitute a crime? In the context of the conflicts that gave rise to the creation of the ad hoc tribunals, however, the second question is crucial, and is represented in the jurisprudence by consideration of the question of fault or effective control. The question as faced by contemporary international tribunals, though similar to that which confronted the Nuremberg and Tokyo tribunals, occurs at a different stage in the inquiry. The post-Second World War tribunals established that international law can hold individuals liable (the question of 'who or what?'); the pivotal issue is now which individual may be found liable ('who among?'). As will be argued below, the doctrine of superior responsibility seeks to answer that question, and the principles it employs make it the perfect candidate for this bridge between regimes.

The question of the actor on which or whom responsibility is imposed depends, in turn, on the primary obligation at issue, and leads to the deeper inquiry as to the source, scope, and content of that primary obligation. Here again, there is potential for a link.

1.4.2. Substantive overlap

When the focus on state responsibility is narrowed to responsibility for violations of obligations *erga omnes*, the parallels between state and individual liability are even stronger, because in this area of law both responsibility regimes share substantive origins in the primary obligations that they seek to vindicate. In *Barcelona Traction*, the Court described the criteria that a state obligation must satisfy before it could

62. See, e.g., *Akayesu* Trial Judgment, *supra* note 46, para. 731 (finding that rape can constitute genocide under international law); *Prosecutor v. Furundžija*, Judgment, Case No. IT-95-17/1-T, T. Ch. II, 10 Dec. 1998 (hereafter *Furundžija* Trial Judgment), paras. 267–269 (finding that rape can constitute torture under international law).

63. Another similarity that becomes apparent, when considering the path that both regimes take from establishment of breach to application of sanctions, is the parallel between circumstances precluding wrongfulness in state responsibility and acceptable defences in international criminal law. This comparison should not be pushed too far, however: though mitigation is possible in both regimes, the differences in the nature of the obligations in question prove too hard to overcome. Under traditional (i.e., non-Art. 40-41-48) state responsibility, mitigation is largely dependent on the conduct of the injured state; in international criminal law, the conduct of the other party in a conflict is generally irrelevant to the determination of guilt. See *Prosecutor v. Kupreškić et al.*, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, Case No. IT-95-16, T. Ch. II, 17 Feb. 1999 (hereafter *Kupreškić Tu Quoque* Decision), para. 4 ('[T]he *tu quoque* principle does not apply to international humanitarian law. This body of law does not lay down synallagmatic obligations, i.e. obligations based on reciprocity, but obligations *erga omnes* (or, in the case of treaty obligations, obligations *erga omnes contractantes*) which are designed to safeguard fundamental human values and therefore must be complied with regardless of the conduct of the other party or parties.').

be termed an obligation *erga omnes*, and gave several examples:

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character.[64]

Although racial discrimination has never been recognized as an international crime,[65] aggression, genocide, and slavery have been criminalized at international law.[66] Crimes against humanity and torture, moreover, unquestionably fall within the description of 'principles and rules concerning the basic rights of the human person'. Additionally, the rules relating to almost all these norms have been codified in conventions 'of a universal or quasi-universal character',[67] and all are generally accepted as part of customary international law.[68]

Customary international law therefore imposes the same negative obligations on both states and individuals, prohibiting both from committing the violations listed above. It is from this shared source of primary obligations that the concept of double responsibility is born: for example, violations of the prohibition against genocide or torture, if conducted by agents of the state or otherwise attributable to the state,[69] might give rise to both individual criminal responsibility and state responsibility for a violation of an obligation *erga omnes*.[70] Although state responsibility for violations

64. *Barcelona Traction*, *supra* note 32, para. 34.
65. Both the International Convention on the Suppression and Punishment of the Crime of Apartheid, entry into force 18 July 1976, 1015 UNTS 243, and the Rome Statute, *supra* note 48, Art. 7, establish apartheid as a crime against humanity. The definitions used by both instruments, however, act to distinguish apartheid from mere racial discrimination. The Apartheid Convention in Art. II notes that the crime of apartheid includes 'similar policies and practices of racial segregation and discrimination as practised in southern Africa', but then lists several 'inhuman acts' that constitute apartheid, such as '[d]enial to a member or members of a racial group or groups of the right to life and liberty of person'. The Rome Statute subjects apartheid to the chapeau requirements of Art. 7, namely that the act must be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack' in order to constitute a crime against humanity.
66. See, e.g., Rome Statute, *supra* note 48, Art. 5. Whether these norms have to be *jus cogens* (and not simply *erga omnes* obligations) is a separate question, and will be discussed below. See *infra* section 2.3.
67. See UN Charter, Art. 2(4) (aggression, 191 parties); 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (hereafter Genocide Convention) (137 parties); 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 266 UNTS 3 (hereafter Supplementary Slavery Convention) (119 parties); 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, UN Doc. A/39/51 (1984) (hereafter Torture Convention) (139 parties).
68. See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 23 (norms in genocide convention part of general, i.e., customary, international law); *Akayesu* Trial Judgment, *supra* note 46, para. 495 (genocide is customary international law); *Furundžija* Trial Judgment, *supra* note 62, paras. 138–9 (torture is customary international law); *Prosecutor v. Musema*, Judgment, Case No. ICTR-96-13, T. Ch. I, 27 Jan. 2000, para. 214 (crimes against humanity are customary international law).
69. See ILC Articles, *supra* note 20, Arts. 4–11 for the rules governing attribution of conduct to a state.
70. See *Furundžija* Trial Judgment, *supra* note 62, para. 142 ('Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility'). The positive obligation to prevent or punish international crimes – as distinct from the

of obligations *erga omnes* has never been imposed by any international tribunal, the principle has gained acceptance by both commentators and international jurists,[71] and has been repeatedly recognized by the International Court of Justice since its dictum in *Barcelona Traction*.[72]

Despite these similarities, however, one key difference remains between state and individual responsibility – the nature of the liability that each imposes on the actors subject to the regime. As explained above, to the extent that state responsibility has a domestic analogue, it is civil liability,[73] while individual responsibility under international law is generally applied in terms of criminal liability. It was on the stumbling block of this traditional distinction that the first effort to link the two regimes fell.

2. State criminality: a failed first attempt

The topic of state criminality has been exhaustively discussed in legal scholarship, both with specific reference to Article 19, and in the context of more general analyses of international law on state responsibility or human rights.[74] This section does not attempt to replicate or even truly summarize the depth and breadth of that treatment. Instead, it seeks to place the concept of state criminality in the context of the earlier discussion of individual and state responsibility, and the theoretical models of international relations that support both regimes.

For the sake of clarity, it must first be noted that the criminal responsibility debated within the ILC with reference to Draft Article 19 was generally not understood to be *penal* responsibility, to the extent that the term invokes municipal legal systems with criminal sanctions and enforcement mechanisms. Indeed, in his conclusion to the Florence Conference on State Responsibility, Joseph Weiler observed that even the

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obligation to abstain from their commission – presents a different question, one that is explored at length in section 3, the discussion of superior responsibility.

71. See, e.g., ILC Articles, *supra* note 20 and accompanying text; ILC Commentaries, *supra* note 32, Commentary to Art. 48; *Furundžija* Trial Judgment, *supra* note 62, para. 151; *Kupreškić Tu Quoque* Decision, *supra* note 63, para. 4.

72. See, e.g., *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, para. 29; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, para. 83; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (hereafter *Genocide Convention Case*), Preliminary Objections, Judgment of 11 July 1996, [1996] ICJ Rep. 595, para. 31; *Genocide Convention Case*, Counter-Claims, Order of 17 Dec. 1997 on the Admissibility of Counter-Claims by Yugoslavia, [1997] ICJ Rep. 243, para. 35.

73. Punitive damages, however, are almost certainly unprecedented in the law governing reparations, rendering it even less like a criminal regime than the law applicable in many domestic civil proceedings. See, e.g., D. Vagts and P. Murray, 'Litigating the Nazi Labour Claims: The Path not Taken', (2002) 43 *Harvard International Law Journal* 503, at 525 ('[T]here would be a serious question as to whether international law authorizes punitive damages benefiting private claimants'.); Bodansky and Crook, *supra* note 19, at 784 n. 78 (noting that '[o]f course, international law lacks notions of punitive damages'). But see 1998 ILC Report, *supra* note 38, para. 284 (noting a difference of opinion among ILC members as to the nature of state responsibility, dividing roughly into three camps: those who saw it as civil liability; those who saw it as purely international and *sui generis* in nature; and those who suggested future development in international responsibility of states to distinguish between civil and criminal responsibility).

74. See especially J. H. H. Weiler, A. Cassese, and M. Spinedi (eds.), *International Crimes of State* (1989) (hereafter Weiler, Cassese, and Spinedi) (reproducing the working papers prepared for a conference on Art. 19, summarizing scholarly debate during the conference, and including additional commentary by esteemed contributors and a limited bibliography spanning 13 pages and listing 147 items).

proponents of Article 19 emphasized that 'the notion of Crimes of State *cannot* in the world order as perceived today have [that] connotation'.[75] What was meant instead was that not all violations of international law were of a kind – some were inherently worse than others, and the 'suppression of [these latter] wrongs is of interest . . . to the international community as a whole'.[76] Despite widespread acceptance among both proponents and opponents of Article 19 of the basic proposition of a differentiation within the regime of state responsibility, however, passionate differences of opinion about the advisability of a special set of rules labelled 'criminal responsibility' remained.[77]

Professor Weiler believed that the explanation for this paradox lay in a deeper level of the debate, reflecting fundamentally different conceptions of international law:

> The controversy over Crimes of State has been so fierce as to make it plausible to believe that something important divides the proposers and the opposers and that in understanding the roots of the cleavage we shall learn something of value on the state of international law, international law making and the thinking on international law today. . . . The key to understanding the cleavage is . . . to realize that beneath the *surface language* of the debate about the concept of Crimes of State there is a more acute controversy touching on the *deep structure* of the international legal process.[78]

Although the controversy that Weiler described in his essay mapped on to the more traditional distinction between the natural law and positivist approaches to international law, the observation is equally applicable to the differences between institutionalist and liberal views of international law. If state criminality is seen as the first attempt to bridge the gap between the manner in which international law treats states and individuals, then the reason that it failed is that the institutionalist model of international law – within which any attempt to attribute liability to a state as a primary actor must be situated – cannot countenance the possibility that states may be treated like individuals.[79] To understand why this is so, we turn first

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75. J. H. H. Weiler, 'On Prophets and Judges: Some Personal Reflections on State Responsibility and Crimes of State: Concluding Remarks to the Florence Conference on State Responsibility', in Weiler, Cassese, and Spinedi, *supra* note 74, at 325. See also G. Abi-Saab, 'The Uses of Article 19', (1999) 10 EJIL 339, at 351 (explaining that international crimes of state did not mean 'criminal responsibility of states', but rather an 'aggravated regime of state responsibility').
76. Weiler, *supra* note 75, at 320.
77. Ibid., at 320–1.
78. Ibid., at 319, 322.
79. That penal responsibility is limited to individual responsibility was a recurring theme in the Art. 19 debate, where several members and states argued vociferously that the very idea of criminality implied punitive sanctions, which in turn necessitated a higher source of authority than the bilateral or multilateral relationships that underpin state responsibility. See, e.g., the official comments of France on Art. 19, cited in J. Crawford, First Report on State Responsibility, UN Doc. A/CN.4/490 (1998), para. 52 (hereafter First Crawford Report):

> No legislator, judge or police exists at an international level to impute criminal responsibility to States or ensure compliance with any criminal legislation that might be applicable to them. It is hard to see who, in a society of over 180 sovereign States, each entitled to impose punishment, could impose a criminal penalty on holders of sovereignty.

Of course, obligations *erga omnes* are an exception to the traditional relationship between states as the holders of rights and duties, a fact which allowed recognition of these obligations to form the basis for a compromise between those supporting and those opposing Art. 19. See *infra* section 2.3.

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to the political context within which the proposed sub-regime of state criminality would have to function.

2.1. The context: the principles and purposes of the post-war legal order

The notion of a state as 'criminal' is a far from easy fit with the existing structure and principles of international law as they have developed over the last six decades. The international legal order that developed after the Second World War, as codified in the United Nations Charter, was designed in conscious contrast to the inter-war legal system that had existed between 1919 and 1939. Instead of a punitive peace that attempted to suppress the defeated powers, Germany and Japan were 'rehabilitated' after the war and readmitted to the community of states. In place of the war guilt clause of the Treaty of Versailles, the Allies created international tribunals in Nuremberg and Tokyo which respectively tried German and Japanese leaders for numerous crimes, including the new international crime of aggression. The concept of state criminality was not part of the nascent post-war legal order, and would in fact have been inconsistent with the principles then being constructed, chief among them universality of membership in a community of states.

Contemporary legal scholarship, influenced by ideas that sound in liberal IR theory, correctly applauds the post-war tribunals as the beginning of the end of state sovereignty as a shield against international liability for violations of fundamental human rights.[80] What should not be lost in the cheering, however, is recognition of the importance of the creation of an *individual* responsibility regime to the *institutionalist* project of the post-war order. The United Nations aspired to the universal membership of all states, and the Charter provides that 'Membership in the United Nations is open to all . . . peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations'.[81] This principle of universality was in turn supported by two deeper principles, each playing a role in increasing the attractiveness of the institution to states: sovereign equality, as enshrined in Article 2,[82] and inclusiveness, a thread to be found throughout the Preamble and Chapter I of the Charter.[83]

Instead of blaming states, an approach that would have contradicted these principles, the wrongs committed during the Second World War by the leaders and officials of the defeated powers were remedied by imposing responsibility on those individuals. Over fifty years later, the proposed regime of state criminality was

80. See, e.g., S. R. Ratner and J. S. Abrams *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2001, at 189; H. T. King Jr, 'Nuremberg and Sovereignty', (1996) 28 *Case Western Reserve Journal of International Law* 135; L. Henkin, *The Age of Rights* (1990, at 1, 16).

81. UN Charter, Art. 4, para. 1. The organization has come close to realising its goal, with 191 members as of 2005. Growth in United Nations Membership, 1945–2005, available at http://www.un.org/Overview/growth.htm, last updated April 2005.

82. UN Charter, Art. 2, para. 1.

83. Note, for example, the language in the Preamble describing the purposes of the Organization: 'to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security'. UN Charter, Preamble.

rejected in large part because, with its inferences or implications of exclusion of the criminal state from the international community, it was inconsistent with the principles and purposes of the inclusive post-1945 legal order.

2.2. The text: Article 19 and the debate

The International Law Commission unanimously adopted Draft Article 19 on first reading in 1976.[84] The Article, later entitled 'International crimes and international delicts', provided:

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.
3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:
   a. a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
   b. a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;
   c. a serious breach of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, and *apartheid*;
   d. a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.
4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.[85]

This text had several flaws, some explicit, others more subtle. Most obvious, perhaps, is the tautology in sub-paragraph 2, which defines an international crime as anything that the 'international community' (a term that is itself undefined) recognizes as a crime. In and of itself, tautology is not fatal to the kind of legal drafting done by the International Law Commission.[86] Indeed, Articles 1 and 2 of the finalized text adopted in 2001 can also be interpreted as proposing a tautology. The first states that 'Every internationally wrongful act of a State entails the international

84. For the definitive account of the origins and drafting history of Art. 19, see M. Spinedi, 'Crimes of State: The Legislative History', in Weiler, Cassese, and Spinedi, *supra* note 74, at 5–138.
85. International Law Commission, 'Article 19', Report of the International Law Commission on the Work of its Forty-eighth Session, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10 (1996), at 131–2.
86. See 1998 ILC Report, *supra* note 38, para. 242 (noting that '[m]ere circularity was not fatal to article 19' and citing the precedent of Art. 53 of the Vienna Convention on the Law of Treaties, which defines peremptory norms as those recognized as such by the international community of states as a whole).

https://doi.org/10.1017/S0922156505003018 Published online by Cambridge University Press

responsibility of that State'; the second defines an internationally wrongful act as that which is both attributable to a state and in violation of an existing obligation.[87] The substantive reference point for Articles 1 and 2 is provided by Article 3, however, which states that the 'characterization of an act of a State as internationally wrongful is governed by international law'[88] – that is, law *external* to the Articles. No such saving provision existed for Article 19, which purported to create a heightened legal regime for especially serious violations of international law by states, but hinged the existence of such a 'serious breach' on the subsequent ad hoc recognition of an undefined legal person, body, or grouping. This method, if allowed to stand, would have undermined the very reason for creating a legal regime in the first place – to declare as clearly as possible rules, principles, or standards that would henceforth be applicable to a predefined set of circumstances.[89]

The controversy surrounding Draft Article 19, however, was not caused by a mere drafting flaw, which could hypothetically be remedied if the Commission reached consensus on the underlying principles. On the contrary, it was precisely the basic disagreement on the underlying principles that prevented the ILC's adoption of the article. The relative advantages and disadvantages of Article 19 and the principles it attempted to codify have been discussed in great detail in scholarly treatments of the subject, as well as within the Commission's debates and reports.[90] The arguments on either side of the debate may roughly be characterized as follows.[91]

Proponents of Article 19 (in some improved version) tended to advance one of two arguments: either (i) that a distinction had to be established between ordinary state responsibility and heightened responsibility for especially grave violations of international law, even if the latter were not labelled as criminal;[92] or (ii) that there

87. See ILC Articles, *supra* note 20, Arts. 1, 2. See also Art. 12, which declares: 'There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation'.

88. Ibid., Art. 3.

89. See 1998 ILC Report, *supra* note 38, para. 288 (noting that criticism of Art. 19 included the fact that 'The definition of State crimes contained in article 19 was . . . confusing, circular, lacking the necessary precision for criminal law, unhelpful for the indictment of any individual or State, and uncertain because it was dependent on subsequent recognition by the international community').

90. See *supra* note 74 and accompanying text; see especially 1998 ILC Report, *supra* note 38, paras. 215–331.

91. The following discussion of the arguments for and against Art. 19 does some disservice to both the variety and sophistication of the contentions that were made on both sides. A more detailed review of the literature, however, is beyond the scope of this article.

92. See, e.g., A. Pellet, 'Can a State Commit a Crime? Definitely, Yes!', (1999) 10 EJIL 425, 426 (arguing that 'it seems obvious, evident, necessary, and indeed indispensable that the consequences deriving from [genocide on one hand, and breach of a treaty on the other] be clearly differentiated', and noting that 'the word "crime" might be misleading, but the concept is indispensable in contemporary international law'); Abi-Saab, *supra* note 75, at 340 (arguing that when 'the international community . . . surrounds [certain common values or interests] with greater legal protection by attaching graver consequences to the violation of their protective norms, it introduces a fundamental distinction and differentiation of functions between the norms of international law, as well as a certain hierarchy among them').

Indeed, the relationship between obligations *erga omnes*, *jus cogens* norms, and proposed state crimes could be viewed as the distillation of this hierarchy. While all *jus cogens* norms are necessarily obligations *erga omnes*, the converse is not true, and state crimes were intended to constitute particularly egregious violations of the most fundamental norms of international law. As such, the three concepts can be conceived as a Venn diagram, with *jus cogens* and state crimes as increasingly smaller subsets of the larger set of obligations *erga omnes*; or as a pyramid or cone, with obligations *erga omnes* at the base, *jus cogens* at the intermediate level, and state crimes at the apex. See G. Gaja, 'Obligations *Erga Omnes*, International Crimes, and *Jus Cogens*: A Tentative Analysis of Three Related Concepts', in Weiler, Cassese, and Spinedi, *supra* note 74, at 151–60.

was special symbolic value to the use of the term 'criminal', which needed to be retained and employed in order to fulfil the Commission's mandate of progressive development of international law.[93] The second type of argument was more prevalent in the earlier debates about Article 19, and was employed progressively less often as it became clear that 'in some ways the triviality of a name ha[d] contributed to obscuring the real issues and creating false dilemmas'.[94] Nevertheless, the use of the term 'crime', with all its connotations, not only influenced the ferocity of the debate, but remained to the end one of the reasons why Article 19 was never accepted by the general membership of the Commission.[95]

Arguments against Article 19 generally fell into three groups: (i) those expressing dissatisfaction with the analytical clarity of its text;[96] (ii) those articulating concerns of bureaucratic efficiency or the proper role of the Commission;[97] and (iii) those conveying deep disagreement with the very idea of 'criminalizing' state actions. Of these, it was the last category that proved fatal to the 'crimes of state' proposal.

When James Crawford was named as the fifth Special Rapporteur on State Responsibility in 1997, it was clear that his most important task was to speed up the Commission's work on the subject. Professor Crawford's First Report on State Responsibility was decidedly critical of the proposed Article, presenting three principal arguments against its adoption.

First, there was no basis in state practice for the notion of state crimes.[98] Second, while he acknowledged the existence in international law of a hierarchy of norms,

93. See, e.g., B. Graefrath, 'A Specific Regime of International Responsibility of States', in Weiler, Cassese, and Spinedi, *supra* note 74, at 164 ('No immunity can be claimed for State conduct that has been qualified as an international crime. . . . Sovereignty cannot be claimed as a shield to cover acts which constitute an international crime. What is reflected here, in the area of international responsibility are basic changes in the structure of current international law'.); Weiler, 'On Prophets and Judges', *supra* note 75, at 324 ('For those who support Article 19 in its present form, it is the efficiency of language which justifies, even necessitates, the term Crime. . . . [N]othing less than the most abject condemnation, translated into the most powerful "negative" in the legal vocabulary, will suffice. . . . If States care, as clearly they do, about being labelled by others as international wrongdoers, so much more will they care. . . . about the attachment of the tag of a "criminal"').

94. Weiler, 'On Prophets and Judges', *supra* note 75, at 323.

95. See First Crawford Report, *supra* note 79, para. 81 (noting that the 'domestic analogy' to municipal concepts of crime and delict could not be completely discounted, and that 'if a concept and terminology [i.e., 'crime'] is to be adopted which is associated with a wealth of national and international legal experience, it can hardly be objected that that experience, and the legal standards derived from it, are also regarded as potentially relevant'). Art. 19's text did not attain the precision demanded of criminal law, and the failure of the Commission to agree on any method of clarifying its provisions led to its deletion from the Articles. See *infra*, Part 2.3.

96. See, e.g., *supra* note 89 and accompanying text.

97. See generally First Crawford Report, *supra* note 79.

98. See ibid., paras. 61–5; see also 1998 ILC Report, *supra* note 38, para. 273. The Report summarized the views of some ILC members as concluding that

> the concept of State crimes was not established in the international law of State responsibility. There was no basis in law for a qualitative distinction among breaches of international obligations. There was no basis in State practice thus far for the concept of international State crimes, in contrast to the principle of individual criminal responsibility . . . There was no State practice to support the notion of crimes by States in contrast to the positive developments concerning individual responsibility since the Second World War. The distinction established in article 19 had not been followed up in international jurisprudence. No State, as a legal person, in contrast to its leaders, had ever appeared as a defendant in criminal proceedings.

he saw no reason why a 'difference in the character of certain norms would produce two distinct regimes of responsibility, still less that these should be expressed in terms of a distinction between "international crimes" and "international delicts"'.[99] Last, and most importantly, the notion of international crimes of state did not fit with the developments in international law since 1945, or even since the Article was first proposed in 1976. These developments included the concept of *jus cogens* norms, obligations *erga omnes*, and individual criminal responsibility.[100] To a large extent, Professor Crawford's criticisms mirrored the objections to the language and purposes of Article 19 that several states had lodged with the Commission.[101]

Summarizing his position in 1999, the Special Rapporteur stated that

> to the extent that the notion of 'international crime' is intended to reflect a qualitative difference between breaches of obligations owed to the international community as a whole and obligations owed to one or a few states, the idea is acceptable but the language of 'crime' and 'delict' is unnecessary. On the other hand, to the extent that it is intended to reflect a 'criminalization' of the state (akin to the international criminalization of individuals before the Yugoslav or Rwanda tribunals, or to the *de facto* criminalization of Iraq, Libya and Yugoslavia in recent practice), then issues of structure and organization, of due process and dispute settlement clearly must be addressed.[102]

The Commission had neither time, energy, nor perhaps inclination to address the issues Professor Crawford identified as necessary for the survival of an attempted 'criminalization' of state responsibility. The Article was deleted from the text eventually accepted by the Commission in 2001.

Despite the intense opposition to the notion of state criminality by scholars and governments, and the significant barriers to consensus within the Commission, the idea of criminalizing state conduct is not completely foreign to state practice, if the treatment of Iraq, Libya, Yugoslavia, and other 'rogue' states is indeed viewed as *de facto* criminalization. Nor are parallels to criminality necessarily absent from the *law* of state responsibility, particularly when considering the primary obligations of *jus cogens* norms, where the principal goal is not to deter illegal behaviour by increasing the costs of breach, but to prohibit it altogether.[103] This is even stronger support for the argument that resistance to the inclusion of rules on state criminality was not based primarily on the incompatibility of the concept of criminality with the structure of the law, but rather on its incompatibility with the underlying cognitive structure that characterizes the state responsibility regime. Borrowing Professor Abi-Saab's terms, it was the dominance of the 'signifier' over the 'signified' that sealed Article 19's fate: what was most important was not the fundamental legal regime to be created, but the *way* that it was described. It was simply unthinkable in the current legal order that state conduct could be 'criminalized'.[104]

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99. First Crawford Report, *supra* note 79, para. 71.
100. Ibid., paras. 66–75.
101. See ibid., paras. 52–60.
102. J. Crawford, 'Revising the Draft Articles on State Responsibility', (1999) 10 EJIL 435, at 443.
103. See Bodansky and Crook, *supra* note 19, at 784 n. 78 (arguing that if the distinction between criminal and civil liability is the function of rules that prohibit, rather than price, undesirable conduct, 'the regime of state responsibility seems in some respects more akin to criminal rather than civil responsibility').
104. See also First Crawford Report, *supra* note 79, paras. 52, 79–80 (noting that the proposed regime of crimes of state would conflict with the role of the Security Council in maintaining international peace and security);

2.3. The compromise

In spite of all that separated the proponents and opponents of Article 19, one central idea was common to both camps: there was a consensus that a hierarchy of norms existed or was emerging in international law, and that the distinction between the interests of the entire international community and those of a particular injured state with respect to the most important norms should be reflected in the finalized text of the Articles. The compromise adopted was the codification of these distinctions in the recognition of obligations *erga omnes*,[105] and the attachment of different consequences to the breach of *jus cogens* norms of customary international law.[106]

But the text of those Articles, like the rest of the ILC's product, retains the focus on states as primary actors on which obligations are imposed, and to whom obligations *erga omnes* are technically owed, at least in practice. Language in the *travaux préparatoires* and in the ILC Commentaries to the Articles discussing the adoption of the 'international community as a whole' terminology has been described as acceptance of the liberal trend in international law, by recognizing that 'the international community now comprises important actors other than states'.[107] In practical terms, however, the vindication of *erga omnes* – at least at the level of abstraction that is reflected in the ILC Articles and the jurisprudence of the International Court of Justice – is left to those entities that have traditional international legal personality.[108] While it is correct that individuals and other non-state actors may directly claim violations and get relief for breaches of norms that are essentially *erga omnes* in certain circumstances,[109] the basis for such direct vindication has been conventional – not customary – with specifically designated crimes or rights, and in fora where those litigants are specifically made rights-holders.[110]

It is therefore superior responsibility – the judging of criminal leaders – that holds out hope for the reconciliation of the state and individual responsibility rules, by providing a theoretical basis and a practical method to develop understandings of liability for breaches of fundamental norms that more accurately reflect the channels of responsibility in contemporary conflict situations.[111] Because the doctrine uses the principles of international criminal law to ascribe liability to a special subset of individual actors, who in turn derive their obligations from the same source as states, it serves as a mechanism to link the two regimes that is free from the cognitive challenges faced by the state criminality proposal.

P.-M. Dupuy, 'Implications of the Institutionalization of International Crimes of States', in Weiler, Cassese, and Spinedi, *supra* note 74, at 173–9 (describing the hazards inherent in introducing responsibility for state crimes, including threats to the determinacy and coherence of the law, and challenges to the functioning of the United Nations).

105. See ILC Articles, *supra* note 20, Art. 48.
106. Ibid., Arts. 40, 41.
107. E. B. Weiss, 'Invoking State Responsibility in the Twenty-First Century', (2002) 96 AJIL 798, at 804.
108. Note that this description includes both states and international organizations: it was the General Assembly of the United Nations that referred the question to the International Court of Justice that resulted in the *erga omnes* declaration in the *Nuclear Weapons* case. See *supra* note 72 and accompanying text.
109. See Weiss, *supra* note 107.
110. See, e.g., the European Court of Human Rights and the Inter-American Court of Human Rights systems.
111. Though genocide, slavery, torture, and crimes against humanity can occur outside the context of internal or international armed conflict, superior responsibility as the link between individual and state responsibility is particularly useful in times of conflict, when formal structures of government may be either in flux or non-existent. See *infra*, section 3.1.

https://doi.org/10.1017/S0922156505003018 Published online by Cambridge University Press

3. Superior responsibility: a better candidate

The idea that international law may impose special duties on an individual, by virtue of his or her superior position, to prevent the commission of crimes can be traced to the 1907 Hague Conventions concerning the laws of war. Article 43 of Hague Convention No. IV imposed on the commander of an occupying force on land the duty to 'take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country';[112] Article 19 of Hague Convention No. X required commanders-in-chief of belligerent naval fleets to supervise the implementation of the operative provisions of the Convention, in conformity with the general principles expressed therein.[113] This limitation of international obligations to military commanders was continued by the jurisprudence of the post-Second World War tribunals; it is only in the decisions of the ad hoc tribunals that 'command responsibility' has been broadened to 'superior responsibility', and the group of individuals on whom liability may be imposed expanded from only military commanders to include civilian superiors. Although the content of the superior responsibility doctrine has been provided principally by the more recent international courts, reference is still made to the principles established at Nuremberg, and it is there that any consideration of the topic must begin.

3.1. From *High Command* to *Čelebići* and beyond

The first case after the Second World War to impose liability on a commander for the actions of his subordinates, however, was actually in Japan, not in Germany, and involved General Tomoyuki Yamashita, the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands for the last year of hostilities between the United States and Japan.[114] The standard applied in that case was one of strict liability, according to which the accused's guilt did not depend on proof of actual or constructive knowledge of the commission of crimes. General Yamashita was found guilty primarily because of his position in the chain of command, not because of the direct commission of any crime, or necessarily because of a failure to fulfil an obligation imposed on him by international law. The reasoning of the US military commission that convicted him, and of the Supreme Court that affirmed the sentence, was rejected by subsequent tribunals dealing with the issue of command responsibility, and the low *Yamashita* standard is not considered part of the contemporary doctrine of superior responsibility.[115]

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112. 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, Annex of Regulations, Art. 43, 36 Stat. 222, TS 539, 1 Bevans 631.
113. 1907 Hague Convention No. X Concerning Bombardment by Naval Forces in Time of War, Art. 19, 36 Stat. 2351, TS 542, 1 Bevans 681.
114. *United States v. Tomoyuki Yamashita*, Military Commission Appointed by Paragraph 24, Special Orders 110, Headquarters United States Army Forces Western Pacific, 1 Oct. 1945, cited in L. Friedman (ed.), *The Law of War: A Documentary History* (1972), at 1596.
115. Other trials of accused Japanese war criminals did in fact develop and apply notions of the responsibility of commanders to intervene and suppress the crimes of their subordinates that correspond more to the

The first criminal proceeding at Nuremberg was the *Trial of German Major War Criminals*, held before the International Military Tribunal under the authority of the London Agreement of 1945.[116] This case did not apply principles of command responsibility, however, as the defendants were charged with and convicted of crimes for which they bore direct liability. Two later Nuremberg cases, tried this time before the Tribunal constituted under Control Council Law No. 10,[117] are the primary post-1945 sources for the roots of the current doctrine attributing liability to superiors: *United States* v. *von Leeb et al.*, or the *High Command* case;[118] and *United States* v. *von List et al.*, or the *Hostages* case.[119]

The decision in *High Command* rejected the strict liability standard of *Yamashita*, requiring instead a personal, voluntary dereliction on the part of the commander – a conscious violation of the obligation to prevent or punish the commission of violations of the laws of war by his subordinates. This personal dereliction was present if the commander issued or transmitted an illegal order, failed adequately to supervise the actions of his subordinates pursuant to an illegal order, or acquiesced in the illegal actions.[120] According to the Nuremberg decisions, therefore, a commanding officer could be found criminally responsible for the illegal actions of his subordinates in two relatively limited sets of circumstances. First, he was responsible if those actions were pursuant to an order that he personally passed to the chain of command, if the order was criminal on its face, or one which he was shown to have known was criminal, where 'criminal' and 'illegal' were understood to be violative of the laws of war.[121] Second, he could be responsible if those actions implemented an order that he did not transmit to his subordinates, if he could be shown to be cognizant of

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contemporary contours of the doctrine, see, e.g., *United States v. Hirota*, 3 *Judgments of the International Military Tribunal for the Far East* (1948), 1 but these cases are little-known and are not referred to in the judgments of the ad hoc Tribunals. This section of the article will therefore focus on the Nuremberg cases.

116. See London Agreement, *supra* note 43.

117. Control Council Law No. 10, reproduced in (1952) VI *Trials of War Criminals before the Nuernberg Military Tribunal under Control Council Law No. 10*, at 17, was the governing constitutive document for the Nuremberg Military Tribunal that tried almost all the cases involving non-'major' German war criminals.

118. *United States v. von Leeb et al.*, Judgment, XI *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (hereafter *High Command Case*).

119. *United States v. von List et al.*, Judgment, X *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* (hereafter *Hostages*). The *Hostages Case* was actually tried before the *High Command Case*, but it is in the latter case that the Nuremberg court's reasoning on superior responsibility is more clearly enunciated.

120. See *High Command Case, supra* note 118, at 544. The Tribunal stated as follows:

> Criminality does not attach to every individual in this chain of command from [the theory of subordination] alone. There must be a personal dereliction. That can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. (Ibid.)

Moreover, the *Hostages* judgment had established that want of knowledge where such knowledge was available to the commander in the form of reports from subordinate units was a dereliction of duty that did not ground a legitimate defence. See *Hostages Case, supra* note 119, at 1271–2.

121. Field Marshal von Leeb, for example, was found guilty of transmittal and application of the Barbarossa Jurisdiction Order, which exempted German soldiers from prosecution if they committed a crime against any Soviet civilian.

the acts,[122] and to have acquiesced in their commission, where acquiescence meant the failure to prevent the actions or to punish their perpetrators.[123] This focus on illegal orders, which is not an aspect of the current form of the doctrine, was a function of two elements that were particular to the Nuremberg trials: the fact that the crimes committed by German forces were part of an explicit policy formulated at the highest levels of the government; and the extensive written record of the orders conveyed to the armed forces that was available to post-war prosecutors.

In marked contrast to the strict military hierarchies at issue in the Second World War, the conflicts with which contemporary international law has to deal are marked by the collapse or continual revision of formal command structures, or the replacement or supplementing of those structures by unofficial armed groups and militias. The task of determining command responsibility is particularly difficult under such circumstances, and the contemporary doctrine has developed criteria to aid in determining whether an individual may be held responsible for the actions of another person allegedly subordinate to him or her. These criteria were originally outlined by the International Criminal Tribunal for the former Yugoslavia in the *Čelebići* Trial Judgment.[124]

First, a superior–subordinate relationship must have existed between the accused and the actual perpetrator or perpetrators of the underlying offence;[125] second, the superior either knew or had reason to know of the commission of crimes by his or her subordinates;[126] and third, he or she failed to act to prevent the crimes, failed to prevent their continuation or reoccurrence, or failed to punish the perpetrators.[127] Specifically rejecting the *Yamashita* standard, the Trial Chamber held that authority over the general geographic area in which the crimes were committed was not sufficient to impose criminal liability; the accused must command the specific persons alleged to have committed the crime, in the sense of exercising 'actual control' over those subordinates.[128]

Because of the lack of formality that often characterized the command structures in place at the time of the crimes' commission, the trial chamber found that either *de facto* or *de jure* command was sufficient to establish the superior–subordinate

122. The judgment also implicitly required knowledge that the actions were illegal. However, the crimes for which the accused in the war crimes trials were being prosecuted were of such a notorious character that the war crimes commission and the tribunals regularly found that no commander could have believed that the action(s) contemplated in the order, or being committed by his subordinates, were in conformity with the laws of war. See, e.g., *High Command Case*, *supra* note 118, discussing the charges against von Leeb (noting that there was no question that the use of prisoners of war to clear minefields violated international law).

123. See *supra* note 120.

124. *Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Judgment, Case No. IT-96-21-T, T. Ch. II *quater*, 16 Nov. 1998 (hereafter *Čelebići* Trial Judgment).

125. Such a relationship could be presumed by the post-Second World War tribunals.

126. The exact terminology used by the *Čelebići* Trial Chamber was that the mental element of superior responsibility was satisfied by proof of either 'actual knowledge' on the part of the superior, or that he 'had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates'. *Čelebići* Trial Judgment, *supra* note 124, para. 383; see *also* ibid., paras. 384–93.

127. Ibid., para. 344.

128. See ibid., para. 647.

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relationship. To be found guilty, however, the defendants must be 'persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control'.[129] For allegations of *de facto* control, therefore, it is essential that 'the exercise of *de facto* authority is accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control'.[130]

Elaborating on the concept of control, the Chamber also noted:

> The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, cannot properly be considered their 'superiors' . . . . [G]reat care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.[131]

It was for this reason that the Chamber held that for the doctrine of command responsibility to apply, 'it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences'.[132]

It is primarily in the jurisprudence of the Rwanda Tribunal that command responsibility has been expanded to include civilian superiors as well as military commanders. Although there was some confusion between different judgments as to the correct standard of effective control to which civilian superiors must be held,[133] recent case law from the Appeals Chamber has established that the control exerted by civilian leaders need not be of the same nature as that of a military commander in order for them to be found responsible for the actions of persons in a subordinate position, though the control should be 'similar to the degree of control of military commanders'.[134] The Rome Statute includes principles of superior responsibility doctrine in Article 28, but does not completely adopt the practice of

129. Ibid., para. 354.
130. Ibid., para. 646.
131. Ibid., para. 377.
132. Ibid., para. 378, affirmed in *Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Judgment, Case No. IT-96-21-A, App. Ch., 20 Feb. 2001 (hereafter *Čelebići* Appeal Judgment), paras. 192, 196–198. The material ability to prevent and punish is thus a constitutive factor relating to both the first and third criteria of the *Čelebići* test, and is the sine qua non of superior or command responsibility.
133. Compare *Akayesu* Trial Judgment, *supra* note 46 (holding that a civilian superior is not held to the same standard of effective control as a military commander), with *Prosecutor v. Bagilishema*, Judgment, Case No. ICTR-95-1, T. Ch. I, 7 June 2001, para. 37 (purporting to adopt the reasoning of the *Čelebići* Trial Judgment and the ILC and holding that responsibility 'extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders').
134. See *Prosecutor v. Bagilishema*, Judgment, Case No. ICTR-95-1A-A, App. Ch., 3 July 2002, para. 52 (noting also that '[i]t is not suggested that "effective control" will necessarily be exercised by a civilian superior and by a military commander in the same way, or that it may necessarily be established in the same way in relation to both a civilian superior and a military commander', Case No. ICTR-95-1A-A, Judgment, paras. 54–56).

the ad hoc international tribunals, limiting the responsibility of civilian superiors to situations in which 'The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes'.[135]

3.2. Building the bridge

With the content and contours of the doctrine established, there are three stages to the explanation of superior responsibility doctrine as a bridge between the individual and state responsibility regimes. First is the understanding that there are elements of the doctrine that not only have no equivalent in municipal law, but are also inconsistent with fundamental principles that should underlie a regime that imposes criminal liability on persons qua individuals. Second is the fact that the obligations that are imposed on superiors by contemporary international criminal law, and on states by customary international law concerning certain obligations *erga omnes*, are functionally identical in their scope and content. Third is the illustration of the practical use of superior responsibility in the application of an area of apparent progressive development in the law of state responsibility, as contained in Article 10 of the ILC Articles.

3.2.1. The unique nature of superior responsibility

Despite the sometimes confusing terminology used by the historical and contemporary tribunals and legal scholars, the doctrine of superior responsibility is not based on a theory of true *respondeat superior*, or vicarious liability.[136] Individual responsibility of superiors is predicated on the fact that they have violated a duty imposed directly *on them*, by customary international law, to prevent or punish the commission of international crimes; it is liability for an omission in the light of an obligation to act. In addition, care must be taken to distinguish between potential sources of responsibility for a superior, and responsibility that may *only* attach to a superior. Included in the former category are direct liability for ordering subordinates to commit crimes;[137] and theories of accomplice liability, according to which the failure of the commander to act renders him or her an accomplice to the perpetrator of the underlying crime.[138] Neither of those bases for responsibility is limited to civilian or military superiors under international law, and they are therefore of little use to the attempt to forge a link between international responsibility regimes. It is the latter category that is of interest: the responsibility imposed on a superior by international law for the failure to act – for a dereliction of a duty, to use the

135. Rome Statute, *supra* note 48, Art. 28(b)(i).
136. See, e.g., *Black's Law Dictionary*, *supra* note 7, at 1313 (defining the term in the area of torts as '[t]he doctrine holding an employer or principal liable *for the employee's or agent's wrongful acts* committed within the scope of the employment or agency) (emphasis added).
137. The difference between the direct liability of a superior and superior responsibility is captured in the distinction between Arts. 7(1) and 7(3) in the ICTY Statute, and Arts. 6(1) and 6(3) of the ICTR Statute. See *supra* note 48.
138. See, e.g., I. Bantekas, 'The Contemporary Law of Superior Responsibility', (1999) 93 AJIL 573, at 577.

terms of the Nuremberg tribunal, that is imposed only on individual superiors and states.[139]

Yet it is precisely those aspects of superior responsibility that are unique to international law which trouble at least one legal scholar, who identified theoretical and philosophical difficulties with the notion of imposing criminal liability on an individual for failing to prevent or punish the actions of another individual.[140] In a recent article Mirjan Damaska argues that there is a 'discrepancy between the approach to command responsibility of international criminal law and the approach taken towards this subject by municipal criminal law of general application' that poses particular problems of legitimacy for the international legal doctrine.[141] Although the criticism is divided into two parts, his principal contention is that in certain circumstances cognizable only under international law, the attribution of theoretically equal or greater responsibility to a superior for the commission of crimes by subordinates appears to be in fundamental conflict with the notion of culpability that is central to all regimes of criminal law.

First, he asserts that under recent international case law, liability for failure to prevent may be imposed not only on the commander who knowingly fails to intervene to prevent the crimes of his or her subordinates, but also on those who either 'consciously disregard . . . a perceived risk of subordinate delinquency', or 'fail to recognize the risk of subordinate delinquency through inadvertent negligence'.[142] Professor Damaska's point is that municipal law will usually impose accomplice liability on the superior in the first situation, but refuse to punish those in the second and third cases, because '[a]s a result of this dramatic escalation of responsibility, a commander's liability is divorced from his culpability to such a degree that his conviction no longer mirrors his underlying conduct and his actual *mens rea*'.[143] Second, liability for failure to punish, as it exists in international criminal law, is also inconsistent with the principle of culpability, because '[i]t holds a commander responsible for the crime of his soldiers for the sole reason that he failed to call them to task after he had learned about what they had done. There is no need to establish that he was in any other way implicated in the crime'.[144]

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139. Whatever theory is adopted, however, the responsibility of superiors derives not merely from the position of power, but that of authority. See Bantekas, *supra* note 138, at 576–7 (noting that 'The crux of the issue is that because of their aura of authority, military and civilian superiors are entrusted with far-reaching duties and must especially ensure their troops' compliance with the laws of war'). This authority is necessarily derived from the fact that military and civilian superiors are representatives of the state, movement, or organization that exercises control over the actions of the individual perpetrators.

140. See M. Damaska, 'The Shadow Side of Command Responsibility', (2001) 49 *American Journal of Comparative Law* 455.

141. Ibid., at 457. For the purposes of his analysis, Professor Damaska discounted distinctions between the form superior responsibility takes in the jurisprudence of the ad hoc tribunals and that included in the Rome Statute. See *supra* note 135 and accompanying text.

142. Ibid., at 463 (citing as an example the ICTY Trial Judgment in *Prosecutor v. Blaškić*, wherein it sufficed that the commander 'failed to implement measures which could have yielded this kind of information [of the impending criminal activity of his troops], provided that he "should have known" that the failure to implement these measures was a "criminal dereliction"') (quotation from Damaska).

143. Ibid., at 464.

144. Ibid., at 468.

https://doi.org/10.1017/S0922156505003018 Published online by Cambridge University Press

To the extent that this critique is based on references to a negligence standard in the *Prosecutor* v. *Blaškić* Trial Judgment,[145] the Appeals Chamber has since re-affirmed that superior responsibility cannot be imposed on the basis of negligence on the part of the accused:

> [T]he *Čelebići* Appeal Judgment has settled the issue of the interpretation of the standard of 'had reason to know'. In that judgment, the Appeals Chamber stated that 'a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates'. Further, the Appeals Chamber stated that '[n]eglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish'. There is no reason for the Appeals Chamber to depart from that position. . . .
>
> [T]he Appeals Chamber recalls that the ICTR Appeals Chamber has on a previous occasion rejected criminal negligence as a basis of liability in the context of command responsibility, and that it stated that 'it would be both unnecessary and unfair to hold an accused responsible under a head of responsibility which has not clearly been defined in international criminal law'. It expressed that '[r]eferences to "negligence" in the context of superior responsibility are likely to lead to confusion of thought . . . .' The Appeals Chamber expressly endorses this view.[146]

The rest of Professor Damaska's complaints may be answered with the recognition that the superior responsibility doctrine is a conceptual and practical bridge between state and individual responsibility. The reason that the purely international legal aspects of superior responsibility have no true domestic analogues, and are therefore not fully consistent with the notions of culpability that underlie criminal law, is precisely because in this sense the commander or superior is not merely an individual, or even an individual on whom special duties are placed, but also acts as a placeholder for the state, movement, or larger organization on which identical responsibilities are imposed by customary international law.[147] Implicit in this observation is the more general insight that superior responsibility, as it exists in current international law, cannot be viewed solely within the theoretical confines of the individual responsibility regime.

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145. See *supra* note 142.
146. *Prosecutor v. Blaškić*, Judgment, Case No. IT-95-14-A, App. Ch., 29 July 2004, paras. 62–63 (footnotes omitted).
147. See *infra* notes 150–158 and accompanying text. This observation is not meant to imply that the superior responsibility doctrine does not require proof of a certain mental state on the part of the superior. Take Professor Damaska's remaining example – what he terms 'conscious disregard' of the 'risk of subordinate delinquency', i.e., the superior who is 'aware of the possibility that his underlings might commit a crime, [but] yet fails to take necessary and reasonable crime-preventing measures'. Damaska, *supra* note 140, at 463. Although this sort of knowledge does not fit neatly into either category expressed in the second criterion of superior responsibility, see *supra* note 126 and accompanying text, it comes closer to 'had reason to know' that crimes will be committed by his subordinates. See *Čelebići*, Appeal Judgment, *supra* note 132, para. 238. A related concern is that a superior may be convicted without proof that he shared the mental state of the actual perpetrators. See, e.g., *Prosecutor v. Brđanin*, Decision on Interlocutory Appeal, Case No. IT-99-36-A, App. Ch., 19 March 2004, paras. 7, 10. However, it must be emphasized again that, although superior responsibility is described as liability *for* the actions of subordinates, it is actually liability imposed directly on certain individuals for their omissions in the face of an express obligation to act.

3.2.2. The substantive obligations involved

The most important element in the superior responsibility doctrine – the core of the criminality inquiry and the trigger for liability – is the failure to prevent or punish. The other two criteria for responsibility are essentially safeguards. The first, the existence of a superior–subordinate relationship, tags the accused as an authority figure with the material ability to fulfil the obligation, that is, as an appropriate repository of responsibility.[148] The second, actual or constructive knowledge of the crimes, ensures that the standard applied is higher than mere strict liability, which was firmly rejected after *Yamashita*.[149] Thus, although the label attached upon conviction is that of guilty of genocide (or crimes against humanity, or war crimes), it would be more accurate to describe the result as having found the accused *responsible* for those crimes, because the norm breached is not strictly the prohibition of the actions, but rather the obligations of the superior to act to prevent or punish their commission.

Damaska is correct that these duties are not usually imposed on individuals.[150] In fact, the content of these primary obligations is functionally identical to those imposed on states to prevent or punish international crimes. Article 1 of the Genocide Convention provides that 'genocide, whether committed in time of peace or in time of war, is a crime under international law which [the Contracting States] undertake to prevent and to punish',[151] while Article 4 states that all persons who commit genocide must be punished, regardless of their status as public or private individuals.[152] Under Article 2 of the Supplementary Slavery Convention, states parties undertake to 'prevent and suppress the slave trade' and 'to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms',[153] while Article 6 requires states 'whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention [to] undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions'.[154] Under the Torture Convention, states are required to 'take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [their] jurisdiction', but also to ensure that, under their criminal laws, all acts of torture are made 'offences punishable by appropriate penalties which take into account their grave nature'.[155] Last, all states are obliged to prevent or punish grave breaches of the Geneva Conventions of 1949, which

148. See *supra* note 132 and accompanying text.
149. See *supra* note 120 and accompanying text.
150. It is interesting to note that although the institutionalist view of international law (as represented by the state responsibility regime) cannot tolerate the idea of states being treated like individuals, see *supra* note 79 and accompanying text, the liberal view of international law (as represented by international criminal law) appears to have relatively little difficulty treating certain individuals like states.
151. Genocide Convention, *supra* note 67, Art. 1.
152. Ibid., Art. 4. As the Genocide Convention has become customary international law, all three obligations are imposed on all states: the prohibition against genocide, and the obligations to prevent and to punish its commission. See *supra* note 68 and accompanying text. Similar status is accorded to the provisions of the other conventions mentioned here.
153. Supplementary Slavery Convention, *supra* note 67, Art. 2(a)–(b).
154. Ibid., Art. 6.
155. Torture Convention, *supra* note 67, Arts. 2, 4.

are generally accepted as the codification of customary norms of international humanitarian law.[156]

All the underlying breaches considered above may be committed by individuals, are considered crimes against international law,[157] and are therefore susceptible to application of the superior responsibility doctrine.[158] Moreover, the scope of the primary obligations involved appears to be coextensive with respect to both states and individual superiors: both actors are required to prevent or punish the crimes of those within their respective spheres of control, measured for states by the territory over which they have jurisdiction, and for superiors as those individuals over whom they exercise effective control. Indeed, it is interesting to note that similar limitations of liability exist for states as for superiors; in both cases, responsibility is conditioned on knowledge that the breach will occur, is occurring, or has occurred. Instead of the strict liability standard that may seem more appropriate for states, customary international law holds that states are responsible for omissions or failures to act only when they are aware of the legal imperative to act,[159] a condition fulfilled only when the state or its agents have knowledge that the obligation to prevent or punish has been triggered. Last in the parallels between state and superior responsibility, the obligation imposed by customary international law on military or civilian superiors does not extend to the prevention or punishment of *all* crimes, but only to those that constitute breaches of fundamental protective norms of human rights and international humanitarian law – that is, those that also constitute breaches of obligations *erga omnes* by states.

3.2.3. Practical implications: Article 10 of the Articles on State Responsibility

The arguments above, by describing superiors as 'placeholders' for states, may appear to invoke the customary rules for attribution, according to which the actions of agents or organs of the state, or of other persons under certain circumstances, are directly attributable to the state and give rise to state responsibility.[160] It is correct that existing rules of international law can already be used to establish state responsibility for breaches of obligations *erga omnes*, for the failure to prevent or punish the internationally illegal conduct of private or official individuals. What extra

156. See generally 1949 Convention (III) Relative to the Treatment of Prisoners of War, Art. 129, 75 UNTS 135; 1949 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Art. 146, 75 UNTS 287; C. van den Wyngaert, 'War Crimes, Genocide and Crimes Against Humanity – Are States Taking National Prosecutions Seriously?', in M. C. Bassiouni, *International Criminal Law* (1999), at 230.

157. See *supra* note 48.

158. Although the definition of torture contained in the Torture Convention was initially limited to acts committed by or with the acquiescence of a state official, the Preparatory Commission for the International Criminal Court, after receiving comments from states on the proposed Draft Elements of Crimes for that court, determined that the customary definition had evolved so as to remove that requirement. See Rome Statute, *supra* note 48, Arts. 7(1)(f), 8(2)(a)(ii); Preparatory Commission for the International Criminal Court, Elements of Crimes, UN Doc. ICC-ASP/1/3, at 119, 126 (omitting from the definition of torture as a crime against humanity or as a war crime the requirement of official involvement), available at http://www.icc-cpi.int/docs/basicdocs/elements(e).html.

159. See, e.g., *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4, paras. 22–23; *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Merits, Judgment of 24 May 1980, [1980] ICJ Rep. 3, paras. 63–67.

160. See ILC Articles, *supra* note 20, Arts. 4–11.

purchase, therefore, does the theory of superior responsibility as the link between individual and state responsibility have? The added advantage of the superior responsibility doctrine is that it provides a method of establishing both individual and state liability for these breaches in precisely the kind of conflict situations that have occurred in recent years and are likely to occur in the future: it offers the opportunity to ascribe responsibility for violations of international law in failed states, fragmenting states, and new states born out of internal and international strife.

As an illustration, take the example of the victor in a civil war. Article 10 of the Articles on State Responsibility, entitled 'Conduct of an insurrectional or other movement', provides in relevant part:

1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.[161]

In explaining that the Article was meant to ensure that a successful insurrectional or other movement could not avoid responsibility for its earlier illegal conduct, the Commission took pains in the attached commentary to distinguish between the 'conduct of the movement as such', and 'the individual acts of members of the movement, acting in their own capacity'.[162] But neither the Article nor the Commentaries provide a means of differentiating between the two types of conduct. Superior responsibility, however, may establish the basis for the responsibility of the movement, and therefore for the eventual state. Moreover, it may do so in a manner that has a greater chance of acceptance by both liberal and institutionalist international lawyers.

First, once superior responsibility has been established under international criminal law, all the elements for state responsibility for *erga omnes* violations have also been proved: breach of a *jus cogens* norm, material ability or capacity of a person in authority to prevent or punish the breach, knowledge that the breach has occurred, and failure to fulfil the obligation to act. Second, to make the link on a more theoretical level, if superior responsibility as a method for imputing liability to individuals only makes sense because commanders derive their duties from the state or larger organization – if superiors are the agents of the state, or the individual placeholders of the movement – then breaches that are attributable to the superior under international criminal law are also attributable to the state or movement. Last, because it is rooted in and formally belongs to the individual responsibility regime, but lays the groundwork for attributing civil liability to states under the state responsibility regime, the doctrine of superior responsibility presents the possibility of reconciling the two distinct sets of rules without challenging the fundamental theoretical conceptions of the international legal order on which each is based.

161. See ibid., Art. 10.
162. See ILC Commentaries, *supra* note 32, Commentary to Art. 10, para. (4).

4. Conclusion

The notion that the character and complexity of contemporary international affairs require the development of new methods for understanding and ascribing responsibility to a greater class of international actors is not especially radical when placed in the context of the progressive development of international law since 1945. The view of international law as solely, or even primarily, interstate law is no longer generally acceptable. International law now governs the actions of, and interactions between, states and non-state actors, including individuals. The shift from that central theme of the last several decades to the arguments presented in this article is not far in theoretical terms, nor very difficult to make once the connections between the existing sets of rules are laid bare.

Superior responsibility, it has been argued, is the best candidate for fostering the recognition that international law can in fact respond and apply to the changing circumstances of the new types of conflicts, without necessarily partitioning blame into overly artificial separate categories. Because its nature as a possible link between responsibility regimes is supported by the recent jurisprudence of international tribunals in discussing the links between the responsibility of individuals and the movements within which they work or with which they are associated, and the work of the International Law Commission in codifying obligations *erga omnes* into the law on state responsibility, it is possible that international law is already moving in the direction of reassessing channels of responsibility. If this is not the case, however, retention of distinct and separate sets of responsibility rules for different types of international actors – or maintenance of the perception that the regimes are unrelated – is likely to impose unnecessary restrictions on the development of theories of responsibility in international law, impeding the progressive development of principles, rules, and procedures that extend the fullest protection possible to human rights and impose the greatest cost on those actors that violate the most fundamental norms of international law.