THE STATUS OF INDIVIDUALS IN INTERNATIONAL LAW: THE CASE OF '*CORE*' INTERNATIONAL CRIMES

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By

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Declaration

I Zelalem Kibret Beza, do hereby declare that this dissertation is my original work and that it has not been submitted for any degree or examination in any other university or academic institutions. Whenever other sources are used or quoted, they have been duly acknowledged.

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Acronyms

ACHPR	African Charter on Human and Peoples Right
AU	African Union
CAT	Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CIL	Customary International Law
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International criminal Tribunal for Rwanda
ICTY	International Criminal tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
ILO	International Labor Organization
IMF	International Monetary Fund
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East UNGA
NAFTA	North American Free Trade Agreement
NMT	Nuremberg Military Tribunal
NSA	Non-State actor
PCIJ	Permanent Court of International Justice
UDHR	Universal Declaration of Human Right

UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor

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CHAPTER ONE

1. INTRODUCTORY REMARKS

Among the enduring statements of the in(famous) Nuremberg trial is Justice Robert Jackson's assertion that *"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]. Nuremberg is one of those seminal moments in International Law which marked a transition from international law's long-established State-centric rules to a new system in which some attention, though limited, and was given to *non-state* entities, like Individual persons.

In the pre-Nuremberg era there was very little (and to the extent that it happened, unsystematic and disorganized) recognition and treatment of Para-state entities as body members of International law. In most cases, the individual was treated as a footnote within state-centered proceedings or as part of cases involving referrals of cases of Individuals to National jurisdictions. Nevertheless, with time, Individual persons became the main International actors in the cast realm of International law. Thus, recognition of individuals under International law has become an elephant in the house; its existence cannot be denied anymore. Especially in this era of many International crimes that resulted International criminal responsibility of Individuals.

1.1. Background of the study and literature review

The classical meaning of law as a biding and enforceable set of rules that governing individual persons' relationships to each other or as a governing order that regulates Individual – entities (the state as the main organ) was challenged by International Law. Traditionally International Law has been defined as:

> The name for the body of customary and conventional rules which are considered legally binding by civilized states in their relation with each other."[2]

[1] Opening statement at the Nuremberg Trial of the Major War Criminals, the U.S. Chief Prosecutor, Justice Robert Jackson (1945)

[2] L. Oppenheim, International Law, a Treatise, vol. I Page 3 (1st ed. 1905)

Or simply as the Law of Nations[3] Thus, International law changes the concern of the law from Individual persons to Nations. That is why some people even doubt that International law is worthy of the epithet of, "law." It is said that, 'Yes, International law is clearly more than a set of social or moral norms, but at the same time it does not fit (entirely) the concept of law developed for domestic law[4]

Thus, International Law is a term coined to elucidate the law that governs state to state relationships. Beginning with its very nomenclature, 'Inter-national' law is a law that governs 'Inter-state' relationships with different remedial and facilitator mechanisms. Within this context, the 'Individual' is either an ignored or subsidiary part of such relationships or an appendage of the state, but not an autonomous subject of International law. The very notion that International law is established as a very principle of state sovereignty is the conventional consideration of what International law means.

By the same token, as International law challenges the conventional meaning of law, the traditional state-centered meaning of International law is also challenged by many. Among the most notable challenges to the current conception of international law, are statements such as: "Not only states but international organizations have rights and duties under International law"[5] and "Because of the widening of aspects of International law even the individuals and other private persons may have rights and duties. International law in current scenario is putting emphasis on well being and protection of just rights of the citizens of member states."[6] These are just some of the statements which criticize international law for its exceedingly state-focused approach.

In spite of all these criticisms, there are some very early precedents in which individuals were tried as part and parcel of the scope of a nascent international law. . The first genuinely recorded international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded[7] Peter was hired by the Duke of Burgundy of

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[3] Ibid.

[4] Samantha Besson and John Tasioulas, The Philosophy of International Law, Page 7 (1st ed. 2010).

[5] Jayaprakash Kakada, What are the drawbacks of the definition of international law given by L. Oppenheim? <http://www.preservearticles.com/2012011020419/what-are-the-drawsbacks-of-the-definition-of-international-law-given-by-l-oppenheim.html> last visited December, 2013.

[6] Ibid.

[7] Georg Schwarzenberger, International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict, p. 463 (1st ed. vol. II, 1968).

France to punish villagers in Germany who refuse to pay tax and peter pillage the town and slaughter the dwellers, that latter results a 27 judges panel who presided over the case and prosecute peter. Peter tries to defend himself as his action was a result of a superior order but, the panel reject his defense and sentence him to death. Hence, Peter's trial became an underpinning for the modern jurisprudence of International responsibility of individuals. Even the so called founding fathers of international law like Francisco de Vitoria, Francisco Suarez and Hugo Grotius[8] used to argue the existence of a universal community of individuals was sustained and the individual was identified as a reference point of rights and duties.

Nevertheless, the *Westphalian* order set another milestone for International law and its scope. European states at the Peace Treaty of Westphalia adopted the principle of non-intervention of one state in the internal affairs of another state and the Sovereignty of states[9] as guiding principles of international law and international relations. *The Westphalian* Order of State *Centrisism*, guided scholars as well as law Makers in the International level to up to the mid-20th Century.

The soverignistic conception of responsibility in International law was given its most significant challenge from the Post World War II trials conducted under the aegis of International Military Tribunals (hereinafter IMT), notably, in the Nuremberg Military Tribunal (NMT), also known as Nuremberg Trials and at The *International Military Tribunal* for the Far East (IMTFE), also known as the Tokyo Trials.

The Nuremberg Tribunals clearly allocate responsibility to individuals for the crimes they committed irrespective of where the act occurred:

> There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have *no particular geographical location* whether they be accused *individually* or in their capacity as members of the organizations or groups or in both capacities.[10] (*emphasis* added)

[8] See Remec, The position of the individual in international law according to Grotrus and Vattel Passimi, (1st ed. 1960).

[9] Treaty of Westphalia; Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies, 24 October, 1648.

[10] Agreement for the Prosecution and Punishment of the Major War criminals of European Axis (The London Agreement) (8 August 1945) Art 1. (Herein after, the IMT agreement).

Moreover, The Charter of the International Military Tribunal[11] clearly set the following acts, or any of them, as crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

I. Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

II. War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

III. Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Moreover, by its decision the Nuremberg Tribunal upended the traditional conception of International law as a law governing states that provides rights and obligation of States as:

> It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as upon States has long been recognized . . . the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain

[11]Charter of the International Military Tribunal (The constitution of the international military tribunal) (8 August 1945) Art 6. (Herein after, the IMT Charter)

immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law.[12]

Hence, as per the trials, numerous Nazi Germany high level political and military leaders[13] and Japanese military and political leaders[14] were tried and convicted. The Post World War IMT trials open three doors simultaneously. One, they help understand what (*core*) International crimes mean. Second, they signaled to the world that it was time to formulate International rules on the protection of Individuals[15] as well as groups[16]. And thirdly, IMT set a cornerstone for making Individuals responsible for what crimes they committed, detached from state responsibility. This triple faced legacy of IMT was the great leap forward in establishing Individuals within the core of International law.

However, the concept of Individual Responsibility with respect to *core* International crimes is neither as straightforward nor as single-facetted, as might appear upon first glance. The general principle behind the concept does not generate too many difficulties,[17] but problems arise when one is confronted with the Post World War legal trend emphasizing the right of Individuals, while ignoring their responsibilities. For instance, the main approach of the Universal Declaration of Human Rights (hereinafter UDHR) is to define the rights of individuals, and to make fulfillment of those rights a responsibility of governmental authorities. Linked to every right is a State obligation.[18] The same was true for most human rights Instruments even trade laws[19] that give rights

[12] The Nuremberg Trial, 6 F.R.D. 69, 110 (Int. ,Military Trib. 1946).

[13] Some 5,000 Nazi's were charged with war crimes. However, the Nuremberg trials were designed specifically to prosecute high-ranking Nazi officials with whom authority over heinous atrocities rested.

[14] Twenty-eight Japanese military and political leaders were charged with Class A crimes (Crime of joint conspiracy to start and wage war), and more than 5,700 Japanese nationals were charged with Class B (Crimes against Humanity) and C crimes (Crime of planning, ordering, authorization, or failure to prevent such transgressions at higher levels in the command structure), mostly entailing prisoner abuse. China held 13 tribunals of its own, resulting in 504 convictions and 149 executions.

[15] See, Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949)

[16] See, International Convention on the Prevention and Punishment of the Crime of Genocide (11 December 1948) (herein after the Genocide Convention)

[17] Ciara Damgaard, Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues (1st ed. 2008).

[18] International Council on Human Rights Policy, Taking Duties Seriously: Individual Duties in International Human Rights Law. Page 10, (1999)

[19] International Centre for Settlement of Investment Disputes, the Convention on the Settlement of Investment Disputes between States and Nationals of Other State (March 18, 1965)

and privileges to Individuals and make states responsible for respecting such given privileges.[20]

But, with the passage of time, non-state actors have become key players in international relationships and individuals have become the center of gravity of International relationships. Especially in this era of information, the role of the individual has become much more significant in determining state to state relationships, as well as general relationships between individuals themselves.

Though state-centered international laws may inhibit the rise of rules protecting the individual might the converse be true? That is, does having a state-centered system with normative expectations of what can and cannot happen within one's borders (in order to be accepted within such a community of states—in yesteryear the community of 'civilized' states) have a positive impact on international rules as they pertain to individuals.

Theoretical controversy as to whether the individual is a subject of the law is not always very fruitful in practical terms, and the issue is always viewed with the idea of proving that he is a subject *vet non.*[21]

Beyond all scholarly Articles written on the subject for and against, an important contribution to the evolution of the concept of individual criminal responsibility has been made by the Draft Code of Offences against the Peace and Security of Mankind, prepared by the International Law Commission (hereinafter, ILC).[22] Since 1951 ILC came up with draft rules on Individuals responsibility in International Law. It plainly puts the case of Individual responsibility in a manner of Offences against the peace and security of mankind […] are crimes under international law, for which the responsible individuals shall be punished.[23] Furthermore, the ILC in its revised version of the draft code,

[20] The African Charter on Human and Peoples Right takes a brand new step with this regard by adopting Individuals duties in a detour from the conventional right giving laws. See, Art 27, 28 and 29 of the Charter. (herein after ACHPR).

[21] Carl Aage Nørgaard, The position of the individual in International law, page 113 (1st ed. 1962) (Herin after Nørgaard)

[22] Edoardo Greppi, The evolution of individual criminal responsibility under international law, (International Review of the Red Cross) 1999. (Herein after, Greppi).

[23] International Law Commission, Draft Code of Offences against the Peace and Security of Mankind (1954) Art 1.

articulates the case of Individual responsibility to Offences against the Peace and Security of Mankind in a clearer manner.[24]

With regard, to legal recognition, the slowest development has occurred in minimal judicial recognition of Individual responsibility under international law. The very nature of the International Court of Justice (herein after ICJ) being a stage which denies Individuals' *locus Standi*[25] makes the case of Individuals standing right/obligation under-developed. But, the last decade of the 20th Century comes up with very essential developments in both Individuals' responsibility and re(definition) of *core* International crimes.

The International Criminal Tribunals for the former Yugoslavia (hereinafter ICTY)[26], International Criminal Tribunal for Rwanda (hereinafter ICTR)[27] and the International Criminal Court (hereinafter ICC)[28]all happened in the 1990's recognized Individual criminal responsibility for crimes committed and participate in, detached from the conventional state responsibility. The same was true with regard to UN-backed hybrid Internationalized courts in different countries.[29] Thus, can the ICTY, ICTR, ICC and all hybrid Internationalized tribunals then also help us to answer the very query of what are *core* International crimes?

Unlike Nuremberg, the late 20th century tribunals identify the crime of genocide as an International crime and rectifies crime against Peace from the list. Both types of crime, [i.e war crime and crimes against humanity] together with the crime of genocide, come under the broader concept of *crimina juris gentium*. The category of crimes against

[24] International Law Commission, Draft Code of Offences against the Peace and Security of Mankind (1996) under Article 2 provides: "A crime against the peace and security of mankind entails individual responsibility"

[25] See, UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 (Herein after, the ICC statute) Art, 34

[26] UN Security Council, Statute for the establishment of International Criminal Tribunal for Rwanda (last amended in 31 January 2010), 8 November 1994 (Herein after, ICTR Statute) Art. 7

[27] See, UN Security Council, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (25 May, 1993) (Herein after, the ICTY statute) Art. 6

[28] The ICC Statue under Article 25 provides "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute."

[29] United Nations Transitional Administration in East Timor (UNTAET), UNTAET/REG/2001/25 (14 September, 2001).

peace has been left aside as its scope is more uncertain and the particular features it presents imply a close connection with *jus ad bellum* issues.[30]

All in all, beyond International criminal Law, Individuals became part of international, humanitarian law (e.g. the four Geneva Conventions and the two subsequent protocols) human rights law (e.g. the main United Nations (herein after UN) human right laws as well as regional rules) and even, in international trade law (e.g., North American Free Trade Agreement (NAFTA) chapter 11 actions) have been inclusive of corporations, and even of certain individuals. But, the main subjects of International law used to be and still are sovereign states.[31] Yet 'Internationally wrongful act' are still defined as a breach of a primary obligation which is attributable to a state[32]

Nonetheless, the individual must be seen in the context of the organized community in which s/he lives, and, therefore, her/his individual condition will depend on general social and economic advancement in that community.

1.2. Research questions

International laws that are adopted in order to govern state relationships are ineffective when it comes to individuals' relationships. Therefore, the first major area of my thesis will examine the existence and workability of international laws with regard to Individual persons beyond the conventional state to state approach. Moreover, I will examine why don't have resolutions and declarations like the "Declaration on Rights and *Duties of States"* to individual persons?

In my search for answers to such failures, I will try to examine the role of Individuals in cases of *core* international crimes like Genocide, War crimes and Crimes against humanity. Although, trials have taken place on three levels - international, regional and National levels, to hold individuals accountable for the commission of and participation in such heinous crimes they have been scattered and disorganized in manner. The lack of comprehensive international rules governing and determining the status of Individuals dooms the efforts to make individual persons part and parcel of International Law and the international system.

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[30] *Supra* at 21.

[31] Knut Triasbach, The Individual in International Law, p. 1 (2006)

[32] Anthony Aust, Handbook on International Law, p. 408 (1st ed. 2005) (Herein after, Aust)

The main purpose for selecting *core* international crimes as an indicator of individuals' status under international law is to frame the scope of the paper and to develop an understanding of what the law says with regard to such matters.

Consequently, the author will probe recent developments with regard to recognition of Individuals under international law, including different UN ad hoc tribunals as well as International Criminal Court precedents. Thus, the main research questions are:

→ In International Law, to what extent is an Individual person detached from the state and treated as an entity?
→ If *core International crimes* happen, what is the extent of individuals' liability and the states share?
→ Can treating Individuals as subject of international law with comprehensive rules be the solution to the impasse that arises between International jurisdictions and state sovereignty?
→ Does the notion of '*Individual sovereignty'* constitute a leeway from such hurdles?
→ What significance would the notion of Individuals separate responsibility result?

These are the principal questions to be raised in this thesis, and the author's endeavor is to answer such questions and to put the issue in perspective.

1.3. Methodology

The author will adopt a critical analytic approach. Consequently, while the research for this paper will involve a literature review of books, journals, and consultation of different binding International and regional laws and soft laws. Desk top research, case analyses and trend identification will be also employed.

1.4. Limitations of the study

This thesis aims to analyze the historical ups and downs of various entities of International law with a special reference to Individual persons and identification of gaps within *the law*. Thus, by Individual person the author is referring to natural persons. Hence, the meaning of Individual in this paper implied only human persons – nothing more. Moreover, since the paper deals with the status of Individuals in International law via their responsibility, no search for right of Individuals in International law is implied.

1.5. Overview of chapters

The paper has five chapters Including the Introductory section. Therefore, beyond this section there are four major chapters. The second chapter deals with the general concept of International responsibility with its core issue of state responsibility and It will probe the contours of the conventional state centered International responsibility and the place of Individuals in such traditional perception. On the other hand, the third chapter concerns itself with the Individual as an entity in International law, with its wider implications and theories, as well as arguments in favor and against designation of individuals as a specific entity under international law. The fourth chapter tries to shed light on the notion of International crimes and tries to identify *core* International crimes determining the scope of the paper. By the fifth chapter based on the spring board – issues raised in the former three chapters we will be boarded to the section that entertains Individuals with regard to International criminal responsibility and the trend and extent of Individuals responsibility for *core* International crimes. The implication and significance of making Individuals responsible for *core* International crimes as well as the very controversies over jurisdiction are also analyzed. And finally the predicaments of Individuals International criminal responsibility for *core* International crimes will be entertained.

Finally, the author concludes with remarks on the way forward in defining the contours of individual criminal responsibility under international law in general, and with regard to *core* International crimes in particular and tries to recommend the best options forward.

CHAPTER TWO

2. INTEARNATIONAL RESPONSIBILITY IN GENERAL

"The right to swing [your] fist ends where the other man's nose begins."[33] John B. Finch

Putting aside arguments concerning 'law without sanctions[34]' which resents law as a third party that simply mediates relationships between individuals and the Hartian *Laws may not necessarily impose duties or obligations but may instead confer powers or privileges without imposing duties or obligations on individuals*[35], the mainstream legal argument is that Law and sanctions are corollary. Or in the words of Alain Pellet 'No responsibility, no law.[36] Unless a law (whatever its nature) is followed by sanctions, making *subjects of the law* responsible for transgressions – is futile.[37] In the Austinian term, all laws are coercive orders that impose duties or obligation on individuals[38] Thus, responsibility is at the heart of Law.

Likewise, responsibility is at the heart of International law. It constitutes an essential part of what may be considered the constitution of the International Community.[39] Even if

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[33] Different versions of this adage are attributed to different Individuals. 'The right to swing my fist ends where the other man's nose begins' belongs to John B. Finch. "The right to swing my arms in any direction ends where your nose begins" goes to John Stuart Mill and "My right to swing my fist ends where your nose begins" is Abraham Lincoln's version.

[34] See, Michael Barkun, Law without Sanctions (1st ed, Yale, USA, 1968).

[35] H.L.A Hart, The Concept of Law (2nd ed, Oxford University Press)

[36] Alain Pellet, The Definition of Responsibility in International Law, p. 6, in The Law of International Responsibility, (1st ed. Oxford). (Herein after, Pellet).

[37] However, there are still arguments that suggest the existence of International law per se would result a well mannered behavior of states even if sanctions are not attached. See, Ryan Goodman and Derek Jinks, Socializing States: Promoting Human Rights through International Law (Oxford University press, 19 September 2013). An extended prospectus of the book is available at <http://www.law.yale.edu/documents/pdf/Faculty/Socializing_States_Workshop_March2007.pdf> last visited on February, 2014.

[38] John Austin, The Province of Jurisprudence Determined (1st ed. 1832)

[39] P. Reuter, 'Trois observations sur la codification de la responsabilité internationale des États pour fait illicite', in Le droit international au srrvice de la paix, de la justice et du développement-Mélanges Michel Virally, Page 390 (Pedone, Paris, 1991) As quoted in Antônio Augusto Cancado Trindade, The Emancipation of the individual from his own State: The Historical Recovery of the Human Person as Subject of the Law of Nations (Human Rights, Democracy and the Rule of Law, 2007).

doubts arise from different school of thoughts, the relationship between domestic law and responsibility parallels the relationship between International Law and responsibility. For that matter, responsibility has evolved profoundly together with international law itself so that responsibility is the corollary of international law.[40]

2.1. Why?

The root of the rationale behind responsibility under International law takes us back to time immemorial. One of the founding fathers of International Law, Hugo Grotius *Magnum Opus* argues that: 'There arises an obligation by the Law of Nature that makes reparation for the damage, if any be done.[41] Inferring from the Grotian assertion, it is a principle of international law and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.[42] Thus, the existence of an International obligation in a form of an *ex ante* obligation precedes and subsequently an e*x post facto* result will follow.

The first and foremost reason for the existence of responsibility in the International legal framework is the law or practice of *jus cogens* that prohibits a certain action that derives from the old dictum of *No Law, No Responsibility* or vice versa, and such prohibition should followed by a transgression by an International legal entity or as Grotius puts it, *if any* [act] *be done.*[43] If these two meets at once – responsibility will be followed.

2.2. What does International responsibility entail?

Logically, the next query will be the basic question of what International responsibility entails. Traditionally, international responsibility was presented as being of a 'civil' or 'private law' character. But, later, jurists came up with the argument that, in international law, responsibility is neither civil nor criminal.[44] In other words, there is no discrimination of the type of liability based on the nature of the act committed, it international acts can result in civil or criminal or both types of liabilities simultaneously. That is to say, primary rules refer to the laws relating to the content and duration of substantive state obligations.

[40] Pellet, p. 3.

[41] H, Grorius, The Rights of War and Peace, para 8 (Vol I, 1625)

[42] Case Concerning the Factory at Chorzów (Germany v Poland) (Merits) PCIJ Rep Series A No 17

[43] H, Grorius, The Rights of War and Peace, para 10 (Vol I, 1625).

[44] Hans Kelesen, The Pure Theory of Law, P. 20, (1st ed. Univerisity of California, USA, 1967)

In contrast, secondary rules refer to the legal consequences of failing to fulfill obligations established by primary rules.[45]

However, international responsibility that arises out of a wrongdoing in contravention of an International rule/custom brings about different results for different entities i.e, the act of misbehavior will have different consequences for different International Legal actors as examined below.

2.3. International responsibility of States[46]

The classical[47] purpose of international law is to function as a pacifying factor for inter-state interactions. In such functioning states used to be the epicenters of International law. Hence, International law throughout the ages was all about (at least in major scholarly writings and International adjudications) enumerating the responsibilities of states, along with their rights and privileges vis-à-vis their relationships with other nations. Since states are in the core of rules of International responsibility, and that have a wide implications for Individuals criminal responsibility, at this juncture first the author will explore the case of state responsibility that followed by discussions over its implication to Individuals responsibility.

A state is responsible in international law for conduct in breach of its international obligations[48] is the widely recognized notion in International law. Nonetheless, from concepts like sovereignty, the very case of state responsibility faces challenges over

[45] See, the International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 14-16 (James Crawford ed., 2002).

[46] When the author of this paper says *State*, It means as the meaning given by the Montevideo Convention as:

> "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states"

[47] "The name for the body of customary and conventional rules which are considered legally binding by civilized states in their relation with each other" As Oppenheim defined in International Law a Treatise, vol. I P. 3, (1st ed. 1905)

[48] See, General Assembly resolution 56/83, Responsibility of States for internationally wrongful acts A/RES/56/83, (28, January 2002). As drafted by International Law Commission. (Herein after resolution 56/83).

time. This challenge was commonly known as the *Westphalian*[49] notion of sovereignty that treats the state as a supreme and inviolable higher organ.

However, when the interaction between states increased, as a result of a newly defined world orders (legal as well as political), the principle of absolute sovereignty as recognized in the *Westpalian* sense faced severe challenges. Consequently, the general criticism against state responsibility goes as:

> If one attempts […] to deny the idea of State responsibility because it allegedly conflicts with the idea of sovereignty, one is forced to deny the existence of an international legal order.[50]

Moreover, the analogy of imagining states with absolute sovereignty with the Hobbesian state of nature[51] cliché, makes the concept of absolute state sovereignty an obsolete notion. Thus, making states responsible for their actions or omissions becomes a new legal world order.

Many scholars argue in favor of state responsibility from different points of views. Charles de Visscher described State responsibility as the 'necessary corollary' of the equality of States.[52] Or making states liable for what they are doing is the only way to halt the old-fashioned trend of *Might is Right*. Others come up with different angles like, state responsibility is a form of vicarious liability, in that some penalty is borne by the citizenry as whole because of actions are taken by their 'agents'.[53] In the words of an International criminal jurist, Antonio Cassese:

> The international community is so primitive that the archaic concept of collective responsibility still prevails. Where States breach an international rule, the whole collectivity to which the individual State official belongs, who materially infringed that rule, bears responsibility [. . .] On the international plane, it is the whole State

[49] The sovereignty of nation-states on their territory, with no role for external agents in domestic structures as well as no responsibility to any other state.

[50] R. Ago, Third Report on State Responsibility, PP. 199,205, (Vol 11(1), lLC Yearbook, 1991).

[51] Thomas Hobbes, Leviathan, (1st ed 1651).

[52] C de Visscher, La responsabiliti des États, Page 90 (Leiden, Bibliorheca Visseriana, 1924).

[53] [53] Eric A. Posner and Alan O. Sykes, An Economic Analysis of State and Individual Responsibility under International Law, P. 16, (The law school the university of Chicago, February 2006). (Herein after Eric and sykes).

that incurs responsibility and which therefore has to take all the required remedial measures.[54]

When we see the scope of State responsibility, it covers many fields. It includes unlawful acts directly committed by the state and directly affecting other states: for instance, the breach of a treaty, the violation of the territory of another state, or damage to state property.[55]

As the author discussed in the previous section, the conditions of existence of an International law/custom and a breach of it, are the main factors that would result state responsibility. In other words, to make a state responsible for its wrongdoing, one has to first ascertain the existence of an international legal obligation in force; secondly, there must have been an act or omission violating an obligation which is imputable to the state responsible, and finally, loss or damage must have resulted from the unlawful act or omission[56]

Traditionally, the term 'state responsibility' referred only to state responsibility for injuries to aliens. But, with time the meaning expanded with multifarious implications. And its development is out of the state practice or International customs. As the ILC vividly puts it; the law of state responsibility is customary international law. Unlike state immunity, which has been developed largely by domestic legislation and domestic courts, state responsibility is preeminently an area of international law developed by state practice and international judgments.[57] In the mean time, many particular treaties made states responsible internationally for actions and omissions. However, beyond these scattered and particularistic treaties that revolve around a certain particular issue, the general notion of state responsibility was not given a comprehensive rule by which to be governed.

As it emerges from state practice, the formal legal development of the concept of state responsibility was not a well developed concept, till the International Law Commission (ILC) came up with new draft rules in the middle of the 20th Century. The ILC's study of

[54] Cassese, A., International Law, Page 241 (2nd edn. Oxford: Oxford University Press, 2005).
[55] Shaw, p.785.
[56] See, H. Mosler, The International Society as a Legal Community, (Dordrecht, 1980). P.157, and E. Jim´enez de Ar´echaga, 'International Responsibility' in Manual of Public International Law PP. 531, 534 (1st ed. London, 1968).
[57] Aust, p. 407.

the law of responsibility began in the 1950s and culminated in the widely respected Articles on State Responsibility.[58] The ILC were codifying state practices in one document and over the past 50 years revised the draft rules many times. Even if the International Law Commission (ILC) began studying the subject in 1956, it was not until 2001 that it produced its final draft Articles on the Responsibility of States for Internationally Wrongful Acts.

In 2001, the United Nations General Assembly (herein after UNGA) adopted the ILC's draft articles on State Responsibility as a resolution[59] and that became a great milestone on the development of the rules of State Responsibility. In A/RES/59/35 (2004), the General Assembly commended the draft Articles without prejudice to the question of any further action on them (such as adopting the Articles as a treaty), invited Members to comment on future action, and decided to consider the matter again in 2007.[60] Since the Articles of State responsibility has a great significance for the development of International responsibility in general, and individuals' International responsibility in particular, the author of this thesis prefers to discuss the major content and concept within the provisions.

2.4. The general overview of attribution of States under Resolution 56/82

As the UNGA adopted the draft articles of Responsibility of the ILC by resolution 56/83, the whole rule of International responsibility of states took a giant leap forward. At least the world now has a codified rule (though still not binding) for states that can be very helpful to guide the development of the concept. Although, , the ILC Articles are not a treaty which is in force, but tribunals and commentators alike consider the ILC Articles to "accurately reflect customary international law on state responsibility."[61]

UNGA's resolution 56/83 was a result of half a century re(development). The resolution constitutes four major parts. Here in this section the author will discuss the first part of the

[58] Kristen E. Boon, New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations, P. 3, (The Yale Journal of International Law).
[59] International Law Commission, Articles of International responsibility of states. p. 45, (Vol. II, Yearbook, UN, 2001).
[60] Aust, p, 407.
[61] Kaj Hober, State Responsibility and Attribution, P. 6 (UK, 1999).

resolution and discussion on part two of the resolution will be entertained in the following sections[62] while leaving section three and section four as they are miscellaneous issues.

Thus, part one of the resolution is all about Internationally Wrongful Acts of a State, the meaning of state responsibility and the scope of it. It tries to identify what state responsibility comprises and what it excludes. Under Article one it provides:

> Every internationally wrongful act of a State entails the international responsibility of that State.

This makes the leeway of irresponsibility of states for wrongdoing a closed end. i.e, if there is any act/omission which is wrong by any state, it will result in International responsibility.

The resolution clearly lists the attributes of conduct states that make them internationally responsible. With that regard Article 4 of the same puts an act done by the organ of a state as the principal responsibility of the state:

> 1. The conduct of any State organ[63] shall be considered an act of that State under international law, whet her the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Moreover, the ILC clarifies the issue in its commentary to the draft articles on states responsibility as:

> In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to

[62] *Infra*, section 2.7.

[63] "State organ" covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State" ILC Commentary on the Articles of International responsibility of states, P. 40.

> the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State[64].

Beyond the principal *act* of a state organ[65] that makes states responsible, the UNGA resolution on State responsibility makes states responsible for some acts/omissions that directly or indirectly related with states. Accordingly, Article five of the resolution provides:

> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

By the same token:

> The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.[66]

Hence, Article 7 of the resolution clarifies the case of *ultra vires* acts that result state responsibility. Therefore, an unauthorized act of officials is also one of the attributes of state conduct under international law; which means that states can't take refuge behind the notion of *ultra vires*[67] by referring to their domestic rules.

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[64] International Law Commission, Articles of International responsibility of states. p. 38, (Vol. II, Yearbook, UN, 2001).

[65] Ibid. "In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance."

[66] Resolution 56/83, Art. 7.

[67] International Law Commission, Articles of International responsibility of states. p. 45, (Vol. II, Yearbook, UN, 2001).

The remaining four articles (Article 8 -11) of the UNGA resolution on state responsibility, with regard to the attribution of the conduct of states, deals with certain additional cases where conduct, not that of a State organ or entity, is nonetheless attributed to the State under international law.

As the ILC summarized[68], Article 8[69] deals with conduct carried out on the instructions of a State organ or under its direction or control. Article 9[70] deals with certain conduct involving elements of governmental authority, carried out in the absence of official authorities. Article 10[71] concerns the special case of responsibility in defined circumstances for the conduct of insurrectional movements. Article 11[72] deals with

[68] Ibid. p. 39.

[69] Article 8: Conduct directed or controlled by a State

> Conduct directed or controlled by a State The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

[70] Article 9: Conduct carried out in the absence or default of the official authorities

> Conduct carried out in the absence or default of the official authorities The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

[71] Article 10: Conduct of an insurrectional or other movement

> 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.
>
> 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

[72] Article 11: Conduct acknowledged and adopted by a State as its own

conduct not attributable to the State under one of the earlier articles which is nonetheless adopted by the State, expressly or by conduct, as its own.

Thus, according to the UNGA resolution on International responsibility of states, the responsibility of states is not only limited to a very act of a state or organs of a state, rather it stretches to direct and indirect[73] acts/omissions of different bodies, that in one or other way related with the state. Even in some notions State International responsibility emerges as a form of *vicarious liability* – States assume liability vicariously for what their citizens are doing.

2.5. Non-State actors (NSAs) and their responsibility In International Law: Special emphasis on Individuals' actions

Legal scholars[74] used to argue that the principal and sole concern of International law was nations. Neither states nor corporations commit harmful acts—"people do" was the major argument, making non state actors as part of International law in general and as part of international responsibility in particular was not an easy course.

To have an understanding of the responsibility of Non state actors in International Law, understanding who they are is essential. Thus, the question of identifying actors of International law is related with the concept of subjects of International law.

As the author tries to indicate above, the traditional and classic actors of International law used to be States. However, this old notion of responsibility has been drastically modified as a result of a tripartite evolution[75], which reflects that of international law itself:

- Is no longer reserved only to States, and has become an attribution of the international legal personality of other subjects of international law;

> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

[73] With regard to conduct directed or controlled by a state see, Nicaragua Case ICJ- US support to contras did not amount to "effective control" of paramilitary, and ICTY in Tadic uses "overall control".
[74] See, Oppenheim.

[75] Pellet, p.6.

- It has lost its conceptual unity as a result of the elimination of damage as a condition for the engagement of responsibility for breach, since
- The common point of departure which it shared with liability for acts not involving a breach of international law has disappeared.

Within such new developments, again, the question of which acts are ascribed to states and which are not is another question that haunts the notion of subjects of International law. Hence, scholars from different sectors come up with different lists of International actors or subjects of International law. But, the main controversies come with answering the subsequent question of which Non state actors are under International law. Others limit the list of Non state actors in International law as International Organizations and Individuals only.[76] Others add Multinational Companies[77] in the list. Furthermore, some people widen[78] its meaning to armed groups, transnational Diaspora communities' etcetera. Hence due to the lack of consensus on the list, the author sticks with the generally agreed upon definition of which actors are non state actors: International Organizations and Individuals.

Between the two major non-state actors of International law, the legal development of International responsibility for International Organizations is considerably more developed than it is for Individual persons. Nonetheless, unlike state responsibility, there used to be some difficulties in elaborating rules concerning the responsibility of international organizations. The first one is due to the limited availability of pertinent practice. As the ILC in its commentary[79] on the Draft articles on the responsibility of international organizations argues, the main reason for this lack of practice is:

- Practice concerning responsibility of international organizations has developed only over a relatively recent period,
- The limited use of procedures for third-party settlement of disputes to which international organizations are parties and,
- Relevant practice resulting from exchanges of correspondence may not be always easy to locate, nor are international organizations or States often willing to disclose it.

[76] Philip Alston, Non-State Actors and Human Rights, (1st edn. Oxford University Press, 2005).

[77] Subjects of International law, <http://www.peacepalacelibrary.nl/research-guides/public-international-law/subjects-of-international-law/> last visited, December 2013.

[79] Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10).

In a move that consider the aforementioned facts the ILC draft Articles on state responsibility later adopted as resolution 56/83 insert a saving clause and exclusionary provisions for International organizations and Individuals respectively.

Article 57 of the resolution provides responsibility of an international organization:

> These articles are without prejudice to any question of the responsibility under international law of an *international organization*, or of any State for the conduct of an *international organization*. (*emphasis* added)

On the other hand, the resolution excludes Individuals responsibility from its realm as:

> These articles are without prejudice to any question of the *individual responsibility* under international law of any person acting on behalf of a State.[80] (*emphasis* added)

This resulted in another big step forward to the ILC and for the legal framework of International Organizations.

After a long time consideration the ILC came up with draft articles on the responsibility of international organizations as adopted by the International Law Commission at its sixty-third session, in 2011.[81] And latter the UNGA[82] adopt it as a resolution.

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[80] International Law Commission, Draft articles on the responsibility of international organizations, (United Nations, 2011), (Herein after, ILC on state responsibility) Art. 58.

[81] At its fifty-second session, in 2000, the International Law Commission, on the basis of the recommendation of the Working Group on the long-term programme of work, concluded that the topic "Responsibility of international organizations" was appropriate for inclusion, and by resolution 56/83 of 12 December 2001, the General Assembly requested the Commission to begin its work on the topic. At its sixty-third session, in 2011, the Commission adopted, on second reading, a set of 67 draft articles, together with commentaries thereto, on the responsibility of international organizations.

[82] In resolution 66/100 of 9 December 2011, the General Assembly took note of the Articles on the Responsibility of International Organizations, the text of which was annexed to the resolution, and commended them to the attention of Governments and international organizations without prejudice to the question of their future adoption or other appropriate action.

The Commission argues on the triggering factors of adopting the Draft articles on responsibility of International organizations in a manner that, the number of existing international organizations and their ever increasing functions, these issues appeared to be of particular importance.[83] The structure and the main feature of the Draft articles on responsibility of International Organizations[84] is a direct replica of resolution 56/83 or as the ILC says[85] it adopts the copycat approach. Since the main provisions are not different with the one about state responsibility the author refrains from employing a detailed review of it.

At this juncture, there is a crucial question that should be asked, what is the place of Individuals' responsibility in the eye of responsibility of States as well as International organizations? Even if the next chapter will explore the contours of Individuals place in International law in a detailed fashion, here in this topic the writer wants to highlight Individual responsibility via the rules that govern the afore mentioned two major International actors – States and International Organizations.

2.6. Individuals' responsibility within the realm of States and International Organizations' responsibility

Since the inception of the International Court of Justice, the query of differing Individuals' actions within the state was at the forefront of many cases. Some of the earliest decisions made indicate, the conduct of private persons is not as such attributable to the State. This was established, for example, in the *Tellini* case of 1923 which resulted from the killing of Enrico Tellini an Italian general in Greece and the court decides in favor of Greece as not responsible for the murder of a foreigner by private citizens. Later As the after the Iran hostage case of Americans during the 1979 Iranian revolution *Iran-United*

[83]. International Law Commission "Articles of International responsibility of states" P. 45, (Vol. II, Yearbook, UN, 2001).

[84] The draft articles were divided into six parts, as follows: Part I entitled "Introduction" (articles 1 and 2); Part II entitled "The internationally wrongful act of an international organization" (articles 3 to 27); Part III entitled "Content of the international responsibility of an international organization" (articles 28 to 42); Part IV entitled "The implementation of the international responsibility of an international organization" (articles 43 to 57); Part V entitled "Responsibility of a State in connection with the conduct of an international organization" (articles 58 to 63); and Part VI entitled "General Provisions" (articles 64 to 67).

[85] International Law Commission "Articles of International responsibility of International Organizations" (Vol. II, Yearbook, UN, 2011)

States Claims Tribunal has affirmed, "in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State"[86]. Furthermore, an unlawful act may be imputed to the state even where it was beyond the legal capacity of the official involved, providing, as Verzijl noted in the *Caire* case, that the officials 'have acted at least to all appearances as competent officials or organs or they must have used powers or methods appropriate to their official capacity'.[87]

But, the squabble over the place of Individuals' responsibility within state responsibility got significant push back. Some say the link between the state and the individual for international law purposes has historically been the concept of nationality. This was and remains crucial, particularly in the spheres of jurisdiction and the international protection of the individual by the state.[88] Others argue state responsibility may co-exist with individual responsibility and the two are not mutually exclusive.[89] Or we can't set a clear line of the responsibility of these two major actors of International law.

On the other hand, some authorities argue that the actions of private citizens cannot implicate state responsibility except in unusual circumstances; others argue that they can as long as the state exercised a sufficient degree of control over the private employees' behavior.[90]

Posner and Sykes in their economic analysis[91] of making Individuals responsible in International law make a distinction and extent of responsibility as:

> First, a state should be responsible for the acts of its citizens (whether state officials or private actors) that harm other states only when the state can engage in cost-effective monitoring of those citizens, and the remedies available against the citizens directly are inadequate to produce proper deterrence of harmful acts.
>
> Second, citizens should be personally responsible under international law for harms they cause to other states only if the combination of state responsibility with

[86] Kenneth P. Yeager, The Islamic Republic of Iran, Iran-U.S. C.T.R., P. 92 (Vol. 17. 1987).
[87] Shaw, p. 788.
[88] Ibid. p. 238.
[89] Ibid. p. 782.
[90] Posner and Sykes, p. 3.
[91] Ibid. p. 5.

the available remedies under domestic law is inadequate to produce proper deterrence of harmful acts.

Third, and related, international criminal liability may be justified for citizens because they are judgment proof or otherwise insulated from adequate incentives for proper behavior when state responsibility alone exists, but makes little sense for states.

To justify this assertion they further go to listing the benefits of it. i.e, In the first place state responsibility is most often justified because the individual actors whose actions violate international law will not bear the costs—they may be beyond the jurisdiction of any foreign entity with the capacity and authority to sanction them, they may be immune from any personal liability under applicable domestic law, and their personal assets may be far smaller than the harm that they have caused. Secondly, the benefits of state responsibility will be greater - the greater the capacity (and inclination) of the state to monitor its "agents" and to discourage their harmful acts. And lastly, state responsibility is generally more useful when the harmful act is "caused" by the activities of the state, and less so if the act is of a more "personal" nature on the part of its agents or citizens.[92]

Nevertheless, as the Oxfordian Alain Pellet briefly discusses[93] the international responsibility of individuals shares a common characteristic with that of States (and international organizations): its source is the violation of an obligation (of abstention) arising under international law. However, apart from this, the responsibility of individuals is markedly different:

- It is largely, if not exclusively, criminal;
- It is implemented by international tribunals (while as regards State responsibility, the intervention of an international court or tribunal is exceptional and is entirely dependent upon the consent of the States concerned) and
- It is quite exceptional at the international level, occurring only if an international criminal tribunal has been created to adjudicate upon its existence, either by treaty, or by a resolution of the Security Council. In the absence thereof, a crime may be defined by an international legal instrument or under customary international law (or both: eg piracy, slavery, racial discrimination), but its

[92] Ibid. p. 16.

[93] Pellet, p. 8.

sanction-that is to say, the penal implementation of punishment-is left to the domestic courts of States.

Taking such differences into account, the ILC follows an approach that saves room for Individuals' International responsibility by inserting a saving clause in both Articles on States and Articles on responsibility of International Organizations. ILC's article on state responsibility as adopted by the UNGA as resolution 56/83, under Article 58 excludes Individuals personal responsibility from the attribution of states. The commission on its commentary[94] of the articles further elaborated the exclusionary rule:

> Article 58 […], making it clear that the articles do not address the question of the individual responsibility under international law of any person acting on behalf of a State. The term "individual responsibility" has acquired an accepted meaning in the light of the Rome Statute and other instruments; it refers to the responsibility of individual persons, including State officials, under certain rules of international law for conduct such as genocide, war crimes and crimes against humanity.

By the same approach, ILC's articles on responsibility of International Organizations treat the case of Individuals' International responsibility differently as:

> These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.[95]

Thus, the fact that the conduct of an individual is attributed to an international organization or a State does not exempt that individual from the international criminal responsibility that he or she may incur for his or her conduct.[96] In other words, even if Individuals are agents of states or International organizations, they are not exempted from Personal responsibility. However, in certain cases the international criminal responsibility of some individuals may arise, for instance when they have been instrumental to the serious breach of an obligation under a peremptory norm or Individual responsibility could relate to damage caused by an act of a person acting on behalf of an

[94] International Law Commission "Articles of International responsibility of states" P. 200, (Vol. II, Yearbook, UN, 2001).

[95] International Law Commissions Articles on the International responsibility of International Organizations (UN, 2011), (Herein after, ILC on International Organizations) Article 66.

[96] International Law Commission "Articles of International responsibility of states" P. 200, (Vol. II, Yearbook, UN, 2001).

international organization.[97] Otherwise, the mere fact of representing a state or an International Organizations cannot be a justification for not being liable in line with distinct Individual responsibility.

In general, the relationship of states International responsibility with International Individuals responsibility has a triple face. First there is a case of State responsibility without individual responsibility.[98] Second there is a chance of Individual responsibility without state responsibility.[99] And finally, there are cases of Individual responsibility blended with state responsibility.[100]

2.7. Miscellaneous remarks on International responsibility

2.7.1. The two notions of International responsibility: Attribiutability and Answerability

In one of the most quoted statements about responsibility, the English Legal philosopher Herbert Lionel Adolphus Hart famously known as H.L.A Hart argues;

> [As for] the ambiguities of the word 'responsibility,' ... it is, I think, still important to distinguish two of the very different things this difficult word may mean. To say that someone is legally responsible for something often means only that under legal rules he is liable to be made either to suffer or to pay compensation in certain eventualities. […] again, if the rules so provide; for the word simply means liable to be made to account or pay and we might call this sense of the word 'legal accountability'. But the new idea — the programme of eliminating responsibility — is not, as some have feared, meant to eliminate legal accountability: persons who break the law are not just to be left free. What is to be eliminated are enquiries as to whether a person who has done what the law forbids was responsible at the time he did it and responsible in this sense does not refer to the legal status of accountability. It means the capacity, so far as this is a matter of a man's mind or will, which normal people have to control their actions and conform to law. In this sense of responsibility a man's responsibility can be said to be 'impaired'.[101]

Thus, the conception of responsibility framed in the two manners. The first one is "attributability" which specifies the conditions under which a certain act or attitude can be

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[97] Ibid.

[98] See, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986.

[99] See, decisions given by The International Criminal Tribunal for Rwanda.

[100] See, Decisions given by the Nuremberg Trial.

[101] H.L.A. Hart, "Changing Conceptions of Responsibility," in Punishment and Responsibility PP. 186, 196–97 (1st. ed 1968).

properly attributed to the agent or the case of ascribing a duty to some particular instances or in other word, In International law attribution is one of the major versions of responsibility.

However, international law tends to use the word 'responsibility' as a synonym for 'liability', not least because other UN languages have equivalents for the former but not the latter. For example article 263 of the 1982 Law of the Sea Convention is entitled in English 'Responsibility and Liability'[102] and that leads us to the other conception of International responsibility of responsibility as answerability. In this case responsibility means declaring that a (natural or legal) person is responsible in this sense to indicate that they can be called to account for their conduct and made to respond to any moral or legal charges that are put.[103] In other terms, responsibility is accountability in a sense of 'criminal responsibility' and hence means answerability to the criminal law." [104] The assertion of responsibility as answerability specifies the conditions under which the agent can be called to answer for his/her act by the members of the relevant moral community?[105] i.e. in terms of the reasons offered by the wrongdoer in order to justify [its] conduct[106]

In general, consideration of International responsibility as attribuitability suggests the identification of who will be liable for what act/omission and the idea of responsibility as [answerability], by contrast, comes into operation *after* it has been decided that a breach of international law has occurred, in the principles that determine the legal consequences following from the violation of an international obligation.[107]

[102] Case Concerning the Factory at Chorzów (Germany v Poland) (Merits) PCIJ Rep Series A No 17.(Herein after, Factory at Chorzów case)

[103] This meaning is given prominence in e.g. Lucas, J., Responsibility (1st ed. Oxford University Press, 1993).

[104] Rollin M. Perkins & Ronald N. Boyce, Criminal Law and Procedure: Cases and Materials, P. 399, (5th ed. 1977).

[105] RJ Wallace, Responsibility and the Moral Sentiments (Cambridge, MA: Harvard University Press, 1994).

[106] G Watson, Two Faces of Responsibility, P. 237, (Volume 24, Issue 2, Fall 1996).

[107]Samantha Besson and John Tasioulas, The Philosophy of International Law, P. 284 (1st ed. Oxford University Press, 2010).

2.7.2. Internationally wrongful act

In one way or another, International responsibility of states is a result of an International wrongful act. Thus, the determination of responsibility in International law is highly attached with the description given to the term *internationally wrongful act*.

The general definitions of 'Internationally wrongful act' revolve around a breach of a primary obligation which is attributable to a state[108] and the state that is presumed responsible is the state which caused, or is believed to have caused, the injury.[109]

When the International Law commission comes up with the Articles of responsibility for states, one of many striking points addressed by the articles is the notion of International wrongful acts. The commission vividly codifies the customary practices of what International wrongful act will constitute.

Hence, Article 2 of ILC's article on State Responsibility[110] as adopted as resolution 56/83 by the UNGA provides:

> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> A. is attributable to the State under international law; and
> B. constitutes a breach of an international obligation of the State.

As a result attribution and breach of the ascribed duty are the major elements of an internationally wrongful act. Although, the ILC is the one who codified this rule but, these two elements were specified, for example, by PCIJ in the *Phosphates in Morocco* case[111] that France and Italy disagreed over priority over extraction of phosphate in Morocco. The Court explicitly linked the creation of international responsibility with the existence of an "act being attributable to the State and described as contrary to the treaty right[s] of another State".[112] ICJ has also referred to the two elements on several occasions. For instance after the in(famous) Iranian hostage of 52 US citizens for 444 days as dubbed

[108] Aust, p.408.
[109] Ibid.
[110] The same is provided on ILC's draft articles on International obligations of International Organizations.
[111] Permanent Court of International Justice, Phosphates in Morocco Italy v. France Judgment, 1938
[112] Ibid.

as the Iranian hostage crisis[113], *United States Diplomatic and Consular Staff in Tehran* case, the ICJ pointed out that, in order to establish the responsibility of the Islamic Republic of Iran as:

> First, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.[114]

Thus, conduct attributable to the State can consist of actions or omissions and the idea of a breach of an obligation has often been equated with conduct contrary to the rights of others.[115] However, the most striking feature of this new approach compared to the traditional understanding of the notion of responsibility is the exclusion of damage as a condition for responsibility.[116] It consists in the absence of any requirement concerning fault or a wrongful intent on the part of the State in order to ascertain the existence of an internationally wrongful act.[117] This does not, of course, imply that the element of fault has no place in the law of State responsibility. Rather, it reflects the consideration that different primary rules on international responsibility may impose different standards of fault, ranging from "due diligence" to strict liability.

However, at the level of conceptual analysis and legal practice, international responsibility is thus a large and multifaceted subject. Besides the cleavage between answerability and liability, it encompasses a number of theoretical and practical distinctions, including the distinctions between individual and corporate subjects, criminal and civil responsibility, and claims brought at domestic and international levels.[118] Hence, in many cases there is a blend of the two notions of responsibility.

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[113] Iran-U.S. Hostage Crisis (1979-1981) <http://www.historyguy.com/iran-us_hostage_crisis.html> last visited in February, 2014.

[114] United States Diplomatic and Consular Staff in Tehran [US v. Iran] Judgment, I.C.J. Reports 1980.

[115] International Law Commission "Articles of International responsibility of states" p. 111, (Vol. II, Yearbook, UN, 2001).

[116] Pellet, p.8.

[117] International Law Commission, "Articles of International responsibility of states" p. 285, (Vol. II, Yearbook, UN, 2001).

[118] Ibid.

2.7.3. Notions of International obligations: Cessation, Non-repetition and Reparation

The last issue that the writer wants to raise in this chapter pertains to the final result of being responsible under International law or the effects of committing/omitting an internationally wrongful act.

There are many situations, when International responsibility will result. *Inter alia*, the [entity] responsible for the internationally wrongful act is under an obligation to *cease that act*, if it is continuing, and to offer appropriate assurances and guarantees of *non-repetition* if circumstances so require.[119] And on the other hand, the essential principle contained in the actual notion of an illegal act is that *reparation* must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[120] Consequently an Internationally wrongful act will result triple consequences. Cessation, non-repetition and reparation.

The former two are very much linked, and in some instances, they become one and the same. The ILC tries to make a distinction between the two consequences and argues both are aspects of the restoration and repair of the legal relationship affected by the breach. Cessation is, as it were, the negative aspect of future performance, concerned with securing an end to continuing wrongful conduct, whereas assurances and guarantees serve a preventive function and may be described as a positive reinforcement of future performance.[121] However, in some instances[122] the question whether the obligation to offer assurances or guarantees of non-repetition may be a legal consequence of an internationally wrongful act.

In spite of such wrangles, the ILC on its articles of State responsibility as the UNGA adopt it as a resolution; provide *Cessation and non-repetition as the main consequences of internationally wrongful act.* Article 30 of resolution 56/83 provides:

> The State responsible for the internationally wrongful act is under an obligation:

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[119] See, Article 30 of UNGA resolution 56/83 and see International Law Commission "Articles of International responsibility of states" P. 216, (Vol. II, Yearbook, UN, 2001).

[120] Factory at Chorzów case.

[121] International Law Commission "Articles of International responsibility of states" P. 88, (Vol. II, Yearbook, UN, 2001).

[122] LaGrand Case (FRG v. US), 2001 ICJ 466 (June 27).

A. to cease that act, if it is continuing;
B. to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

The ILC draft articles of responsibility of International organizations follow a copycat approach from the articles of state responsibility and recognize[123] the same consequences.

On the other tip of responsibility, there is an international responsibility of *repatriation*. As stated in one of the most quoted cases of the International Court:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.[124]

Thus, reparation made for an internationally wrongful act/omission inflicted against other International entities is one of the foremost consequences of being responsible under International law. An entity which causes any damage (material or moral) against other International entity/entities is under an obligation of to make good of the damage. Like that of cessation and non-repetition, the ILC in it pioneer articles of states responsibility provide[125]:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

[123] Article 30 Cessation and non-repetition:

> The international organization responsible for the internationally wrongful act is under an obligation:
>
> (a) to cease that act, if it is continuing;
>
> (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

[124] Factory at Chorzów case.

[125] General Assembly resolution 56/83, Responsibility of States for internationally wrongful acts A/RES/56/83, (28, January 2002).

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

The provision makes the requirement of repatriation full and the scope of the damage as material and moral damages. The same rule was acknowledged[126] under the drafts rules of responsibilities of International organizations.

[126] Article 31 Reparation:

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.

CHAPTER THREE

3. INDIVIDUALS IN INTERNATIONAL LAW

'[…] the individual is sovereign'[127] John Stuart Mill

A law provided has a target to govern. Usually, law creates legal entities which are expected to profess allegiance and adhere to the rules. These entities are commonly known as legal personalities. International law is no different in this regard, with a long time controversy concerning the scope of those subject to its rules, particularly determining whether someone is an International legal person.

Inter alia for the main part of its history, international law was conceptualized as consisting of a set of rules governing state-to-state relations. However, the deep searches for the pedigree of International law tell otherwise. Since the coinage of ancien term jus gentium to the middle age droit des gens, exclusion of other entities than states was neither provided nor implied. As one of the leading scholars of International law, Francisco de Vitoria *puts it jus gentium* [is a] law for all - individuals and peoples as well as States, or every fraction of humanity [with] common consensus of all peoples and nations".[128]

Later developments of International law exclude entities other than states from the realm of International law and make states the sole actor of *jus gentium.* But, such exclusion of other entities except states from International law backfired to itself. Especially by making its application difficult and as a result a more inclusive notion of International law reemerge. Among the newly rebreed actors of International law, Individuals comes in the forefront.

3.1. Who is an Individual?

Hence, to deal with the main topic of the paper the author reduces the discussion to the place of Individuals in International law among other International entities and solicits the very question of who is an individual in International law?

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[127] Mill, John Stuart, On Liberty p. (1st ed. 1859).

[128] Francisco de Vitoria, De Indis – Relectio Prior (1538-1539), in Obras de Francisco de Vitoria – Relecciones Teológicas, p. 675 (ed. T. Urdanoz, Madrid, BAC, 1960) as quoted Antônio Augusto Cancado Trindade, The Emancipation of the individual from his own State: The Historical Recovery of the Human Person as Subject of the Law of Nations, (Human Rights, Democracy and the Rule of Law, 2007).

The difficulty arises with the nature and usage of the word individual itself. Since the 19th century, […] there have been numerous objections to the use of the word to refer simply to "person" where no larger contrast is implied[129] and later developments give a wider meaning to it.

The same wider usage of it was/is true in a legal sense. In this paper when the writer refers to the "individual," *Inter alia* it only refers to a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association.[130] In other words, the reference to an individual implicates a natural, single human person.

3.2. Individuals as International juristic entity

Considering Individuals status as part and parcel of International law is all about the humanization of International law; a change to the highly *statized* overarching discourse of International law. The search for the root of individualized international law goes backs to time immemorial, but mainly it is a post middle Age construct which resulted after the so called founding fathers of modern International law wrote many volumes in the issue. They consider the international community in its entirety – as a single legal community, with no subject/object divides of its applicability.[131] C. Wolff puts this interconnected fate of every living/existing entity as:

> "That eternal and unchangeable law, which nature herself has established, controls the acts of individual men as well as those of nations also, by prescribing duties both toward themselves and toward each other. And just as it has united individual men to each other by the closest bond and has established among them a certain society, so that man is necessary to man (...); so by no less close a bond has it united nations, (...) so that nation is necessary to nation (..). Indeed, just as it has provided for the happiness of individual men, so also has it provided for that of individual nations, which is promoted and preserved by mutual assistance. Therefore the entire human race is likened to a living body whose individual

[129] Individual: <http://www.thefreedictionary.com/individual> last visited on January 2014.

[130] Individual: <http://www.thelawdictionary.org/individual> last visited on January 2014.

[131] Francisco de Vitoria: "Relecciones Teológicas" (1538-1539); Francisco Suarez: De Legibus ac Deo Legislatore (1612); Hugo Grotius: "De jure belli ac pacis" (1625).

members are individual nations, and it retains unimpaired health so long as the individual members perform their functions properly."[132]

Thus, the existence of a universal community of individuals was sustained and the individual was identified as a reference point of rights and duties.[133] Or, the international juridical subjectivity of the human being was foreseen by the so-called founders of international law (the *droit des gens*).

But, while scholars of International law assert the membership of Individuals in the framework of the International legal environment, the appearance of Positivists led to the decline in importance of individuals In International law and the denunciation of arguments forwarded in favor of individuals' role as a recognized entity under international law. The notion of denouncing the international personality of individuals under international law has its origins primarily in the work of non-legal scholars, mostly in the realm of philosophy, basically flowing from the German philosopher, Hegel.

The Hegelian[134] and neo- Hegelian formulations of the State as a final repository of the freedom and responsibility of the individuals who composed it, and which entirely integrated themselves in it, starts to exclude Individuals from the realm of International law and separates the meaning of the latter from the conventional and original meaning of *jus gentium or droit des gens.*

For Italian jurist and a former judge for the PCIJ, Dionisio Anzilotti, 'It is unthinkable' that there may exist any subjects of international rights and obligations other than the States.[135]

Some object to this assertion of exclusion of individuals from the International law regime from a philosophy point of view as, in international law, the theme of the private person as a subject is not related to a philosophical analysis about the human being. However, to determine whether the international order contains norms that establish rights and duties

[132] C. Wolff, Jus Gentium Methodo Scientifica Pertractatum (vol. II, Oxford/ London, Clarendon Press/H. Milford – Carnegie edition of 1764).

[133] Francisco de Vitoria: "Relecciones Teológicas" (1538-1539); Francisco Suarez: De Legibus ac Deo Legislatore (1612); Hugo Grotius: "De jure belli ac pacis" (1625).

[134] Hegel's 'The state is the actuality of the ethical Idea' makes the state a universally accepted creation and extends the status of the only subject of International law. See, G.W.F. Hegel, Philosophy of Right (1833).

[135] Criton G. Tornaritis, Q.C.: The Individual as a Subject of International law. p. 17 (Nicosia, 1972).

intended to apply directly to private persons, it is rather simpler to examine the legal landscape.[136]

In the mean time, a state centric approach to International law dominates the latter centuries. But, it costs the development of International law highly or the personification of the all-powerful State, inspired mainly in the philosophy of law of Hegel, had a harmful influence in the evolution of International Law by the end of the [19th] century and in the first decades of the [20th] century.[137] *Inter alia* a state centric International law left individuals to states jurisdiction and impunity became rampant that eventually being a predicament for the progress of International human and humanitarian laws.

Thus, for a long time [Individuals have been] regarded as 'objects' of international law.[138] And the doctrinal trend which […] insists in denying individuals the condition of subjects of International Law is based on a rigid definition of the latter, requiring from them not only to possess rights and obligations emanating from International Law, but also to participate in the process of creation of its norms and of their compliance with them.[139]

Upon the dawn of the 20th century a new phenomenon that tries to make sense out of International role of Individuals and their position makes its appearance. Among the early 20th century literature on the concept, J. Spiropoulos's statement on his monograph is a pioneer. Spiropoulos argues, contrary to what ensued from the Hegelian doctrine [of a state obsessed International law] the State is not a supreme ideal subject only to its own will, is not an end in itself, but rather "a means of realization of the vital aspirations and necessities of the individuals", it being, thus, necessary to protect the human being against the violation of his rights by his own State.[140]

From that time onwards, International law has tried to liberate itself from the chains of *statism*, and was again met with the conception of a true *jus gentium* (*droit des gens*), which, in its early beginnings, inspired its historical formation and evolution.[141] Hence, the

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[136] Barberis, Juli A: Los Sujetos del Derecho Internacional Actual, p. 160 (Buenos Aires. 1984).

[137]Antônio Augusto Cancado Trindade, The Emancipation of the individual from his own State: The Historical Recovery of the Human Person as Subject of the Law of Nations, p.14 (Human Rights, Democracy and the Rule of Law, 2007). (Herein after, Antônio Augusto)

[138] See, the dictum of the Permanent Court of International Justice in jurisdiction of the Courts of Danzig, 1928, PCI], Series B. No 15, p 4,17-18.

[139] Antônio Augusto, p.21.

[140] J. Spiropoulos, L'individu en Droit international, p. 66 (Paris, LGDJ, 1928) (Herein after, Spiropoulos)

[141] Antônio Augusto, pp. 425- 434.

time to herald the reemergence of the early *jus gentium* and *droit des gens* notion of International law happens to come. Such recognition of the individual as subject of international law brings about a clear rejection of the old positivist dogmas, discredited and unsustainable, of the dualism of subjects in the domestic and international orders, and of the "will" of States as exclusive "source" of international law.[142] The Heglian Individual hostile notion of International law losing its ground and a more inclusive conception of International law starts to emerge.

In sum, (e)arlier attempts that deny to individuals the condition of being a subject of international law on the ground that individuals lack some of the capacities which States have (such as, e.g. that of treaty-making), are definitively devoid of any meaning. At the domestic law level, not all individuals participate, directly or indirectly, in the law-making process, yet they do not thereby cease to be subjects of law.[143]

After the positivist state centric conception of International law was debunked from every angle, the new conception was that there is no natural or legal person beyond the reach of international law, if only to be the subject of a single right or injunction. And the international juridical subjectivity of the human being, as foreseen by the so-called founders of international law (the *droit des gens*), becomes a reality.[144]

Conventionally, the participation of the individual as a subject of international law has been historically related to the consular and diplomatic protections, implying different issues and problems. But later, humanizing International law was mainly a result of the awakening of International Human Rights and Humanitarian issues. In other words, the question of the status in international law of individuals is closely bound up with the rise in the international protection of human rights.[145] Especially, the post world war literatures on the subject embrace individuals as the main actors and subjects of International law.

Philip Jessup in his *magnum opus* 'A Modern Law of Nations' asserts:

> "[I]nternational law or the law of nations must be defined as law applicable to states in their mutual relations and to individuals in their relations with states.

[142] H. Lauterpacht, International Law and Human Rights, p. 8 (London, Stevens, 1950).(Herein after, Lauterpacht)

[143] Antônio Augusto, p. 534.

[144] Ibid.

[145] Shaw, p. 257.

> International law may also, under this hypothesis, be applicable to certain interrelationships of individuals themselves, where such interrelationships involve matters of international concern."[146]

By the same token, one of the pioneers of International Human Rights law, Sir Hersch Lauterpacht state:

> "The position of the individuals as a subject of international law has often been obscured by the failure to observe the distinction between the recognition, in an international instrument of rights ensuring to the benefit of the individual and the enforceability of these rights at his instance. The fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law or that the rights in question are vested exclusively in the agency which possesses the capacity to enforce them. Thus in relation to the current view that the rights of the alien within foreign territory are the rights of his state and not his own, the correct way of stating the legal position is not that the state asserts its own exclusive right but that it enforces, in substance, the right of the individual who, as the law now stands, is incapable of asserting it in the international sphere."[147]

Thus, in a post world war II legal literature, the reconceptualization of *droit des gens* dominates the pages, at the coffins of the state centric argument of International law forwarded by Positivists. Scholars of different backgrounds decline the objectification of Individuals in the eye of International law and states Individual's subjectivity to the same. This is all summed up in lucid terms like the individual is, thus, subject to both domestic and international law[148] or Irrespective of the circumstances; the individual is subject *jure suo* of international law, as sustained by the more lucid doctrine, since the writings of the so-called founding-fathers of the discipline.[149] Some others pronounce the individual [as] the final subject of all law[150] and the individual as "subject to duties" at international law level; one cannot deny his international legal personality, recognized also in fact by

[146] Philip C. Jessup, A Modern Law of Nations p.17, (1949).

[147] Lauterpacht, p. 27.

[148] Spiropoulos, pp. 33, 66.

[149] P.N. Drost, Human Rights as Legal Rights, pp. 226-227 (Leyden, Sijthoff, 1965).

[150] Lauterpacht, p. 69.

customary international law itself.[151] Even some modern writers go to the extent of saying:

> No one in sane conscience would today dare to deny that the individuals effectively possess rights and obligations which emananate (sic) directly from International Law, with which they find themselves, therefore, in direct contact.[152]

Beyond all scholarly arguments modern day state practice provides strong support for the existence of a new customary international law recognizing the individual as an international juristic entity, with international rights and procedural capacity.[153] And International treaties and court rules affirm the same fact that the author of this paper will discuss in the subsequent sections.

3.3. Theories of Individuals status in International Law

One of the very gaps of the development of International law vis-à-vis Individuals is the lack of cogent theories on it. Beyond scattered and disorganized here and there assertions, it is very challenging to get comprehensively developed theories of the concept. However, as a spring board on developing theories with regard to individuals' status in International law, it is helpful to have some theories on general subjects of International law.

Recently, jurists tried to coin[154] the very theories of subjects of International law as a realistic theory that provides that states alone are subjects of International Law notion, Fictional theory which states the contrary of the realistic one as, Individuals alone are subjects of International Law and a third midway Functional theory which adopt a more inclusive concept of States, Individuals and certain non-state entities are subjects of International Law.

From such theories the discourse of dualists and monists arise. What both dualists and monists did, in these particular theories, was to "personify" the State as subject of

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[151] P. Guggenheim, "Les principes de Droit international public", p.66 (Recueil des Cours de l'Académie de Droit International, 1952).

[152] Antônio Augusto, p.21.

[153] Julie Cassidy, Emergence of the individual as an international juristic entity: enforcement of international human rights, (Deakin Law Review, Vol. 9, No. 2) p.530.

[154] Subjects of International Law, <http://www.lawnotes.in/Subjects_of_International_Law#ixzz2r7FywXlF> last visited on January, 2014.

International Law. Monists discarded all anthropomorphism, affirming the international subjectivity of the State by an analysis of the juridical person; and dualists did not contain themselves in their excesses of characterization of the States as sole subjects of International Law.[155] However, beyond the general indication of subjects of International law the aforementioned theories don't assert special theories that deal with individuals alone. Thus, here in below the writer tries to make sense out of the scattered theories that directly deals with the status of Individuals in International law.

3.3.1. The object theory

The first and the foremost theory that explains Individuals' place in International law is the object theory. The object theory also known as the traditional theory is self explanatory, it refers to individuals as objects of International law akin to rivers, cattle or real property[156] as differ from subjects of International law. According to this theory, States alone are subjects of International Law and individuals are excluded from the realm of subjects [of International law].[157]

Thus, the [object] theory denies both the existence of any fundamental individual international rights and the possibility of these rights being created. It also denies individuals the procedural capacity required to enforce international law[158] and maintains that individuals constitute only the subject-matter of intended legal regulation. Only states, and possibly international organizations, are subjects of the law.[159]And under this approach, individuals […] must rely on their State, normally the offender, to enforce 'their' rights. Whether they enjoy the benefits of international protection will, therefore, depend upon the 'good nature' of the State and its willingness to act for the aggrieved individual for international legal theory, as originally conceived, to be confined to States.[160]

[155] Antônio Augusto, p. 14.

[156] Christiana Ochoa, The Individual and Customary International Law Formation, (Virginia journal of international law, Vol. 48:1, 2007).

[157] Subjects of International Law, <http://www.lawnotes.in/Subjects_of_International_Law#ixzz2r7FywXlF> last visited on January, 2014.

[158] See, Hans Kelsen, Principles of International Law (2nd ed, 1966)

[159] See e.g. O'Connell, International Law, pp. 106–7.

[160] Julie Cassidy, Emergence of the individual as an international juristic entity: enforcement of international human rights, (Deakin Law Review, Vol. 9, No. 2) p.534 (Herein after, Cassidy).

The object theory emerges as legal positivists' subordinate assertion on their state centric notion of International law. Some says it was a reaction for the false doctrine of Individuals as subject of International law.[161]

The main reason given by scholars for the adoption of the object theory is related with answering the questions of who institute the International law and for what purpose. i.e. since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law. This means that the Law of Nations is a law for the international conduct of States, and not their citizens ... an individual human being ... is never directly a subject of International Law ... But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations[162]

Even if the root of the object theory goes back a long time, the first comprehensive and well mannered proposition of it was forwarded by a German jurist by the name of Heilborn in 1896. Since its proposition, it received different recognition from scholars and even from the International legal framework. For instance, the 1907 convention on the establishment of an International court of prize at The Hague recognize the object theory. Even, the International Court in some of its earliest decisions adopts the same.[163] Therefore, the object theory enchains Individuals with their state and objectifies them. In this regard it tries to maintain that, individuals constitute only the subject-matter of intended legal regulation as such or only states, and possibly international organizations, are subjects of the law.[164]

However, the object theory faces fierce opposition from many perspectives. Some ferociously argues the object theory as odd, unrealistic, immoral, and illogical.[165] Moreover, it is non-concordant with [state] practice itself.[166] Others invoke it is neither theoretically correct, nor true to the origins of international law. The works of some of the earliest international law jurists show that it was unintended[167] or the object theory was a

[161] George Manner, The Object Theory of the Individual in International Law, (The American Journal of International Law, Vol. 46, No. 3, Jul., 1952), p. 428. (Herein after, Manner).

[162] Lassa Oppenheim, International Law pp. 18, 344 (1905).

[163] See*, Infra,* section 3.4.

[164] See O'Connell, International Law, pp. 106–7.

[165] Manner, p.433.

[166] Ibid. p. 434.

[167] Cassidy, p.535.

twist to the very intention of the so called fathers of International law, those who consider the global community as a single legal community with no object-subject dichotomy.

In other terms, the object theory has been a theory of limited value. Because, the essence of international law has always been its ultimate concern for the human being and this was clearly manifest in the Natural Law origins of classical international law. The growth of positivist theories, particularly in the nineteenth century, obscured this and emphasized the centrality and even exclusivity of the state in this regard. Nevertheless, modern practice does demonstrate that individuals have become increasingly recognized as participants and subjects of international law. This has occurred primarily but not exclusively through International human rights laws.[168] On the other hand, the inadequacy and backwardness of the object theory is implicated from its failure to address the issue of slavery, piracy, genocide, crimes against humanity etc., which directly involves Individual persons. For that end, by the early 1950s, the grounds for the object theory of the individual were significantly eroded and rested only on the circular argument that an individual is an object under international law because international law treats the individual as an object.[169]

Thus, If International law is to reconcile with its roots and If International Law is a rule that strives to govern *Internation* as well as *interindividual* relations; it should have to go beyond the traditional theory that objectifies Individuals as subservient to states.

3.3.2. The ultimate actor theory

The other theory that tries to explain Individuals' status in International law is the theory that separates itself from the common subject-object dichotomy and claims Individuals are neither objects nor subjects of International Law, but, actors of International law – that the author calls the ultimate actor theory.

It is derived from Hans Kelsen's famous dictum of Individuals as actors but, not juristic entities. Kelsen defines a 'subject' of international law in terms of its ability to exercise the procedural capacity required to bring a claim before an international tribunal, rather than the mere possessor of interests protected by international law. As individuals traditionally lack procedural capacity to enforce international rights, or only possess this ability as

[168] Shaw, p. 258.

[169] Manner, p. 429.

representatives of the State, they are not ‘subjects’ of international law within Kelsen's strict definition.

Thus, the ultimate actor theory refrains from objectifying Individuals and simultaneously it avoids extending the subject status for individuals in International law. Individuals are not objects of International law because, they have a certain role in the eye of International law as actors representing states and they are not subjects of International law because they lack procedural capacity to stand on their own.

In a Kelsenian term, (T)he view that seeks to effect a distinction between the procedural capacity of individuals and their status as subjects of international rights obscures this normal pattern of international law by the tendency to identify as rights any interests of individuals that are somehow protected by international law.”[170] Moreover, Kelsen goes on to reason to why states are International Juristic entities and Individuals are only mere actors by distinguishing the juristic person as an entity different from the so-called natural or physical person. For Kelsen, the human individual is a auxiliary concept of juristic thinking, an instrument of legal theory, the purpose of which is to simplify the description of legal phenomena […] The state as a juristic person is the personification of a legal order constituting a legal community […] The state as a community is not a biological, psychological, or sociological unit; it is, as a legal community, a specifically juristic unity.”[171]

Thus, as any apparent ‘rights’ held by individuals are always dependent upon the State exercising its ‘right,’ individuals are personally ‘subjects’ of international rights only in an imperfect sense.[172] In other terms, the ultimate actor theory is derivative of the object theory with a slight modification lying in its treatment of Individuals as actors of International law.

Some jurists even push the ultimate actor theory to every entity of International law by reducing the place of International entities to a participant/actor status. According to Rosalyn Higgins, it is more helpful, and closer to perceived reality, to return to the view of international law as a particular decision-making process. Within that process (which is a dynamic and not a static one) there are a variety of participants, making claims across state lines, with the object of maximizing various values. Determinations will be made on

[170] Kelsen, H: “Principles of International law, p. 232 (2nd ed. Holt, Rinehart and Winston, Inc. EEUU, 1966).
[171] Ibid pp. 181 -183.
[172] Cassidy, p. 546.

those claims by various authoritative decision makers –Foreign office legal advisers, arbitrary tribunals, courts. Now, in this model, there are no "subjects" and "objects", but only participants. Individuals are participants, along with states, international organizations (such as the United Nations, or the International Monetary Fund (IMF) or the International Labor Organization (ILO), multinational corporations, and indeed private non-governmental groups."[173] Or the subject-object dichotomy is confusing in the context of international law, hence we have to leave and adopt the ultimate actor theory.

Nonetheless, beyond its absurdity as a derivative of the object theory, the ultimate actor theory is also futile in addressing matters related with Individual persons under International law. It still enchains individuals with the state and treats them as agents of states with a non-independent status. Again, this backfires in the universal application of International rules, even going against state practice.

3.3.3. The subject theory

Among the main theories of conceptualizing the status of Individuals in International law, the subject theory is the modern and the most acceptable one. It started with criticizing the object theory that treats individuals as objects of International law and subordinates of states. The subject theory argues that the Individual is not only the object but, a final end of International law. In stronger terms, Individuals are the sole, the real, the indirect and the ultimate subjects of International law.[174]

Subject theorists' start their argument by defining the term "subject" itself. A subject is a member of a State in relation to his government or owing allegiances to a sovereign or other ruler, or member of a State except the Sovereign himself. All people residing in a country are the subjects of that country[175] and by the same logic every Individual in the planet is the subject of the same.

Thus, the very motive behind adopting the subject theory was unleashing individuals from the confinement of her own state or an attempt of denationalization of man. Objectification of Individuals is the positivist creation that was never intended by the so

[173] Higginis, R.: Problems and process: International Law and how we use it, p. 50 (Oxford, Clarendon Press, 1994).

[174] See, Westlake, International law p.1 (1910), Lauterpacht, H: International Law and Human Rights, p. 5 (London, 1950).

[175] Subjects of International Law, <http://www.lawnotes.in/Subjects_of_International_Law#ixzz2r7FywXlF> last visited on January, 2014.

called founding fathers of International Law. Among the so called founding fathers of International law, Vitoria saw the law of Nations as being no more than the law of nature, rules derived from 'natural reason', based on the natural fellowship existing amongst all persons.[176] Nor did Grotius confine international law to States. The code of *jus gentium* supplemented the law of nature and provided a legal system regulating all international relations, whether they are between individuals or States.[177] According to the subject theorists, despite the intentions of authors of the very rules, with the passage of time the meaning of phrases such as '*jus inter gentes*,' '*inter populos*' and '*gentium inter se*' were corrupted and confined to States.

Looking for the original intention of the writers who set the first rules of International law forces one to inquire into a theory that explains why states should be responsible for the actions of individuals, and when they should not be, would help resolve the controversy of subject-object dichotomy.[178] It is also well established that individuals can commit international crimes, but there is no good theory that explains why individuals are usually not subject to international criminal responsibility, and why they are only under certain circumstances. A theory of the proper role for individual criminal responsibility under international law is needed.[179]

Among the main jurists on this issue, Hersch Lauterpacht, believes the traditional theories exclusion of the individual is 'obsolete,' 'unworkable' and an inaccurate representation of the present legal position.[180] With the invocation of International rules he further comments, the world is increasingly being seen as a collective of individuals rather than a community of States.[181]

Thus, the reemergence of *jus gentum* as an all inclusive concept was vested in the subject theory of Individuals status in International law. To summarize the topic, Lauterpacht eloquently puts the need of adopting the subject theory as:

> To assert that duties prescribed by international law are binding upon the impersonal entity of States as distinguished from the individuals who compose

[176] Ernest Nys (ed) Francisci de Vitoria, De Indis et de Ivre Belli Relectiones (1919) (extracted from the original publication in 1557).

[177] Hugo Grotius, De Iure Belli ac Pacis Libri Tres (1646 ed) in Classics of International Law (1913).

[178] Posner and Sykes, p. 4.

[179] Ibid.

[180] Lauterpacht, p.6.

[181] The preamble of the Charter of the United Nations opens with the phrase 'We the peoples' of the United Nations.

them and who act on their behalf is to open the door wide for the acceptance, in relation to States, of standards of morality different from those applying among individuals. Experience has shown that 'different' standards mean, in this connection, standards which are lower and less exacting. … [U]pon final analysis it is difficult to escape the conclusion that unless legal duties are accepted as resting upon the individual being, they do not in practice - nor, to some extent, in law - obligate anyone.[182]

3.4. A germane observation on the International legal framework vis-à-vis Individuals

To draw the full picture of the status of Individuals in International law, the author attempts to deal with the legal contours of the Individuals in International law in a slight manner (the subsequent chapters will come up with the detail of the issue).

Legal treatment of Individuals from both right and duty perspectives are more of a 20th century phenomenon, especially, in a post World War II period. In this regard, among many different sources of International law, case development by International courts, treaties and other agreements between/among state and International customary practices play a great role for the advancement of determination of Individuals' status in the International legal framework. Thus, herein below for the discussion over the International legal framework of Individuals, the writer has chosen these three major sources of International law as an indicator of the changing International law landscape that embrace individuals and employs a swift summery.

3.4.1. International case law development

One of the first International legal treatments of individuals comes from International courts of law or case developments by International courts from the earliest Permanent Court of International Justice (PCIJ) to its 'successor' International Criminal Court (ICC).

The PCIJ in some of its decisions like the *Breard case*[183] and *Avena* case[184] identifies violations that clearly affects individuals, as the main theme of the cases and gives a decision.

[182] H. Lauterpacht, p.5.

[183] Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), ICJ, 9 April 1998.

However, as the successor of the PCIJ, the International legal community came up with International Court of Justice (ICJ) which by its statute excludes Individuals right of *locus standi*. Article 34(1) of the ICJ statue provides that *only states may be parties in cases before the Court*. In line with that, in some of its cases like in the case of *Bosnia and Herzegovina vs. Yugoslavia case*, the International court follows a passive approach of not taking Individuals as subjects of International law in a reference to its exclusionary clause of the statute, which hampers individuals' procedural capacity to stand before the world court. By the same token, in the *LaGrand* brothers' case[185] which involves United States of America and Germany the world court states that, individuals are subjects of international law and domestic legal procedures can't be invoked to justify any transnational action which is illegal in international rules. Nonetheless, the ICJ has not yet examined the question of whether the existence on the international plane of remedies for individuals affects the ability of states to invoke international responsibility for the same injury.[186]

This is with regard to Individuals before the world court. But, the major development of making Individuals part and parcel of International law via case developments is made from the responsibility of Individuals' point of view. The duties-holder concept in international law is directly related to the development of principles and rules about the responsibility of the individual before international courts. Piracy,[187] slavery and genocide as crimes against humanity are the most prominent examples identified as sources of responsibility of the individual under international law.

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[184] Case concerning *Avena* and Other Mexican Nationals (Mexico v. United States of America) ICJ, 31 March 2004.

[185] *Lagrand* case (Germany v. United States of America) reports of judgments, advisory opinions and orders judgment, ICJ, 27 June 2001.

[186] Giorgio Gaja, the Position of Individuals in International Law: An ILC Perspective, (The European Journal of International Law Vol. 21 no. , 2010)

[187] Article 101 of United Nations Convention on the Law of the Sea of 10 December 1982:

> Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The Institutionalization of the post World War II courts by the International community was another milestone on the case development of the Individuals place with regard to their International duty. Both trials at Nuremberg and Tokyo introduced the concept of Individuals' personal responsibility that opens the door for subsequent developments with regard to the issue. The IMT trials vividly declare that:

> 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.[188]

The post World War II courts thus, provided individual International criminal responsibility specifically for crimes against peace, war crimes and crimes against humanity.

Since Nuremberg for the next half a century the development of the notion of humanization of International law (i.e., extending International law to Individuals) via case law was sluggish till the 1990's UN-backed International courts appear on the scene. The International Criminal Tribunal for the former Yugoslavia (ICTY) has been operating working since 1991,[189] The International Criminal Tribunal for Rwanda (ICTR)[190] was instituted in 1994, more than half a dozen UN-backed hybrid courts and other internationalized domestic courts and tribunals[191] emerged in the 1990's, and of course, the first permanent International criminal court in history – the International Criminal Court (ICC). The main contribution of these International courts to the development of the legal framework of Individuals in International law is their treatment of Individuals separately from states with decisions that criminalized individuals separately from their countries of origin.

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[188] *Supra*, No. 1.

[189] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.

[190] Prosecuting persons responsible for genocide and other violations of international humanitarian law committed in Rwanda Since 1994 and still working. The United Nations Security Council called upon the tribunal to finish its work by 31 December 2014 to prepare for its closure and transfer of its responsibilities to the International Residual Mechanism for Criminal Tribunals which will begin functioning for the ICTR branch on 1 July 2012.

[191] Among some of UN hybrid International courts, The Special Court for Sierra Leone, The Extraordinary Chambers of Cambodia , Kosovo Regulation 64 panels, East Timor Special Panels for Serious Crimes The Bosnia War Crimes Chamber, The Special Tribunal for Lebanon, The Iraqi High Tribunal and The Serbian War Crimes Chamber as the major ones.

3.4.2. Treaty law development

As discussed earlier in this chapter, the international jurisprudence has highlighted the rights and duties allocated to the individuals under international law and the procedural capacity to claim said rights or being and bear responsibility accordingly. Moreover, different International courts instituted throughout time also recognize Individuals as both right bearers and as duty holders. The next question is which International rules are adopted with regard to Individuals placed in the International legal structure?

As of case developments, the rule based regime of Individuals with international status is a post World War II phenomenon. However, in the pre-war time also some instances were recorded. For instance, the Treaty of Versailles [in] 1919 noted that the German government recognized the right of the Allied and Associated Powers to bring individuals accused of crimes against the laws and customs of war before military tribunals (article 228) and established the individual responsibility of the Kaiser (article 227).[192]

Nonetheless, the post World War II era comes up with the development of laws of individual rights as well as responsibility for violations of international law, whether in the human rights or humanitarian law arenas, providing further evidence of individuals becoming subjects of international law. The London Charter that establishes the International Military tribunal provides[193] Individuals; responsibility separated from the state. But, the main development in the last half a century was made with regard to treating individuals as right holders. Since the Universal Declaration of Human Rights in 1948, the International Human Rights and Humanitarian law regime acknowledges Individual persons as the ultimate actors and aims of International law. Beyond protecting Individual Human rights, so far there are five Human right conventions in international law which contain the right of individual complaint or extend *locus standi* for Individuals: The International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Protection of Rights of All Migrant Workers and Members of their Families, the Convention on the Elimination of All Forms of Discrimination against Women.[194]

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[192] Shaw, p. 399.

[193] See, *Infra*, chapter 5.

[194] The UDHR and the ACHPR have an exception clause that explicitly provides duties to Individual persons.

This is a very significant move with regard to putting the Individual at the center of International law. On the other hand, there is a regime of International rules that duty bound Individuals or makes individuals responsible. The agreements/charters that establish International tribunals in different time under the guise of the United Nations play a great role in this regard.

Moreover, statutes that establish the International Criminal courts in the 1990s play a role in the development of responsibility of Individuals under International law. Article 7 of ICTY and Article 6 of the ICTR statute provide identical provisions with regard to individuals' criminal responsibility as:

> A *person* who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime […] shall be *individually responsible* for the crime. (*emphasis* added).

By the same token the ICC statute under Article 25 (2) provides:

> A *person* who commits a crime within the jurisdiction of the Court shall be *individually responsible* and liable for punishment in accordance with this Statute. (*emphasis* added).

Thus, laws that establish International criminal tribunals highly contribute to decentering International law from state-centric old fashioned notion and establishing a new human-centric conception.

Finally *inter alia*, draft soft rules of the ILC later adopted as UNGA resolutions exert some efforts towards recognition of Individuals in International law as the sole and independently responsible entity. Among the major works of the ILC, its draft provisions on state responsibility[195] and draft articles of International organizations, adopt a saving clause of Individuals. i.e, both drafts identify Individuals as independent entities of International law that can shoulder their own responsibility[196] beyond the states and organizations they represent.

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[195] As the author discuss in Chapter 2 with details.

[196] Article 58 of the ILC draft articles on Responsibility of States for internationally wrongful acts provide:

> These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

And Article 66 of Draft articles on the responsibility of international organizations also provide:

3.3.3. Customary International Law

The other main contribution to widen the specter of International law is state practice or customary rules. Customary practice (*jus cogens*) of states followed from a sense of legal obligation.[197] Especially, customary International Humanitarian Law (IHL).

Mainly, State practice plays its role in the development of Individuals' status in International law in two manners. The first is that while some States have not ratified important treaty law, they remain nonetheless bound by rules of customary law. The second one is the relative weakness of treaty law which has its own difficulties of application.[198] Thus, customary International law fills this gap.

According to Article 53 of the Vienna Convention on law of treaties, a *jus cogens* norm is:

> A norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Hence, the terms international custom and Customary International Law (CIL) will be used to refer to that set of practices to which one attaches international rights or legal obligations.[199] Moreover, the ICJ in its statute provides customary law as "evidence of a general practice accepted as law."[200]

While talking about the treatment of Customary International laws there are two basic notions. First, the role of Individuals in the formation of customary International law

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> These draft articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of an international organization or a State.

[197] Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1986).

[198] ICRC, Customary international humanitarian law, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm> last visited on January 2014.

[199] Christiana Ochoa, The Individual and Customary International Law Formation, p.128 (Virginia journal of international law, Vol. 48:1, 2007).

[200] Article 38/2/B of The statue of the International Court of Justice.

beyond the conventional role of states[201] and the other is how customary International law treats Individual persons. The latter is the case of this topic.

The traditional doctrine of CIL used to be a state-centric practice that was later proven as wrong, both factually and normatively. That is why, until recently, the recognition that actors other than states participate in customary international law has been confined to the observation of legal realists.

A rule of customary law which recognizes the competence of internal courts to judge international crimes perpetrated abroad, regardless of the place where they have been committed, the nationality of the author or of the victim[202] was the among the first moves of state practice with an individual touch. With regard to responsibility in general and Individuals responsibility in particular, customary International laws are the very basis of conventions and treaties that later codified[203].

Taking one simple instance would clarify the matter. In August 2000, the United Nations Sub-Commission on the Promotion and Protection of Human Rights adopted Resolution 2000/17 on The Death Penalty in Relation to Juvenile Offenders. The main reason for the commission to adopt this resolution was a universal existence of state practices of reliving juvenile delinquents from the scope of death penalty and imposing a responsibility to the state.

In sum, customary International law plays a two edged role on the development of Individuals status in International law, First, as a source for the treaty as well as case developments and secondly, filling the gaps that are not covered by the aforementioned two.

To wrap-up the topic, it is quite clear today that there is nothing intrinsic to International Law that impedes or renders it impossible to non-State actors to enjoy international legal personality.[204] Among these non state personalities Individuals are the major ones. Hence, International law's treatment of individuals as subjects of law nowadays an

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[201] See, Christiana Ochoa, The Individual and Customary International Law Formation, (Virginia journal of international law, Vol. 48:1, 2007) and Alexander Orakhelashvili, The position of the Individual in international law, (California International Law Journal, Vol. 31, 2001)

[202] Individuals as subjects in International Law <http://www.lawyr.it/index.php/articles/reflections/item/17-individuals-as-subjects-in-international-law> last visited on January, 2014.

[203] See, 2001 -Yearbook of the International Law Commission, (United Nations - New York and Geneva, 2001).

[204] Antônio Augusto, p.21.

irreversible reality, and the human being emerges, at last, even in the most adverse conditions, as the ultimate subject of Law, both domestic and international, endowed with full juridico procedural capacity.[205] As jurists put it in stronger terms no one in sane conscience would today dare to deny that the individuals effectively possess rights and obligations.[206]

These all leads to the conclusion of Individuals as the bearers of rights conferred and duties/responsibilities imposed upon them directly, indirectly and derivatively by International law itself.

[205] Ibid. p. 25.
[206] Ibid.

CHAPTER FOUR

4. INTERNATIONAL CRIMES AND THE CASE OF *CORE* INTERNATIONAL CRIMES

The term "crime" does not, in modern times, have any simple and universally accepted definition.[207] By the same token, there is no universally agreed upon definition of "international crime" either. But it is a convenient term for those crimes that are of concern to every state because of their corrosive effect on international society or their particularly appalling nature.[208] Defining *core* International crimes is even more cumbersome. Hence, what can be discussed and explained are arguments and concepts with regard to crime in general and International crimes and core International crimes in particular.

Nonetheless, whether a crime is local, transnational or International, its common feature is its personal nature. Although fictitious legal personalities are represented by human persons, an act done by individuals results in personal liability. This is very true in criminal matters.

On the other hand, the concept of reducing vicarious liability of invented legal personalities like states on behalf of Individual persons, especially with regard to International crimes, ripens the fruit of the jurisprudence of International criminal responsibility of Individuals.

4.1. Of crime and criminality

It is not the author's intention to deal with the jurisprudential aspect of crime and criminality in detail, but rather to give a fuller picture of *International* crime and core International crimes, by shedding a glimmer of light over the general concept of crime.

Conceptualizing crime and reducing all the definitions of it to a single one are not easy tasks. Similarly, etching a demarcation line between criminal and noncriminal acts is also cumbersome.

[207] Farmer, Lindsay. Crime, definitions of. In Cane and Conoghan (editors). The New Oxford Companion to Law. Oxford University Press. 2008. p. 263.
[208] Aust, p. 268.

Jurists avow that the conception of *Crime, "*as distinguished from that of *Wrong* or *Tort* and from that of *Sin,* involves the idea of injury to the State of collective community, we first find that the commonwealth, in literal conformity with the conception, itself interposed directly, and by isolated acts, to avenge itself on the author of the evil which it had suffered." [209] (*emphasis* in the original). Hence, the basic element of an act that makes it a criminal act is the victim of the infliction – the general public or the collective community.

But, most of the legal definitions of crime emphasize the transgression of law element as detached from the victim's identity – whether it is a collective victim or single individuals. To prove this assertion, let's see some of the legal definitions of crime:

> An act that the law makes punishable; the breach of a legal duty treated as the subject-matter of a criminal proceeding.[210]
>
> An act [or sometimes failure to act] that is deemed by a statute or by a common law to be public wrong and is therefore punishable by the state in criminal proceedings. [211]
>
> [A] Conduct that is prohibited and has a specific punishment (as incarceration or fine) prescribed by public law compare.[212]
>
> Any violation of the government's penal laws [or] an illegal act.[213]
>
> An offence against the state that is punishable.[214]
>
> An offense against a public law or An offense against the laws of a country or state.[215]
>
> An illegal act for which someone can be punished by the government.[216]

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[209] Henry S. Maine, Ancient Law, p.320 (17th ed. 1901).
[210] Black's Law Dictionary (8th ed. 2004).
[211] Oxford, Dictionary of Law (8th ed. 2003).
[212] Crime: <http://dictionary.findlaw.com/definition/crime.html> last visited on January, 2014.
[213] Daniel Oran, Oran's Dictionary of the law (3rd edn. 2000).
[214] W. J. Stewart, Dictionary of Law (2nd edn. 2001).
[215] Crime: <http://www.lawdictionaryonline.com/home_search.php> last visited on January, 2014.
[216] Crime: Merriam-Webster Online Dictionary. http://www.merriam-webster.com (January. 2014).

From these different definitions it is easy to grasp the prevailing legal thinking takes the positivist view for any conduct declared as criminal by a state law/statute/act is a crime. Thus, to make an act a criminal act, the matters.

Crimes are always followed by criminality or entities action/omission with regard to the crime. Criminality or the state of being criminal or an act or practice that constitutes a crime[217] is an easy task in comparison with crime. Once criminal acts and noncriminal acts are known, it is not difficult to determine criminality. Simply, the transgression of the law that makes an act a crime gives the status of criminality. However, difficulties arise when the nature of entities is invoked. For instance, legal immunity legalizes some crimes. This difficulty is very rampant with regard to the International community.

In principle, any act that is provided as a crime by a criminal law is a crime and anyone (natural or juridical persons) who violates that law is a criminal. But, exceptions in reference to the identity of the wrongdoer, the nature of the crime and other circumstances debunk the principle in some manner. With regard to International crimes these exceptional circumstances are widespread phenomena as treated in the subsequent topic.

4.2. The notion of International crimes

Making all societal vices a crime is a very slippery notion. That is what makes conceptualization of crime a difficult matter. When the case of vices is internationalized, it becomes more difficult. Vice and virtues as a source of the conception of crime and the law are relative terms, that are subjects of redefinition circumstantially or it is area centric and culture driven. That is why the term "international crime" does not have one, simple, universal meaning.[218]

Like crime in general, legal dictionaries define International crime in comparison with International law as a grave breach of international law, such as genocide and crimes against humanity, made punishable offenses by treaties and applicable rules of customary international law.[219] Others define international crime broadly as an act

[217] *Supra* 210.

[218] What Is International Crime? <http://www.wisegeek.com/what-is-international-crime.htm> last visited on January, 2014.

[219] *Supra* 210.

universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.[220] Still others assert the definition of International crime as crimes which affect the peace or safety of more than one state or which are reprehensible in nature as to justify the intervention of international agencies in the investigation and prosecution thereof.[221] Though no single and all agreed upon definition is given to International crimes, It could make the case easier if we manage to squeeze the common elements of the definitions.

Thus, an international crime occurs when three conditions are satisfied[222]:

I. The criminal norm must derive either from a treaty concluded under international law or from customary international law, and must have direct binding force on individuals without intermediate provisions of municipal law,

II. The provision must be made for the prosecution of acts penalized by international law in accordance with the principle of universal jurisdiction, so that the international character of the crime might show in the mode of prosecution itself (e.g., before the International Criminal Court), and

III. A treaty establishing liability for the act must bind the great majority of countries. Also termed international offense.

A binding International rule that got the approval of the majority of world states, accompanied by universal jurisdiction makes an act International crime and extends liability to International entities who are transgressing it. In other words, for such crimes, international law does not place criminal responsibility on the state on whose behalf the crime may have been done, but on the individual who committed the crime.[223] States are not vicariously liable for what their citizens have done in their own personal capacity and they shouldn't assume International criminal liability for any International crimes done on their behalf. (e.g. by state agents).

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[220] International criminal law <http://www.geneva-academy.ch/RULAC/international_criminal_law.php> last visited on January 2014.

[221] Duhaime Legal Dictionary <http://www.duhaime.org/LegalDictionary/I/InternationalCrime.aspx> last visited on January 2014.

[222] *Supra* 210

[223] Ibid.

The IMT on it decision at Nuremberg tries to define International crimes in the following manner:

> An act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances.[224]

Thus, IMT's definition of International crime flows from two points of view. First, an act that got a universal status of crime because of its gravest nature and second, an act which results in universal jurisdiction.

Some scholars try to draw a distinction between international crimes and international delicts. And argue that within the context of internationally unlawful acts it was provided that 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 was recognized as a crime by that community as a whole constitutes an international crime. All other internationally wrongful acts were termed international delicts.[225] Examples of such international crimes provided were aggression, the establishment or maintenance by force of colonial domination, slavery, genocide, apartheid and massive pollution of the atmosphere or of the seas. However, the question as to whether states can be criminally responsible has been highly controversial.[226]

Listing International crimes is another difficult task. Crimes like drug trafficking, arms trafficking, money laundering, smuggling of cultural artifacts, child trafficking, transnational graft etcetera qualify as transnational crimes.[227] On the other hand, age old offenses like slavery, piracy, genocide, crimes against humanity, war crime, aggression, and terrorism to modern rule specific crimes like unlawful seizure of aircraft[228], crimes

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[224] IMT, judgment of 1 October 1946, in The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, (22nd August ,1946 to 1st October, 1946).

[225] See, M. Mohr, The ILC's Distinction between "International Crimes" and "International Delicts" and Its Implications' in Spinedi and Simma, *UN Codification*, p. 115, and K. Marek, Criminalizing State Responsibility', 14 *Revue Belge de Droit International*, 1978– 9, p. 460.

[226] L. Oppenheim, International Law, a Treatise, vol. I, p. 533 (1st ed. 1905).

[227] Transnational Crime: <http://www.peacepalacelibrary.nl/research-guides/international-criminal-law/transnational-crime> last visited on January 2014.

[228] Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, Art. 1.

against internationally-protected persons[229], hostage-taking[230] and cyber crime got the status of International crimes in different rules and court decisions.

The only 'comprehensive' definition of International crimes found is under the International law commissions' 1996 very first draft of articles on International responsibility of state. The draft proposes[231] the definition of International crimes as:

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 that community as a whole constitutes an international crime.

And by the same token the draft provides[232] the causes of International crimes as follows:

(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 on a scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

[229] Convention of the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, Art. 2.
[230] Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, Art. 124.
[231]. International Law Commission's 'Draft Code of Offences against the Peace and Security of Mankind' 1996, Art.19.
[232] Ibid.

(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.

The ILC assertion of the definition of International crime lacks exhaustiveness and is provided only from the state perspective. That is why the final draft of the ILC articles on state responsibility as later adopted by the UNGA as resolution 82/56 exclude the provision totally.

In spite of the scattered laws and International court rulings over the issue, until now there is no International legal instrument that succinctly provides the meaning of International crimes and its components. But, inferring to different practices ease the search for a real and working meaning of it.

Eventually, international crimes came to be termed as breaches of obligations under peremptory norms of general international law with no discrimination of who did it and why. These international crimes fall under the umbrella of universal jurisdiction.

4.3. What is in the *core* of International crimes?

As the author tried to narrow down the meaning of different terms involved in this paper, first it assess crime and its meanings in nexus with elements of it. Then out of the general crime, the author chose International crimes and tries to present legal definitions for it. And since the main topic of this paper concentrates on core international crimes, efforts are employed to extract what is in the *core* of the bulk of international crimes. Or strictly speaking, the author tries to look at the notion of core international crimes.

Using the term core as an adjective of International crimes is very diplomatic. Different International instruments and International courts use terms like serious International crimes [233], gravest International crimes and so on and so forth. Beyond jurists and scholars adoption of the term core International crime, the International legal instruments and decisions avoid to use it. However, *inter alia*, the writer of this paper prefer to use the term core for a reason of, reducing the fierce debate over usage of other terms like *serious* and *grave* and found it more explanatory of the major International crimes.

[233] See, ICC statute, Preamble - Para. 4 and 9 as well as Art. 1 and 5 of the same. As amended in 2010.

Nonetheless, listing and delisting of *core* international crimes is not an effortless undertaking because the earliest International crimes evolved over time. For instance, until the middle of the 20th century, the crime of piracy was the major International crime that was recognized by the then International community. However, in the post world war II period, piracy relinquished its core place for other crimes like crimes against humanity and war crime. Therefore, the meaning of *core* international crimes is time bound and dynamic in its nature. Second, there is no International legal Instrument that lucidly elucidates the meaning of International crimes in general and core International crimes in particular. Thus, all endeavors to capture its meaning are directly or indirectly attached with the general practices of the International legal community.

When proceeding to examine the International community's practice, another fact that is clear is the very link determining the meaning of *core* international crimes (that result with international responsibility of Individuals. The rise of Individuals' International criminal responsibility[234] plays a great role in the development of the notion of International crimes and for the determination of *core* International crimes.

> As the principle of individual responsibility for crimes under international law was clearly established at Nurnberg, same was true for core International crimes. The charter of the International Military Tribunal (IMT) extends its jurisdiction to crimes that were considered as grave International crimes by the European Axis powers.[235] Thus, under article 6 of the charter it provides the following crimes as crimes under which the tribunal has jurisdiction:

- *Crimes against peace*[236]: the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

- *War crimes*: violations of the laws and customs of war. A list follows with, inter alia, murder, ill-treatment or deportation into slave labour or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, the killing of hostages, the plunder of

[234] *Infra* Chapter 5.

[235] Axis powers represent the three principal partners in the Second World War namely Germany, Italy, and Japan who lose the War and face trial. Hence, European Axis powers mean the former two.

[236] Before the Nuremberg crimes against peace, had no preexisting definition in international law. But latter it emerges as the crime of Aggression.

public or private property, the wanton destruction of cities, towns or villages, or devastation not justified by military necessity and;

- *Crimes against humanity :* murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated

Accordingly, crimes against peace latter known as aggression, war crimes and crimes against humanity were the three major International crimes which embodied many types of international wrongdoings under the Nuremberg regime. The crime of aggression and war crimes are well known even before the establishment of the IMT. But, It is for the first time that crimes against humanity was comprehensively codified by the IMT charter. By accepting these crimes as the jurisdictional bases the IMT reduced the significance of other International crimes.

But, latter developments redefine the IMT's assertion and came up with new core international crimes. Among new developments, exactly two years after the UNGA affirmed in Resolution 95(I)/1946 the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, the UNGA came up with Convention on the Prevention and Punishment of the Crime of Genocide which declares:

> Genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.[237]

Thus, the crime of genocide[238] became part of *core* international crimes. The Geneva conventions affirm such precedents for the case of war time offenses.[239] After a long time of contemplation the ILC came with its first Draft Code of Offences against the Peace and Security of Mankind in 1954. The draft code provides some offenses such as offenses that are against the Peace and Security of Mankind and recognized as core International offenses. Article two of the draft code lists such crimes as:

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[237] Genocide convention, Art. 1.

[238] See*, Infra* discussion on Genocide.

[239] See, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva Convention relative to the Treatment of Prisoners of War, and Geneva Convention relative to the Protection of Civilian Persons in Time of War.

1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.

(10) Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

(i) Killing members of the group;
(ii) Causing serious bodily or mental harm to members of the group;
(iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(iv) Imposing measures intended to prevent births within the group;
(v) Forcibly transferring children of the group to another group.

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

(12) Acts in violation of the laws or customs of war.

In other words, the draft code recognizes the crime of aggression, terrorism, genocide, crimes against humanity and war crimes as major offences against mankind or as *core* international crimes. The ILC redraft the Code of Offences against the Peace and

Security of Mankind in 1996 and adopted detailed but, narrower lists of core International crimes.[240]
For most of the second half of the 20th century, once a decade old (1945 – 1955) vibrant International legal environment over conceptualization of crime and *core* International crimes became dormant. That later reawaken in the 1990's and continue to be active to the present.

From fully fledged UN courts such as the International Criminal Tribunal for the former Yugoslavia (ICTY), The International Criminal Tribunal for Rwanda (ICTR) and The International Criminal Court (ICC) to Hybrid UN courts of The Special Court for Sierra Leone, The Extraordinary Chambers of Cambodia, Kosovo Regulation 64 panels, East Timor Special Panels for Serious Crimes, The Bosnia War Crimes Chamber, The Special Tribunal for Lebanon, The Iraqi High Tribunal and The Serbian War Crimes Chamber, established by a statute that lucidly provide the jurisdiction of the courts as well as the core International crimes that result in allocating responsibility to entities.

One thing that makes all these 11 UN-backed courts similar is, their recognition of crimes against humanity, war crimes and genocide as the main International crimes (In certain manner aggression is also recognized as a main International crime). The traditional tripartitions of these three major crimes influence the contemporary conception of core International crimes.

However, all UN backed courts that mushroomed in the 1990's and in 2000's are not identical in their recognition of *core* International crimes. Some of the courts extend the embodiments of *core* international crimes to other crimes beyond the aforementioned tripartite notion. For instance, the UN Transitional Administration in East Timor (UNTAET list International serious crimes committed in East Timor as genocide, war crimes, and crimes against humanity, murder, sexual offences and torture.[241] By the same token, the statute that establishes the most controversial[242] International court, the ICC provides[243] its jurisdiction only to *most serious crimes of concern to the international community as a whole* and lists four crimes as**:**

[240] See, *supra* discussion on International crimes.
[241] Defined in sections 4–10 of Regulation 2000/15 of UN Transitional Administration in East Timor (UNTAET).
[242] Some even dare to say 'The International Controversy Court' (ICC) See, eg. Sreeram Chaulia, The International Controversy Court: Why its selective justice is failing Africa and the world <http://rt.com/op-edge/africa-international-controversy-court-183/ > last visited on January 2014.
[243] ICC statute, Art. 5, as amended in 2010.

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes and;
(d) The crime of aggression.

Among these *most serious crimes of concern to the international community as a whole,* the crime of aggression got push back from state parties and is still not workable. Actually, the original text of the ICC statue as adopted in 1998 used to have a sub-article for Article 5 of it that goes:

> The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Although, this condition was deleted in accordance with RC/Res.6, annex I, of 11 June 2010, after Review Conference of the Rome Statute in Kampala, Uganda, until today for lack of subsequent action of defining what aggression means, the ICC doesn't exercise its jurisdiction in reference to the crime of aggression.

Except for the ICC, the rest of the 10 UN-backed International courts established in the 1990's and in 2000's didn't cause any controversy over the crimes for which they had jurisdiction or for the list of International crimes. But, for the ICC because of its universal jurisdiction, beyond political distrust and lack of legitimacy,[244] legal controversies also arise. Among some legal arguments present, the final resolution when the Rome Statute was signed specifically recommended that the review should reconsider including *drug trafficking* and *terrorism* in the list of crimes, and also agreeing on a definition[245] of

[244] African Union resent disgruntlement and resentment over the ICC prosecutorial policy led the Union to send a letter of case deferral against African heads of states and heads of governments.

[245] According to the 2010 Insertion by RC/Res.6, the statute states::

1. [...] "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

aggression so that the court can exercise its jurisdiction over this crime. However, until today the ICC has stuck with three *core* international crimes – crimes against humanity, war crimes and genocide. This is affirmed by the ICC's practice. Since July, 2005 when the ICC started to indict suspects till February, 2014, it opened investigations into 21 cases in eight situations and publicly indicted 36 individuals globally (all in Africa) and except one[246], the rest of them are indicted for one or more of the aforementioned three *core* International crimes.

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2. […] "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of, the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

> (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of
> another State or part thereof;
>
> (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
>
> (c) The blockade of the ports or coasts of a State by the armed forces of another State;
>
> (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
>
> (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
>
> (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State and;
>
> (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

[246] Walter Barasa of Kenya was indicted for offences against the administration of justice.

As a result of such a tripartite conception of *core* International crimes, the author of this paper espouses the narrow definition of *core* international crimes as Genocide, Crimes against Humanity and war crimes. This is essential in two manners. First, these three are the one included in International tribunals as the *common* working components of International crimes and secondly, it will reduce the controversy over the list of *core* International crimes to the commonly agreed one, while leaving the gray area.

A bird's eye view over the contemporary International legal conception of the three *core* International crimes will ease understanding of the extent and contents of such crimes. Hence, here in below the author discuss each case in a slight manner.

4.3.1. War crime

War crime is one of the first and foremost International crimes that results a universal jurisdiction. Because, […] [war crime] sickens the conscience of civilized society.[247] The simplest definition of a war crime might be a conduct that violates international laws governing the conduct of international armed conflicts.[248] However, looking at International law and state practice in general elaborates the term in its fullest sense.

Like most of the International crimes, a documented meaning of war crime was the result of a post Nuremberg phenomenon[249]. The charter which established the IMT defined war crimes as violations of the laws and customs of war[250] and lists some acts which constitute a war crime. But, the most comprehensive definition, and the one that shapes the contemporary meaning of war crime, is the meaning of war crime given by the Four Geneva Conventions of 1949. In particular, the common Article[251] of the Four Geneva conventions defines war crimes as:

[247] Christopher C. Joyner, Arresting Impunity: The case for universal jurisdiction in bringing war criminals to accountability, p. 1 (1997).

[248] Black's Law Dictionary (8th ed. 2004).

[249] See, *Supra* discussion on *Core* International crimes.

[250] IMT Charter, Art 6.

[251] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 50. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Art. 51, Geneva Convention relative to the Treatment of Prisoners of War, Art. 130, and Geneva Convention relative to the Protection of Civilian Persons in Time of War, Art. 147.

> wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or wilfully depriving a protected person of the rights of fair and regular trial,... taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Although, there are some practices which do not contain the adjective 'serious' with respect to violations and which defines war crimes as any violation of the laws or customs of war,[252] the Geneva conventions use adjectives like 'serious', 'willful' and 'wanton' that directly refer war crime as a grave International crime which qualifies the core place over International crimes.

Thus, in a reference to the Geneva Conventions the contemporary meaning of war crime includes the following acts which happen during war time:

- Willful killing;
- Torture or inhuman treatment, including biological experiments;
- Willfully causing great suffering or serious injury to body or health;
- Extensive destruction or appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- Willfully depriving a prisoner of war or other protected person of the rights of a fair and regular trial;
- Unlawful deportation or transfer;
- Unlawful confinement and;
- Taking of hostages.

Accordingly, latter developments of the conception of war crimes especially, the establishment statutes of the 1990's UN-backed courts mainly adopt the meaning of war crimes as defined by the Geneva conventions[253] with slight addendums. Most of the statutes that establish International tribunals and hybrid UN courts, conceptualize the

[252] IMT Charter (Nuremberg), Art. 6(b), IMT Charter (Tokyo), Article 5(b), Allied Control Council Law No. 10, Art. 2.

[253] Article 2 of the Statute of the ICTY (As last amended in 2009), Article 4 of the Statute of the ICTR, Article 8 of The Statute of the ICC (As last amended in 2010)

contemporary meaning of war crime in a direct reference to the common Article 3 of the four Geneva conventions[254] that provide protection of civilians and Prisoners of War (POW) and prohibit many acts as unlawful war time actions. Among the newest conception of the meaning of war crime, the ICC statute came up with a detail of what is provided in the Geneva conventions that eases understanding of some vague terms as used by the conventions.

Accordingly, while still giving more emphasis to International conflicts, the current notion of war crime minimalises the distinction between International and non-International

[254] The common Article 3 of the four Geneva Conventions provide:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> b) taking of hostages;
>
> c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> 2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

conflicts[255] and extends its horizons to internal conflicts within the state that affects protected groups like civilians.

4.3.2. Crimes against humanity

Defining crimes against humanity is not a simple task. The principal difficulty in interpreting the term 'crime against humanity' is the ambiguity of the word 'humanity'.[256] By Humanity anyone can implicate different meanings. For instance, from philosophical accounts Christopher Macleod list seven versions[257] of the meaning of crimes against humanity.

However, looking at the legal definition of crimes against humanity led to the immediate post World War II period. In spite of some International rules that punish acts against humanity in a pre-Nuremberg time, the contemporary notion of Crimes against humanity is derived from the 1945 Nuremberg Charter. Under Article 6 of the constitution of the International criminal Tribunal, it provides crimes the IMT jurisdiction emanates. Hence, Crimes against Humanity is one of the three core International crimes that results a universal jurisdiction. The Charter defines crimes against humanity by listing acts that constituted as a crime inflicted against humanity. The charter lists[258] such crimes and its jurisdiction as:

[255] See, Additional Protocol II of the Geneva Convention, ICTR statue, the *Tadich* case of ICTY.

[256] Christopher Macleod, Towards a Philosophical Account of Crimes Against Humanity, on The European Journal of International Law Vol. 21 no. 2 (2010).

[257] [257] Christopher Macleod seven philosophical accounts of crimes against humanity goes:

1. An action is a crime against humanity if and only if it is an action contrary to the human-nature of the perpetrator.
2. An action is a crime against humanity if and only if it targets the human-nature of the victim(s).
3. An action is a crime against humanity if, in ignoring it, we would ourselves be acting contrary to human-nature.
4. An action is a crime against humanity if and only if it is an action that shocks the conscience of human-kind.
5. An action is a crime against humanity if and only if it is a crime that endangers the public order of human-kind.
6. An action is a crime against humanity if and only if it is a crime that diminishes human-kind.
7. An action is a crime against humanity if and only if it is a crime that damages human-kind.

[258] IMT charter, Art 6.

> Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Nonetheless, the definition/list of crimes against humanity of the charter lacks exhaustiveness on the one hand and it piles up many separate core International crimes like war crimes and genocide within it. Moreover, it has no term that qualifies the act listed in crimes against humanity category.

Like the development of many core International crimes, the meaning of crimes against humanity also advanced by the statutes as well as the decisions of UN-backed courts that mushroomed in the 1990's. The statutes that establish International courts for different situations adopt an identical definition for crimes against humanity[259]. Thus, the following crimes, when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds are identified as crimes against humanity;

> Murder, Extermination, Enslavement, Deportation, Imprisonment, Torture, Rape[260], Persecutions on political, racial and religious grounds and Other inhumane acts.

The ICC statute add *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law*, *Enforced disappearance of persons* and *the crime of apartheid* to the above list.[261]

Beyond listing acts that constituted as crimes against humanity, the contemporary notion of crimes against humanity qualifies or makes conditional considerations. i.e. any of the acts that will be considered as crimes against humanity are not automatically qualifies the

[259] See, e.g. Art, 7 of ICC statute, Art. 3 of ICTR statute and Art.5 of ICTY statute.

[260] The ICC statue under Art. 7/1/g elaborate it with by widening crimes related with it including - sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

[261] *Ibid*, Art. 7, as amended in 2010.

status of being crimes against humanity, rather they have to fulfill the subjective stipulation of being *widespread* and *systematic* conditions too.

The ICTY and the ICTR tribunals play a great role on elaborating such vague terms. The ICTY trial chamber define the term *systematic*[262] in the *Blaškić* case and the ICTR trial chamber in its first trial known as the *Akayesu* case gives a meaning for the intricate terms of *attack*[263] and *widespread*[264] as is provided in its statute.

In sum, crimes against humanity is one of the core International crimes that contemporarily results in universal jurisdiction and the definition of it varies from case to case with common criteria of being systematic and widespread by nature.

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[262] In *Blaškić* case the ICTY Trial Chamber defined *systematic* in terms of:

> The existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; the preparation and use of significant public or private resources, whether military or other, and the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan. The plan, however, need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events.

[263] The ICTR trial chamber in the *Akayesu* case define *attack* as:

> Unlawful act of the kind enumerated in Article 3(a) to (i) of the [ICTR] Statute, like murder, extermination, enslavement etc. An attack may also be nonviolent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.

[264] The ICTR trial chamber in *Akayesu*, declared that the concept of *widespread* could be defined as:

> 'Massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims', while 'systematic' could be defined as 'thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources'. It was noted that there was no requirement that this policy must be adopted formally as the policy of a state, although there had to be some kind of preconceived plan or policy.

4.3.3. Genocide

Genocide is a relatively recent conception. Although, the word is new, the concept is ancient[265]. Until the Second World War, the phenomenon of genocide was nameless act or in Winston Churchill's remark it was a *crime without a name*. Hence, Genocide has been regarded as an international crime since the Second World War.

Even though, genocide is conceptually derivative of the crimes against humanity prosecuted by the International Military Tribunal at Nuremberg, the credit of coining and conceptualizing genocide goes to a Polish jurist Raphael Lemkin. Lemkin argues:

> By "genocide" we mean the destruction of a nation or an ethnic group. . . . Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.[266]

The 1948 UN Genocide Convention codifies Lemkin's general argument as a *critical step in the process* of criminalizing genocide.[267] Consequently, the UN genocide convention defines genocide[268] as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

> (a) Killing members of the group;

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[265] Leo Kuper, Genocide: Its Political Use in the Twentieth Century, p. 9 (Harmondsworth: Penguin, 1981).

[266] Lemkin cited in Adam Jones, Genocide: A Comprehensive Introduction, pp. 10 – 11. (London: Zed Books, 2004).

[267] Shaw, p.431.

[268] Genocide convention, Art.2.

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(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group [and];
(e) Forcibly transferring children of the group to another group.

As a result, genocide itself, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are punishable acts.[269]

However, as a result of enforcing mechanisms and soft nature of the genocide convention, there was no big step forward in developing the International legal conception of it until the 1990's UN backed courts came up with binding definition of genocide.

Article 4 of the statute of ICTY, Article 2 of the statute of ICTR and Article 6 of the statute of ICC adopt the meaning of genocide as stated by the UN genocide conventions and the tribunals elaborate the meaning of it in the trials.

Even if, there are jurists who suggest a wider meaning of genocide beyond the four - national, ethnical, racial or religious groups, contemporarily genocide is conceptualized as an act inflicted against such groups only. It is true that there are some states like Ethiopia[270] that widen the meaning of genocide as an act against other groups like political groups by their domestic law. But, the current International legal environment which takes genocide as one of the core International crimes limits itself to defining genocide in the aforementioned four groups.

Nevertheless, the three core international crimes that got a universal acceptance are not mutually exclusive. In other words, there is a chance that two or all the three of them can happen simultaneously out of a singular act. While an act is constituted as a war crime, at the same time that act can amount to crimes against humanity or genocide and vice versa. Decisions given by different International tribunals try to accommodate this possible collision.

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[269] *Ibid.* Art. 3.

[270] For instance, in *Special Prosecutor v. Col. Mengistu Hailamariam et al*., File No. 1/87,/ case Ethiopian Federal High Court Case, redefine genocide in a wider term that includes a systematic attack against *political groups*.

Summing up, the contemporary notion of core International crimes was shaped according to post World War II incidents and developed by the statute and decisions given by UN backed International courts. Thus, such International practice and International criminal tribunal statutes led us to the conclusion of the tripartite notions of core International crimes – War crime, Crimes against humanity and Genocide.

CHAPTER FIVE

5. INDIVIDUALS CRIMINAL RESPONSIBILITY VIS-À-VIS *CORE* INTERNATIONAL CRIMES

> There was no criminal responsibility which could not be traced back to individuals.[271]
>
> Individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.[272]

History records the mercenary mission of Peter von Hagenbach, who was hired by the Duke of Burgundy in France to punish rebellious citizens in Germany. Hagenbach ransacked the town and slaughtered the dwellers which resulted the in(famous) historic trial of Hagenbach. Cherif Bassiouni narrates what happened as follows:

> The second trial was […] that of Peter von Hagenbach in 1474 in Breisach, Germany. Peter was a Dutch condottiere --the equivalent of a modern mercenary leader. Peter was hired by the Duke of Burgundy to raise an army to occupy the city of Breisach and exact taxes from its population. The Duke had acquired the city in exchange for services rendered to the Holy Roman Empire. Uninterested in the fate of the distant German townspeople, the French Duke ordered Peter to collect massive exactions. When the townspeople rebelled, the Duke ordered Peter to sack, pillage, rape, and burn the city. Peter obeyed his superior's orders, as was expected at the time. The attack on Breisach was so horrendous that the news spread throughout the empire, bringing about an uncommon consensus that this situation was a "crime against the laws of God and Man." The leaders of the twenty-six member states of the Holy Roman Empire, either in person or through representatives, acted as international judges to prosecute Peter, a Dutchman, for crimes committed in Germany on the order of a French head of state. […] At the trial, Peter sought to exhibit the written orders of the Duke of Burgundy, but the judges refused to allow him to do so. Allowing this evidence would have conveyed the impression that subordinates in Peter's position should not execute the orders of their superiors when they are so manifestly "against the laws of God and Man." […] Accordingly, the court's refusal to accept Peter's defense shielded the Duke

[271] Greek Delegation statement on the Rome statute, Summary Records of the Meetings of the Committee as a Whole, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1st mtg, [57], UN Doc A/CONF.183/C.1/L.3 (June 16, 1998).

[272] United Nations General Assembly, Affirmation of the principles of international law recognized by the charter of the Nurnberg tribunal, Resolution 95 (I) (11, December 1946).

> from responsibility. Peter was sentenced to be drawn and quartered, a particularly brutal method of inflicting death.[273]

The trial of Peter von Hagenbach happened half a millennium ago and his trial marked the establishment of the first *ad hoc* international criminal court in Breisach, Germany, where 27 judges of the Holy Roman Empire judged and condemned Peter von Hagenbach for his violations of the "laws of God and Man" by allowing his troops to rape and kill innocent civilians and pillage their property.[274] Thus, the first recorded case of holding an individual criminally responsible against his criminal act beyond his/ states was found in Hagenbach's case which end up in beheading Hagenbach.

However, most legal commentators believe that the first [genuine] effort to establish an international criminal tribunal was represented by Articles 227-229 of the Treaty of Versailles in 1919, which was provided in order to prosecute Kaiser Wilhem II for 'Crimes against Peace', and the German military personnel for 'War Crimes'; and Turkish officials for 'Crimes against Humanity.[275] Correspondingly, Article 227[276] of the Versailles treaty, attempted to establish individual criminal responsibility for Germany's aggression in World War I by requiring the prosecution of the German Kaiser for "a supreme offense against international morality and the sanctity of treaties." The viability of this provision, however, was never put to the test, for the Kaiser enjoyed sanctuary from prosecution in The Netherlands, which refused to surrender him for trial.

Beyond all these sporadic attempts of making individuals criminally liable in the international arena was made, however, it is the International Military Tribunal (IMT) that took a judicial leap by assuming that international law had been fairly and rapidly evolving toward the view that aggression and crimes against humanity should be outlawed, and that individual criminal responsibility for such crimes had become legally enforceable.

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[273] M. Cherif Bassiouni, Perspectives on International Criminal Justice, 50 VA. J. INT'L L. 269, (2010).

[274] Stuart H. Deming, War Crimes and International Criminal Law, p.1 (Akron Law Review, 1995).

[275] *Ibid.*

[276] Article 227:

> "The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy, and Japan.

Although, the range of offences under international law for which individuals bore international responsibility was indeed narrow[277] but, the IMT trials by making individuals criminally liable for what they were themselves doing took a major leap forward, that changed the *unipolar* - state centric conception of International law to a *bi/multi-polar* one.

5.1. International criminal responsibility

As the previous chapters states, the details of responsibility and international crimes with a special emphasis on *core* International crimes, states used to be the sole (almost in all the cases) responsible international entities as they were the lone privileged and recognized international entities. Accordingly, states used to be the responsible entities for International wrong doings done by their citizens as a vicariously liable organ. Time changes everything, and International criminal responsibility is no exception.

5.1.1. Individual – state nexus: Collective vs. Individual responsibility

The notion of states' absolute rights and responsibilities with regard to International crimes is obsolete. Meaning that in the contemporary international legal framework, the idea of absolute State sovereignty, – which led to the irresponsibility and the alleged omnipotence of the State, not impeding the successive atrocities committed by it (or in its name) against human beings, – appeared with the passing of time entirely unfounded.[278] Rather, state sovereignty, in its most basic sense, is being redefined [and …] States are now widely understood to be instruments at the service of their peoples, and not vice versa.[279]

The traditional state centric International law was a proponent of state centric International criminal responsibility. It failed to single out the perpetrators of *core* International crimes instead, it collectivize International responsibility to groups/state. In other words, International law answers the question, "against whom are the sanctions to

[277] See the advisory opinion of the Inter-American Court of Human Rights in the Re- Introduction of the Death Penalty in the Peruvian Constitution case, 16 HRLJ, 1995.

[278] Antônio Augusto Cançado Trindade, The emancipation of the individual from his own state: the historical recovery of the human person as subject of the law of nations, p. 14 (Japanese International legal periodical, 2009). (Herein after Antônio Augusto)

[279] Kofi A. Annan, Two concepts of sovereignty, The Economist, (18 September 1999) Available at <http://www.economist.com/node/324795 >

be directed?", not, as national criminal law does[280], by determining a certain human being individually, but by determining a certain group of individuals who stand in a certain legal relation to the person who by his own conduct, has performed the act constituting the delict; namely, the individuals who are the subjects of the State whose organ has committed the delict also known as collective responsibility.[281]

Extending International responsibility to the state for acts done by their citizens was the basic trend of International responsibility adopted by early 20th century treaties like the 1907 Hague Convention on Laws and Customs of War on Land states (here in after Hague Convention) which states:

> A belligerent party which violates the provisions of the said Regulations (annexed to the Convention) shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.[282]

The conception of collective responsibility interweaves different elements of states into a single entity. Hence, any International criminal act done by such elements of the state results in state responsibility. Individuals are one of the major elements of a state and wrongdoing on their part would impose responsibility on the state. The State being responsible for its acts means that the subjects of the State are collectively responsible for the acts of the organs of the State; and the statement that international law imposes duties on States and not on individuals means, in the first place, that the specific sanctions of international law-reprisals and war--constitute collective, not individual, responsibility.[283]

In defense of collective responsibility, jurists argue, individual responsibility is implied by the collective responsibility of the State in so far as the latter is obliged by international law to punish these individuals and to compel them to repair the illegally caused damage.[284] Some others say that one can assert that international law, at least indirectly,

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[280] One of the basic principles of Criminal law is personal liability. In principle vicarious criminal responsibility is prohibited.

[281] Hans Kelsen, Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals, p. 534 (31 Cal. L. Rev. 530 (1943). (Herein after Kelsen)

[282] Laws and Customs of War on Land, (Hague IV, October 18, 1907) Art. 3. Available at <http://www.icrc.org/ihl.nsf/INTRO/195>

[283] Ibid.

[284] Ibid.

imposes upon the individuals the obligation to abstain from such acts injurious to other States, and that international law, indirectly, establishes individual responsibility.[285] Furthermore, if individuals shall be punished for acts which they have performed as acts of State, by a court of another State, or by an international court, the legal basis of the trial, as a rule, must be an international treaty concluded with the State whose acts shall be punished, by which treaty jurisdiction over these individuals is conferred upon the national or international court.[286]

Nonetheless, collectivization of International criminal responsibility was very problematic from its inception. First it redefined the very principle of personal criminal responsibility by trying to punish states as a representative of individuals. Second, it opened the door wide for rampant impunity of individuals. Since states as a sovereign organ are entitled to claim immunity for acts or transactions performed by one of its organs in its official capacity, any individual organ may not be held accountable for those acts or transactions.

Collective responsibility of states for individual citizens' International criminal acts was a dominant narrative of International criminal responsibility until the establishment of international tribunals in the Post World War II period.

Upon its establishment the IMT rejected the notion of collective International criminal responsibility explicitly as:

> It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals […] [This submission] must be *rejected*. That *international law imposes duties and liabilities upon individuals* as well as upon States has long been recognized.[287] (*emphasis* added)

The contemporary International law adopts the IMT argument that destroys the old barrack of impunity of International crime called collective responsibility by rejecting every argument forwarded in its defense.

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[285] Kelsen,p. 536.

[286] Ibid.

[287] Nazi Conspiracy and Aggression: Opinion and Judgment, p. 52 (Washington, United States Government Printing Office, 1947). Available at <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi-opinion-judgment.pdf>

Inter alia, the ICTY rejected the defense of state immunity for Individuals international criminal acts in a way that immunity cannot be claimed by a person acting in his official capacity if he commits war crimes, crimes against humanity and genocide.[288] As Hartley Shawcross puts it eloquently, there can be no reconciliation unless individual guilt for the appalling crimes […] replaces the pernicious theory of collective guilt.[289] Correspondingly, modern criminal tribunals reject the defense of official capacity in international criminal proceedings.[290] This led us to the subsequent issue that treats individual persons as a separate criminal entity in the International criminal law framework.

5.1.2. Individuals as a separate internationally criminal responsible entity

> *Humanity is a victim when the intentions of individual perpetrators or the harms of individual victims are based on group characteristics rather than on individual characteristics. Humanity is implicated, and in a sense victimized, when the sufferer merely stands in for larger segments of the population who are not treated according to individual differences among fellow humans, but only according to group characteristics […]. The international community thus enters the picture, in order to vindicate humanity through its international legal tribunals.*[291]

Thus, if International law has to be protective of world peace and order, its placement of individuals at the epicenter of its liability regime is unquestionable. The common notion of individual responsibility takes as a starting point the idea that a person is responsible for his or her own actions.[292] A very quintessence instance of such reformulation was taken by the IMT on its trial of the Nazi perpetrators. The IMT takes a stance on the issue as Shaw describe 'in ringing and lasting terms'[293]

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[288] Prosecutor v. Blaškić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, Para. 41 (18 July 1997, Case No. IT-95-14-AR108bis).

[289] Hartley Shawcross, Let the Tribunal do its Job (N.Y. TIMES, May 22, 1996) quoted by Thomas M. Franck in Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?

[290] See, ICC statute, Article 26-28 and Art. 31 and 32.

[291] Larry May, Crimes against Humanity: A Normative Account, p. 9. (Cambridge: Cambridge University Press, 2005).

[292] Michail Wladimiroff, The individual within international law p. 106. In Ramesh Thakur and Peter Malcontent , From Sovereign Impunity to International Accountability: The Search for Justice in a World of States (United Nations University Press August 2004).

[293] Shaw p.400.

> 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.

Hence, from this strong IMT stance, it is easy to conclude, the principle of individual responsibility and punishment for crimes under international law recognized at Nuremberg is the cornerstone of international criminal law. Moreover, the IMT clarifies its stance as,

> It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both *these submissions must be rejected*. That international law imposes duties and liabilities upon individuals as upon States has long been recognized...the very essence of the Charter is that *individuals have international duties which transcend the national obligations of obedience imposed by the individual State*. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorising action moves outside its competence under international law.[294] (*emphasis* added).

This principle is the enduring legacy of the Charter and the Judgment of the Nuremberg Tribunal which gives meaning to the prohibition of crimes under international law by ensuring that the individuals who commit such crimes incur responsibility and are liable for punishment.[295] Thus, it was only after the IMT trials that a movement started up within the international community which clearly began to shape a deeper consciousness of the need to prosecute serious violations of the laws of war [and other International laws] with regard both to the traditional responsibility of States and to the personal responsibility of individuals.[296]

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[294] In a unanimous resolution the General Assembly, affirmed on 11 December 1946 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.'

[295] International Law Commission, Commentary on Draft code of crimes against the peace and security of mankind (Part II) p.19 (1996).

[296] Edoardo Greppi, The evolution of individual criminal responsibility under international law <http://www.icrc.org/eng/resources/documents/misc/57jq2x.htm> last visited January, 2014.

In a more inclusive manner the ILC adopted a report on the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* in 1950. The ILC adopted IMT's decision and stated:

> Any *person* who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.[297] (*emphasis* added).

On its adoption of the IMT decisions, the ILC made all International entities responsible for their International wrongdoings by abandoning the old state-Individual dichotomy of International responsibility. Furthermore, the ILC adopted its soft Draft Code of Offences against the Peace and Security of Mankind in 1954 which clearly recognized individuals' responsibility for core International crimes.

> Offences against the peace and security of mankind […] are crimes under international law, for which the *responsible individuals* shall be punished.[298] (*emphasis* added).

With regard to one of the foremost *core* International crimes – war crimes, the Geneva conventions play a pivotal role in criminalizing Individuals for any war crimes that they commit.

Besides such international developments, some national court decisions also contributed to placing individuals in the ladder of International criminal responsibility. *Inter alia*, the Supreme Court of Israel in the *Eichmann* case[299] states:

> [T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them

[297] Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Principle I (ILC, 1950).

[298] International law Commission, the Draft Code of Offences against the Peace and Security of Mankind (1954) Art. 1.

[299] "After World War II, Nazi war criminal Adolf Eichmann fled from Austria and made his way to Argentina where he lived under the name Ricardo Klement. In May 1960, Israeli Security Service agents seized Eichmann in Argentina and took him to Jerusalem for trial in an Israeli court." Holocaust Encyclopedia Available at <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005179>

and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct.[300]

Hence, the Supreme Court justified Individuals' criminal responsibility because those crimes entailing individual criminal responsibility challenge the foundations of international society and affront the conscience of civilized nations. The justification later became the underpinning for International criminal responsibility of Individuals.

In general, the international responsibility of individuals is a longstanding concept that emerged in the field of criminal responsibility, namely in the field of slavery, piracy, crimes of war and crimes against humanity. There are number of international conventions that define as international crimes certain conducts committed by individuals. *Inter alia* the United Nations Convention on the Law of the Sea of 10 December 1982 for the crime of piracy,[301] the Convention on the Prevention and Punishment of the Crime of Genocide[302] and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[303]

The amalgamation of all these national and International developments establishes the customary international law of individuals' International criminal liability. That is why jurists argue that the legal basis of individual criminal responsibility is customary international law.[304] Thus, the case of Individuals international criminal responsibility develops to *jus cogens* and that result *erga omnes* obligations to International entities.

On the other hand, the most comprehensive legal framework over Individuals criminal responsibility for committing *core* International crimes that shaped the contemporary notion was a result of UN-backed International tribunals. *Inter alia*, an important step in the lengthy process of developing rules on individual criminal responsibility under international law was taken with the setting-up of the two ad hoc Tribunals for the prosecution of crimes committed, respectively, in the former Yugoslavia (ICTY) and in Rwanda (ICTR).[305] Article 7 and Article 6 of the statute of the ICTY and the statute of the ICTR respectively provide exclusive Individual criminal responsibility as:

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[300] Israel v. Eichmann, (International Law Reports 277, 291-93 (Isr. S. Ct. 1962).

[301] Art. 100 -107.

[302] Art. 4.

[303] Art. 2.

[304] Prosecutor v. Tadic, Opinion and Judgment, Case No. IT-94-1-T, T. Ch. II, 7 May 1997, paras. 666-669.

[305] Greppi, *Supra* 22.

1. A person, who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime […] shall be *individually responsible for the crime*.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, *shall not relieve such person of criminal responsibility* nor mitigate punishment.

3. The fact that any of the acts […] of the present Statute was committed by a subordinate *does not relieve his superior of criminal responsibility* if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior *shall not relieve him of criminal responsibility*, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires. (*emphasis* added)

Hence, pursuant to the statute of ICTY as well as ICTR, not only committing a *core* International crime held Individuals liable rather, planning, instigation and giving an ordered or aiding to do such acts will also result Individual criminal responsibility. The same approach was adopted by other UN-backed hybrid courts[306].

The very recent development of Individuals' International criminal responsibility is fetched from the provisions of the statutes of the International Criminal Court (ICC). Like its UN-backed predecessor tribunals, the ICC adopts individuals' criminal responsibility as the base of its Universal Jurisdiction. But, unlike other UN-backed tribunals the ICC came up with a different provision that provide Individuals criminal responsibility in different terms:

> A person who commits a crime within the jurisdiction of the Court shall be *individually responsible* and liable for punishment in accordance with this Statute.[307] (*emphasis* added).

[306] Statute of the special court for Sierra Leone, (14 August 2000) Art. 6.

[307] ICC Statue, Art. 25/2.

Moreover, the statute provides[308] Individuals will be criminally responsible if they:

> (a) Commits such a crime, whether as an *individual*, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
>
> (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.
>
> e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
>
> (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. (*emphasis* added)

Accordingly, the contemporary notion of individuals' International criminal responsibility with regard to *core* International crimes is highly influenced by the statutes as well as decisions of UN-backed International tribunals. At this juncture, one main point that needs to be stressed is the widening of Individuals responsibility from the post world war II construct of its meaning. i.e. the extension of responsibility beyond the mere commission of a crime to making Individuals liable for being accomplices, incitement, planning and etcetera. Moreover, the tribunals detach individuals from their states and narrow Individuals criminal defenses to few circumstances[309]. Hence, they deny defenses like official duty et al[310].

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[308] Ibid. Art. 25/3.

[309] Ibid. Art. 31 and 32.

[310] Ibid. Art. 27 and 33.

Summing-up, the question of the legal personality of individuals under international law extends to questions of direct criminal responsibility also. It is now established that international law proscribes certain heinous conduct in a manner that imports direct individual criminal responsibility.[311] Hence, contemporarily, international law imposes duties and liabilities upon individuals as well as upon states. Individuals become the flip side of *core* International crimes. However, the fact that an individual may be responsible for the crime in question is deemed not to affect the issue of state responsibility[312] and vice versa.[313]

5.2. Aspects of Individual responsibility in International law

Since this thesis deals with International criminal responsibility of Individuals for *core* International crimes, the author discusses the criminal aspect of the International responsibility of individuals. However, to put the issue in a wider perspective herein below I try to deal with the forms of International responsibility with regard to Individuals. This approach serves a two-edged purpose. First, it helps to understand the extent of International criminal responsibility of Individuals and secondly, because discussion of other forms of International responsibility in one or the other implicates Individuals' criminal responsibility.

Unlike the notion of responsibility of other International entities like states[314] and International organizations,[315] contemporarily, there is no clear and codified guide/rule for the forms and aspects of Individuals' International responsibility. The only reference to it will be resulted from the practices of International tribunals and their establishment statues.

5.2.1. Criminal responsibility

Out of the bulk of International responsibility of Individuals the major ones was/is their criminal responsibility. This fact is even more glaring with regard to Individuals' responsibility for wrongdoings related with *core* International crimes. Nonetheless, Individuals are not only criminally responsible for committing *core* International crimes, but also for attempting to commit any of the *core* International crimes, as well as for

[311] Shaw, p.259.

[312] International Law Commission, Draft Code of Crimes Against the Peace and Security of Mankind (1991) Art. 4.

[313] ILC on States Responsibiliy Art. 58 and ILC on International Organizations, Art. 66.

[314] See, ILC on State Responsibility.

[315] See, ILC on International Organizations.

assisting in, facilitating, aiding or abetting the commission of the same. They are also responsible for planning or instigating the commission of an International Crime.[316] In other words, International criminal responsibility of Individuals results in responsibility in two degrees.

The first one is playing the principal role on the crime by commission/omission of it or in the words of the ILC by 'performing an unlawful act or omitting a duty.'[317] The second degree of Individuals' responsibility is their participatory role over the crime committed. However, the degree of participation has no clear margin and meaning in contemporary International law. Some suggest distinguishing of the level of commission/participation of International crimes as primary liability, secondary liability, liability for omission and liability for inchoate offences.[318] On the other hand, since Nuremberg, different International tribunals and laws use different catchy words that indicate involvement of the criminal.

In the earliest International trials the phrases that used to indicate participation in *core* International crimes were phrases like planning, preparation and initiation.[319] Later the 1948 genocide convention came up with other terms with a wider meaning like Conspiracy, Incitement, Attempt, and Complicity.[320] Furthermore, the 1990's UN-backed International tribunals criminalize participation in *core* international crimes by using words like Instigation, order, aid, abet,[321] Order, solicit, and inducement.[322] The ICC statute went further by making the meaning of participation to a wider and open ended concept as.

> In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.[323]

[316] See, *inter alia* the statutes of ICTY, ICTR and ICC.

[317] International Law Commission, *Supra* 24.

[318] Elies van Sliedregt and Desislava Stoitchkova: International criminal law p. 262. On Research Handbook on International Human Rights Law Edited by Sarah Joseph and Adam (McBeth, 2010).

[319] IMT statute, Art. 6….

[320] Genocide Convention Art. 3, ICTY statute, Art, 4/3, and ICTR Statute, Art. 2/3.

[321] ICTY statute Art. 7/1 and ICTR statute, Art 6/1.

[322] ICC statute, 25/3/b.

[323] Ibid. Art. 25/3/D.

Notwithstanding the use of different terms that indicate participation of individuals in the commission of *such* crimes, they all come down to the common truth of criminalizing not only the commission of *core* International crimes, but participation as well.

5.2.2. Civil liability

While the main international responsibility of individuals in international law is criminal responsibility, the room for civil liability exists too. Because of the nature of states (a union of people) civil liability in the form of reparations is the major International responsibility of states[324]. The same is true for International organizations.[325] However, when one comes to individuals it is difficult to make them civilly liable. That is why most of the UN-backed International criminal tribunals limit their jurisdiction only to imprisonment[326] and simply order [for] the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner.[327]

However, limiting Individuals' International criminal responsibility for inflicting *core* international crimes to a simple criminal responsibility hampers the effort of pacification as well as justice in the wider sense. That is why, In a report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, the UN Secretary-General recommended that "combatants be held financially liable to their victims under international law where civilians are made the deliberate target of aggression" in order to make warring parties more accountable for their actions.[328] By the same line of argument, the ILC in one of its commentaries states:

> So far this principle [of Individual International responsibility] has operated in the field of criminal responsibility, but it is not excluded that developments may occur in the field of individual civil responsibility.[329]

[324] See, ILC on State responsibility, Art. 31.

[325] See, ILC on International Organizations,. Art. 31.

[326] ICTY Statute, Art. 24/1, ICTR Statute, Art, 23/1 and Statute of the special court for Sierra Leone, Art. 19/1 provides: "The penalty imposed … shall be limited to imprisonment."

[327] See, ICTY Statute, Art. 24/3, ICTR Statute, Article 23/3. see also Rules of Procedure and Evidence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, Rule 105

[328] UN Secretary-General, Report on the causes of conflict and the promotion of durable peace and sustainable development in Africa (UN, 1 August 2013).

[329] International Law Commission commentary on Draft Code of Crimes against the Peace and Security of Mankind, p.142 (1996)

Recently, the ICC statute takes the pace making role with regard to International civil liability of Individuals. Under Article 75/2 of the statute which provides:

> The Court [ICC] may make an order directly against *a convicted person* specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. (*emphasis* added).

Similarly, the United Nations Transitional Administration in East Timor (UNTAET) provides for of civil liability against peoples who commit *core* International crimes under section 50.1 as:

> An alleged victim may claim compensation for damages or losses suffered or inflicted by *a suspected crime* by filing *a civil action* before a competent court. (*emphasis* added).

Hence, the ICC model of liability imposes a direct civil liability against a convicted person for committing *core* International crimes. This new effort takes the whole global endeavor of criminalization of individuals for the commission and participation of *core* international crimes one step forward.

5.3. 'Identical twins' - rights and duties

The whole jurisprudence of Individuals International criminal responsibility for International crimes is mainly an offspring of the right-duty dichotomy. In international [...] law, the individual is regarded as a subject of law and is endowed with rights and duties.[330] Hence, for every criminal responsibility of Individuals there is a protected right. In other terms, when International criminal responsibility is flipped, there is a protected International right. To every right there is an express or implicit correlative human duty owed. In theory, everyone cannot fully enjoy their rights unless everyone fulfills their duties.[331] In fact, rights and duties are two wheels on which the chariot of life moves forward smoothly. Life can become smoother if rights and duties go hand in hand and become complementary to each other. Sergio Moratiel Villa puts the correlation of rights and duties eloquently as:

[330] Elies van Sliedregt and Desislava Stoitchkova: International criminal law, p. 270 On Research Handbook on International Human Rights Law Edited by Sarah Joseph and Adam (McBeth 2010).
[331] Ibid.

> Just as freedom is inconceivable without intelligence, so also duties are inconceivable without rights, both the former and the latter being innate. Duty is the application of the normative faculty of intelligence to freedom; right is the guarantee and endorsement demanded by freedom. Duty impels us towards a goal; right offers us the means to achieve it.[332]

Even in the earliest centuries of International law, scholars suggest, every legal norm – whether of domestic law or of the law of nations – creates rights and duties for the persons addressed to. Thus, the possibility of the international protection of human rights against the State itself[333] was traced back to the origin of International law itself.

Hence dealing with International criminal responsibility of Individuals for *core* International crimes namely, war crime, crimes against humanity and genocide can't be complete, unless there is a slight touch of discussion on the notion of Individuals status as right holders.

5.3.1. Individuals as right holders

The conception of rights as a legally recognized and enforceable claim or entitlement held by an individual (or, some argue, a group or collective) to do or not do something, or to prevent others from doing or not doing something,[334] was the most comprehensive one. It simultaneously states privilege to the right holder and duty for the rest with regard to the right holder. Traditionally, International legal Instruments as well as customary practices extend rights for Individuals and impose a duty of respecting such rights against states. Actually, the question of the status in international law of individuals is closely bound up with the rise in the international protection of human rights.[335]

The true cornerstone of the international legal personality of the individual lies in the attribution of rights and the means of action to secure them; from the moment this occurs, it effectively occurs at international level.[336] Accordingly, it becomes evident that there is

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[332] Sergio Moratiel Villa, The philosophy of international law: Suárez, Grotius and epigones <http://www.icrc.org/eng/resources/documents/misc/57jnv9.htm> last visited on January 2014.

[333] P.P. Remec, The Position of the Individual in International Law according to Grotius and Vattel, p. 243 (The Hague, Nijhoff, 1960).

[334] Condé, H. Victor, A Handbook of International Human Rights Terminology, p. 230. (2nd Edn., University of Nebraska, USA).

[335] Shaw, p.788.

[336] Antônio Augusto, p.20.

nothing inherent to the structure of the international legal order which impedes the recognition to the individuals of rights that emanate directly from International Law, as well as international remedies for the protection of those rights[337] or Individuals were clearly enabled to exercise rights emanating directly from international law.[338]

Such conceptualization led the global legal environment to came up with International as well as regional Human right Instruments[339] and that plays a very crucial role on the development of rights of Individuals that is protected by International law. Later, International criminal tribunals use such instruments as general human rights norms which can be applied as general principles of law.

The greatest leap taken by human right Instruments with regard to Individuals' International criminal responsibility is in relation to the right of *locus standi* that flows from the right of Individuals to submit a compliant before International/regional courts. Thus, International Individuals' rights look two edged; on the one hand, there are privileges given to Individuals and on the other hand, upon violation of such privileges, Individuals have the right to lodge a personal complaint to International bodies.

The earliest case of an Individual complaint before International courts was the Tribunal created under the Upper Silesia Convention of 1922 which decided that it was competent to hear cases by the nationals of a state against that state.[340] Since then a wide range of other treaties have provided for individuals to have rights directly and have enabled individuals to have direct access to international courts and tribunals.[341] For instance, the European Convention on Human Rights,[342] the Inter-American Convention on Human Rights,[343] the Optional Protocol to the International Covenant on Civil and Political Rights,[344] Optional protocol to the Convention on the Elimination of All Forms of

[337] Ibid.

[338] Ibid.

[339] For instance, The European Convention on Human Rights, 1950; the European Communities treaties, 1957; the Inter-American Convention on Human Rights, 1969; The International Covenant on Civil and Political Rights, 1966; The International Covenant on Socio Economic Rights, 1976, the International Convention for the Elimination of All Forms of Racial Discrimination, 1965.

[340] Shaw, p.25.

[341] Ibid.

[342] Art 21.

[343] Art. 47/1/b.

[344] Art. 1.

Discrimination against Women[345] etcetera extends the right of an Individual to submit a compliant to a vested organ.

The flip side of allowing Individuals to submit their compliant over any violation of their rights provided by the aforementioned instruments is setting someone (States or Individuals) on duty. If an Individual transgress the right of other Individuals he can be criminally responsible for the act he has committed before International tribunals. Many UN-backed tribunals refer to different International Instruments that protect individuals' rights and indirectly impose responsibility to others. Since *core* International crimes are wider in their meaning,[346] International tribunals make Individuals responsible by referring their acts in line with International Instruments that provide Individuals as well as groups rights. Hence, the inseparability of Individuals' rights and responsibilities once again affirmed the fact that rights and responsibility are a long time corollaries of each other.

5.3.2. Individuals as duty bearers

Generally, Individuals' duty indicates, the obligation owed by individuals […] to act in a way that promotes the interests of the totality of the social and political context in which one lives and acts. [347] As Individual persons are one of the major global entities, their duty also extended to the promotion of universal values and ethics.

Whereas someone who violates global human rules would be responsible for the act he inflicts against mankind. Piracy was one of the major International crimes in the 19th century and in the early 20th century, thus, the pirate [was] treated as an outlaw […] the enemy of all mankind [...] whom any nation may in the interest of all capture and punish.[348]

Imposing International duty against Individuals was the major assurance of internationally guaranteed rights of Individuals. The main and the most effective international duty that imposed against individuals were in a form of International criminal responsibility.

[345] Art. 1.

[346] See, Supera discussion on Chapter 4.

[347] Condé, H. Victor, A Handbook of International Human Rights Terminology, Second Edition P. 73 University of Nebraska, USA.

[348] Lotus Case (France v. Turkey) (1927) P.C.I.J., Ser. A, No. 10.

The rights of individuals in international law have evolved significantly in the post-1945 era, the placing of obligations directly upon persons as opposed to states has a distinct, if narrow, pedigree.[349] Again, the trials of IMT set the very crucial International precedents of the principles that impose direct duty against individual persons and criminalizing any transgression of such duties. Accordingly, the principle of Individuals International criminal responsibility for committing *core* International crimes develop in line with the tripartite rules of - International humanitarian law, International criminal law and International human rights laws.

In other words, the rise of individual criminal responsibility/duty directly under international law marks the coming together of elements of traditional international law with more modern approaches to human rights law and humanitarian law, and involves consideration of domestic as well as international enforcement mechanisms.[350] Thus, the contemporary Individual criminal responsibility regime for *core* International crimes is the distillation of modern International conceptions of Humanitarian, Human Rights and Criminal law together.

Herein below the author tries to examine the aforementioned three International law regimes in line with the criminal responsibility of Individuals for the three *core* International crimes identified in this work.

5.3.2.1. Responsibility arises from International humanitarian Law

Out of the three *core* International crimes identified, the regime of war crimes is a modern construct of International humanitarian law. Although, humanitarian law governs other International crimes, the contemporary notion of it mainly concentrates on war and related crimes. The writer's motive here is to deal with International rules that govern war crimes and the legal framework for International criminal responsibility of Individuals who commit such crimes.

First of all a disclaimer; the rules of humanitarian law concerning international crimes and responsibility has not always appeared to be sufficiently clear. One of the thorniest problems is that relating to the legal nature of international crimes committed by individuals and considered as serious violations of the rules of international humanitarian

[349] See e.g. M. C. Bassiouni, Crimes against Humanity in International Criminal Law, (2nd edn, The Hague, 1999).
[350] Shaw, p. 398.

law.[351] However, the fact that the humanitarian law regime is not clear does not mean the reality that principles of individual responsibility have clearly been established by humanitarian law.[352] The violations of humanitarian law, however, make crimes a universal matter regardless of nationality and location. Consequently, individual responsibility for violations of humanitarian law has become a global issue and the shift of focus from state responsibility to individual responsibility.[353]

Even if the root of Humanitarian law goes back to time immemorial, the greatest milestone was the 1949 Four Geneva conventions.

Among the major steps made by the conventions, at this juncture, making Individuals responsible for the grave breach of law of war is the pertinent one. The conventions in a common article for all (with slight differences) list acts of grave breaches of the rules of war as any of the following acts, if committed against persons or property protected by the convention:

> Wil[l]ful killing, torture or inhuman treatment, including biological experiments, wil[l]fully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial […], taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[354]

Hence, according to the Geneva conventions, committing one of the aforementioned acts is a war crime and results in responsibility. Later Additional Protocol II of the Geneva Conventions extends the meaning of war crime and in sum the Geneva Conventions became the most authoritative rules over war crime. That is why International *ad hoc*

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[351] See M. Cerif Bassiouni and Ved P. Nanda, A Treatise on International Criminal Law (1974).

[352] Greppi, Supra 22.

[353] Michail Wladimiroff, The individual within international law p. 111. In Ramesh Thakur and Peter Malcontent , From Sovereign Impunity to International Accountability: The Search for Justice in a World of States (United Nations University Press August 2004).

[354] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 51; Geneva Convention relative to the Treatment of Prisoners of War, art. 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 147.

(ICTY and ICTR) and permanent (ICC) tribunals, as well as internationalized hybrid criminal tribunals (E.g. the UN special court for Sierra Leone, and UNTAET) adopt the Geneva conventions' meaning of war crimes in their statute. (For more, look at chapter 4).

The most important point at this juncture is International humanitarian law's position of making individuals criminally responsible for committing the afore-listed crimes of war. In this regard, the four Geneva Conventions came up with a common provision that oblige states to punish the culprits:

> Each High Contracting Party shall be under the obligation to search for *persons* alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such *persons*, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such *persons* over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.[355] (*emphasis* added).

Thus, if an individual person commits war crimes, she is subject to International jurisdiction[356] or her acts are borderless and punishable before any court in the world. But, it is not only a national court matter, rather Individual criminal responsibility for war crimes committed in international armed conflicts was the basis for prosecutions under the Charters of the International Military Tribunals at Nuremberg and at Tokyo, as it is under the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Statute of the International Criminal Court.[357]

However, determining individuals' criminal responsibility for war crimes is not always an easy matter specially, when it comes to internal wars. The traditional conception of war crimes clearly deals with criminalization of persons who commit war crimes in

[355] The article common to the four Geneva Conventions: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50; Geneva Convention relative to the Treatment of Prisoners of War, art. 129; Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 146

[356] See, *Infra* discussion on Jurisdiction..

[357] IMT Charter (Nuremberg), Art. 6, IMT Charter (Tokyo), Art. 5, ICTY Statute, Art. 2–3 and ICC Statute, Art. 5 and 25

International wars[358], but, the rise of internal wars changes the old conception of war crimes as a separate crime which can only be committed in International wars and extends a very limited protection for protected groups during non-international wars.

Among the pioneer of this new development, the Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone explicitly provide that individuals are criminally responsible for war crimes committed in non-international armed conflicts. Moreover, decisions given by the ICTY set a new precedent of internalization of war crimes. The ICTY in its judgment in the *Furundžija case* in 1998[359] and in its judgment on appeal in the *Tadi´c case* in 1999[360], held that a State is responsible for the behavior of its armed forces whether it is in International or internal wars. Especially in the latter case, The Appeals Chamber of the Tribunal in the *Tadi´c* case confirmed that customary international law had imposed criminal responsibility for serious violations of humanitarian law governing internal as well as international armed conflicts as:

> Customary international law imposes criminal liability for serious violations of common Article 3 [of Geneva Conventions] as supplemented by other general principles and rules on the protection of victims of *internal armed conflict*, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.[361] (*emphasis* added).

The ICTY in reference to customary International laws thus widens the scope of the application of the laws of war (particularly the Geneva Conventions) for both International as well as non-international (Internal) wars. Looking at the ICC's indictment of Individuals proves this new notion of a holistic approach.

In sum, Individuals' International criminal responsibility for *core* International crimes basically rooted in International humanitarian rules that mainly criminalize war crimes

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[358] Article 2 of the Four Geneva Conventions determine the scope and Article 3 set limited protection for protected groups in non-International wars.

[359] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Prosecutor Vs. Anto Furundžija *(1998).*

[360] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Prosecutor Vs. DuškoTadic (1997).

[361] Ibid.

(one of the three core International crimes identified in this work). And the principle of individual criminal responsibility for war crimes is a long-standing rule of customary international law. Practically, many suspected war criminals have been tried on the basis of this principle. This principle has also been recalled in numerous resolutions of the UN Security Council[362], UN General Assembly[363] and UN Commission on Human Rights.[364] Hence, the dominant narrative is setting war criminals responsible for the crime they committed is by definition criminalizing Individual persons as the major actors of war crime.

5.3.2.2. Responsibility arises from International Human Rights Law

Sometimes it is difficult to demarcate where International human right rules end and humanitarian ones begin. The relationship between these two International law regimes is an ever growing case and there is a growing connection. Indeed, some recently adopted provisions of humanitarian law appear clearly influenced by human rights rules and standards of protection.[365]

In spite of such relationships, human rights rules and humanitarian laws have a clear difference with regard to the scope and concern of the laws. As discussed in the previous topic of humanitarian laws, their main concern is war and war crimes in the widest and fullest sense. International human rights rules, instead, basically concerned with protecting Individual persons rights and with respect to *core* International crimes they are more concerned with crimes against humanity and genocide (but, still there is a chance to invoke International human right laws in criminalizing war crimes).

International Human right rules can be the source of Individuals' International criminal responsibility for committing and participating in *core* international crimes in two

[362] See, e.g. UN Security Council, Res. 670, Res. 771, Res. 780 and Res. 808. Available at <http://www.un.org/en/sc/documents/resolutions/index.shtml>

[363] See, UN General Assembly, Res. 3074 (XXVIII), Res. 47/121, Res. 48/143, Res. 48/153, Res. 49/10, Res. 49/196, Res. 49/205; Res. 50/192, Res. 50/193 and Res. 51/115. Available at <http://www.un.org/documents/resga.htm>

[364] See e.g. UN Commission on Human Rights, Res. 1993/7, Res. 1993/8; 1994/72, Res. 1994/77, Res. 1995/89, Res. 1996/71 and Res. 2002/79. Available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Documents.aspx>

[365] Edoardo Greppi, The evolution of individual criminal responsibility under international law <http://www.icrc.org/eng/resources/documents/misc/57jq2x.htm> last visited January, 2014.

manners. First, by providing a duty clause against Individuals and any violations of such duties would result criminal responsibility. The best instances in this regard are The Universal Declaration of Human Rights (UDHR)[366] and The African Charter on Human and Peoples Right (ACHPR)[367]. Both documents provide Individuals duties to others and to their communities as a corollary to their rights. This underpins the development of Individuals' international criminal responsibility. Secondly, International human rights rules are being used as the reference for the violated rights. For instance, the Nuremberg and Tokyo rulings imposed responsibility upon the individual in a personal capacity for involvement in the commission of human rights violations.[368] The same is true in case of the ICTY and ICTR.

Particularly, in relation with crimes against humanity and genocide, the very laws that are used as a rule of reference are International human right rules. The best instance of this is the adoption of the meaning of the crime of genocide as stated by the Genocide convention. Most of International criminal courts (permanent, *ad hoc* or hybrid in nature) criminalize Genocide with identical terms that the genocide convention uses to criminalize it.[369] The same is true for crimes against humanity.

The bases of crimes against humanities are human right rules. An act would have a clear meaning of crimes against humanity only in a reference to human right rules that protects Individuals' rights. For instance, contemporarily, murder is constituted as a crime against humanity[370] which would result in Individual International criminal responsibility, if it is committed in a systematic and widespread form. But, the crime of murder connotes the right to life as provided in different human right laws[371]. Hence, directly or Indirectly, International human right rules are the main sources of Individuals International criminal responsibility for inflicting *core* International crimes. In other terms, the *raison d'être* for Individuals criminal responsibility are protected human rights.

On the other hand, some commentators argue that the duty to protect rights implies a duty to prosecute violators[372] or if there is certain protected right by International Human

[366] See, UDHR, Art. 29/1.

[367] See, ACHPR, Art. 27 – 29.

[368] Wladimiroff, *Supra* 353.

[369] *Supra* discussion on Genocide.

[370] ICTR Statute, Art. 3/a.

[371] UDHR, Art. 3, ICCPR, Art. 6, ACHPR Art. 4 and etcetera.

[372] N. Roht-Arriaza, State responsibility to investigate and prosecute grave human rights violations in international law' p. 451 (California Law Review, 1998).

right rules, state parties to that law had an obligation to criminalize Individuals who violates such protected rights of others. For instance, the UN Human Rights Committee established an organ to monitor compliance with the ICCPR. The committee has held a stand that state parties must investigate, prosecute and punish those responsible for summary executions, torture and unresolved disappearances. The Committee has further held that amnesties for serious violations of human rights are incompatible with of states under the ICCPR. When states fail to punish Individuals who violate International human rights, International jurisdiction would arise.[373]

Generally, International human right rules are among the foremost justifications for making Individuals responsible for the commission/participation of *core* International crimes especially for crimes against humanity and genocide.

5.3.2.3. Responsibility arises from International Criminal Law

The third and the major International law regime that directly imply Individuals' International criminal responsibility for core International crimes is the International criminal law regime. Like other counterparts, it is also a fruit of the post world war II International development especially, the IMT decisions. Apparently, the principle that individuals, including State officials, can be criminally responsible under international law was established in the aftermath of the Second World War. Hence, the contemporary notion of Individuals criminal responsibility that emerges out of International criminal law is the construct of three major developments. First there is IMT's precedent. Second, the works of the International law commission in different periods to the present and thirdly, the practices of UN-backed International and Internationalized criminal tribunals.

One basic feature that makes International criminal law more unique than other sources of Individuals' International criminal responsibility like International humanitarian and human rights rules is its more inclusive nature. In other words, International criminal law explicitly adopts the three *core* International crimes as a *raison d'être* for making individuals responsible.

The IMT charter clearly recognizes individuals' criminal responsibility for the then *core* International crimes like crimes against peace, crimes against humanity and war crimes.[374] By its famous statement of "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes

[373] *Infra* discussion on Jurisdiction.

[374] IMT Charter, Art. 6.

can the provisions of international law be enforced" it opens the door of Individuals criminal responsibility in the International arena.

Recognition of Individuals as an internationally responsible entity underpins later developments of International criminal law in general. The establishment of the ILC in 1948 enhances the IMT's assertion of setting Individuals in the chariot of International responsibility and in 1950; the ILC adopted a report on the "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal".[375] Principle I of the report states:

> *Any person* who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment. (*emphasis* added).

Later the ILC came up with the first 'Draft Code of Offences against the Peace and Security of Mankind' in 1951.[376] But it is in its recent draft code of offences against the peace and security of mankind the ILC provides:

> A crime against the peace and security of mankind entails *individual responsibility*.[377] (*emphasis* added).

As far as the list of crimes is concerned, the Draft Code takes into account major developments in the last half century and adopts the traditional tripatriation of *core* International crimes - the crime of genocide[378] crimes against humanity[379] and War crimes[380] and some other crimes.[381]

Beyond the draft codes of offenses against mankind unlike its state responsibility[382] and International organizations draft International responsibility articles yet, the ILC hasn't drafted a code that defines and frames Individuals' International responsibility. However,

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[375] International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950)

[376] The ILC Draft Code of Offences against the Peace and Security of Mankind are until today amended 4 times (1951, 1954,1991 and 1996).

[377] ILC *Supra* 24.

[378] Ibid. Art. 17.

[379] Ibid. Art. 18.

[380] Ibid. Art. 20.

[381] Ibid. Art. 16 on Aggression and Art. 19 about Crimes against UN personnel's.

[382] ILC on State responsibility.

it inserts saving clauses on both draft articles that accept Individuals international responsibility as a separate responsibility.[383]

However, the contemporary International criminal law regime that made Individuals responsible for committing or participating in *core* International crimes is highly influenced by the statutes and decisions of UN-backed permanent, ad hoc and hybrid tribunals. Some of them are International tribunals (e.g. ICC. ICTY and ICTR) and others are Internationalized tribunals (E.g. the UN special court for Sierra Leone, and UNTAET).

These UN-backed tribunals were basically motivated by the desire to make individuals responsible for the serious or *core* International crimes they inflict. That is why they all insert a provision that stress individual criminal responsibility as:

> A *person* who commits a crime [and participate in a crime] within the jurisdiction of the Court shall be *individually responsible* and liable for punishments. (*emphasis* added).[384]

Pursuant to such explicit declaration, almost all (there are some cases that involve organizations) cases that are involved within the jurisdiction of such UN-backed courts are Individual cases.[385]

Summing-up, the contemporary International law that governs the issue of Individuals responsibility for *core* International crimes is a mold of three layers of rules -International humanitarian, human right and criminal laws. Often, there are overlaps of these three, while still there are gaps and problems.

5.4. How to make Individuals criminally responsible?

Once Individuals are subjects of International criminal responsibility, the next question will be: is it a must to institute an International court that would realize individuals' criminal responsibility? The answer lies in the middle of yea and nay. Because, to make individuals responsible for committing *core* international crimes, the need of a criminal

[383] ILC on state responsibility (2001), Art. 58 and ILC on International Organization, (2011) Art. 66.

[384] ICC statute, Art. 25/1 of ICC, ICTY statute, Art. 7, ICTR Statute, Art. 6, Section 1/A of UNTAET, statute of the Special Court for Sierra Leone, Art. 6.

[385] For instance In its decade old system the International criminal court investigate 8 situations and all are against Individuals.

tribunal is unquestionable. But, the type of the tribunal would be different from case to case. It can be International or a domestic one.

Consequently, there are many choices that would conduct trials over Individual persons who commit or participate in those *core* international crimes namely - war crime, crimes against humanity and genocide. *Inter alia*, the application of Universal jurisdiction, institutionalization of International and Internationalized court and obligatory rules that compels state to punish Individuals who inflict the aforementioned International crimes.

5.4.1. Universal jurisdiction

Out of many options of making individuals criminally responsible, the extension of universal jurisdiction is the rising one. Actually, the concept is not a new one. For instance The First Draft of the 1948 Genocide Convention under Article VII stated:

> The High Contracting Parties pledge themselves to punish any offender under this Convention *within any territory under their jurisdiction, irrespective of the nationality of the offender or the place where the offence has been committed*. (*emphasis* added).

However, at the time it got a fierce and staunch critique. The US delegation downplayed it as 'one of the most dangerous and unacceptable of [all the] principles'[386] and the representative of the former USSR mocked it as 'Jealous of sovereignty'.[387] Hence, until recently, it was a mere agenda of some human right groups which advocated for it.

The classic meaning of Universal jurisdiction is:

> A legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim[388]

[386] UN General Assembly, Sixth Committee, Summary Records of meetings (21 September – 10 December 1948).
[387] Ibid.
[388] Kenneth C. Randall, Universal jurisdiction under international law, pp. 785-8 (Texas Law Review, No. 66, 1988).

Later in 2001 the Princeton Project (a legal project established by a bunch of academics and human right advocates) came up with the principle of universal jurisdiction and redefine it as:

> Criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.[389]

Thus, the concept of universal jurisdiction was based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or the victim.[390] This enables national courts to exercise jurisdiction under international law over crimes of such exceptional gravity that they affect the fundamental interests of the international community as a whole. In other words, it is jurisdiction based solely on the nature of the crime.[391]

The so called Princeton principles on Universal jurisdiction (even if they are soft rules with no binding effect, started to establish a norm) identify some 'serious crimes under international law' which include War crimes, Crimes against humanity and Genocide as crimes which are subject of universal jurisdiction.[392] Thus, any individual who commits any of the crimes listed under the principles, including *core* International crimes, is subject (under the Princeton principles) to Universal jurisdiction enabling any country to have jurisdiction over the perpetrators. This was confirmed by a number of cases in pre as well as post Princeton Principles time. For instance in the *Eichmann* Case in 1961, the *Demanjuk* Case in 1985[393], and more recently the *Pinochet* Case in 1999[394], the *Butare*

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[389] Princeton Project on Universal Jurisdiction, The Princeton Principles on Universal Jurisdiction (Princeton University Press, Princeton, 2001). Principle 1.

[390] Mary Robinson**:** 'Forward', Princeton Principles on Universal Jurisdiction. p. 16 (Princeton University Press, Princeton, 2001).

[391] The Princeton Principles on Universal Jurisdiction, Introduction (Princeton University Press, Princeton, 2001).

[392] Ibid. Principle 2:

> For purpose of these principles, serious crimes under international law include (i) piracy, (ii) slavery, (iii) war crimes, (iv), crimes against peace, (v) crimes against humanity, (vi) genocide, and (vii) torture.

[393] Demanjuk v. Petrovsky, US Court of Appeal, 6th Cir., 31.10.1985, ILR 79, 546.

Four Case in 2001[395] and very recently *Hisse`ne Habre´* case in Senegal, 2012[396]. Such cases emphasizing that universal jurisdiction could lead to the trial of perpetrators of international crimes.[397]

On the other hand, the ICC statute in its preamble slightly recognizes universal Jurisdiction over Individual criminals as:

> […] the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.[398]

Out of many justifications given in favor of universal jurisdiction, former United Nations High Commissioner for Human Rights, Mary Robinson argues:

> Certain crimes are so harmful to international interests that states are obliged to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim'. Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world.[399]

Beyond the seriousness of the crimes there are many justifications for the extension of Universal jurisdiction over the commission and participation of *core* International crimes. *Inter alia* first, *core* International crimes are often committed in locations where they cannot be prevented or punished easily. Second, *core* International crimes in the current era are typically committed within the territory of a particular state caught up in internal conflict. Thirdly, the gross and bestial natures of *core* International crimes press on introduction of universal jurisdiction over it. Moreover, these offenses threaten to subvert the very foundations of the [establishments of the] enlightened international community

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[394] House of Lords, 24 March 1999, [1999] 2 WLR 827 (HL).

[395] Cour d'Assises de Bruxelles, 8 June 2001.

[396] The Case Against Hissène Habré, an 'African Pinochet': <http://www.hrw.org/node/93175>

[397] Xavier Philippe, The principles of universal jurisdiction and complementarity: how do the two principles intermesh?, International Review of the Red Cross, p 378 (Volume 68 Number 862 June 2006).(Herein after Xavier).

[398] ICC statute preamble Para. 4.

[399] Mary Robinson, Supra 390.

as a whole[400] and the international legal norms of *erga omnes* and *jus cogens* lend support to the role that universal jurisdiction can play in obtaining jurisdiction over *core* International crimes offenders

However, before extending universal jurisdictions over such grave crimes there are some basic requirements that needs to be fulfilled - the existence of a specific ground for universal jurisdiction, a sufficiently clear definition of such *core* international offences and their constitutive elements, and national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes.[401] After all these steps, there are still obstacles that hamper the plea and exercise of universal jurisdiction like the question of application of sovereign immunity defenses.[402]

5.4.2. Permanent, *Ad hoc* and Hybrid international tribunals

The second judicial mechanism of setting Individuals in the framework of International criminal responsibility is the institutionalization of high level International criminal tribunals. The main justification behind such tribunals is the reality of mass atrocities and of oppressive rule, national judicial systems have often been unable or unwilling to prosecute serious crimes under international law.[403]

The post World War II ad hoc International Military Tribunals (IMT) are the bases of such formulations. There are three basic modalities of institutionalizing such courts. The first and the foremost one is establishment of a permanent International criminal court with a global jurisdiction of making individuals criminally responsible. Contemporarily the International Criminal Court (ICC) is established in that motive. The second modality is the institutionalization of International tribunals which aimed to specific cases. The IMT, ICTY and ICTR are the best instances of it. And thirdly, there is the modality of Internationalization of some tribunals because of their nature. This trend of hybrid courts is very rampant in the UN system[404]. The jurisdiction of the International Criminal Court will, however, be available only if justice cannot be done at the national level.

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[400] S.Z. Feller, Jurisdiction over Offenses with a Foreign Element, in A treatise on International criminal law 5, 32-33 (M. Cherif Bassiouni & Ved Nanda eds., 1973).

[401] Xavier, p.379.

[402] *Infra* discussion on the predicaments of International criminal responsibility of Individuals.

[403] The Princeton Principles on Universal Jurisdiction, Introduction (Princeton University Press, Princeton, 2001). .

[404] See, E.g. United Nations Transitional Administration in East Timor and United Nations Special Court for Sierra Leone.

Out of many mechanisms of punishment of Individual criminals for the commission/participation of *core* International crimes, instituting International tribunal has been very effective. However, the critics over it are multifaceted and ever growing[405].

5.4.3. Obliging states to prosecute criminals: Human right treaties perspective

Although, there is the principle of Universal jurisdiction and establishment of International tribunals but, still the dominant system for making individuals accountable for the commission of *core* international crimes is the domestic courts system. That is why the principle of complementarity of International courts with national courts got a prior consideration up on the establishment of International criminal tribunals.[406]

Hence, the primary burden of prosecuting the alleged perpetrators of *core* International crimes resides with national legal systems. Many International as well as regional treaties impose the duty of investigating and prosecuting perpetrators of such crimes. In other words, State parties to treaties shall take measures as may be necessary to establish its jurisdiction over *core* International offences in cases where the alleged offender is present in any territory under its jurisdiction. For instance, Article 5 of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides:

> Each State Party shall take such measures as may be necessary and establish its jurisdiction over [International] the offences:
>
> (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is a national of that State;
>
> (c) When the victim is a national of that State if that State considers it appropriate.

By the same token, many International humanitarian rules require States to enact legislation to punish such grave breaches, to search for persons who have allegedly

[405] *Infra* discussion on the predicaments of International criminal responsibility of Individuals.

[406] ICC statute, Preamble Para. 10 and Art. 17.

committed such crimes & to bring them before their own courts or to extradite them to another State for prosecution. *Inter alia* the four Geneva conventions in a common article states:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.
>
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed [grave breaches of the 1949 Geneva Conventions], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.[407]

At this juncture, we have to be careful not to confuse the principle of universal jurisdiction with the obligation of prosecution. In the former case it is a privilege/duty of any world nation to prosecute Individuals who commits *core* International crimes. But, in the later case it is an obligation of states to punish their nationals who inflict such serious crimes.

In general, even if there are some extra-judicial mechanisms of making Individual persons responsible for the commission of *core* international crimes, the legal mechanisms are basically the aforementioned three. Nonetheless, there is still a chance of an overlap of jurisdiction that different International rules manage differently.

5.5. Predicaments of Individuals International criminal responsibility

The debate over to what extent Individuals allegiance to their state should extend to and what Individuals' obligations to the International community are seem to be a never-ending one. The international community devised different innovative approaches to

[407] 1949 Geneva Convention I, Art. 49, 1949 Geneva Convention II, Art. 50,1949 Geneva Convention III, Art. 129 and1949 Geneva Convention IV, Art. 146.

make Individual persons criminally responsible for the commission of heinous International crimes classified as core International crimes.

Such responsibility was basically proposed for the very general purpose of guaranteeing lasting respect for the enforcement of international justice.[408] And in particular, in a motive of preventing threats to the peace and security of the world, ending of impunity, prevention of the perpetration of core international crimes and pursuit of global peace and order.[409]

Notwithstanding such 'holy' rationales there are suspicions, questions of legality and questions of legitimacy arising from the criminalization of Individuals' commission of *core* International crimes. Here in below, the author tries to look at the contemporary major impediments of Individuals International criminal responsibility.

5.5.1. The veil of Sovereignty: 'the all time adversary of International law'?

"[…] States are gods, and this is no less true of contemporary secular states."[410] Hence, logically states are untouchable, immutable and ultimate beings. Or like gods, states do not admit their own mortality, and they demand devotion and obedience.[411] This is the traditional as well as the dominant notion of states placed in the International legal system. James Caporaso calls it *the Wesphalian Syndrome.*[412]

Sovereignty of states is the underpinning of the interstate relationship, as well as the foundation of International law. The United Nations Charter affirms this fact by asserting: "The Organization [UN] is based on the principle of the *sovereign equality* of all its Members."[413] (*emphasis* added).

States used such defense of sovereign equality as a justification of their actions within their respective territories. On the other hand, an Individual accused of committing a

[408] ICC Statue, preamble.

[409] Ibid.

[410] Kahn, P.W., Putting Liberalism in Its Place, p.228 (Princeton: Princeton University Press, 2005).

[411] David Luban, Fairness to rightness: jurisdiction, legality, and the legitimacy of international criminal law, p. 577 in Samantha Besson and John Tasioulas, Philosophy of International law (Oxford University Press, 2010).

[412] James Caporaso, Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty p, 16 (International Studies Review, Volume 2, Issue 2, 2000).

[413] Charter of the United Nations, Art. 2, para. 1 (San Francisco, USA, 24 October 1945).

core International crime in an International tribunal raised the question of 'by what right do you try me?' Thus, arguments based on sovereignty suffocate International trials and international legal deliberations. Even objections of anything International as 'this would intrude on our sovereignty' were often used as a euphemism for 'we don't like this.' [414]

Many International rules as well established principles are cremated by making recourse to the weapon of sovereignty by states. States commit whatever they want in their territory and pick the sovereignty card as a justification. In other terms, the overweening nation-state all too readily begat the horrors of nationalism. The jurisprudence of sovereignty, in turn, all too easily lent a spurious legitimacy to these horrors.'[415]

The defense of sovereignty is very rampant with regard to Individuals' International criminal responsibility. Especially in protest of Universal jurisdictions over *core* International crimes committed by Individuals. This hampers the global effort of preventing impunity and leaves Individuals who threaten universal law and order unpunished.

However, when it comes to Individuals' international criminal responsibility, the classical Westphalian theory of equal sovereign states becomes an outmoded arrangement. That is why scholars from different angles as well as the International legal framework denounce it. The UN charter creates an exception to sovereignty[416] in some circumstances, as a sign of the erosion of absolute sovereignty.

The stance of 'there is no criminal defense called sovereignty' was latter adopted in major International tribunals as well as in International rules which denounce the defense of sovereignty as a justification for committing core International crimes. The IMT in its judgment states:

> The very essence of the Charter (of the International Military Tribunal) is that *individuals have international duties which transcend the national obligations of*

[414] Robert Cryer, International Criminal Law vs State Sovereignty: Another Round? p.981 (The European Journal of International Law Vol. 16 no.5, 2006).

[415] I. Ward, Justice, Humanity and the New World Order, p. 18 (August 2003).

[416] UN Charter . Art, 2, para. 7:

> But this principle [Sovereign equality] shall not prejudice the application of enforcement measures under Chapter VII.

> *obedience imposed by the individual State.* He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.[417] (*emphasis* added)

Recently, the trial chamber of the ICTY reaffirmed IMT's stance over the defense of sovereignty in more strong words as:

> Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are *not crimes of a purely domestic nature*. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and *transcending the interest of any one State*. The Trial Chamber agrees that in such circumstances, *the sovereign rights of States cannot and should not take precedence over the right of the international community* to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.[418] (*emphasis* added)

Consequently, the ICTY trial chamber denies the invocation of sovereignty as a defense against serious/core International crimes. Thus, accused persons in International tribunals lack a positive answer for their query of 'by what right do you try me?

On the hand the International law commission argues for the denial of defense of sovereignty for Individuals from exclusion of Individuals from the realm of sovereignty perspective.

> The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State.[419]

The ICTY trial chamber on *Tadić* case reaffirms this stance of the ILC as:

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[417] Before Resolution 95 of the United Nations General Assembly of 1946, the rules of the Nuremberg Charter and the decision of the Tribunal are part of International Law.

[418] ICTY trial chamber decision on Prosecutor v. Duško Tadić a/k/a "dule" case.

[419] The Attorney-General of the Government of Israel v. Eichmann (D.C, Jerusalem 1961).

> In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State.[420]

The contemporary notion of the invocation of sovereignty as a viable defense by state parties as well as Individuals in relation to the commission of *core* international crimes has a dual perspective. First, since *core* International crimes are crimes inflicted against humankind in general jurisdiction over individuals who inflict such grave crimes would not be confined. Secondly, although, states still have the right of sovereign equality vis-à-vis other world states, the defense of sovereignty can only be raised by states only, whereas Individuals accused of committing *core* International crimes have no right of raising it personally. Nonetheless, such generalizations are found impractical.

Still, scholars denounce International criminal tribunals which are established to deal with Individuals as the maker of so called Dual sovereignty by being a supranational body. But, in defense of the tribunals jurists argue otherwise, as International tribunals are not supranational bodies, but an international body similar to existing ones extension of national criminal jurisdiction. Consequently it doesn't, infringe on national sovereignty.[421]

However, the existence of International criminal jurisdiction over Individuals doesn't mean sovereignty is eroded at all. Denial of the role of sovereignty in the contemporary notion of Individuals' International criminal responsibility would be a *head in the sand* stance. Not even the so-called 'likeminded' states that promote [universal jurisdiction] are heretical enough to reject the religion of sovereignty.[422] Hence, Sovereignty, the old adversary of International law continues its haunting of efforts to make individuals criminally responsible for the commission of core international crimes.

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[420] ICTY trial chamber decision on Prosecutor v. Duško Tadić a/k/a "dule" case.

[421] Cherif Bassiouni, as quoted by Robert Cryer International Criminal Law vs State Sovereignty: Another Round? p.984 (The European Journal of International Law Vol. 16 no.5, 2006).

[422] David Luban, Fairness to rightness: jurisdiction, legality, and the legitimacy of international criminal law, p. 578 in Samantha Besson and John Tasioulas, Philosophy of International law (Oxford University Press, 2010).

5.5.2. Of jurisdiction: Universal, national or complementary?

The question of primacy of jurisdiction over Individual criminals for *core* International crimes is another challenge to the issue. The challenge consists of three major paths – universal jurisdictions[423], national jurisdiction and complementary relations. Answers given to the question of jurisdiction are helpful in two ways. First they will stabilize the fierce debate of International criminal responsibility vis-à-vis state sovereignty. And secondly, they will answer what should be done and how it should be done with regard to Individuals' International criminal responsibility. Hence, basically answering jurisdiction over individuals is an attempt of determining the question of did national and International tribunals competitive or collaborative?

Traditional theorists of the concept came up with four major principles that favor national courts over International ones namely, the territorial principle, which gives states jurisdiction over crimes committed in their territories, as well as crimes committed elsewhere with effects in their territories, the nationality principle, which gives states jurisdiction over crimes committed by their own nationals, the passive personality principle, which gives states jurisdiction over crimes committed against their nationals and the protective principle, which gives states jurisdiction over crimes committed against vital governmental interests.

On the other hand, modern theorists of the concept came up with the brand new principle of universality, which holds that some crimes are so universally abhorrent and thus condemned that their perpetrators are *hostis humani generis*— enemies of all people— and allows that jurisdiction may be based solely on securing custody of the perpetrators.

These two thus stretch in the two extremes sides. Proponents of the traditional principles that give a jurisdiction over Individual International criminal responsibility for *core* international crimes favor national courts. The opponents of it propose the principle of universal jurisdiction over such crimes to any court in the world since these *core* International crimes are transcendental of borders. The need of a third middle way forward from this impasse gives a birth for the principle of complimentarity which allows jurisdiction over Individuals for both national as well as International tribunals simultaneously as some people call it the ICC model[424].

[423] *Supra* discussion on Universal Jurisdiction.

[424] Xavier, p.380.

The principle of Complementarity is a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction.[425] It is all about giving the primary jurisdiction to a certain body and when that body fails to exercise its jurisdiction a body with secondary jurisdiction will take the case. In the case of Individuals' criminal responsibility for the commission of and participation in *core* International crimes the complementarity principle advocates for primary jurisdiction for national courts when national courts fail to exercise in their jurisdiction, International tribunals will take the matter.

Hence it is a two edged concept. The fact that international prosecutions alone will never be sufficient to achieve justice emphasizes the crucial role of national legal systems in bringing an end to impunity on the one hand and the sad reality that territorial states often fail to investigate and prosecute serious human rights abuses[426]. Consequently, the principle of complementarity is based on a compromise between respect for the principle of state sovereignty and respect for the principle of universal jurisdiction,[427]

Complementarity transforms the old suspicious relationship of National-International tribunal's competitive relationship to a new collaborative one. Since it is a very recent phenomenon, it emerges out of recent UN-backed International tribunals. Both the ICTY and the ICTR have concurrent but primary jurisdiction over domestic courts. Thus they may hold a retrial when national proceedings are deemed not to have been impartial, independent or diligently conducted.[428] As Louise Arbour, Prosecutor of the ICTY said:

> Recourse to an international criminal forum will occur when horrendous crimes have been committed with the collusion or impotence of national authorities.[429]

However, the statute of the International Criminal Court is the one that came up with well articulated provisions over the principle of complementarity. The ICC statute in its preamble stresses national jurisdiction:

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[425] Ibid.

[426] Mary Robinson, supra 390.

[427] Xavier, p.380.

[428] The Statute of ICTY Art. 9 and the statute of ICTR Art. 8.

[429] Statement by Justice Louise Arbour to the Preparatory Committee on the establishment of the International criminal Court, 8, December 1997.

> Recalling that, it is the duty of *every State to exercise its criminal jurisdiction over those responsible for international crimes*.[430] (*emphasis* added).

The statute further clarifies its jurisdiction clearly as the International Criminal Court established under the Rome Statute is held to be complementary to national criminal jurisdictions.[431] Furthermore, the statute provides conditions of (in)admissibility of cases to the ICC tribunal. Thus, If the state who had the primary jurisdiction over Individuals suspected committing and participating in *core* International crimes has already commenced an investigation and prosecution over it,[432] or if the Individual is already tried in the national court[433], the case will be inadmissible before the ICC. However, Investigations and trial will be genuine.[434]

Failure to fulfill the aforementioned conditions led the Issue to the other way round. i.e., if the national court with primary jurisdiction fails to investigate and put the case of Individuals on trial at all or if the investigations and trials are sham, the ICC will take on the case under the principle of complementarity. The Statute clearly provides[435] indicators of sham nature of investigation and trial held by the national court as:

A. [If] the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility [for *core* International crimes];

B. [If] there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

C. [If] the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

[430] ICC Statute, Preamble para. 6.
[431] Ibid. Para 10..
[432] Ibid. Art. 17/1/ a and b.
[433] Ibid. Art. 17/1/ C.
[434] Ibid. Art. 17/1/ A .
[435] Ibid. Art. 17/2.

Hence this Innovative way forward by the ICC is intended to ensure that ICC's jurisdiction is only secondary to domestic courts. The ICC will therefore exercise its jurisdiction only when national authorities are either unable or unwilling to genuinely investigate and prosecute *core* International crimes committed by Individuals.

Although, the principle of complementarity rose as a compromising principle of universal jurisdiction and national jurisdictions, it is not flawless. Out of many challenges for it the lack of precise definitions of *core* international crimes where complementarity will be applied and the subjective nature of conditions of implementation of it are the major challenges.[436]

The best instance of such challenges to the principle of complementarity and its conditions (as the ICC statute provides) is the recent controversy between Kenya/African Union and the ICC. It all started after Kenya's contested 2007 elections. In the aftermath of the election, violence erupted all over Kenya, often in an ethinicized manner.[437] The violence resulted in the death of more than thousand of peoples and the displacement of hundreds of thousands of peoples[438]. A Kenyan Commission of Inquiry, also known as *The Waki Commission* (named after its Kenyan chair Justice Philip Waki), which was a UN-backed effort, was established to audit the results of the violence. Among the notable recommendations of the commission was the establishment of a special tribunal to try those responsible for the worst abuses of the violence. However, beyond a sporadic attempt of making individuals responsible for their actions, Kenya failed to take measures as recommended by the inquiry commission.

At this juncture, since Kenya is the signatory of the International Criminal Court, the prosecutorial office of the ICC started its investigation over *core* International crimes especially crimes against humanity committed during the violence and finally indicted six Kenyans as the main culprits of the violence.[439] Kenya immediately raised its objection of the indictment as violative of the principle of complementarity as provided in the statute and challenged the admissibility of the cases before the ICC in 2011 citing the capacity of

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[436] Xavier, pp. 389-390.

[437] Human Rights Watch Report, HIGH STAKES Political Violence and the 2013 Elections in Kenya p. 1 (2013) Available at < http://www.hrw.org/sites/default/files/reports/kenya0213webwcover.pdf > last visited on February 2014.

[438] Ibid.

[439] Situation in the Republic of Kenya: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx last visited on February 2014.

its new constitutional framework to handle these crimes. The ICC on its part argued that Kenya failed or was unwilling to investigate and prosecute those responsible for the commission of *core* International crimes genuinely hence, the indictment resulted from the secondary jurisdiction of the court. Moreover, the court referred to the *same person, same conduct rule*, which meant that Kenya needed to demonstrate that its criminal justice system was investigating the ICC suspects (the six ICC indictees) for the same crimes which had caused the ICC to be seized of the matter.

In the mean time, Kenya asked the UNSC for a deferral,[440] a quest that was later supported by the African Union[441] and which finally, led the Kenyan parliament to decide that Kenya ought to withdraw from the ICC.[442] However, its withdrawal doesn't mean it stopped the ongoing trials.

In sum, even if the principle of complementarity is considered as way out from the two old extreme notions of universal jurisdiction and national jurisdiction over Individuals' criminal responsibility, it is not panacea. Rather, the subjective criteria within becomes a new challenge for the effort ahead.

5.5.3. The *realpolitik* Conundrum

Modern critical legal theorists say 'law is politics.'[443] Meaning law is one of the means of expanding political gains for the one who holds the magic wand of power. International law is very susceptible to kidnapping by International politics and diplomacy. That finally results International politics and International law in the same room of serving the mighty one. With this regard some peoples even goes to invoke the International law as an enemy of politics;

> The fight for an international Rule of Law is a fight against politics, understood as a matter of furthering subjective desires and leading into an international anarchy.

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[440] Article 16 of the ICC statute allows …

[441] Decision on Africa's relationship with the international criminal court (ICC) at the extraordinary session of the Assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia.

[442] Kenyan MPs vote to quit international criminal court: <http://www.theguardian.com/world/2013/sep/05/kenya-quit-international-criminal-court > last visited on February 2014.

[443] Critical Legal theory, <http://www.law.cornell.edu/wex/critical_legal_theory> last visited on February, 2014.

> Though some measure of politics is inevitable, it should be constrained by non-political rules.[444]

Hence, making Individuals criminally responsible for the commission of and participation in *core* International crimes is very prone for the International *realpolitik*. That is why in some manner justice given against certain Individuals by International tribunals was/is downplayed as a 'Victor's justice'.[445]

Indian jurist Radhabinod Pal was a dissenter during the Tokyo tribunal decision against Japanese criminals of World War II and in his no guilt dissenting opinion Radhabinod states:

> So long as the international organization continues at the stage where trials and punishment for crime remain available only against the vanquished in a lost war, the introduction of criminal responsibility cannot produce the deterrent and preventive effect.

The challenge from International *realpolitik* continues to haunt the International legal framework of Individuals' criminal responsibility even in a wider and bigger manner. During the trials of suspected culprits in International tribunals, many accused Individuals downplay the tribunals as political weapons,[446] even as the devil's court.[447]

The best instance of the challenge from politics against International criminal responsibility of Individuals is the ever growing controversy with regard to the only permanent International tribunal - The International Criminal Court (Some call it the International Controversy Court[448]).

The challenges of the court are multifarious. However, since the topic is about the political challenges to International criminal liability of Individuals the author sticks with it.

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[444] Martin Wight, Western Values in International Relations' p. 122, in Butterfield, Wight, Diplomatic Investigations; Essays in the Theory of International Politics (1966).

[445] Andrew Altman and Christopher Heath Wellman, A Defense of International Criminal Law p. 34 (2004).

[446] See, E.g. Slobodan Milošević Opening Speech at the ICTY in 2004 Available at <http://a-place-to-stand.blogspot.ae/2004/11/milosevics-opening-speech.html> last Visited on February 2014.

[447] Mladic Snubs Karadzic in Hague Courtroom, <http://www.balkaninsight.com/en/article/mladic-refuses-to-answer-karadzic-s-questions> last visited on February, 2014.

[448] Sreeram Chaulia, The International Controversy Court: Why its selective justice is failing Africa and the world? <http://rt.com/op-edge/africa-international-controversy-court-183/> last visited on February 2014.

The ICC's political challenges, thus mainly come from two perspectives. The first challenge is a theoretical one that is directly related with its establishment statute. Although, the majority of the world's states are signatories to the statute[449] there are still scores of states who are not yet part of the ICC system for the reason that it transcends the line of sovereignty and intrudes upon internal politics of sovereign nations. Despite the fact that ICC's jurisdiction is the result of its secondary jurisdiction by the principle of complementarity, opposition remains very stiff.

The second challenge to the ICC came from its practice. Until today,[450] the ICC investigated eight situations and indicted Thirty Six Individuals and all of them are Africans. From the practical point of view the first challenge is unless it is a western political tool, why only Africans? Why not other Individuals who commit heinous/*core* crimes in other parts of the world? In other words, it is the *tu quoque* argument that the ICC tries to address from different angles. The ICTY trial chamber in one of its decisions addresses such a claim international humanitarian law point of view as as:

> The *tu quoque* argument amounts to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by the other party to the conflict. However, the *tu quoque* defence has no place in contemporary international humanitarian law. It is fallacious and inapplicable in international humanitarian law as it envisages humanitarian law based upon a narrow bilateral exchange of rights and obligations. In contrast, the bulk of humanitarian law lays down absolute obligations that are unconditional and not based on reciprocity.[451]

The second political challenge against the ICC from practical point of view is its new practice of indictment of Heads of states during their tenure. The African Union in its Decision on Africa's relationship with the international criminal court (ICC) declared that:

> To safeguard the constitutional order, stability and, integrity of Member States, *no charges shall be commenced or continued before any International Court or*

[449] The ICC statute came in to force after 120 signatory world states ratified it.

[450] February 2014.

[451] Prosecutor v. Kupreskic et al, Judgement, Case No. IT-95-16, T.Ch.II, 14 January 2000, paras. 515-520.

Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office[452]

However, such a political stance of AU to immunize heads of states got fierce critics. First and foremost it is a major setback to the global legal war on impunity. Secondly, it denied justice for victims.

In general, from the ever growing controversies over the ICC it is not arbitrary to say *realpolitik* and states' interest will continue, in the future, to be important obstacles to the effectiveness of the effort to make Individuals answerable for the *core* international crimes they commit.

5.5.4. Institutional challenges for International criminal Justice system

While internationalizing certain crimes as *core* International crimes, there are questions that are raised in relation to a body that will administer such a case. Which body should investigate and prosecute such crimes? Could the world manage to create a supranational body that investigate *core* International crimes and held culprits responsible? As the author briefly discussed[453] the possibilities of forums that can investigate *core* International crimes and set the offenders on trial, there are three choices – universal jurisdiction, International tribunals and internationalized domestic tribunals.

However, with all the jurisdictions the task of tribunals is under the mercy of states. In other words, the contemporary jurisdiction over Individual International criminal responsibility is only possible with the blessing and cooperation of states. Once concerned states object an internationalized investigation or trial of a case, that would be enough to cripple the Institution or the tribunals.

Legal scholars and practitioners have on various occasions condemned the International criminal institutions for their perceived inefficiency, maladministration and misplaced attempts to tackle adequately contentious issues of substantive or procedural law.[454]

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[452] Decision on Africa's relationship with the international criminal court (ICC) at the extraordinary session of the Assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia.

[453] *Supra* discussion on Jurisdiction.

[454] Sarah Joseph, Adam McBeth (Editors), Research Handbook on International Human Rights Law, p.256 (January 30, 2010).

Hence, the main problem of such efficiency is directly resulted from states unwillingness to cooperate with the Institutions.

International tribunals generally have no executive powers and no police forces of their own; they are totally dependent on full, effective and timely cooperation from states parties.[455] Thus, their dependence on states and other horizontal Institutions is inevitable. But, such a horizontal relationship is a difficult task. The practical indicators of such an Institutional gap over International crimes are the statistics over International tribunals' punishment rate.

Out of many International tribunals since the establishment of the IMT, the Individual punishment rate of the major International tribunal is daunting. Out of thousands of culprits of *core* International crimes during the Second World War, only a few of them were ever set on trial. The same is true in both the ICTY and ICTR trials. So far out of hundreds of thousands of participants, only 29 peoples in the former case and 161 in the latter instance faced justice.[456] The ICC trend is even less praiseworthy given that that till today (In more than a decade period of time) it was only able to indict 36 peoples with even a much less number of trials[457].

Apparently, contemporary International criminal institutions are institutions that tried to survive as marred by controversy and criticism from every angle. And the weak stature of such institutions have a direct impact over International criminal responsibility of Individuals for the commission and participation of *core* International crimes like war crime, genocide and crimes against humanity.

5.5.5. Opening the *Pandora's* Box?

Once individuals are internationalized for an action they do, where is the limit of such internationalized personality? Does such International criminal responsibility create *supra-global* citizenship? To whom are Individuals supposed to show their allegiance –to their state or to the International community? Are some of the questions that will possibly raised at this moment.

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[455] Jakob Katz Cogan, International Criminal Courts and Fair Trials—Difficulties and Prospects, 27 YALE J. INT'L L. 111, 119 (2002).

[456] ICTR/ICTY Case Law Database, < http://unmict.org/cld.html > last visited on February, 2014.

[457] Cases and Situations: <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> last visited on February, 2014.

The traditional states responsibility results from states sovereignty, but to ask where International responsibility of Individuals arises have no explicit answer as of states responsibility. Hence, with all these unanswered questions making Individuals Internationally responsible would result in both theoretical as well as practical problems.

Let's say International tribunals ensured to Investigate and prosecute all *core* international crimes and the culprits respectively. Can they inspect and deal with every crime in all corners of the world? Is it not opening the *Pandora's Box* with no assurance of where such trend would lead the issue of International justice? By considering the very slow pace and highly expansive current International trials with regard to *core* International crimes, imagining an all inclusive and strong International as well as internationalized tribunals is unrealistic unless the global legal community devises a certain workable way forward.[458]

Generally, the effort of international criminal responsibility of the individuals goes a long way, but is marred by different predicaments that need a viable global policy as well as legal framework. Yes, the struggle against impunity of Individuals for the commission and participation in *core* International crimes resulted in some historic successes and were able to devise new legal principles that resulted in an anthropomorphic International law, which subjectifies Individuals. However, out of rampant *core* International crimes the contemporary legal framework is able to deal with only the tip of the iceberg. In other words, as a result of theoretical and practical challenges the larger portion of *core* International crimes is out of the realm of International investigations and culprits are still unpunished. The global community is thus at the cross road of addressing such matters.

[458] The author tries to recommend some mechanisms to deal with the current impasse. See *Infra* recommendations.

6. CONCLUSIONS AND RECOMMENDATIONS

If sovereignty is the main virtue of International law so do responsibility. Separating the two is obliteration for the two. States as the traditional epicenter of International law can only enjoy sovereignty in as long as other states and subsidiary International organs are responsible for their action which may violates other states sovereign rights.

Nonetheless, the notion of responsibility as the corollary of sovereignty was not an idea that develops in one night rather it was a result of a long time dominance of absolute sovereignty which considers states as infallible and untouchable actors, especially in their domestic affairs. Such conception was directly clash with the earliest roots of modern International law.

Jurists of age of enlightenment like Vitoria, Suárez, Gentili and Grotius as dubbed as founding fathers of International law in their treatises declares the inseparability of all international actors in International law – states or International organizations or individual persons as part and parcel of the global community and in effect as subjects of International law.

Hence, *any* wrongdoing inflicts against *any* member of the global community will result an International responsibility. But, this holistic approach was latter starts to fade especially after the rise of legal positivism which favors states in their internal as well as offshore affairs. With regard to a mighty and impervious state, the peace treaty of Westphalia among the then European superpowers was a milestone. Which dominate the whole International legal contour as well as diplomatic relationship to the middle of the 20th century. The *Westphalian* International law knows only states as the lone subjects of International law and International relations and such mighty state is not responsible for any act it is doing against anyone not to mention irresponsibility for wrongdoings of its Individual citizens against any other International body.

The age old belief recognize only states as the sole actor of international law and all other beings like Individual persons and International organizations as subsidiary organs of states that are only known through their states. In other words, the *Westphalian* International law as blended with the *Hegelian* positivism; consider states as the one and the only subject of International law which is able to enjoy rights and the rest (Individuals, International organizations, transnational corporations and etcetera) are objects of International law.

However, the more states interaction increased it followed by the involvement of other bodies to International rules as well as relations. *Inter alia* the Involvement of Individual persons is one of the major one. Individuals per se became the main actors of International law. While coming to the front, the need of International rules that governs the regime of Individuals rights and duties became necessary. This results the change of the old theory of International law that objectify Individuals as a subsidiaries of states and bears the modern notion of International law that recognizes many bodies as subjects of International law – the modern subject theory of International law.

The 20th Century witness two devastative world wars which causes global catastrophes and apocalypse. Upon the end of the First World War the global legal environment was a bit hotter and trying to draft rules that extend rights for Individuals and responsibility for Individual criminals who commits International crimes. Among other International efforts the Versailles treaty of 1919 imposes Individual criminal responsibility for the culprits of the war but, because of different legal and political circumstances the effort was not successful. In the mean time, World War II happens in a more horrific and destructive manner. Unlike its predecessor the end of World War II was the beginning of another great leap of pulling Individual persons to the center of International law.

Although, the newly established United Nations upon the end of the global war reaffirms sovereign equality of state as one of the main principles of the UN Charter but, it was not absolute. In other terms, the UN Charter creates exceptions over sovereignty. Besides the charter the global legal community establishes the International Military Tribunal which constitutes two main tribunal chambers – The Nuremberg Tribunal and the Tokyo Tribunal.

The IMT charter was the first comprehensive International legal document which recognizes Individual International criminal responsibility for a certain selected crimes like crimes against humanity, crimes against peace and war crime. Furthermore, the IMT trials set a new precedent of International criminal responsibility to the extent of explicitly providing “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” and punish major culprits of the second world war. Immediately after the IMT trials the global legal effort to fight impunity and to protect Individuals mushroomed. The UN came up with different new rules (like the 1948 UDHR and the Genocide convention) that gives rights and privileges to Individuals and at the same time makes violations of such rights an unlawful act. Latter followed by scores of UN human right documents like the ICCPR, CEDAW, CAT and etcetera. Moreover,

newly established UN bodies (like the ILC) try to codify customary practices (e.g. Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*)* and tries to draft new International criminal rules (e.g. the 1951 first Draft Code of Offences against the Peace and Security of Mankind which latter amended in 1954, in 1991 and in 1996).

Out of the UN frame work the major effort on protection of Individuals and making an act which violates it a criminal act was the 1949 four Geneva conventions on the law of war (which latter followed by the two Geneva protocols). Though, International rules with regard to protection of Individuals grown up in the post World War II period but, the effort of making Individual persons criminally responsible in the International arena was very weak beyond the IMT trial, with the exception of some sporadic and disorganized efforts.

Hence the world again witnesses some atrocities in different parts of the world. *Inter alia*, the 1990's human catastrophes in the former Yugoslavia and Rwanda. Such atrocities awaken the global legal community and become the immediate triggering factors to establish UN-backed *ad hoc* tribunals of the ICTY and the ICTR. This finally results the first permanent International criminal court in the world - ICC. Beyond, these *ad hoc* and permanent International tribunals, internationalized criminal tribunals that aim to punish Individual persons established all over the world with the UN backing (e.g. UNTAET, The special court for Sierra Leone etcetera).

Thus, the contemporary International criminal responsibility of Individuals for the commission of *core* International crimes is a post World War II legal construct which emerges out of the IMT trials and latter reinvigorated by International Human right, Humanitarian and criminal rules.

In this paper the author tries to excavate the very roots of International criminal responsibility of Individuals for the commission of and participation in core International crimes in line with the overall development of International law. And finally, tries to show the contemporary International legal frameworks that govern the issue with the invocation of recent developments.

Hence the whole theme of this paper is the anthropomorphic aspect of International law with a special emphasis to the criminal responsibility regime. To make the objective of the paper clear, the author first frames the conceptual and practical issues that defines and shapes the contemporary place of Individual persons in International law specially their status along with states. Upon framing three major theories that will explain Individuals status in International law are identified. The oldest of all the theories is the

object theory which considers Individual persons as a subsidiary of state which has no International legal personality. On the other hand, the ultimate actor theory recognizes individuals as International actors but, deny International personality. The modern and the more practical theory of Individuals place in International law is the subject theory which tries to detach Individuals from the manacle of states and recognize it as a well fulfilled International legal persons.

Based on such discussions on the theories and endorsement of the subject theory, the author proceed to the identification of *core* International crimes that Individuals will be criminally responsible, which will help to answer the research questions raised. However, the lack of single International rule with regard to International crimes in general and core International crimes in particular makes the concept contentious. I.e. contemporarily the definition of International crimes is far different from case to case and a universal list of such crimes never exists and still not happens. This makes the road ahead to defining *core* International crimes cumbersome.

Charters and Statutes that establish International tribunals and decisions of such tribunals from the IMT to the ICC, use different adjectives that indicate the *core* nature of some International crimes. Serious crimes, gravest crimes and even Super Crimes are some of the terms the legal regime adopts to show the degree of some International crimes. But, the list of such crimes was evolved differently in different times. For instance the IMT charter recognizes crimes against peace, crimes against humanity and war crime as the only serious crimes that the tribunal will have a jurisdiction. But, latter developments of new International crimes like genocide force the redefinition of serious nature of crimes with an inclusion of genocide. That is why the 1990's UN-backed tribunals (like ICTY and ICTR) as well as the ICC adopt the meaning of serious/grave crimes in the tripartition of – Genocide, War Crime and Crimes against humanity. Although the crime of aggression is trying to hold the ladder of serious International crimes along with the aforementioned three, yet it is very controversial with less practical legal instances.

As a result of this, the author identifies Genocide, War Crime and Crimes against humanity as the contemporary lists of *core* International crimes which fulfill the legal as well as practical conceptualizations. But, such core International crimes are re(defined) in different documents widely and in a more inclusive manner of other International crimes like torture.

Once, Individuals status in international law was determined in the realm of International responsibility and contemporary *core* International crimes are identified, the next step

was putting individuals and their International criminal responsibility for the commission of or/and participation in *core* International crimes in one spot. Such fusion of Individuals with core international crimes will testify the extent of Individuals criminal responsibility in International law, it will determine the state-Individuals dichotomy and it will indicate the evolution and contemporary stances of International law with regard to individuals in line with core International crimes. Which are the very research questions of this paper.

Hence, likewise many issues that are raised in this paper dealing with such questions have no easy answer. But, the ever growing International law tries to suggest some way forwards. Though, there are some old recorded instances of Individual criminal responsibility for certain International crimes since the 15th century, but, the major International development was not more than a century.

Traditionally, the state per se was a hiding place of Individual criminals under the guise of absolute sovereignty. Even in some instances that individuals are found guilty of committing some core International crimes the state was the liable body instead of Individuals vicariously. In other words, the earlier version of International criminal responsibility of individuals was nexus with state and collective by its nature. However, such notion was not effective especially in the eye of fighting the rising number of heinous crimes and the high rate of impunity under that used states sovereignty as a pretext.

Once and for all such hiding wall of state demolished by the rise of a new International jurisprudence that redefines International responsibility beyond states, Individuals began to be treated as a separate International entity. Thus, the contemporary notion of Individuals International criminal responsibility for core international crimes is molded by the separation of Individuals and their states. Since the IMT different International rules developed the explicit Individuals criminal responsibility because core International *crimes are committed by Individuals not states*.

Among the new perspectives of Individuals International criminal responsibility the extension of it from the direct notion of responsibility for commission of an International crime to more inclusive second degree participation is the major one. I.e. contemporarily commission of core International crimes is not the only degree of crime that results responsibility rather, participating in any form (e.g. accomplice and Incitement) are also punishable acts. This stance was first taken by the IMT charter and the statutes of UN-backed tribunals like the ICTY and ICTR as well as the ICC statute re-affirmed this conception even in a wider sense.

On the other hand, even if the dominant rules and arguments that favor International responsibility of individuals are in line with criminal responsibility, newly rising developments (e.g. the ICC statute and the UNTAET Regulation) are trying to include International civil liability as part of the International responsibility of Individuals.

Inter alia, the present day International criminal responsibility regime is shaped by the three main regimes of International law. In this paper the writer tries to show the extent, development and present day stance of Individuals International criminal responsibility through these three regimes namely, International humanitarian rules, International human rights rules and International criminal law rule.

Humanitarian rules especially as the four Geneva conventions on the law of war states, mainly regulates the war crime regime of the three core International crimes that are identified in this papers. The Geneva conventions in a common article recognizes Individuals criminal responsibility for the commission and participation in war crime that latter adopted by many International criminal tribunals. International human rights rules in their part mainly develop the criminal responsibility regime with regard to crimes against humanity and genocide. These human right rules were distinctively two edged, first it gives rights and privileges to individuals and secondly, it impose responsibility against violators of such rights and privileges. In other terms, genocide and crimes against humanity are International crimes that results individual responsibility because it violates individuals rights to life, dignity and integrity that are given by International human rights rules. Hence, this corollary relation of rights and duties are treated in the paper with details.

Among the three major International law regime that governs the regime of Individuals international criminal responsibility the third one is International criminal law regime which develop since the IMT and latter strengthened by different ILC draft articles and contemporarily reaches to the establishment of the first permanent International criminal court in history. International criminal law is a more inclusive legal regime which treats the three *core* International crimes and beyond as crimes that results International criminal responsibility for Individuals. Especially, the contemporary practical cases of Individuals criminal responsibility are resulted from this international criminal law dominion (e.g. UN-backed *ad hoc* (ICTY and ICTR), hybrid (like UNTAET, The special court for Sierra Leone) and permanent (ICC) tribunals).

The other main point this paper deals with was the modalities of making Individuals criminally responsible for *core* International crimes. Currently the International legal framework recognizes three types of such modalities (at least theoretically). The first one

is the case of Universal jurisdiction that enables any world state to establish legal jurisdictions over core International crimes. The Princeton principles codified these customary practices and currently it is used as guidance. The second modality of Individuals International criminal responsibility is the institution of International and Internationalized tribunals. Since the IMT this modality was common especially after the 1990's Un-backed International tribunals. The third way that enables Individuals International criminal responsibility is the obligation that imposes duties on states to punish Individuals who commits and participates in *core* International crimes. This modality was mainly adopted under UN basic human right documents. However, these three modalities get faces different problems. Inter alia, there is an overlap of the three modalities, the laws and practices that establish such modalities lack binding effect or they are soft laws in nature and states refusal to comply with it are the major problems.

Although, individuals are becoming one of the main actors of international law in general and the main responsible bodies for *core* International crimes but, the challenges of such developments are enormous. Hence, in writing this study the author finds theoretical, legal and practical challenges that the contemporary notion of Individuals International status as well as their International criminal responsibility for core International crimes faces.

Among many general challenges, sovereignty as the old adversary of international law and International relations is the first one. Though the post World War II International legal framework limits the extent of sovereignty in line with other nations as well as global community's interest, still many International and internationalized tribunals faces the challenge of sovereignty from states as well as from accused individuals. Among such tribunals the recent and the sole permanent International criminal tribunal - the ICC faces such question of sovereignty. In general term, states wary of a supranational entity that dried their sovereign rights and accused Individuals on the other hand claim they belong to their own states. The debate over it is ever growing.

The second major challenge the author identified with regard to International criminal responsibility of Individuals for *core* international crimes is the issue of jurisdiction. The rise of universal jurisdiction in the one hand, the traditional national jurisdictions on the other hand and the newly ICC statute coined principle of complimentarity that gives priority to national jurisdictions but, upon failure it allows International criminal tribunals will exercise their jurisdiction are the main controversies. Though, the principle of complimentarity seems the middle way to solve International-National tribunals' impasse,

complementarity per see have its own unsolved problems especially with regard to the conditions and terms that recently results International controversies.

The other contemporary challenge of anthropomorphic International criminal jurisdiction over individuals is the global *realpolitik*. States and leader are trying to bend the purpose and principles in their favor and it results regression in the development of the notion as well as the purpose of fighting impunity. And finally the author raised current challenges of weak criminal institutions that mis(manages) Individuals International criminal responsibility for *core* International crimes and the unpredictable future of anthropomorphic International criminal policy that would inflict damage to itself.

Hence, the challenges of the contemporary criminalization of Individuals are many and the hurdles to pass are numerous. But, if it has to fulfill its purpose of fighting impunity and securing the global law and order, there are many steps that should be taken by different international organs as well as state. Thus, based on the challenges and gaps that hampers the global effort that are identified in this paper, the author recommend the following basic steps for concerning bodies as a way forward.

As the writer tries to indicate in this paper, the major challenges of the contemporary state of Individuals International criminal responsibility with regard to *core* International crimes are categorically three – theoretical, legal and practical challenges.

Concerning theoretical challenges:

What basically lacks is a comprehensive theorization of the status of Individuals in International law and a conceptualization of *core* International crimes. Thus, with regard to the former jurists and scholars are expected to conceptualize the notion of anthropomorphic International law and to comprehensively compress theories of Individuals place in international law that presently scattered and sporadic. In other words, a theory that briefly explains why individuals as a separate International entity would be responsible for their action is essential. This will ease the road to face major challenges of the issue like sovereignty.

The other theoretical gap over the issue deals with the notion of core International crimes. Although, jurists recognize there are sore grave/serious International crimes that the author calls in this paper as core International crimes, but, the theoretical comprehension of such crimes is still underdeveloped and this weaken the categorization of some crimes as *core* International crimes. Therefore, giving a shade of

theoretical light about the reason of why some crimes are *core* International crimes than others, will pave the way for embodying the issue in the International legal framework.

Concerning legal challenges:

The main challenges to the criminalization of individuals for the commission of and participation in core International crimes is a legal one. Though, the last half of the 19th century was called the golden period of individuals' treatment in International law, but a careful look at what has been done suggests it is good for a starter but, not something to celebrate.

To start with from the crimes and responsibility itself, unlike other International legal entities (Especially states and International organizations) rules that are exclusively governing Individuals matters are either not exist or scattered and disorganized. The ILC was trying to came up with draft responsibility laws like it did for states in 2001 and International organizations in 2011 that latter adopted by the UNGA. But still can't make it. Hence, preparing a draft article on International responsibility of Individuals will be a great leap forward. First is will be a guide to state parties and International tribunals. Secondly, it will set the extent of Individuals responsibility for *core* International crimes in a lucid form and thirdly it will enunciate state-Individuals relationship and the nexus/dichotomy of the two.

The other legal measure that makes the author considers as essential in dealing with International criminal responsibility of Individuals for core International crimes is the issue of International criminal code. The current sluggish legal trend makes this a daunting task, but it was not something new. The ILC in different periods (1951, 1954, 1991 and 1996) tries to draft International code of offenses but, the International community ignores and the effort was not that much successful. Thus, If Individuals has to be responsible for core International crimes; the need of at least a guiding International criminal code is unquestionable. This move will have a multifaceted result. At first glance it gives us what are International crimes (currently very controversial) and their lists as well as it will provide us the meaning and lists of *core* International crimes. The other purpose of International criminal code is being guidance to International and Internationalized as well as national courts who are dealing with core International crimes.

The next legal conundrum of Individuals International criminal responsibility is the issue of jurisdiction. Contemporarily which court have the first say over individuals who are committing and participating in *core* international crimes, is very controversial query. Out

of the very solutions for such impasse, drafting an International binding rule of Universal jurisdiction over Individuals who are culprits of *core* international crimes is the best choice of all. Especially, if states are *really* committed for fighting impunity and protecting peoples from such heinous international crimes, a rule that allows all states to assume jurisdiction over Individuals who commit and participate in such grave crimes is a must. In other terms, denial of a hiding place for the culprits would be the best deterring mechanism.

On the other hand, as some states are very cautious of such universal jurisdictions for many reasons (mainly political), a legal framework that facilitates complemetarity jurisdiction can be another way forward. Presently, beyond the ICC statute (though, It lacks clarity) there is no other International rule that recognize the principle of complementarity the simultaneously gives Jurisdiction over Individuals for both national courts and International criminal tribunals. Thus, making the principle of complementarity universal (with clear and objective conditions) will solve the suspicious relationship of International tribunals and states.

Concerning practical Challenges:

Inter alia, the last in the list of challenges is a practical one. Challenges from the practice are mainly resulted from two angles, Institutional failure in the one hand and lack of political will on the other hand.

Currently International criminal responsibility is handled by weak and fragile institutions which their legitimacy is in question. The ICC is the best instance with this regard. Currently, ICC's investigation and prosecution rate of *core* international crimes is very sluggish. Its prosecution policy got fierce criticism from many angles. The same is true in some of the *ad hoc* as well as internationalized hybrid courts. Hence, institutional stability and legitimacy will solve such problems. Though, the problem is not only from the institutions per se, but, making the institutions strong and realistic, will result progress.

The last but not least (even the prominent) among the challenges is the global political order. International tribunals lacks legitimacy for a mere reason of states political will, culprits of core International crimes get asylum and hiding place in other states for political profit, states tarnish and label any attempt of International criminal responsibility of Individuals (especially political leaders) as an enemy of states equal sovereignty and etcetera. This politically motivated stand of states used as a weapon to hide from justice and hampers *the global war on impunity*. Thus, if a universal dream of peaceful and just

planet is to be realized, states should leave their traditional barrack of absolute sovereignty and have to show their political will in favor of global justice.

7. BIBLIOGRAPHY

BOOKS AND JOURNALS ARTICLES

Adam Jones, *Genocide: A Comprehensive Introduction* (London: Zed Books, 2004).

Alain Pellet, *The Definition of Responsibility in International Law*, in The Law of International Responsibility, (1st ed. Oxford).

Alexander Orakhelashvili, The position of the Individual in international law, (*California International Law Journal,* Vol. 31, 2001)

Andrew Altman and Christopher Heath Wellman, *A Defense of International Criminal Law* (2004)

Anthony Aust, *Handbook on International Law* (1st ed. 2005)

Antônio Augusto Cancado Trindade, *The Emancipation of the individual from his own State: The Historical Recovery of the Human Person as Subject of the Law of Nations*, p.14 (Human Rights, Democracy and the Rule of Law, 2007).

Carl Aage Nørgaard, *The position of the individual in International law* (1st ed. 1962)

Cassese, A., *International Law* (2nd edn. Oxford: Oxford University Press, 2005)

C de Visscher, *La responsabiliti des États*, (Leiden, Bibliorheca Visseriana, 1924)

Christiana Ochoa, The Individual and Customary International Law Formation, p.128 (*Virginia journal of international law*, Vol. 48:1, 2007).

Christopher C. Joyner, *Arresting Impunity: The case for universal jurisdiction in bringing war criminals to accountability*, p. 1 (1997).

Christopher Macleod, Towards a Philosophical Account of Crimes Against Humanity, on The European Journal of International Law Vol. 21 no. 2 (2010).

Condé, H. Victor, *A Handbook of International Human Rights Terminology*, p. 230. (2nd Edn., University of Nebraska, USA).

Criton G. Tornaritis, Q.C., *The Individual as a Subject of International law*. p. 17 (Nicosia, 1972).

Ciara Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (1st ed. 2008)

C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (vol. II, Oxford/ London, Clarendon Press/H. Milford – Carnegie edition of 1764)

David Luban, *Fairness to rightness: jurisdiction, legality, and the legitimacy of international criminal law* (Oxford University Press, 2010).

Elies van Sliedregt and Desislava Stoitchkova, International *criminal law* (McBeth, 2010)

E. Jim´enez de Ar´echaga, 'International Responsibility' in Manual of Public International Law (1st ed. London, 1968)

Eric A. Posner and Alan O. Sykes, *An Economic Analysis of State and Individual Responsibility under International Law*, (The law school the university of Chicago, February 2006)

Farmer, Lindsay. *Crime, definitions of. In Cane and Conoghan (editors) (The New Oxford Companion to Law.* Oxford University Press. 2008)

Francisco de Vitoria, *Relecciones Teológicas* (1538-1539)

Francisco Suarez, *De Legibus ac Deo Legislatore* (1612)

Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (1st ed. vol. II, 1968)

George Manner, The Object Theory of the Individual in International Law, (*The American Journal of International Law*, Vol. 46, No. 3, Jul., 1952), p. 428

Giorgio Gaja, the Position of Individuals in International Law: An ILC Perspective, (*The European Journal of International Law* Vol. 21 no. , 2010)

G Watson, *Two Faces of Responsibility*, (Volume 24, Issue 2, Fall 1996)

Henry S. Maine, *Ancient Law* (17th ed. 1901)

Hans Kelesen, *The Pure Theory of Law* (1st ed. Univerisity of California, USA, 1967)

Hans Kelsen, Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals, (31 *Cal. L. Rev*. 530 (1943).

H, Grorius, *The Rights of War and Peace* (Vol I, 1625)

H. Lauterpacht, *International Law and Human Rights*, (London, Stevens, 1950).

H.L.A Hart, *The Concept of Law* (2nd ed, Oxford University Press)

H.L.A. Hart, *Changing Conceptions of Responsibility, in Punishment and Responsibility* (1st. ed 1968)

H. Mosler, *The International Society as a Legal Community*, (Dordrecht, 1980)

Hugo Grotius: *De jure belli ac pacis* (1625)

International Council on Human Rights Policy, *Taking Duties Seriously: Individual Duties in International Human Rights Law* (1999)

I Ward, Justice, *Humanity and the New World Order* (August 2003).

Jakob Katz Cogan, International Criminal Courts and Fair Trials—Difficulties and Prospects, (*27 YALE J. INT'L L*. 111, 119 (2002).

James Caporaso, *Changes in the Westphalian Order: Territory, Public Authority, and Sovereignty* (International Studies Review, Volume 2, Issue 2, 2000).

John Austin, *The Province of Jurisprudence Determined* (1st ed. 1832).

J. Spiropoulos, *L'individu en Droit international*, (Paris, LGDJ, 1928)

Julie Cassidy, Emergence of the individual as an international juristic entity: enforcement of international human rights, (*Deakin Law Review*, Vol. 9, No. 2)

Kahn, P.W., *Putting Liberalism in Its Place*, (Princeton: Princeton University Press, 2005).

Kaj Hober, *State Responsibility and Attribution*, (UK, 1999)

Kelsen, H, *Principles of International law*, (2nd ed. Holt, Rinehart and Winston, Inc. EEUU, 1966).

Kenneth P. Yeager, *The Islamic Republic of Iran, Iran-U.S. C.T.R.*, (Vol. 17. 1987

Larry May, *Crimes against Humanity: A Normative Account*, (Cambridge: Cambridge University Press, 2005)

Kenneth C. Randall, Universal jurisdiction under international law (*Texas Law Review, No. 66*, 1988)

Knut Triasbach, *The Individual in International Law* (2006)

Kristen E. Boon, New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations (*The Yale Journal of International Law*)

Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Harmondsworth: Penguin, 1981)

L. Oppenheim, *International Law, a Treatise*, vol. I (1st ed. 1905)

Lucas, J., *Responsibility* (1st ed. Oxford University Press, 1993)

Malcolm N. Shaw QC, *International Law*, (6th edn. Cambridge University Press 2008).

Martin Wight, *Western Values in International Relations* (1966).

Michael Barkun, *Law without Sanctions* (1st ed, Yale, USA, 1968)

Michail Wladimiroff, *The individual within international* law (United Nations University Press August 2004)

Mill, John Stuart, *On Liberty* (1859)

M. Mohr, *The ILC's Distinction between "International Crimes" and "International Delicts" and Its Implications* (1996)

M. Cerif Bassiouni and Ved P. Nanda, *A Treatise on International Criminal Law* (1974).

M. Cerif Bassiouni, *Crimes against Humanity in International Criminal Law*, (2nd edn, The Hague, 1999)

M. Cherif Bassiouni, Perspectives on International Criminal Justice, (*50 VA. J. INT'L L.* 269, 2010)

N. Roht-Arriaza, State responsibility to investigate and prosecute grave human rights violations in international law' (*California Law Review*, 1998)

P. Guggenheim, *Les principes de Droit international public*, (Recueil des Cours de l'Académie de Droit International, 1952)

Philip Alston, *Non-State Actors and Human Rights*, (1st edn. Oxford University Press, 2005)

Philip C. Jessup, *A Modern Law of Nations* (1949)

P.N. Drost, *Human Rights as Legal Rights*, (Leyden, Sijthoff, 1965)

R. Ago, *Third Report on State Responsibility*, (Vol 11(1), lLC Yearbook, 1991)

P.P. Remec, *The Position of the Individual in International Law according to Grotius and Vattel*, (The Hague, Nijhoff, 1960).

RJ Wallace, *Responsibility and the Moral Sentiments* (Cambridge, MA: Harvard University Press, 1994)

Robert Cryer, International Criminal Law vs State Sovereignty: Another Round? (*The European Journal of International Law* Vol. 16 no.5, 2006)

Rollin M. Perkins & Ronald N. Boyce, *Criminal Law and Procedure: Cases and Materials* (5th ed. 1977)

Samantha Besson and John Tasioulas, *The Philosophy of International Law* (1st ed. 2010)

Sarah Joseph, Adam McBeth (Editors), *Research Handbook on International Human Rights Law*, (January 30, 2010)

Stuart H. Deming, *War Crimes and International Criminal Law*, (Akron Law Review, 1995)

S.Z. Feller, *Jurisdiction over Offenses with a Foreign Element, in a treatise on International criminal law* (M. Cherif Bassiouni & Ved Nanda eds., 1973).

The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (James Crawford ed., 2002)

Thomas Hobbes, *Leviathan*, (1st ed 1651)

Xavier Philippe, *The principles of universal jurisdiction and complementarity: how do the two principles intermesh?* International Review of the Red Cross, (Volume 68 Number 862 June 2006)

INTERNET SOURCES

Edoardo Greppi, *The evolution of individual criminal responsibility under international law* < http://www.icrc.org/eng/resources/documents/misc/57jq2x.htm > last visited January, 2014

Critical Legal theory, <http://www.law.cornell.edu/wex/critical_legal_theory> last visited on February, 2014

Holocaust Encyclopedia: Available at <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005179>

Human Rights Watch Report, HIGH STAKES Political Violence and the 2013 Elections in Kenya p. 1 (2013) Available at < http://www.hrw.org/sites/default/files/reports/kenya0213webwcover.pdf > last visited on February 2014

ICTR/ICTY Case Law Database, < http://unmict.org/cld.html > last visited on February, 2014.

Individuals as subjects in International Law <http://www.lawyr.it/index.php/articles/reflections/item/17-individuals-as-subjects-in-international-law> last visited on January, 2014

ICRC, Customary international humanitarian law, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm> last visited on January 2014

International Criminal Court, Cases and Situations: <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx> last visited on February, 2014

International criminal law <http://www.geneva-academy.ch/RULAC/international_criminal_law.php> last visited on January 2014

Jayaprakash Kakada, What are the draw-backs of the definition of international law given by L. Oppenheim? <http://www.preservearticles.com/2012011020419/what-are-the-drawsbacks-of-the-definition-of-international-law-given-by-l-oppenheim.html> last visited December, 2013

Kenyan MPs vote to quit international criminal court: <http://www.theguardian.com/world/2013/sep/05/kenya-quit-international-criminal-court > last visited on February 2014

Kofi A. Annan, *Two concepts of sovereignty*, The Economist, (18 September 1999) Available at <http://www.economist.com/node/324795 >

Laws and Customs of War on Land, (Hague IV, October 18, 1907) Art. 3. Available at <http://www.icrc.org/ihl.nsf/INTRO/195>

Mladic Snubs Karadzic in Hague Courtroom, <http://www.balkaninsight.com/en/article/mladic-refuses-to-answer-karadzic-s-questions> last visited on February, 2014

Nazi Conspiracy and Aggression: Opinion and Judgment, p. 52 (Washington, United States Government Printing Office, 1947). Available at <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi-opinion-judgment.pdf>

Ryan Goodman and Derek Jinks, Socializing States: Promoting Human Rights through International Law (Oxford University press, 19 September 2013). An extended prospectus of the book is available at <http://www.law.yale.edu/documents/pdf/Faculty/Socializing_States_Workshop_March2007.pdf> last visited on February, 2014

Sergio Moratiel Villa, The philosophy of international law: Suárez, Grotius and epigones <http://www.icrc.org/eng/resources/documents/misc/57jnv9.htm> last visited on January 2014.

Situation in the Republic of Kenya: <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx> last visited on February 2014

Slobodan Milošević Opening Speech at the ICTY in 2004 Available at <http://a-place-to-stand.blogspot.ae/2004/11/milosevics-opening-speech.html> last Visited on February 2014

Subjects of International law, <http://www.peacepalacelibrary.nl/research-guides/public-international-law/subjects-of-international-law/> last visited, December 2013

Subjects of International Law, <http://www.lawnotes.in/Subjects_of_International_Law#ixzz2r7FywXlF> last visited on January, 2014

The Case Against Hissène Habré, an 'African Pinochet': http://www.hrw.org/node/93175 last visited on January, 2014

'The International Controversy Court' (ICC) See, eg. Sreeram Chaulia, The International Controversy Court: Why its selective justice is failing Africa and the world <http://rt.com/op-edge/africa-international-controversy-court-183/ > last visited on January 2014

Transnational Crime: <http://www.peacepalacelibrary.nl/research-guides/international-criminal-law/transnational-crime> last visited on January 2014

What Is International Crime? <http://www.wisegeek.com/what-is-international-crime.htm> last visited on January, 2014

LAWS AND COMMENTARIES

Additional Protocol to the Geneva Conventions of the Protection of Victims of Non-International Armed Conflicts (Protocol II) (12 August, 1949)

Agreement for the Prosecution and Punishment of the Major War criminals of European Axis (The London Agreement) (8 August 1945)

Charter of the International Military Tribunal (The constitution of the international military tribunal) (8 August 1945)

Convention of the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, (Dec. 14, 1973)

General Assembly *resolution 56/83, Responsibility of States for internationally wrongful acts A/RES/56/83*, (28, January 2002)
Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949)

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949)

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949)

Geneva Convention relative to the Treatment of Prisoners of War, and Geneva Convention relative to the Protection of Civilian Persons in Time of War (12 August 1949)

Hague Convention for the Suppression of Unlawful Seizure of Aircraft, (Dec. 16, 1970)

International Law Commission*, Draft Code of Offences against the Peace and Security of Mankind* (1954)

International Law Commission*, Draft Code of Offences against the Peace and Security of Mankind* (1996)

International Law Commission, *Articles on the International responsibility of International Organizations* (UN, 2011)

International Law Commission, *Commentary on Articles of International responsibility of International Organizations* (Vol. II, Yearbook, UN, 2011)

International Law Commission, *Commentary on Articles of International responsibility of states* (Vol. II, Yearbook, UN, 2001)

Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (September 23, 1971)

International Centre for Settlement of Investment Disputes, *the Convention on the Settlement of Investment Disputes between States and Nationals of Other State* (March 18, 1965)

The African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3/Rev.5. (Banjul, June 27,1981)

The Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (16 January 2002)

Treaty of Westphalia; *Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies* (24 October, 1648)

United Nations Transitional Administration in East Timor (UNTAET), UNTAET/REG/2001/25 (14 September, 2001)

UN Commission on Human Rights, Res. 1993/7, Res. 1993/8; 1994/72, Res. 1994/77, Res. 1995/89, Res. 1996/71 and Res. 2002/79. Available at <http://www.ohchr.org/EN/HRBodies/HRC/Pages/Documents.aspx>

UN General Assembly, Res. 3074 (XXVIII), Res. 47/121, Res. 48/143, Res. 48/153, Res. 49/10, Res. 49/196, Res. 49/205; Res. 50/192, Res. 50/193 and Res. 51/115. Available at <http://www.un.org/documents/resga.htm>

UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998

UN General Assembly, *Universal Declaration of Human Rights*, Adopted and proclaimed by General Assembly Resolution 217 A(III) of 10 December 1948

UN Security Council, Res. 670, Res. 771, Res. 780 and Res. 808. Available at <http://www.un.org/en/sc/documents/resolutions/index.shtml

UN Security Council, *Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, Adopted 25 May 1993 by Resolution 827; as amended 13 May 1998 by Resolution 166; as amended 30 November 2000 by Resolution 1329

UN Security Council, *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of IHL Committed in Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the*

Territory of Neighboring States, between 1 July 1994 and 31 December 1994, Adopted 8 November 1994 by Resolution 955

CASES

Case concerning *Avena* and Other Mexican Nationals (Mexico v. United States of America) ICJ, 31 March 2004

Case Concerning the Factory at Chorzów (Germany v Poland) (Merits) PCIJ Rep Series A No 17

Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America), ICJ, 9 April 1998

Demanjuk v. Petrovsky, US Court of Appeal, 6th Cir., 31.10.1985, ILR 79, 546

Lotus Case (France v. Turkey) (1927) P.C.I.J., Ser. A, No. 10

Lagrand case (Germany v. United States of America) reports of judgments, advisory opinions and orders judgment, ICJ, 27 June 2001

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986

United States Diplomatic and Consular Staff in Tehran [US v. Iran] Judgment, I.C.J. Reports 1980

Prosecutor v. Blaškić, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, (Case No. IT-95-14-AR108bis, 18 July 1997)

Prosecutor v. Jean-Paul Akayesu", case no. ICTR-96-4-T

Prosecutor v. Kupreskic et al, Judgement, (Case No. IT-95-16, T.Ch.II, 14 January 2000

Prosecutor v. Tadic, Opinion and Judgment, (Case No. IT-94-1-T, T. Ch. II, 7 May 1997)

Israel v. Eichmann, (International Law Reports 277, 291-93 (Isr. S. Ct. 1962).

Special Prosecutor v. Col. Mengistu Hailamariam et al., File No. 1/87,/ case Ethiopian Federal High Court Case

The Nuremberg Trial, 6 F.R.D. 69, 110 (Int. ,Military Trib. 1946)

DICTIONARIES

Black's Law Dictionary (8th ed. 2004)

Daniel Oran, *Oran's Dictionary of the law* (3rd edn. 2000)

Duhaime Legal Dictionary, available at http://www.duhaime.org

Find law dictionary, available at http://dictionary.findlaw.com

Merriam Webster dictionary, available at http://www.merriam-webster.com

Oxford, *Dictionary of Law* (8th ed. 2003)

The law dictionary, available at http://www.lawdictionaryonline.com

W. J. Stewart, *Dictionary of Law* (2nd edn. 2001)

OTHERS

Advisory opinion of the Inter-American Court of Human Rights in the Re- Introduction of the Death Penalty in the Peruvian Constitution case, 16 HRLJ, 1995

African Union, *Decision on Africa's relationship with the international criminal court (ICC) at the extraordinary session of the Assembly of the African Union* 12 October 2013 Addis Ababa, Ethiopia.

Greek Delegation statement on the Rome statute, Summary Records of the Meetings of the Committee as a Whole, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 1st mtg, [57], UN Doc A/CONF.183/C.1/L.3 (June 16, 1998)

Hartley Shawcross, *Let the Tribunal do its Job* (N.Y. TIMES, May 22, 1996)

House of Lords, 24 March 1999, [1999] 2 WLR 827 (HL)

IMT, judgment of 1 October 1946, in The Trial of German Major War Criminals. Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, (22nd August ,1946 to 1st October, 1946)

Mary Robinson**:** *'Forward', Princeton Principles on Universal Jurisdiction* (Princeton University Press, Princeton, 2001)

Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (Princeton University Press, Princeton, 2001)

Opening statement at the Nuremberg Trial of the Major War Criminals, the U.S. Chief Prosecutor, Justice Robert Jackson (1945)

United Nations General Assembly, *Affirmation of the principles of international law recognized by the charter of the Nurnberg tribunal, Resolution 95 (I)* (11, December 1946)

UN General Assembly, Sixth Committee, Summary Records of meetings (21 September – 10 December 1948)

UN Secretary-General, *Report on the causes of conflict and the promotion of durable peace and sustainable development in Africa* (UN, 1 August 2013)