statutory certainty currently present. While I am unable to adequately address each of these criticisms in this short paper, the Statute already contains provisions that impinge on state sovereignty (Article 12(3) declarations and UNSC referrals, for instance, can override the decision of a state's previous government or its current government, respectively, to not join the Court) and, as alluded to above, already allows for a level of prosecutorial discretion and contains a degree of statutory textual ambiguity.

Conclusion

This summary paper argues that the changing structure of modern conflict paired with a permanent court governed by expansive procedural mechanisms and open-ended admissibility factors offer opportunities to at least partially close the perpetual impunity gap that has existed between domestic and international legal systems. I do not contend that the Court's judiciary should overstep its bounds and become legislators or that the Court should reinterpret its jurisdictional framework at the point at which charges are brought. I merely suggest that mechanisms, both procedural and textual, exist within the Statute to enable the Court to consider events outside its strict jurisdictional boundaries when gravity is at issue in order to narrow impunity gap. Adopting an expansive rather than a constricted approach to jurisdiction will aid the Court in fulfilling its complimentarity mandate and provide legal recourse where none has existed in the past decades, or even centuries.

Adjudicating the State's Role in International Crime

By Rebecca Hamilton[*]

I am concerned with the way we adjudicate international crimes and specifically the way we allocate responsibility for crimes like genocide, torture, and slavery. In my paper, I focus on a subset—a very large subset—of instances in which a state played a vital role in commission of those crimes. I call this subset of instances State-Enabled Crimes.[1] I will flesh this out in a moment, but I first want to emphasize that State-Enabled Crimes is not a legal classification. I am not trying to define a new kind of crime. Instead, it is an analytical category I use to illuminate and question something that legal scholars have largely taken for granted: the bifurcated structure of our system for adjudicating international crime.

What do I mean by a bifurcated structure? I mean that we have one set of courts, laws, and processes for adjudicating an individual's role in international crime, and an entirely different set of courts, laws, and processes for adjudicating the state's role. I believe this binary approach is flawed. It fails to reflect the reality of crimes in which individual and state actions were deeply intertwined at the point of conception and commission. And I believe we would do better to look for sites of integrated adjudication, whereby one court or judicial body would develop a holistic factual record in order to assess individual and state responsibility concurrently. Such an integrated adjudication would be fairer to defendants, be more satisfying for victims, more accurately reflect events on the ground, and better serve the justifications for the international adjudication of these crimes.

After a brief explanation of State-Enabled Crimes, I describe how the international judicial system currently responds to these crimes, highlighting the problems with this approach.

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[1] *See* Rebecca J. Hamilton, *State-Enabled Crimes,* 41 Yale J. Int'l L. 302 (2016).

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Then, moving from problem to solution, I discuss how my proposal for the integrated adjudication of these crimes is not only normatively desirable, but also feasible in practice.

State-Enabled Crimes

State-Enabled Crimes is a category I use to ground my analysis of the adjudication of international crimes in the reality of how many, if not most, international crimes are actually committed. I deploy this term to direct attention to the fact that so many instances of crimes about which the international community is concerned cannot be properly understood in isolation from the state policies and practices that enabled them.

Take torture in Syria for example. Investigators have found the same custom-made instruments of torture used across detention sites nationwide, with instructions on their use disseminated down through the state apparatus and reports on their use sent back up through a multimodal chain of command.[2] This program of torture, on the scale we have seen in Syria, would not have occurred without the state policies and practices that support it. One can readily think of other examples. Once we ground our analysis of international adjudication in the reality of how most international crimes are actually committed, we can start to see the problems with a response that adjudicates individual and state responsibility in isolation from each other.

Problems with Bifurcated Adjudication

Bifurcated adjudication generates a distorted picture of how these crimes are committed. This has a detrimental impact on international justice goals like prevention and reconciliation. At present, this problem is compounded by the fact that the system of adjudication is not only bifurcated, but it is bifurcated in a deeply skewed manner. When it comes to the adjudication of international crimes, individuals are far more likely to be held responsible for their role than states are. Right now, the proverbial Martian coming to survey our adjudicatory landscape would be left with the general impression that international crimes are the product of bad choices by bad individual actors. But even if this overemphasis of the role of the individual vis-à-vis the state was balanced out, bifurcation would still give us a distorted view. When individual and state responsibility are adjudicated in isolation from each other, neither the court assessing individual responsibility, nor the court assessing state responsibility has a complete picture of how the underlying crime was committed.

This brings us to another problem; bifurcated adjudication risks an unfair allocation of responsibility between individual and state. Interestingly, scholars on each side of the international criminal law/law of state responsibility divide have already highlighted this risk. On the international criminal law side, there is a wonderful body of literature concerned with the way that assignments of individual culpability serve to paper over a complex social reality rife with communal responsibility.[3] And on the state responsibility side, the 2007 International Court of Justice (ICJ) opinion in the genocide case, brought by Bosnia against

[2] Comm'n for Int'l Justice and Accountability, *Crimes Against Humanity Committed in Syrian Regime Detention Facilities* (on file with author); Human Rights Watch, Torture Archipelago: Arbitrary Arrests, Torture, and Enforced Disappearances in Syria's Underground Prisons Since March 2011 (2012), *at* https://www.hrw.org/report/2012/07/03/torture-archipelago/arbitrary-arrests-torture-and-enforced-disappearances-syrias; Rep. of the Independent Int'l Comm. of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/S-17/2/Add.1, paras. 92–93 (Nov. 23, 2011).

[3] *See, e.g.*, Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity,* 99(2) Nw. U. L. Rev. 539 (2005); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity,* Col. L. Rev. 1751 (2005).

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Serbia, showed how it is very difficult for the ICJ to say anything at all about state responsibility without also considering individual criminal responsibility.[4] Yet there has been scant recognition that each body of law is grappling with mirror images of the same problem.[5] In a State-Enabled Crime, one cannot accurately assess the state's responsibility without understanding the role played by individuals. But likewise, one cannot accurately assess an individual's culpability in isolation from the state policies or practices that enabled his action.

Toward Integrated Adjudication

In light of the problems with the existing bifurcated system, the way forward is to look for potential sites of integrated adjudication. In my longer paper, I flesh out one possible mechanism through which such integrated adjudication could be brought to life at the International Criminal Court. But I want to emphasize that there are many possible sites for pursuing integrated adjudication, and I am more concerned with making the conceptual case and showing it is at least minimally feasible, than with proving that the ICC is the best forum for this new approach. Indeed, my central hope with this paper is to catalyze critical conversations about the status quo of bifurcated adjudication and spur proposals for a range of possible sites of integrated adjudication.Procedurally speaking, integrated adjudication at the ICC would be fairly straightforward. First, during the criminal trial of an individual defendant for a State-Enabled Crime, the parties—rather than sidelining evidence about the state from the trial—would proactively draw this evidence in. (Recent case law from the Court already permits the admission of evidence not directly related to the guilt or innocence of the individual defendant.[6] Second, the judges in the reparations phase would use the factual record developed by the Trial Chamber in the criminal proceedings to assess the responsibility of the state, using the lower standard of proof that applies to the reparations phase (and is appropriate for assessing state responsibility given that it is not a criminal form of liability).[7] Third, in addition to making a reparations order against the convicted defendant for his role in the State-Enabled Crime, the judges would also issue a reparations order against the state whenever it finds there has been state responsibility. This order could be directly targeted to the state policies and practices that enabled the crimes—for instance, ordering that reparations payments continue until such time as the state policy is reformed.

This mechanism, or another like it, would address a number of pressing issues in international criminal law scholarship. A growing number of scholars, drawing largely on insights from social psychology about the influence of situational factors on individual behavior, have raised concerns about international criminal trials.[8] One of the problems they have

[4] *See e.g.*, Richard Goldstone & Rebecca Hamilton, Bosnia v. Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia*, Leiden J. Int'l L. 95, 103 (2008).

[5] To date, there has not only been uneven development in practice between the adjudication of individual criminal responsibility on the one hand and state responsibility on the other, but also an almost complete fracturing of the scholarly conversation. The one notable exception to this trend comes from a handful of Amsterdam-based scholars, led by André Nollkaemper, whose work appears in System Criminality in International Law (André Nollkaemper & Harmen van der Wilt eds., 2009).

[6] *See* Prosecutor v. Dyilo, ICC-01/04-01/06-3129-AnxA, Order for Reparations, para. 156 (Mar. 3, 2015).)

[7] Prosecutor v. Dyilo, ICC-01/04-01/06 AA2A3, Judgment on the Appeals Against the ''Decision Establishing the Principles and Procedure to be Applied to Reparations'' of 7 August 2012, with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2, para. 65 (Mar. 3, 2015) (establishing ''the balance of the probabilities'' as the appropriate standard of proof for the reparations phase of ICC proceedings).

[8] *See supra* note 3.

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identified is that criminal law typically sanctions behavior that deviates from a socially-accepted norm. But in many international crimes, the usual norms are so inverted that an individual perpetrator who kills, rapes, or tortures acts in a way that is thoroughly consistent with the norms around him. Hence there arises a ''deviance paradox'' when international criminal law comes in to punish an individual for behavior that was in line with the norms prevailing in the environment in which he was operating.[9] The resulting concern is that international criminal law may over-punish relative to actual culpability.[10]

What has so far gone noticed is the role that bifurcation is playing in establishing this paradox. If the role of state policies and practices in creating this environment of inverting norms was not sidelined to a different adjudicative setting, but instead integrated into the assessment of an individual's actions, then the Court could factor in the effect of situational influences and arrive at a more accurate picture of any particular individual defendant's culpability. Meanwhile, the state would be held liable for its contribution to the commission of the crimes, so that any diminishment in liability of an individual defendant would be made up for by the increased liability of the state. In other words, increased fairness to the defendant would not lead to reduced satisfaction for victims.

Resolution of the deviance paradox is just one example of how an integrated approach addresses some major concerns being raised by international criminal law scholars. There are others. But an integrated approach does more than resolve a set of existing concerns. It proactively advances some of the core goals of international justice.[11] All that said, the proposal does of course generate some important concerns, including political feasibility, selectivity, and trial length. I grapple with these and others in the paper. But here let me just address the one concern that has come up most frequently as I have spoken about this paper. The concern is that this proposal takes us back to the bad old days of imposing collective guilt upon an entire state. Framed slightly differently, commentators have worried that this proposal would undermine one of the great accomplishments of international law in the twentieth century: the ability to hold individuals criminally liable.

In response, I note firstly that the law of state responsibility is not a body of criminal law. A finding of state responsibility does not bring with it the moral condemnation—that marker of guilt—that accompanies a finding of criminal liability.[12] In addition, this proposal does nothing more than draw into a single adjudicative setting two bodies of law—international criminal law and the law on state responsibility—that have been accepted by states and are already in use. So, to the extent anyone has concerns about the collective nature of a finding of state responsibility, those concerns exist independent of this proposal. Of course, that is a rather formalist response. Thus, I would add that far from undermining the move toward individual criminal responsibility in international law, this proposal celebrates and builds on that progress. Individuals are still prosecuted under a system of integrated adjudication; it

[9] Saira Mohamed, *Reconciling Mass Atrocity and the Criminal Law,* 124 Yale L.J. 1628, 1639 (2015) (introducing the term ''deviance paradox'').

[10] *See, e.g.*, Drumbl, *supra* note 3.

[11] *See supra* note 1 for a fuller discussion on the benefits of integrated adjudication to goals of prevention and reconciliation.

[12] *See generally* James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and commentaries 1–60 (2002) (recounting the history of the discussion on state crime at the International Law Commission). *See also* Thomas M. Franck, *Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?* 6 Wash. U. Global Stud. L. Rev. 567, 569–70 (2007) (emphasizing that ''a finding of state responsibility is not tantamount to a determination of the people's collective guilt'').

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is just that drawing in the law of state responsibility can enhance the fairness and accuracy of those prosecutions.

Improved fairness and accuracy provides a clear benefit to defendants. But they are not the only beneficiaries of this proposal. Victims too would fare better under a system of integrated adjudication. In scores of interviews I have conducted with survivors of atrocity crimes, victims articulate an array of visions of justice. But the one theme that everyone seems to agree on is the need to know the truth.[13] And integrated adjudication paints a more accurate picture of how a crime was committed, and where the balance of responsibility for it lies. In addition, the incorporation of the state into the proceedings provides another source of finance for reparations that may be vital considering the number of individual defendants who are judgment-proof. Moreover, the state can provide forms of nonfinancial reparation to victims that no individual defendant can ever provide: state-sponsored memorials to the victims, a commitment to ensure that the events are recorded in school textbooks, or an apology from the state that promises its policies and practices will not be used to support the commission of such crimes again.

To conclude then, focusing on State-Enabled Crimes—instances in which state policies or practices were integral to the commission of an international crime—reveals a feature of the adjudicative response to international crimes that has previously been overlooked: its bifurcated structure. This bifurcation, I have argued, is problematic to the degree it forces a separation of individual and state responsibility for crimes in which the role of individual and state are, in fact, deeply intertwined. The solution is to move to an integrated response for State-Enabled Crimes. This could be done at the International Criminal Court, as I explain in my paper. Or, other ways could be found. But whatever form it takes, an integrative response would help to overcome the problems of inaccuracy and the risks of unfair allocation of responsibility under the existing bifurcated system and it would better serve goals undergirding the system of international justice, such as prevention and reconciliation, than our existing bifurcated response.

The Dark Side of Legal Truth

By Shiri Krebs[*]

January 4, 2009, 6:30 a.m., Zeytoun area, south of Gaza city; the seventeenth day of Israeli Military offensive in Gaza (Operation Cast Lead) begins: Palestinians report that Israeli forces fire several projectiles at the Al-Samouni family house, where dozens of unarmed civilians had taken shelter, killing twenty-one family members and injuring nineteen. Israeli military authorities reject this description, arguing they were targeting a group of terrorists holding RPG rockets. Many other facts concerning this 22-day offensive, including the total number of Palestinian casualties, were also extremely contested. The international community decided to intervene: the UN Human Rights Council established a Fact-Finding Mission on the Gaza Conflict, headed by former South African Judge and International Criminal Tribunal for the Former Yugoslavia (ICTY) prosecutor Richard Goldstone, to investigate the case. After months of intensive work collecting evidence and hearing testimonies, the Mission

[13] *See generally* Rebecca Hamilton, Fighting for Darfur: Public Action and the Struggle to Stop Genocide (2011).

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