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Correlating Thinkers**

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Front cover: *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

Back cover: *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

The Statute of the International Criminal Court as a Kantian Constitution

Alexander Heinze*

11.1. Introduction

On 26 February 2018, in his final address to the Human Rights Council, the United Nations ('UN') High Commissioner for Human Rights, Prince Zeid, declared in a blunt and rather frustrated remark:

Eastern Ghouta, other besieged areas in Syria; Ituri and the Kasais in the Democratic Republic of Congo; Taiz in Yemen; Burundi; Northern Rakhine in Myanmar have become some of the most prolific slaughterhouses of humans in recent times, because not enough was done, early and collectively, to prevent the rising horrors.¹

In fact, the toll for Syria – for instance – is a tragic account of inaction. Over ten million people have fled the country, and several hundred thousand have been killed.² Apart from these shocking numbers, the situa-

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¹ Coalition for the International Criminal Court, "For the love of mercy, end the pernicious use of the veto", 26 February 2018.

² Christian Wenaweser and James Cockayne, "Justice for Syria? The International, Impartial and Independent Mechanism and the Emergence of the UN General Assembly in the

tion in Syria is an example of a failure for especially two reasons. First, because of the “terrifying brutality and systemic disrespect for the most basic rules of international humanitarian law, ranging from the promotion of enslavement on an industrial scale, to indiscriminate attacks on civilians”.³ Second, because the entire world is watching through mass media. Yet, the war in Syria has exposed the limits of current attempts to maintain international peace and security, and international justice.⁴ On several occasions, the UN Security Council has failed to resolve the situation, for example through a referral to the International Criminal Court (‘ICC’). It is the grist to the mill of those who already reject the ICC as ineffective or even biased.⁵ A majority of the accused and suspects before the ICC are African, while the ICC has ignored situations not only in Syria but also in Afghanistan, Iraq, North Korea, Palestine, Sri Lanka, Ukraine, and the United States with respect to methods used in interrogations and detention since 9/11.⁶

The tensions between the ICC and especially African States do not stem from a sudden aversion of African States to the Court, but rather from reservations of the African Union (‘AU’) regarding the UN Security Council and its inconsistent decisions⁷ as well as from particular interests of certain African leaders not to be investigated by the Court. It was the formal independence of the ICC from the Security Council that made many African States support the creation of the Court.⁸ The AU, however, has been sceptical ever since about the Security Council’s referral deci-

Realm of International Criminal Justice”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, p. 211.

³ *Ibid.*, p. 212.

⁴ *Ibid.*

⁵ Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 89 ff. (www.toaep.org/ps-pdf/26-kaleck).

⁶ Manisuli Ssenyonjo, “State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia”, in *Criminal Law Forum*, 2018, vol. 29, no. 1, p. 63.

⁷ Juliet Okoth, “Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals”, in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds.), *Africa and the International Criminal Court*, T.M.C. Asser Press, The Hague, pp. 195 ff.

⁸ Jean-Baptiste Jeangène Vilmer, “The African Union and the International Criminal Court: counteracting the crisis”, in *International Affairs*, 2016, vol. 92, no. 6, p. 1330 with further references.

sions (even though they were made with the support of African States),⁹ which proved – in the AU’s eyes – that this independence could be circumvented by *Realpolitik*. While the Libya referral may be viewed as the starting point of the reservations against the ICC by African States, the tensions came to a head when an arrest warrant was issued against Sudan’s sitting President Omar al-Bashir¹⁰ and reached a new escalation level when South Africa failed to arrest and extradite al-Bashir in July 2015¹¹ and declared its withdrawal from the ICC pursuant to Article 127(1) of the ICC Statute in October 2016.¹² The withdrawal announcement set an example for Burundi and the Gambia that made similar declarations (although a new president of the Gambia later pulled back from the withdrawal declaration).

Even though the withdrawals do not affect pending trials and they “shall take effect one year after the date of receipt of the notification” (per Article 127(1) of the ICC Statute), making further decisions not to withdraw likely (as in the case of the Gambia and South Africa), the political damage for the Court cannot be overstated. In 2016, the AU called for a mass withdrawal of African States from the ICC, following a declaration that granted sitting heads of State immunity over prosecutions of international criminal tribunals.¹³

Notwithstanding the political motivation behind the accusations, they certainly have to be taken seriously, not least because a world criminal court is expected to investigate at a global level and without any bias. As manifold as the attacks are against the ICC, equally numerous are

⁹ *Ibid.*

¹⁰ Kai Ambos, “Expanding the Focus of the ‘African Criminal Court’”, in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Ashgate, Farnham, 2013, pp. 499–529.

¹¹ Tim Murithi, “Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court”, in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds.), *Africa and the International Criminal Court*, T.M.C. Asser Press, The Hague, 2014, pp. 179–94.

¹² Max du Plessis and Guénaél Mettraux, “South Africa’s Failed Withdrawal from the Rome Statute: Politics, Law, and Judicial Accountability”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 361 ff.

¹³ Dire Tladi, “The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 3 ff.

those who jump to its defence. I would like to provide a similar defence, however, based on a Kantian approach.

11.2. Waves of Internationalism

In times of growing nationalism and increasing popularity of political realism,¹⁴ a reminder as to what the ICC is and what it is not, why it was established and what it is intended to achieve, is timely. And it is worth bringing to mind that world history is not faced with nationalist and realist challenges for the first time. In the seventeenth century, continental Europe was overrun by the Thirty Years' War, resulting in the famous Peace of Westphalia and "the birth of the modern, non-ecclesiastical nation-state".¹⁵ Parliament and the King were at war in England, inspiring Thomas Hobbes and John Locke to "reconsider political philosophy and relocate man – natural man, frail but ambitious – to the centre of the political and moral universe".¹⁶ Human rights, however, were generally considered to be a matter within the exclusive domestic sovereignty of States until 1945. The first significant conceptual revolution, a vague 'internationalising' of human rights, came only with the United Nations Charter of 1945.¹⁷ After World War II, the Allies set up the International Military Tribunal in Nuremberg to prosecute the "Major War Criminals". The creation of both the IMT and the International Military Tribunal for the Far East were milestones in the development of international criminal law and international accountability for serious crimes.¹⁸ The IMT was also a symbol of the universality of law.¹⁹

¹⁴ See, for instance, the Remarks by US-President Trump to the 73rd Session of the United Nations General Assembly in New York on 25 September 2018:

America's policy of principled realism means we will not be held hostage to old dogmas, discredited ideologies, and so-called experts who have been proven wrong over the years, time and time again (www.legal-tools.org/doc/6e3d04/).

¹⁵ Alan Sussman, "Why Human Rights Are Called Human Rights", in *Ethics & International Affairs Journal*, 2014, vol. 28, no. 2, pp. 171–82.

¹⁶ *Ibid.*

¹⁷ Douglass Cassel, "Does International Human Rights Law Make a Difference?", in *Chicago Journal of International Law*, 2001, vol. 2, no. 1, pp. 121, 134.

¹⁸ Madelaine Chiam, "Different Models of tribunals", in David A. Blumenthal and Timothy L.H. McCormack (eds.), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, Martinus Nijhoff Publishers, Leiden, 2008, p. 205; Richard D. Heideman, "Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials", in *Loyola of Los Angeles International and Comparative Law Review*, 2017, vol. 39, no. 1, pp. 5 ff.; Stefanie Schmahl, "Human Dignity in International Human Rights,

After this wave of idealism and universalism, its support reached a low with the Cold War. State leaders mostly ignored human rights violations, which were still marginalised issues in international relations. These leaders had little incentive to prevent and stop the gross violations of human rights by risking the mutual respect for sovereignty. In a number of countries, the struggle over whether and how to limit the application of the concept of ‘universality’ in the post-war human rights regime went hand in hand with related limiting jurisdictional principles based on particularist notions of identity, such as nationality and ethnicity. Whereas offences at Nuremberg were prosecuted as ‘crimes against humanity’ on a universal basis, in the subsequent national trials of the 1950s and 1960s, these offences were prosecuted in terms of the collective. The conflicts focused in particular on the conception of the State and the extent of its commitments to and agenda regarding economic security. Another wave of universalism and human rights protections came with the fall of the Berlin Wall, the end of the Soviet Union and therefore the end of the Cold War.²⁰ The 1990s marked the birth of the ‘age of accountability’, somewhat euphemistically announced by the UN Secretary General at the ICC’s Kampala Review Conference, evoking the establishment of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’) in 1993 and 1994 and – eventually – the ICC in 1998. International human rights norms have now ‘gone global’ and the ICC’s Statute is seen by many as the constitution of international criminal justice. The ICC was established with the concept of universal jurisdiction in mind, although some of the parties who worked on the ICC Statute rejected the idea of universal ju-

Humanitarian and International Criminal Law: A Comparative Approach”, in Eric Hilgendorf and Mordechai Kremnitzer (eds.), *Human Dignity and Criminal Law*, Duncker & Humblot, Berlin, 2018, pp. 79, 101.

¹⁹ Robert H. Jackson, “The Influence of The Nuremberg Trial on International Criminal Law”, available on the web site of the Robert H. Jackson Center.

²⁰ See Jorrik Fulda, “Eine legitime Globalverfassung? Die US-Hegemonie und die weltgesellschaftlich gerechte Vollendung des Kantischen Projektes”, in *Archiv des Völkerrechts*, 2016, vol. 54, no. 3, p. 334:

Seit dem Ende des Kalten Krieges drängt der Westen verstärkt auf die weitere Vollendung des Kantischen Projektes – der Errichtung einer Weltfriedensordnung.

In a similar vein Héctor Olásolo, *International Criminal Law, Transnational Criminal Organizations and Transitional Justice*, Brill, Leiden, 2018, p. 3.

risdiction.²¹ The Preamble of the ICC Statute notes that the purpose of the ICC was to have jurisdiction over “the most serious crimes of concern to the international community as a whole”, and that the aim of the ICC is to “guarantee lasting respect for and the enforcement of international justice”.²² The ICC Statute is not only the “culmination of international law-making”.²³ Rather, it codifies the customary international humanitarian laws,²⁴ and the jurisprudence of previously established international or internationalised tribunals such as the ICTY and ICTR.²⁵ Thus, the law with regard to grave international crimes, customary and treaty-based international law, the applicable general principles of law and internationally recognised human rights, “consolidated over a century’s worth of jurisprudence and customary law”, have been ‘constitutionalised’ by the ICC Statute.²⁶

11.3. Methodology

If the conception of the ICC is viewed as an expression of the intention to get the cycle of international universalist movements going, the current attacks against the Court and nationalist movements all over the world can be seen as another recession. In such times, it is worth looking back at those who first provided an exit strategy to the *perpetuum mobile* of hegemony and armed conflict. One of those who did so was Immanuel Kant. Unsurprisingly, his moral and political philosophy is currently experiencing a “broad revival”, including a “sustained effort to build a broader, rights-based cosmopolitanism, in part by extending Kant’s ideas”.²⁷ However, what is the Kantian approach to international law and cosmopolitan-

²¹ See Hans-Peter Kaul and Claus Kreß, “Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises”, in *Yearbook of International Humanitarian Law*, 1999, vol. 2, pp. 143–75.

²² Rome Statute of the International Criminal Court (‘ICC Statute’), 17 July 1998, in force 1 July 2002, Preamble (www.legal-tools.org/doc/7b9af9/).

²³ Marc Weller, “Undoing the Global Constitution: UN Security Council Action on the International Criminal Court”, in *International Affairs*, 2002, vol. 78, no. 4, p. 693.

²⁴ Errol P. Mendes, *Peace and Justice at the International Criminal Court*, Edward Elgar Publishing, Cheltenham, 2010, p. 22.

²⁵ *Ibid.*

²⁶ *Ibid.*, pp. 15, 21–22; Yvonne McDermott, “The Influence of International Human Rights Law on International Criminal Procedure”, in Philipp Kastner (ed.), *International Criminal Law in Context*, Routledge, London, 2018, p. 282.

²⁷ Alec Stone Sweet, “A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe”, in *Global Constitutionalism*, 2012, vol. 1, no. 1, pp. 53–54.

ism? The answer to that is not as easy as it sounds. Kant published only a few writings that explicitly addressed the issue of international relations. They were written mainly during the later part of his life, and “have sometimes been criticized by scholars for their supposed lack of seriousness stemming from rather suspicious remarks Kant made about them”.²⁸ The best example is what became (in)famous as Kant’s “sorry comforters” remark:

For Hugo Grotius, Pufendorf, Vattel and the rest (sorry comforters as they are) are still dutifully quoted in justification of military aggression, although their philosophically or diplomatically formulated codes do not and cannot have the slightest legal force, since states as such are not subject to a common external constraint. (*Perpetual Peace*, p. 103)

Kant’s rather sarcastic remark in his seminal *Zum ewigen Frieden* (*Toward Perpetual Peace* – in a version translated by H.B. Nisbet and edited by Hans Reiss) is *prima facie* not only a mockery of the undoubtedly great thinkers Grotius, Pufendorf and Vattel but also of scholars and teachers of international law in general. Moreover, and even more importantly, it – again, *prima facie* – questions the mere existence of international law as envisioned by Grotius, Pufendorf and Vattel, since this law can hardly be enforced. Kant targeted Grotius’s, Pufendorf’s and Vattel’s understanding of natural law that paid lip service to ‘right’ and a legal order,²⁹ promoting instead “a system for calculating happiness and constraint on the basis of an empirically defined ‘human nature’ so as to produce an optimally robust social order”.³⁰ Comparing Kant’s above-mentioned quote to the situation today, it could certainly be argued that Kant was wrong: international criminal law has developed as a unique form of law and “the teachings of the most highly qualified publicists of the various nations” are explicitly mentioned as a source of law in Article 38 of the Statute of the International Court of Justice (‘ICJ’).

²⁸ Eric S. Easley, *The War Over Perpetual Peace*, Palgrave Macmillan, New York, 2004, p. 5.

²⁹ Immanuel Kant, “Perpetual Peace: A Philosophical Sketch”, *Kant: Political Writings*, H.S. Reiss ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1991, p. 103 (www.legal-tools.org/doc/dc079a/); Dietmar von der Pfordten, “On Kant’s Concept of Law”, in *Archiv für Rechts- und Sozialphilosophie*, 2015, vol. 101, no. 2, pp. 191–92.

³⁰ Martti Koskeniemi, “Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization”, in *Theoretical Inquiries in Law*, 2007, vol. 8, no. 1, pp. 9, 17.

However, a synopsis of Kant's writings on moral and political philosophy provides useful guidelines on how to ensure peace and security in the world, and how to protect gross human rights violations. On the subject of international relations, there exist not only Kant's unpublished reflections from 1764 to 1768 and from 1773 to 1789, but also published works, of which the most influential are dated between 1784 and 1797. These latter publications are: *Idea for a Universal History with a Cosmopolitan Purpose* (1784); *On the Common Saying: This May be True in Theory but It Does not Apply in Practice* (1793); *Perpetual Peace* (1795); and *The Metaphysics of Morals* (1797).³¹ They all deal with matters that Kant confronts in *Perpetual Peace*.³² In fact, it is the other writings – rather than *Perpetual Peace* – that provide an answer to the question of whether Kant would have supported an institution such as the ICC.

In this chapter, I argue that Kant would have welcomed the establishment of a permanent international criminal court (that is, the ICC) and the adoption of the ICC's Statute in Rome as a Constitution of international criminal justice. To support this argument, I will conduct a detailed analysis of the following of Kant's writings:

- *The Metaphysics of Morals*, translation by Mary J. Gregor, Cambridge University Press, Cambridge, 1991;
- *Groundwork of the Metaphysics of Morals*, translation by Mary J. Gregor (ed.), Cambridge University Press, Cambridge, 1997;
- *Anthropology from a Pragmatic Point of View*, translation by Robert B. Loudon (ed.), Cambridge University Press, Cambridge, 2006;
- *Critique of Judgement*, translation by James Creed Meredith, Nicholas Walker (ed.), Oxford University Press, Oxford, 2007;
- *Political Writings*, translation by H.B. Nisbet, 2nd edition, Hans Reiss (ed.), Cambridge University Press, Cambridge, 1991:
 - a) "An Answer to the Question: 'What is Enlightenment?'"', pp. 54 ff.;

³¹ Easley, 2004, p. 6, see *supra* note 28; Benedict Vischer, "Systematicity to Excess: Kant's Conception of the International Legal Order", in Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (eds.), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, Oxford University Press, Oxford, 2017, pp. 303–04.

³² Easley, 2004, p. 6, see *supra* note 28.

- b) “Perpetual Peace: A Philosophical Sketch”, pp. 93 ff.; and
- *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Pauline Kleingeld (ed.), Yale University Press, New Haven, 2006,

to answer the following questions:

1. What are human rights violations (in the nation State)?
2. Are human rights violations conceivable at an international level?
3. Should perpetrators of gross human rights violations be punished?
4. Is the ICC a legitimate platform to punish these perpetrators?; and, if it is,
5. does the ICC as it is institutionalised and organised today live up to Kant’s expectations?

Methodologically, this chapter will in a way be an interpretation of those of Kant’s writings that are relevant to answer the five questions above. This almost exegetical textualist exercise is necessary to both decode and de-mystify Kant’s approach to international criminal law. As such, selected quotes from Kant, derived from several sources, form the backbone of this chapter. These quotes inform the common theme of the chapter. To highlight them, I set out the quotes in separate paragraphs, with a short reference (title, page number(s)) to the respective publication underneath. The words I deemed important for my interpretation I have underlined. Those underlinings are not in the original. Even though the quotes take up much space and are challenging for both the reader’s eyes and focus, they are necessary due to the fact that Kant can be read and understood in different ways, which is in part due to Kant’s rather complicated language – a deliberate choice he made to communicate his *a priori* concepts – and the fact that translations of Kant’s works necessarily carry an interpretive element. Unsurprisingly, as it is the case with many old writings that leave a margin of interpretation, there is a temptation to view Kantianism as “some kind of cult with strange rituals and jargon”.³³

11.4. Punishment: Kantian Freedom and its Hindrance

During the Rome Conference, where the Statute of the ICC was negotiated, it was made rather clear that the ICC should not be established as a

³³ R. Lanier Anderson, “Lucy Allais, Manifest Reality: Kant’s Idealism and His Realism”, in *Philosophical Review*, 2017, vol. 126, no. 2, p. 278.

human rights court. The head of the U.S. delegation, Ambassador David Scheffer, noted just a few weeks before the conference: “This is not a human rights court; it is an international criminal court”.³⁴ The U.S. pointed out early in the conference that “every human rights violation is not a crime”,³⁵ and U.S. delegates repeated: “an international court of human rights is unacceptable, lock, stock, and barrel”.³⁶ The ICC Appeals Chamber itself has emphasised that the ICC “was not established to be an international court of human rights, sitting in judgment over domestic legal systems”.³⁷ We shall see in the course of this chapter that this is only half of the truth. As I already noted in the introduction to this chapter, the establishment of the *ad hoc* tribunals and the ICC are perceived as a success story of human rights law. The ICC was praised as “the first standing global human rights court”.³⁸ In fact, the perception of the ICC has always been closely linked with human rights protection. In November 2000, the BBC asked: “Do we need a worldwide human rights court, with its own powers of arrest, giving no safe havens for former dictators?”, making no distinction between a human rights court and this court’s punishment of individuals.³⁹ If international media reports were an indication of this perception, human rights issues only made the front pages in a criminal law context: when Baltazar Garzon on 10 October 1998 issued an international warrant for the arrest of former Chilean President Augusto Pinochet for the alleged deaths and torture of Spanish citizens;⁴⁰ when Slobodan Mi-

³⁴ Marcus R. Mumford, “Building upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference”, in *Michigan State University-Detroit College of Law Journal of International Law*, 1999, vol. 8, pp. 151, 170.

³⁵ *Ibid.*, pp. 151, 189.

³⁶ *Ibid.*, pp. 151, 204.

³⁷ Jacob N. Foster, “A Situational Approach to Prosecutorial Strategy at the International Criminal Court”, in *Georgetown Journal of International Law*, 2016, vol. 47, no. 2, pp. 439, 463.

³⁸ Michael Contarino and Selena Lucent, “Stopping the Killing: The International Criminal Court and Juridical Determination of the Responsibility to Protect”, in *Global Responsibility to Protect*, 2009, vol. 1, no. 4, pp. 560, 567.

³⁹ BBC World Service, “Should there be one court for the world?”, 3 November 2007, transcript.

⁴⁰ David Connett, John Hooper and Peter Beaumont, “Pinochet arrested in London”, in *The Guardian*, 18 October 1998:

The Spanish judges who requested his arrest had initially sought only to question Pinochet as part of an investigation into human rights violations in Chile and Argentina.

lošević, Radovan Karadžić, Ratko Mladić stood trial before the ICTY;⁴¹ when the ICC was established; when former ICC Prosecutor Moreno-Ocampo issued an arrest warrant against Omar al-Bashir; and more recently, when African States threatened to leave the ICC.⁴²

The ICC's dual nature as a human rights (monitoring)⁴³ body and a criminal court warrants a short separate analysis of Kant's view of punishment, even though this view will be touched upon in other parts of this chapter. Unfortunately, as I hinted in the introduction, Kant does not paint a clear and consistent picture of his approach to punishment.⁴⁴ As Hill noted more than twenty years ago: "Kant's expressed views on punishment are like intriguing pieces of a large jigsaw puzzle. It is obvious enough how some pieces fit together, but not quite how others complement and unite the rest. Moreover, there seem to be gaps, and so some pieces may be missing".⁴⁵ And more than thirty years ago, in a paper provocatively titled "Does Kant have a Theory of Punishment", Jeffrie G. Murphy remarked in a rather blunt account (it is worth reading the entire section): "As I now return to examine Kant's theory of punishment, I find that this proves to be an occasion of anxiety and disenchantment rather than the indulgence in affectionate nostalgia that I had expected. Not only am I no longer confident that the theory is generally correct; I am also not at all sure that I understand (or find understandable) much of what Kant says on crime and punishment. It is no longer clear to me to what extent it is proper to continue thinking of Kant as a paradigm retributivist in the theory of punishment. Indeed, I am not even sure that Kant develops anything that deserves to be called a *theory* of punishment at all. I genuinely wonder if he has done much more than leave us with a random (and not

⁴¹ CNN, "World welcomes Milosevic handover", 2 July 2001.

⁴² Cornelius Prittwitz, "Die Rolle des Strafrechts im Menschenrechtsregime in Pilgram", in Arno Pilgram and Susanne Krasmann (eds.), *Einheitliches Recht für die Vielfalt der Kulturen?*, Lit, Vienna, 2012, pp. 23, 27.

⁴³ See *infra* sect. 11.7.3.4.

⁴⁴ In a similar vein, see Lucy Allais, *Manifest Reality: Kant's Idealism and His Realism*, Oxford University Press, Oxford, 2015, p. 11.

⁴⁵ Thomas E. Jr. Hill, "Kant on Punishment: A Coherent Mix of Deterrence and Retribution", in *Annual Review of Law and Ethics*, 1997, vol. 5, pp. 291–92.

entirely consistent) set of *remarks* – some of them admittedly suggestive – about punishment”.⁴⁶ So let us look at at least three of those ‘remarks’:

I ought never to act except in such a way that I could also will that my maxim should become a universal law.
(Groundwork of the Metaphysics of Morals, p. 15 [402])

This supreme principle of ethics – the Categorical Imperative – aims at the motivation (or reasons) for acting; any consideration of external behaviour is absent.⁴⁷ The quote illustrates that dignity is “intrinsic, deontological and non-negotiable (replaceable), it is the basis of the individuality and the mutual recognition (inter-personal relationship) of the members of a society”.⁴⁸ By contrast, the principle of Kant’s legal philosophy, the Universal Principle of Right,⁴⁹ states (in rather ambiguous language):

Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law. (*The Metaphysics of Morals*, p. 57 [231])

This “transposes the categorical imperative to the sphere of external action”.⁵⁰ Freedom referred to by the Universal Principle of Right is “ex-

⁴⁶ Jeffrie G. Murphy, “Does Kant Have a Theory of Punishment”, in *Columbia Law Review*, 1987, vol. 87, no. 3, p. 509.

⁴⁷ Luke J. Davies, “A Kantian Defense of the Right to Health Care”, in Reidar Maliks and Andreas Føllesdal (eds.), *Kantian Theory and Human Rights*, Routledge, London, 2014, p. 82; Wilfried Küper, “Das Strafgesetz ist ein kategorischer Imperativ: Zum ‘Strafgesetz’ in Kants Rechtslehre”, in Michael Hettinger and Jan Zopfs (eds.), *Strafrechtliche Beiträge zu Rechtsgeschichte und Rechtsphilosophie*, Mohr Siebeck, Tübingen, 2017, pp. 397 ff.

⁴⁸ Marie E. Newhouse, “Two Types of Legal Wrongdoing”, in *Legal Theory*, 2016, vol. 22, no. 1, pp. 59 ff.; Ulfried Neumann, “Das Rechtsprinzip der Mensch als Schutz elementarer menschlicher nisse: Versuch einer Eingrenzung”, in *Archiv für Rechts- und Sozialphilosophie*, 2017, vol. 103, no. 3, p. 293; Julian A. Sempill, “Law, Dignity and the Elusive Promise of a Third Way”, in *Oxford Journal of Legal Studies*, 2018, vol. 38, no. 2, p. 228.

⁴⁹ Kai Ambos, “Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law”, in *Oxford Journal of Legal Studies*, 2013, vol. 33, no. 2, pp. 293, 305.

⁵⁰ Vischer, 2017, p. 306, see *supra* note 31:

[W]hile the categorical imperative requires the universalizability of the voluntary maxim, the principle of right merely demands that the action – irrespectively of the agents’ motive – conforms to a universal law.

About the different interpretations of Kant’s external action, see von der Pfordten, 2015, pp. 193 ff., see *supra* note 29.

ternal freedom”, it “bars considerations of internal motivation”.⁵¹ The distinction between external and internal freedom is Kant’s “most profound statement on the relationship between an autonomous morality and political practice. By reconstructing Kant’s arguments in favor of their distinction, we see the dynamics behind his theory of justice: The pure practical reason of morality (inner freedom) informs – and thereby subordinates – the structure of outer freedom and the political reality with which it is associated”.⁵²

The difference between internal and external freedom has been well-illustrated by Antonio Franceschet:

Freedom	Negative (<i>Willkür</i>)	Positive (<i>Wille</i>)	Motive to Act
Internal Freedom <i>Morality</i>	Independence from nature or material causes (i.e. inclinations)	Autonomy: obedience to the objective laws that one’s reason produces	Incentive is internal and autonomous: duty or reverence for the moral law

The *moral* realm subordinates and gives *form* to the *political* realm without losing its autonomous status.

External Freedom <i>Legality</i>	Justice (<i>Recht</i>): The equal limitation of outer freedom of choice of subjects	Original Contract (Idea): common subordination to a republican order of laws to which one consents	Incentive is external and heteronomous: obligation an impure mixture of coercion, self-interest, and increasingly, duty
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Source (modified): Antonio Franceschet, *Kant and Liberal Internationalism: Sovereignty, Justice, and Global Reform*, Palgrave Macmillan, New York, 2002, p. 28.

Kant’s discussion of punishment – punishment in general is physical evil accruing from moral evil⁵³ – has probably generated more scholarly attention than any other aspect of his legal and political thought.⁵⁴ I

⁵¹ Davies, 2014, p. 82, see *supra* note 47.

⁵² Antonio Franceschet, *Kant and Liberal Internationalism*, Palgrave Macmillan, New York, 2002, pp. 23–24.

⁵³ Immanuel Kant, *Lectures on Ethics*, Cambridge University Press, Cambridge, 2001, p. 55.

⁵⁴ Arthur Ripstein, “Hindering a Hindrance to Freedom”, in *Annual Review of Law and Ethics*, 2008, vol. 16, p. 227.

would like to differentiate between the questions “Why should we punish?”, “Who should be punished?” and “How should they be punished?”. Kant’s answer to the second question seems relatively clear: only all those who commit crimes ought to be punished.⁵⁵ As Thomas Hill interprets it: “those who should be punished are all those guilty of legal offences and (so also) morally guilty (at least for violating the duty to obey the law)”.⁵⁶ With regard to the “why” of punishment, Kant remarks:

Now whatever is wrong is a hindrance to freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with Right by the principle of contradiction an authorisation to coerce someone who infringes upon it. (*The Metaphysics of Morals*, p. 57 [231])

In other words, “[c]oercion is in general unjust because it is a hindrance of freedom, but *state* coercion following on an unjust hindrance of freedom is just, for it is a hindrance of a hindrance of freedom, which is consistent with universal freedom”.⁵⁷ Coercion is morally justified “when used to protect rational agency from standard threats to its existence and flourishing”.⁵⁸ Thus, “the use of coercion by the state to restrain the thief is right, even though it is a hindrance to the thief’s freedom, because the thief is using *his* freedom to restrain the victim’s freedom under a universal law (in this case, the victim’s peaceful enjoyment of his possession)”.⁵⁹

Here again, to understand this metaphysical justification of coercion, it is important to grasp Kant’s two concepts of freedom. On the one hand, there is a “certain use of freedom”, on the other hand there is a “certain use of freedom”. The two concepts “underlie Kant’s conceptions of the

⁵⁵ Hill, 1997, pp. 291, 294, see *supra* note 45.

⁵⁶ *Ibid.*, pp. 291, 298.

⁵⁷ Alan W. Norrie, *Law, Ideology and Punishment*, Kluwer, London, 1991, p. 51 (emphasis in the original).

⁵⁸ Brian Orend, “Kant on International Law and Armed Conflict”, in *Canadian Journal of Law and Jurisprudence*, 1998, vol. 11, no. 2, pp. 329, 335.

⁵⁹ Fernando R. Teson, “Kantianism and Legislation”, in *Annual Review of Law and Ethics*, 2008, vol. 16, pp. 275, 283.

will, law, justice and coercion which are all parts of the philosophical progression which eventually leads to the justification of punishment”.⁶⁰ According to the former concept, coercion is “a concrete negation of phenomenal freedom”, the latter concept refers to “a metaphysical affirmation of moral freedom”.⁶¹

The answer to the question of how an offender should be punished is provided by Kant in a lengthier remark:

But in what kind and what amount of punishment is it that public justice makes its principle and measure? None other than the principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other. Accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself. But only the *law of retribution (ius talionis)* – it being understood, of course, that this is applied by a court (not by your private judgment) – can specify definitely the quality and the quantity of punishment; all other principles are fluctuating and unsuited for a sentence of pure and strict justice because extraneous considerations are mixed into them. (*The Metaphysics of Morals*, p. 141 [332])

11.5. Human Rights Violations and Criminal Law on the International Level

In his writings on external freedom, Kant hinted at the universal laws and the ‘right’ as he understood it. The concept of ‘right’ is especially important for the justification of an institution like the ICC.

11.5.1. The Concept of ‘Right’ on the International Level

Kant’s conception of human dignity (see above) is complemented by his vision of a ‘perpetual peace’. The structure of his work *Toward Perpetual Peace* is as follows: Six “Preliminary Articles” ban treacherous dealings

⁶⁰ Norrie, 1991, p. 45, see *supra* note 57.

⁶¹ *Ibid.*, p. 51.

among States, including preparation for war.⁶² They describe steps that can be taken to “wind down” a war and avoid armed conflict. Kant’s preliminary articles basically “seek to ground the federation on measures of good faith, self-determination and non-interference”.⁶³ For the creation of a cosmopolitan constitution, “any failure to comply in good faith with any article of the constitution can be seen as unconstitutional and therefore grounds the legal basis for federal exclusion”.⁶⁴ Three “Definitive Articles” establish actions and institutions deemed necessary for a cosmopolitan system to sustain itself over time and end a war.⁶⁵ Compared to the Preliminary Articles, the Definitive Articles present “stronger terms for membership [in the federation] and the normative conditions upon which the federation stands”.⁶⁶

For the purpose of this chapter, Kant’s Definitive Articles deserve closer consideration:

1. The Civil Constitution of Every State shall be Republican (principle of civil right);
2. The Right of Nations shall be based on a Federation of Free States (principle of international right);
3. Cosmopolitan Right shall be limited to Conditions of Universal Hospitality (principle of cosmopolitan right). (*Perpetual Peace*, p. 98)

The conceptual novelty of Kant’s doctrine of cosmopolitanism is that he recognised “three interrelated but distinct levels of ‘right’, in the juridical senses of the term”.⁶⁷ Definitive Article 1 defines the necessary prerequisites for the type of States that are eligible for membership in the

⁶² Stone Sweet, 2012, pp. 53, 56, see *supra* note 27; Garrett Wallace Brown, “Kantian Cosmopolitan Law and the Idea of a Cosmopolitan Constitution”, in *History of Political Thought*, 2006, vol. 27, no. 4, pp. 661, 678.

⁶³ *Ibid.* See also Cécile Fabre, *Cosmopolitan Peace*, Oxford University Press, Oxford, 2016, p. 16 (critic of Fabre’s “treatment (or, rather, lack thereof) of corporate moral agents” is Avia Pasternak, “Cosmopolitan Justice and Criminal States”, in *Journal of Applied Philosophy*, 2018, advance article). See also Philipp Gisbertz, “The Concepts of ‘War’ and ‘Peace’ in the Context of Transnational Terrorism”, in *Archiv für Rechts- und Sozialphilosophie*, 2018, vol. 104, no. 1, p. 9.

⁶⁴ Brown, 2006, pp. 661, 678, see *supra* note 62.

⁶⁵ Stone Sweet, 2012, pp. 53, 56, see *supra* note 27.

⁶⁶ Brown, 2006, pp. 661, 681, see *supra* note 62.

⁶⁷ Seyla Benhabib, in Robert Post (ed.), *Another Cosmopolitanism*, Oxford University Press, Oxford, 2006, p. 21.

federation.⁶⁸ The States have a republican constitution guaranteeing the liberty and equality of their citizens as “inalienable rights” (Definitive Article 1). This constitution depends “on a single, common legislation”, and “the law of the equality”, following “from the idea of an original contract, upon which all laws legislated by a people must be based”.⁶⁹ In modern terms, what is meant here is “[a] nation that has established a competitive electoral system, independent courts and the rule of law, and basic market freedoms would be included”.⁷⁰ The second factor (Definitive Article 2) is the sphere of rightful relations among nations (*Völkerrecht*), resulting from treaty obligations among States.⁷¹ Here, Kant is only concerned with regulating international disputes among its members,⁷² where every member would be free to decide to opt out at any time.⁷³ It is an indication of Kant’s trust in the “effectiveness of institutionally embodied international law”.⁷⁴

Just like individual men, [States] must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and thus form an international state (*civitas gentium*), which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present conception of international right (so that they reject *in hypothesis* what is true *in thesi*), the positive idea of a world republic cannot be realised. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation likely to prevent war. (*Perpetual Peace*, p. 105)

⁶⁸ Brown, 2006, pp. 661, 681, see *supra* note 62.

⁶⁹ Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Yale University Press, New Haven, 2006, pp. 74–75, 8:350.

⁷⁰ Stone Sweet, 2012, pp. 53, 56, see *supra* note 27.

⁷¹ Benhabib, 2006, p. 21, see *supra* note 67.

⁷² See also Jenny Martinez, “Towards an International Judicial System”, in *Stanford Law Review*, 2003, vol. 56, no. 2, pp. 429, 462; Klaus , “Falscher Friede durch repressives Völkerstrafrecht?”, in Werner Beulke *et al.* (eds.), *Das Dilemma des rechtsstaatlichen Strafrechts*, Berliner Wissenschafts-Verlag, Berlin, 2009, p. 84.

⁷³ Stone Sweet, 2012, pp. 53, 56, see *supra* note 27; Jürgen Habermas, *Politische Theorie*, Philosophische Texte vol. 4, Suhrkamp, Frankfurt am Main, 2009, p. 324.

⁷⁴ Wade L. Huntley, “Kant’s Third Image: Systemic Sources of the Liberal Peace”, in *International Studies Quarterly*, 1996, vol. 40, no. 1, pp. 45, 50.

While in earlier writings Kant was in favour of a global State, in *Perpetual Peace* he rejects this advocacy and thereby a world State or super State.⁷⁵ Thus, there is a contradiction between Kant's conceptual demand for an international State (and that States must be subjected to a higher authority) and his understanding that this is more an aspiration than a realistic achievement.⁷⁶ In his view, a world federation "is still to be preferred to an amalgamation of the separate nations under a single power which has overruled the rest and created a universal monarchy. For the laws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy".⁷⁷ The compromise of a world federation, however, should not be understood as a "limitation of the appeal to reason" – quite

⁷⁵ Patrick Capps and Julian Rivers, "Kant's Concept of International Law", in *Legal Theory*, 2010, vol. 16, no. 4, pp. 229–30 with further references; Huntley, 1996, pp. 45, 50, see *supra* note 74; Stone Sweet, 2012, pp. 53, 56, see *supra* note 27 with fn. 2; Brown, 2006, pp. 661, 682, see *supra* note 62; Vlad Perju, "Double Sovereignty in Europe: A Critique of Habermas's Defense of the Nation-State", in *Texas International Law Journal*, 2018, vol. 53, p. 52.

⁷⁶ Vischer, 2017, p. 323, see *supra* note 31; Pauline Kleingeld, "Kant's Cosmopolitan Law: World Citizenship for a Global Order", in *Kantian Review*, 1998, vol. 2, pp. 72–73:

Either [cosmopolitan law] is a superfluous category, and its content can simply be subsumed under international law; or, if it is to be a distinct category, it cannot be institutionalized without presupposing the kind of world republicanism that Kant rejects.

Habermas, 2009, p. 324, see *supra* note 73:

Es ist viel darüber gerätselt worden, warum [Kant] gleichwohl die schwächere Konzeption eines Völkerbundes einführt und seine Hoffnung auf eine freiwillige Assoziation friedenswilliger, aber souverän bleibender Staaten gründet.

⁷⁷ Kant, 1991, p. 113, see *supra* note 29; Vischer, 2017, p. 324, see *supra* note 31, see also p. 326:

Cosmopolitan law is essentially a law of borders. To be sure, it is supposed to ensure a universal legal status of the individual beyond and independent of state borders. Yet this universality cannot simply be provided through a set of rules on the global level. Every distinct legal body, even if it had a worldwide scope, implies by its very determinacy a limit that excludes and conceals claims. Universal recognition beyond borders requires therefore an unending activity of border crossing (fn. omitted).

Capps and Rivers, 2010, p. 244, see *supra* note 75. For Habermas, the reference to 'soulless despotism' is reminiscent of Foucault's fear of 'normalization', see Habermas, 2009, p. 328, *supra* note 73:

Im Hintergrund steht schon so etwas wie Foucault's Furcht vor 'Normalisierung', wenn Kant überlegt, dass in einer hochkomplexen Weltgesellschaft Recht und Gesetz nur um den Preis eines 'seelenlosen Despotism' durchgesetzt werden könnten.

the contrary, it is an inherent element: the aspiration of a global State must necessarily lead to its perversion into the opposite.⁷⁸

Nevertheless, today's international treaties and the States' "new sovereignty"⁷⁹ that centre around the right of States to participate in the development and implementation of international norms can certainly be viewed as a product of Kant's Second Definitive Article:

For if by good fortune one powerful and enlightened nation can form a republic (which is by its nature inclined to seek perpetual peace), this will provide a focal point for federal association among other states. These will join up with the first one, thus securing the freedom of each state in accordance with the idea of international right, and the whole will gradually spread further and further by a series of alliances of this kind. (*Perpetual Peace*, p. 104)

The role of Kant's "one powerful and enlightened nation" has for a long time been filled by the United States with the NATO.⁸⁰ Under NATO, Western Europe became a security community, in alliance with the U.S. and Canada.⁸¹ NATO membership expanded from ten members in 1949, to 29 States today.⁸² Kenneth Waltz described this as a 'bandwagoning' versus balancing behaviour and balance of power configuration anticipated by neo-Realism.⁸³ In times of growing nationalism and anti-cosmopolitanism by the United States and Russia, it seems that a leadership role for the United States as the "enlightened nation" is less likely than ever. In fact, the speech of US President Donald Trump in Warsaw on

⁷⁸ Vischer, 2017, p. 324, see *supra* note 31.

⁷⁹ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, Cambridge (MA), 1995. See also Habermas' dual sovereignty thesis:

[T]he [EU-]member states, who retain their monopoly on the legitimate use of force, subordinate themselves to supranational law, albeit with an interesting proviso [...] and that they share their 'sovereignty' in a certain sense with the citizenry of the Union as a whole.

Jürgen Habermas, *The Crisis of the European Union: A Response*, Ciaran Cronin trans., Polity Press, Cambridge, 2012, p. 13, critic Perju, 2018, pp. 49 *et seq.*, see *supra* note 75.

⁸⁰ Huntley, 1996, pp. 45, 70, see *supra* note 74; Habermas, 2009, p. 315, see *supra* note 73.

⁸¹ Stone Sweet, 2012, pp. 53, 59, see *supra* note 27.

⁸² "NATO Member Countries", available on the NATO web site.

⁸³ Kenneth N. Waltz, *Theory of International Politics*, Addison-Wesley, Reading, 1979, p. 126; Huntley, 1996, pp. 45, 70, see *supra* note 74.

6 July 2017 showed him as a “crusader against cosmopolitanism”⁸⁴ who predicted a clash of civilisations.⁸⁵ A year later, on 10 September 2018, John Bolton, National Security Advisor of US-President Trump, continued the concerted attacks on cosmopolitanism and multilateralism by the Trump-administration in a speech before the Federalist Society.⁸⁶ As if this was not clear enough, in his speech during the 73rd Session of the United Nations General Assembly in New York on 25 September 2018, President Trump bluntly declared: “America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism.”⁸⁷ The United States will have to return to its internationalism shortly following events in 1918 and 1945 to become again that “powerful and enlightened nation” Kant is referring to.⁸⁸

The third factor is a world citizen law (*Weltbürgerrecht*) which entails the ‘right of hospitality’ (*Recht der Hospitalität*), that is, that each citizen must not be treated in a hostile way by another State.⁸⁹ With regard to the term hospitality, Kant himself notes the oddity of the term in this context, and therefore remarks that “it is not a question of philanthropy but of right”.⁹⁰ In other writings, Kant clarified that the notion of hospitality and cosmopolitan right included a wider range of rights, including “the right of citizens of the world *to try to establish community with all*”,⁹¹ “engage in commerce with any other, and each has a right to make this

⁸⁴ The Economist, “Donald Trump’s G20 Speech Owed a lot to Putin”, 13 July 2017.

⁸⁵ Ishaan Tharoor, “What the Idea of Civilization Does (and Doesn’t) Mean to Trump”, in *The Washington Post*, 7 July 2017.

⁸⁶ The entire speech is available via Matthew Kahn, “National Security Adviser John Bolton Remarks to Federalist Society”, in *The Lawfare Blog*, 10 September 2018. For a critical account of this speech and the reaction it provoked see Alexander Heinze “Exaggerations and over-simplifications mar debate about John Bolton’s ICC Speech”, in *The Hill*, 3 October 2018.

⁸⁷ See *supra* note 14.

⁸⁸ Habermas, 2009, p. 315, see *supra* note 73.

⁸⁹ Ambos, 2013, pp. 293, 305–06, see *supra* note 49.

⁹⁰ Kant, 2006, p. 105, see *supra* note 69; Benhabib, 2006, pp. 21–22, see *supra* note 67. For a detailed analysis see Jasmine K. Gani, “The Erasure of Race: Cosmopolitanism and the Illusion of Kantian Hospitality”, in *Millennium*, 2017, vol. 45, no. 3, pp. 425 ff.; Kleingeld, 1998, p. 75, see *supra* note 76.

⁹¹ Immanuel Kant, *The Metaphysics of Morals*, Mary J. Gregor trans., Cambridge University Press, Cambridge, 1991, p. 158, emphasis in the original (www.legal-tools.org/doc/cb8e1e/); Huntley, 1996, pp. 45, 51, see *supra* note 74.

attempt without the other”,⁹² and a free “public use of man’s reason”.⁹³ For Benhabib, therefore, human rights covenants can be qualified as cosmopolitan norms.⁹⁴

Klaus Günther follows from Kant’s Third Definitive Article, that the application of public human rights is a necessary precondition for a permanent peace.⁹⁵ Kant justifies this precondition through a two-step argument, as indicated above. First,

[the] universal law of Right [*Rechtsgesetz*], so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, is indeed a law [*Gesetz*], which lays an obligation on me, but it does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation; [...]. (*The Metaphysics of Morals*, p. 56 [231])

Second,

if (as must be the case in such a constitution) the agreement of the citizens is required to decide whether or not one ought to wage war, then nothing is more natural than that they would consider very carefully whether to enter into such a terrible game, since they would have to resolve to bring the hardships of war upon themselves [...]. (*Perpetual Peace*, [351])

⁹² Kant, 1991, p. 158, see *supra* note 91, fn. omitted.

⁹³ Immanuel Kant, “An Answer to the Question: What is ‘Enlightenment?’”, *Kant: Political Writings*, H.S. Reiss ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1991, p. 55; Brown, 2006, pp. 661, 664, see *supra* note 62; Gani, 2017, p. 431, see *supra* note 90; Habermas, 2009, p. 321, see *supra* note 73:

Die Gefahr des Despotismus, die in allen von der Obrigkeit bloß auferlegten Gesetzen brütet, kann einzig durch das republikanische Verfahren einer fairen Meinungs- und Willensbildung aller potentiellen Betroffenen vorgebeugt werden.

⁹⁴ Seyla Benhabib, “Claiming Rights across Borders: International Human Rights and Democratic Sovereignty”, in *American Political Science Review*, 2009, vol. 103, no. 4, pp. 691, 696. Against this view with a narrow reading of hospitality, Vischer, 2017, p. 325, see *supra* note 31:

Kant’s cosmopolitan law is far from proclaiming a firm catalogue of human rights or even a world constitution. It only asserts in a rather moral than legal tone a minimal guarantee of peaceful intercourse, and explicitly presumes the ongoing asymmetry of host and visitor.

⁹⁵ See also Günther, 2009, p. 84, see *supra* note 72.

In sum, with this conception, Kant laid the foundations for all current conceptions of human dignity and world peace, an “international rule of law”.⁹⁶ Even though according to Definitive Article 2 international law is created through treaty obligations between States, cosmopolitan norms move the individual as a moral and legal person in a worldwide civil society into the centre of attention.⁹⁷ Nevertheless, I reiterate what was emphasised above: it is doubtful whether Kant can be read to propose a global super-State or other forms of international institutional governance of similar form.⁹⁸ Surely, Kant cuts the cord (of legal theory) between law and the State: for Kant, law implies the *Rechtsstaat* and “a republican form of governance”, as I have described above (“A state (civitas) is a union of a multitude of men under laws of Right”),⁹⁹ which is not necessarily limited to the institutional form of a nation-State, but “allows for the creation, interpretation, and, where necessary, enforcement of law”.¹⁰⁰

Moreover, the empirical argument has been made that “Kant’s quite uncharacteristic claim that we should opt for a loose confederation of states because states will never *want* to join a transnational body with coercive powers [...] has to a large extent been falsified by twentieth-century developments”.¹⁰¹ Habermas therefore proposes an “institutional” cosmopolitanism,¹⁰² which is defined elsewhere as holding “that the

⁹⁶ Huntley, 1996, pp. 45, 49, see *supra* note 74; Stone Sweet, 2012, pp. 53, 58, see *supra* note 27; Jorrik Fulda, “Eine legitime Globalverfassung? Die US-Hegemonie und die weltgesellschaftlich gerechte Vollendung des Kantischen Projektes”, in *Archiv des Völkerrechts*, 2016, vol. 54, no. 3, pp. 334, 345. About the role of human dignity in international human rights law and international criminal law, see Schmahl, 2018, pp. 79 ff., *supra* note 18.

⁹⁷ Benhabib, 2009, pp. 691, 695, see *supra* note 94.

⁹⁸ Habermas, 2009, pp. 313 ff., see *supra* note 73; Jürgen Habermas, *The Divided West*, Ciaran Cronin trans., Polity, Cambridge, 2006, pp. 115 ff.; Thomas Carson, “Perpetual Peace: What Kant Should Have Said”, in *Social Theory and Practice*, 1988, vol. 14, no. 2, pp. 173 ff.; Alexander Wendt, “Why a World State is Inevitable”, in *European Journal of International Relations*, 2003, vol. 9, no. 4, pp. 491 ff.

⁹⁹ Kant, 1991, p. 124, see *supra* note 91.

¹⁰⁰ Capps and Rivers, 2010, p. 234, see *supra* note 75. In the same vein, see Habermas, 2009, p. 337, *supra* note 73:

Der Staat ist keine notwendige Voraussetzung für Verfassungsordnungen.

¹⁰¹ Kleingeld, 1998, p. 83, see *supra* note 76.

¹⁰² Habermas, 2009, pp. 313 ff., see *supra* note 73; Habermas, 2006, pp. 115 ff., see *supra* note 98; Ronald Tinnevelde and Thomas Mertens, “The World State: A Forbidding Nightmare of Tyranny? Habermas on the Institutional Implications of Moral Cosmopolitanism”, in *German Law Journal*, 2009, vol. 10, no. 1, p. 65.

world's political structure should be reshaped so that states and other political units are brought under the authority of supranational agencies of some kind – a 'world government', for example, or perhaps a network of loosely associated regional bodies".¹⁰³ However, as promising (and worth pursuing) as institutional cosmopolitanism sounds, this is not what Kant had in mind, for whatever reason. Institutional cosmopolitanism leaves room for a pluralistic order, Kant does not.¹⁰⁴ Institutional cosmopolitanism (and Habermas in particular) feeds on systems theory,¹⁰⁵ Kant does not. Quite the opposite, systems theory provides an alternative to subjectivity and rationality.¹⁰⁶ And as convincing as it sounds that Kant might have refrained from making his empirical claim that an international State "is not the will of the nations, according to their present conception of international right",¹⁰⁷ had he enjoyed the privilege of witnessing the development of international law today,¹⁰⁸ this is and will always be hypothetical. In fact, it is common knowledge that a revolutionary idea gains more attention when it draws at least in part on realistic considerations¹⁰⁹ rather than on pure utopia. Who is to say that Kant would not have made the same claim today, considering the nationalist tendencies that conquer the world right now?¹¹⁰ In fact, even Habermas admits that the risk of

¹⁰³ Charles R. Beitz, "Cosmopolitan Liberalism and the States System", in Chris Brown (ed.), *Political Restructuring in Europe: Ethical Perspectives*, Routledge, London, 2009, pp. 119–20.

¹⁰⁴ Armin von Bogdandy and Sergio Dellavalle, "Universalism Renewed: Habermas' Theory of International Order in Light of Competing Paradigms", in *German Law Journal*, 2009, vol. 10, no. 1, p. 19.

¹⁰⁵ Tony Prosser, "Constitutions as Communication", in *International Journal of Constitutional Law*, 2017, vol. 15, no. 4, pp. 1039, 1047 ff.; von Bogdandy and Dellavalle, 2009, p. 17, see *supra* note 104. Critically Gunther Teubner, "Quod Omnes Tangit: Transnationale Verfassung ohne Demokratie?", in *Der Staat*, 2018, vol. 57, no. 2, pp. 171, 174–75.

¹⁰⁶ von Bogdandy and Dellavalle, 2009, p. 20, see *supra* note 104.

¹⁰⁷ Kant, 1991, p. 105, see *supra* note 29.

¹⁰⁸ Habermas, 2009, p. 313, see *supra* note 73.

¹⁰⁹ *Ibid.*:

Nach realistischer Auffassung ist eine normative Zählung der politischen Macht durch das Recht nur innerhalb der Grenzen eines souveränen Staates möglich, der seine Existenz auf die Fähigkeit zu gewaltsamer Selbstbehauptung stützt.

¹¹⁰ Jürgen Habermas himself admits this:

Für die *empirische* Beobachtung, daß die Nationalstaaten auf ihrer Souveränität beharren, daß sie den Handlungsspielraum, den ihnen das klassische Völkerrecht zugesteht, 'durchaus' nicht aufgeben 'wollen', gibt es selbst heute noch genügend Evidenzen.

Ibid., p. 325 (emphasis in the original).

“soulless despotism” by a world super power might be (or already is) increased through the use of mass media.¹¹¹

It does not do justice to Kant’s normative work to accuse him of “a certain colour blindness” that is due to a “bias based on his contemporary horizon” and draw the hypothetical conclusion, Kant would have plead differently today.¹¹² Or to voice a demand like Fernando H. Llano does: “To overcome the chronological barrier separating us from Kant we must adapt the institutions of his project of perpetual peace to the present time and historical reality”¹¹³ – as if it was certain that “the present time and historic reality” would have altered Kant’s approach considerably. I therefore agree with Capps and Julian Rivers that “those Kantians who advocate a world state, a state of peoples, a state of states, or anything that resembles the institutional form of a global state are incorrect if they consider their position to be that of Kant. And those interpreters who defend any of these institutional configurations as representative of Kant’s own view are mistaken”.¹¹⁴ At the same time, Kant’s federation of States is certainly more than “a weak, noncoercive confederation of republican sovereign states, with minimal or no suprastate forms of institutional governance, in which states have plenary jurisdiction”, as Capps and Rivers propose.¹¹⁵ As I will demonstrate in the course of this chapter, Kant’s federation does have the power to coerce States.

¹¹¹ *Ibid.*, p. 346:

Und eine von elektronischen Massenmedien beherrschte Öffentlichkeit dient nicht weniger der Manipulation und Indoktrination als der Aufklärung (wobei oft das Privatfernsehen eine traurige Avantgardefunktion übernimmt).

¹¹² *Ibid.*:

Wenn wir der andauernden Relevanz des Kantischen Projekts gerecht werden wollen, müssen wir von den Befangenheiten absehen, die dem zeitgenössischen Horizont geschuldet sind. Auch Kant war ein Kind seiner Zeit und mit einer gewissen Farbenblindheit geschlagen.

¹¹³ Fernando H. Llano, “European Constitutional Patriotism and Postnational Citizenship in gen Habermas”, in *Archiv für Rechts- und Sozialphilosophie*, 2017, vol. 103, no. 4, p. 507.

¹¹⁴ Capps and Rivers, 2010, pp. 230–31, see *supra* note 75.

¹¹⁵ *Ibid.*, p. 230. Capps and Rivers draw their conclusion from a comparison of Kant’s remarks on the federation of states with “those made in support of a coercive and permanent federation of states set out in the Federalist Papers. Although geographically a substantial leap, this, at least, provides an exposition and critique of arguments for and against various forms of international governance at the time Kant was writing” (p. 246).

11.5.2. Protection of Human Rights on the International Level

Having understood Kant's idea of 'right' on the international level, the question now is whether and how Kant justifies an international institution to both protect human rights and punish possible violations of those rights. Some have argued that the State and the international community are called upon to protect the human dignity by way of criminal law.¹¹⁶ According to Katrin Gierhake international punishment compensates, "on the individual level, for the material injustice brought about by an international crime with regard to the inter-personal relationship of citizens; on the general, universal level, supranational punishment operates as a restitution of the universal law and peace, equally violated by the international crime".¹¹⁷ Consequently, the international wrong has to be negated by way of (supranational) punishment.¹¹⁸ Others interpret Kant's Definitive Articles – especially the Kantian idea of a *Weltbürgerrecht*, his concept of human dignity, focusing on people instead of States as subjects of the international order – more like a cosmopolitan vision.¹¹⁹ Human dignity is here also understood as a moral source of subjective rights of all people, of universally recognised human rights which ultimately have to be protected by a universal, interculturally recognised criminal law. It is a form of cosmopolitanism based on principles of reason with a claim of universal validity.¹²⁰

11.5.2.1. A "Violation of Rights in One Part of the World is Felt Everywhere"

The remark that is of crucial meaning for the ICC is the following:

The peoples of the earth have thus entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in one part of the world is felt everywhere. (*Perpetual Peace*, p. 108)

¹¹⁶ Ambos, 2013, pp. 293, 306, see *supra* note 49 with further references.

¹¹⁷ Katrin Gierhake, *Begründung des Völkerstrafrechts auf der Grundlage der Kantischen Rechtslehre*, Duncker & Humblot, Berlin, 2005, pp. 165–66, 297, 299 and *passim*, cited in and translated by Ambos, 2013, pp. 293, 307, see *supra* note 49.

¹¹⁸ Gierhake, 2005, see *supra* note 117; Ambos, 2013, pp. 293, 307, see *supra* note 49.

¹¹⁹ Ambos, 2013, pp. 307–08, see *supra* note 49.

¹²⁰ *Ibid.*

What is ‘a violation of rights in one place that is felt throughout the world’? This is a rather “forceful declaration”.¹²¹ When Kant made this statement, “European states were affirming their sovereignty and, at the same time, were colonizing all other continents”.¹²² How can one ‘feel’ a human rights violation in Northern Uganda, Afghanistan, or Colombia? There have been several attempts to answer that question. Reinhard Merkel, for instance, opines that “felt” means more than following or noting a human rights violation – it is a symbolic harm of the validity of a *Grundnorm* (Kelsen).¹²³ This reading might indeed be supported by Kant’s understanding that the public is more than a public of reason but a coming together of citizens:¹²⁴ “We are here concerned only with the attitude of the onlookers as it reveals itself in public while the drama of great political changes is taking place”.¹²⁵ David Luban opines that it symbolises an assault on “the core humanity and that we all share and that distinguishes us from other human beings”, on “the individuality and sociability of the victims in tandem”.¹²⁶ This goes in the direction of what Georg Schwarzenberger expressed in 1950: international crimes “strike at the very roots of international society”.¹²⁷ Or in the words of Ronald Tinnevelt and Thomas Mertens: “The world truly shares a common fate”.¹²⁸

However, is this not an over-interpretation of the word ‘felt’? Compared with all the complicated terminology Kant deliberately used throughout his works, why would he use such a simple and emotional word like ‘felt’ to make such an important point? This cannot be a coinci-

¹²¹ Daniele Archibugi, “A Cosmopolitan Perspective on Global Criminal Justice”, in *SSRN*, 2015, p. 5.

¹²² *Ibid.*

¹²³ Reinhard Merkel, “‘Lauter leidige Tröster’? Kants Friedensschrift und die Idee eines Völkerstrafgerichtshofs”, in Reinhard Merkel and Roland Wittmann (eds.), *Zum ewigen Frieden: Grundlagen, Aktualität und Aussichten einer Idee von Immanuel Kant*, Suhrkamp, Berlin, 1996, pp. 309, 349.

¹²⁴ James Donald, “Kant, the Press, and the Public Use of Reason”, in *Javnost - The Public*, 2003, vol. 10, no. 2, p. 53.

¹²⁵ Immanuel Kant, “The Contest of Faculties”, *Kant: Political Writings*, H.S. Reiss ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1991, p. 182.

¹²⁶ Ambos, 2013, p. 312, see *supra* note 49.

¹²⁷ Georg Schwarzenberger, “The Problem of International Criminal Law”, in *Current Legal Problems*, 1950, vol. 3, no. 1, pp. 263, 273.

¹²⁸ Tinnevelt and Mertens, 2009, p. 63, see *supra* note 102, who opine that:

These words seem to resonate with Immanuel Kant’s famous statement that ‘a violation of right on one place of the earth is felt in all’.

dence, because first, the official *a priori* character of Kant's *Critique of Judgment*¹²⁹ determines his language: Kant said that *a priori* knowledge is knowledge that is independent of all experience¹³⁰ and experience includes language.¹³¹ Kant therefore had to make his language applicable to his *a priori* concepts, which turned his language into an almost mathematical tool.¹³² Second, there is indeed an indication in Kant's writings of how he understands "felt":

Enjoyment which someone (legally) acquires himself is doubly felt. (*Anthropology*, p. 134 [238])

When [a child] starts to speak by means of "I" a light seems to dawn on him, as it were, and from that day on he never again returns to his former way of speaking. – Before he merely felt himself; now he thinks himself. (*Anthropology*, p. 15 [127])

Epistemologically, there is a difference between thinking and feeling and many authors confuse the two.¹³³ Even more important is the explanation provided by Kant: violations of rights are felt everywhere not because humans are creatures of the same God or because they belong to the same race:

[F]or all men are entitled to present themselves in the society of others by virtue of their right to communal possession of the earth's surface. Since the earth is a globe, they cannot disperse over an infinite area, but must necessarily tolerate one another's company. [...] to utilise as a means of social intercourse that right to the earth's surface which the human race shares in common. (*Perpetual Peace*, p. 106)

¹²⁹ Brown, 2006, pp. 661, 664, see *supra* note 62.

¹³⁰ Immanuel Kant, *Critique of Judgment*, Oxford University Press, Oxford, 2007, pp. 15 ff.

¹³¹ Natascha Gruber, "Sprachphilosophische Überlegungen zu Kants Transzendentalphilosophie. Zum Verhältnis von Sprache und Denken", in Martina t, Wolfgang Gombocz and Christian Hiebaum (eds.), *Analysen, Argumente, Ansätze*, Editiones Scholasticae, Ontos, 2008, pp. 115, 118.

¹³² Michael N. Forster, "Kant's Philosophy of Language?", in *Tijdschrift voor Filosofie*, 2012, vol. 74, no. 3, p. 485; Andrea Staiti, "The Neo-Kantians on the Meaning and Status of Philosophy", in Nicolas De Warren and Andrea Staiti (eds.), *New Approaches to Neo-Kantianism*, Cambridge University Press, Cambridge, 2015, p. 19 ("Kant created a new language").

¹³³ Merkel, for instance, interprets "felt" as "being aware of" or "having knowledge", see Merkel, 1996, pp. 309, 349, *supra* note 123.

Thus, Kant does not provide a metaphysical justification, but rather a social justification.¹³⁴ “Felt” is therefore a form of ‘social empathy’ that Kant finds in his definition of public.¹³⁵ As I have previously remarked, there is an important difference between Kant’s cosmopolitan law on the one hand and the much older natural law tradition on the other hand.¹³⁶ In the natural law tradition, “rights exist as long as humans exist. Under cosmopolitan law, rights violations are perceived everywhere because of human interconnections. In other words, they are associated to a specific historical context”¹³⁷.

11.5.2.2. Human Rights Violations and the Global Public Sphere

The medium through which human rights violations are felt everywhere is communication on the platform of a public sphere. What Kant identifies is “a ‘world community’ manifesting moral duties beyond the state and common to all”, originating in the priority of human freedom.¹³⁸ The public is the collective body of all citizens, but there is no reason why it could not also be a Kantian “world at large”, which contains the viewpoint of “everyone else”:

[A]s a scholar addressing the real public (i.e. the world at large) through his writings, the clergyman making public use of his reason enjoys unlimited freedom to use his own reason and to speak in his own person. (*What is Enlightenment*, p. 57)

In this sense, we can speak of a world public opinion, and of various ways in which even this largest of publics may be politically organised.¹³⁹ Kant promotes a pluralistic conception of reason.¹⁴⁰ But what is this public at large?

¹³⁴ Archibuigi, 2015, p. 5, see *supra* note 121.

¹³⁵ For a similar interpretation, albeit in a slightly different context, see Donald, 2003, p. 54, *supra* note 124.

¹³⁶ Archibuigi, 2015, p. 5, see *supra* note 121.

¹³⁷ *Ibid.*

¹³⁸ Huntley, 1996, pp. 45, 51, see *supra* note 74.

¹³⁹ About the public use of reason in detail, see Donald, 2003, pp. 45 ff., *supra* note 124.

¹⁴⁰ *Ibid.*, p. 48.

Habermas spoke of world societies because communication systems and markets have created a global context.¹⁴¹ I wish to reiterate that I employ the Habermasian discursive theory¹⁴² without adopting his rather radical interpretation of Kant that leads to an institutional cosmopolitanism.¹⁴³ Due to its normative dimension,¹⁴⁴ not only does Habermas's intersubjective framework¹⁴⁵ provide a fitting paradigm for the international community that is connected through mass media, but it also complements the Kantian Universal Principle of Right. However, it does not justify the crossing of Kant's red line between the federation of States and a global super-state. James Bohman proposes a cosmopolitan public sphere to change and create democratic institutions,¹⁴⁶ which functions to "keep debate open to revise decisions that have already been made".¹⁴⁷ He thereby uses the advantages of a transnational (constitutional) regime, where self-contradiction is reached through the media and not through the democratic process known in national entities.¹⁴⁸ This public sphere can eventually lead to a constitutional moment as proposed by Bruce Acker-

¹⁴¹ Jürgen Habermas, "Kant's Idea of Perpetual Peace with the Benefit of 200 Years' Hindsight", in James Bohman and Matthias Lutz-Bachmann (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, MIT Press, Cambridge, 1997, p. 131; Habermas, 2009, p. 344, see *supra* note 73:

Es geht vielmehr um die theoretische Frage, ob die globale Meinungsbildung in einer informellen Öffentlichkeit, ohne verfassungsrechtlich institutionalisierte Wege der Umsetzung kommunikativ erzeugten Einflusses in politische Macht, der Weltbürgergesellschaft eine hinreichende Integration und der Weltorganisation eine hinreichende Legitimation verschaffen kann.

In favour also Perju, 2018, p. 67, see *supra* note 75, who, however, rejects Habermas' dual sovereignty thesis.

¹⁴² Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, MIT Press, Cambridge, 1996; Prosser, 2017, p. 1045, see *supra* note 105.

¹⁴³ See Section 11.5.1. above.

¹⁴⁴ Prosser, 2017, p. 1047, see *supra* note 105.

¹⁴⁵ von Bogdandy and Dellavalle, 2009, p. 20, see *supra* note 104.

¹⁴⁶ James Bohman, "The Public Spheres of the World Citizen", in James Bohman and Matthias Lutz-Bachmann (eds.), *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*, MIT Press, Cambridge, 1997, p. 187.

¹⁴⁷ *Ibid.*, p. 188.

¹⁴⁸ See Teubner, 2018, p. 192, see *supra* note 105:

Kommunikationsmedien machen den Unterschied. Über ihr eigenes Kommunikationsmedium entwickeln transnationale Regimes je eine idiosynkratische Episteme, die auf eine entsprechende idiosynkratische Form des demokratischen Selbst-Widerspruchs angewiesen ist.

man. Kant explicitly emphasised the freedom of the press: “Thus *freedom of the pen* is the only safeguard of the rights of the people”.¹⁴⁹ Bohman draws on this important role of the media:¹⁵⁰ “In complex societies, public deliberation is mediated not only by the powerful institutions of the state but also by the mass media, which have the capacity to reach a large and indefinite audience”.¹⁵¹ This resonates with the following remark in Kant’s *Critique of Pure Reason*: “Our age is, in especial degree, the age of criticism, and to criticism everything must submit”.¹⁵² The media today (especially social media) is not merely the channel through which opinions, and “likes and dislikes”¹⁵³ are exchanged. Thus, the public “that read and debated these matters read and debated about itself”, not only about its own opinions but about itself as a practically reasoning public.¹⁵⁴

In fact, the role of the media has long changed from a mere transmitter of ideas that find its ways into the political (parliamentary) debate to being the real forum of political debate.¹⁵⁵ Bohman even goes so far to state that “media institutions are the only means powerful enough to achieve a cosmopolitan public sphere, although they are currently not part of it. [S]uch media are conceivable as channels by which to appeal to an indefinitely large audience and by which social movements in civil socie-

¹⁴⁹ Immanuel Kant, “On the Common Saying: ‘This May Be True in Theory, But it Does Not Apply in Practice’”, *Kant: Political Writings*, H.S. Reiss ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1991, p. 85 (emphasis in the original). As Donald interprets, however, Kant is here “actually talking about freedom of authorship and publication (*die Freiheit der Feder*, freedom of the pen) in the particular context of citizens having a right to public abuse, injustice or errors in the administration of the state. In other words, he is talking about public exposure, rather than a necessary feature of the public conceived as a forum of learned debate and communication”. See Donald, 2003, p. 50, *supra* note 124 (emphasis in the original).

¹⁵⁰ Bohman, 1997, p. 193, see *supra* note 146.

¹⁵¹ *Ibid.*, p. 196.

¹⁵² Immanuel Kant, *Critique of Pure Reason*, Norman Kemp-Smith trans., 2nd edition, Macmillan, London, 2007, A, p. xii. See also David Owen, “The Contest of Enlightenment: An Essay on Critique and Genealogy”, in *Journal of Nietzsche Studies*, 2003, vol. 25, pp. 35–36; Donald, 2003, p. 55, see *supra* note 124.

¹⁵³ Bohman, 1997, pp. 189–90, see *supra* note 146.

¹⁵⁴ *Ibid.*

¹⁵⁵ Karl-Heinz Ladeur, “Persönlichkeitsschutz und ‘Comedy’ - Das Beispiel der Fälle SAT 1/Stahnke und RTL 2/Schröder”, in *Neue Juristische Wochenschrift*, 2000, vol. 54, no. 28, pp. 1977–78.

ty may gain and structure international public attention to shared problems”.¹⁵⁶

Kant’s “negative substitute” (Definitive Article 2) enables the reshaping of “political institutions in accordance with cosmopolitan right” and “may even create and then continually reshape new, international institutions based on the principle of interlinked public spheres in which world citizens exercise their sovereignty”.¹⁵⁷ In a way, this is what happened in the 1990s when the UN *ad hoc* tribunals were established and a “transition from a Kantian universalism to a more contextualised cosmopolitanism” took place.¹⁵⁸

11.6. The Institutional Justification of the ICC

After these rather abstract and descriptive accounts of those of Kant’s writings that are relevant for the justification of the ICC, I would now like to apply them to the legal regime of the Court, and especially to its Statute. This warrants a short reminder of the findings in the first section of this chapter. A wrong is a hindrance to freedom in accordance with universal laws and as a consequence, *State* coercion (punishment) is just and has to be done with the purpose of retribution. Does this, however, not only apply to State coercion but also to coercion by an international organisation?

11.6.1. The *Ius Puniendi* of the ICC

In other words, punishment can only be justified by the State’s power to punish (*ius puniendi*) and eventually by certain *purposes* of punishment. I lean towards translating *ius puniendi* as ‘power’ and not ‘right’ to punish, to avoid confusion with the *ius poenale*. Reinhard Maurach and Heinz Zipf distinguish *ius poenale* and *ius puniendi* as the objective and subjective right to punish, respectively.¹⁵⁹ The *ius poenale* describes the sum of

¹⁵⁶ Bohman, 1997, p. 196, see *supra* note 146.

¹⁵⁷ Habermas, 1997, p. 181, see *supra* note 141; cf. Habermas, 2009, p. 344, see *supra* note 73, who opines that the alternatives of world federations v. global super-state are inconclusive. See also Vischer, 2017, p. 323, see *supra* note 31; Capps and Rivers, 2010, p. 235, see *supra* note 75; Vlad Perju, “Cosmopolitanism and Constitutional Self-Government”, in *International Journal of Constitutional Law*, 2010, vol. 8, no. 3, p. 328.

¹⁵⁸ Daniel Levy and Natan Sznaider, “The Institutionalization of Cosmopolitan Morality: The Holocaust and Human Rights”, in *Journal of Human Rights*, 2004, vol. 3, no. 2, pp. 143, 153.

¹⁵⁹ See Reinhard Maurach and Heinz Zipf, *Strafrecht: Allgemeiner Teil, Vol. 1: Grundlehren des Strafrechts und Aufbau der Straftat*, C.F. Müller, Heidelberg, 1992, p. 3.

rules about offences, sentences and other forms of punishment. The *ius puniendi* is the State power to punish, that is, the State's capacity – resulting from its sovereignty – to declare certain conduct as punishable and to determine a sentence.¹⁶⁰ Thus, the *ius poenale* is the result of a *ius puniendi*.¹⁶¹ Others also distinguish between the subjective and objective right to punish, but for them the subjective right to punish is more of a right and less of an inherent power.¹⁶² Here, the premise is different from my premise: while I agree with the above-mentioned authors that a *ius poenale* presupposes a *ius puniendi*, for Franz von Holtzendorff, for example, it is the other way around – a *ius puniendi* presupposes a *ius poenale*.¹⁶³ In other words: only when there exists a body of rules about offences, sentences, and other forms of punishment, does the State have the *right* to punish. This goes to Wesley Hohfeld's classical analysis of 'right' that includes – *inter alia* – a power, *in concreto*: the right to punish comprises both the normative power and the State's permissibility to punish.¹⁶⁴ Especially a State's jurisdiction stems from a State's power to punish and only indirectly from a right.¹⁶⁵

¹⁶⁰ *Ibid.*

¹⁶¹ In a similar vein, Hans-Heinrich Jescheck, *Lehrbuch des Strafrechts: Allgemeiner Teil*, Duncker & Humblot, Berlin, 1978, p. 8:

Das Strafrecht beruht auf der Strafgewalt ("ius puniendi") des Staates, und diese ist wiederum Teil der Staatsgewalt (emphasis in the original, fn. omitted).

¹⁶² See Hilde Kaufmann, *Strafanspruch, Strafklagerecht: Die Abgrenzung des materiellen und formellen Strafrechts*, Otto Schwartz & Co, Göttingen, 1969, pp. 71–72 with further references.

¹⁶³ *Ibid.*, p. 72; Franz von Holtzendorff, "Einleitung in das Strafrecht", in Franz von Holtzendorff (ed.), *Handbuch des deutschen Strafrechts in Einzelbeiträgen, Vol. 1: Die geschichtlichen und philosophischen Grundlagen des Strafrechts*, Lüderitzsche Verlagsbuchhandlung, Berlin, 1871, p. 3:

Jedes staatliche Recht auf Bestrafung (jus puniendi) ist an das Vorhandensein eines positiven Rechtssatzes (jus poenale) geknüpft, durch welchen eine Handlung als verbrecherisch erklärt und die darauf anzuwendende Strafe bestimmt wird.

¹⁶⁴ Alejandro Chehtman, "Jurisdiction", in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law*, Oxford University Press, Oxford, 2014, p. 402.

¹⁶⁵ Permanent Court of International Justice, *The Case of the S.S. "Lotus" (France v. Turkey)*, Judgment, 7 September 1927, Series A, no. 10, para. 45:

Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a *permissive rule* to the contrary – it may not exercise its *power* in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a

For three reasons, however, the emanation of a power to punish (*ius puniendi*) from a right to punish (*ius poenale*) is not convincing. First, the Hobbesian ‘right’ to punish should not be confused with a Hohfeldian ‘right’ to punish.¹⁶⁶ According to Hobbes, State punishment stems from the right to self-preservation.¹⁶⁷ Even though, strictly speaking, this right belongs to all natural, mortal humans, the sovereign possesses it through the State’s existence in a specific state of nature *vis-à-vis* a natural person.¹⁶⁸ Second, especially at an extraterritorial and/or international level, beyond a right to punish “we must also account for a specific body having the authority to exercise that right”.¹⁶⁹ Third, should the *ius puniendi* really presuppose a *ius poenale*, the question of why a State has the right to punish is obsolete – a classical *circulus vitiosus*.¹⁷⁰

Here, the development of the term *ius puniendi* deserves closer consideration. It originally only described the power to punish, also known as *potestas criminalis*, and included the State’s power to punish, resulting from superiority (*Selbsherrlichkeit, Imperium*), a superior right and duty to protect (*hoheitliches Schutzrecht mit Schutzpflicht*) or the *ius eminens*, comparable with Hobbes’s right to self-preservation.¹⁷¹ The power to pun-

permissive rule derived from international custom or from a convention (emphasis added) (www.legal-tools.org/doc/c54925/).

¹⁶⁶ Alice Ristroph, “Respect and Resistance in Punishment Theory”, in *California Law Review*, 2009, vol. 97, no. 2, p. 603 with fn. 8.

¹⁶⁷ Thomas Hobbes, *Leviathan*, Richard Tuck ed., Cambridge University Press, Cambridge, 1996/2003, p. 214:

[E]very man had a right to every thing, and to do whatsoever be thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto. And this is the foundation of that right of Punishing, which is exercised in every Commonwealth. For the Subjects did not give the Sovereign that right; but onely in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him onely; and (excepting the limits set him by naturall Law) as entire, as in the condition of meer Nature, and of warre of every one against this neighbour.

See also, Ristroph, 2009, pp. 613–14.

¹⁶⁸ *Ibid.*, p. 615, see *supra* note 166.

¹⁶⁹ Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, Oxford University Press, Oxford, 2010, p. 6.

¹⁷⁰ In the same vein, Peter Klose, “‘Ius puniendi’ und Grundgesetz”, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1974, vol. 86, no. 1, p. 36.

¹⁷¹ *Ibid.*

ish had a pre-positive origin¹⁷² and became successively intertwined with the positive right to punish as result of the triumph of liberal criminal law,¹⁷³ constructing juridical relationships between the State as a (criminal law) legislator, and the State as possessing the right to punish.¹⁷⁴ This, however, ignores that the *ius poenale* can hardly have the function of being both the criminal law (right), which is addressed to the citizens, and the basis of punishment (power), at the same time.

Be that as it may, both theoretical elements – the *ius puniendi* and the purpose of punishment – are highly disputed on an international level. International criminal law lacks a consolidated punitive power in its own right, since it does not operate pursuant to a legislative body, but instead claims the ability to punish without the status of a sovereign nation.¹⁷⁵ In fact, for Kant, law cannot exist without a public power to enforce it.¹⁷⁶ Others provided similar arguments: At the international level a normative order is absent where norms are recognised by the society as a whole and determine social communication; this, however, is a requirement for the power to punish (Günther Jakobs);¹⁷⁷ law cannot exist without the State (Thomas Hobbes).¹⁷⁸ However, a more fundamental question arises as to whether it makes sense at all to apply the theories of validity of norms, developed with classical sovereign nations in mind, to a supranational order which follows different rules of organisation.¹⁷⁹ Here, the enforcement of fundamental human rights by international criminal law come to the rescue of the international community's *ius puniendi*, eventually blurring the lines between the community's obligation to protect human rights and its power to punish human rights abuses. As previously mentioned, it

¹⁷² Heinrich Luden, *Handbuch des teutschen gemeinen und particularen Strafrechts*, vol. 1, Friedrich Luden, Jena, 1847, p. 6.

¹⁷³ Klose, 1974, pp. 39–41, see *supra* note 170.

¹⁷⁴ Karl Binding, *Handbuch des Strafrechts*, Duncker & Humblot, Berlin, 1885, p. 191.

¹⁷⁵ Ambos, 2013, p. 298, see *supra* note 49.

¹⁷⁶ *Ibid.*, p. 300.

¹⁷⁷ Günther Jakobs, “Untaten des Staates – Unrecht im Staat: Strafe für die Tötungen an der Grenze der ehemaligen DDR?“, in *Goldammer's Archiv für Strafrecht*, 1994, vol. 141, no. 1, pp. 13–14. Jakobs *expressis verbis* refers to the state's ‘power’ and not ‘right’ to punish, since a power to punish is a necessary requirement for the right to punish. In Jakobs's own words: “Ohne staatliche Gewalt gibt es kein staatliches Recht” (p. 13). See also Ambos, 2013, pp. 299–300, *supra* note 49.

¹⁷⁸ Jakobs, 1994, p. 300, see *supra* note 177.

¹⁷⁹ *Ibid.*, p. 303.

was Kant who had the idea of human dignity as a source of fundamental human (civil) rights which, ultimately, must be enforced by a supra- or transnational (criminal) law.¹⁸⁰ Thus, Kant's conception of human dignity, complemented by his view of 'perpetual peace' leaves the door open for a *ius puniendi* of the international community: first, a just and permanent peace is established through the recognition of and respect for the rights of the citizens, that is, human rights. Secondly, violations of human rights must be identified as serious wrongs and punished. Reinhard Merkel and Klaus Günther demand stigmatisation and punishment for these violations in service of the confirmation and reinforcement of fundamental human rights norms.¹⁸¹

The question now is whether it is an ICC that can punish individuals for human rights violations.

11.6.2. Can States Be Coerced?

However, some may rightly point out that the following remark is proof that Kant did not advocate for an international criminal court:¹⁸²

[W]hile natural right allows us to say of men living in a lawless condition that they ought to abandon it, the right of nations does not allow us to say the same of states. For as states, they already have a lawful internal constitution, and have thus outgrown the coercive right of others to subject them to a wider legal constitution in accordance with their conception of right. (*Perpetual Peace*, p. 103)

Admittedly, the remark that States "have thus outgrown the coercive right of others" can easily be understood as a rejection of something like international criminal justice and an obligation to co-operate or detain.¹⁸³ This reading, however, ignores the fact that what Kant requires is a *de iure* coercive effect and not a *de facto* one;¹⁸⁴ Pauline Kleingeld views

¹⁸⁰ *Ibid.*, p. 304.

¹⁸¹ *Ibid.*

¹⁸² Steven C. Roach, *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, Oxford University Press, Oxford, 2009, p. 152, fn. 3.

¹⁸³ Capps and Rivers, 2010, p. 245, see *supra* note 75.

¹⁸⁴ Merkel, 1996, pp. 309, 319, see *supra* note 123.

“*Recht* (rights, rightful law) and the use of necessary coercion as two sides of the same coin”.¹⁸⁵

[C]oercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindering of a *hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with Right by the principle of contradiction an authorization to coerce someone who infringes upon it. (*The Metaphysics of Morals*, p. 57 [232])

A *de iure* meaning of coercion on an international level, however, cannot be found in its domestic understanding.¹⁸⁶ Right may therefore comprise more or less formalised coercion mechanisms.¹⁸⁷ Hans Kelsen, for whom – like Kant – a characteristic of laws is “that they are coercive orders”,¹⁸⁸ includes sanctions such as ‘reprisals’ in this coercive order.¹⁸⁹ These sanctions can also be used to “regulate the mutual behaviour of states”.¹⁹⁰ Kelsen’s idea of *non sub homine, sed sub lege* – the binding force emanates, not from any commanding human being, but from the impersonal anonymous ‘command’ as such¹⁹¹ – can, in my view, also be applied to Kant: in a system of right, there is a subordination under the law, that is, the legislator:

Each nation, for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to the civil one, within which the rights of each could be secured. This would mean establishing a *federation of peoples*. But a federation of this sort would not be the same thing as an international state. For the idea of an international state is contradictory, since every

¹⁸⁵ Kleingeld, 1998, p. 81, see *supra* note 76.

¹⁸⁶ H.L.A. Hart, *The Concept of Law*, 2nd edition, Clarendon Press, Oxford, 1994, pp. 213 ff.; Merkel, 1996, pp. 309, 319, see *supra* note 123.

¹⁸⁷ *Ibid.*

¹⁸⁸ Hans Kelsen, *Pure Theory of Law*, Lawbook Exchange, Clark, 2005, p. 33.

¹⁸⁹ Hans Kelsen, “Sanctions in International Law under the Charter of the United Nations”, in *Iowa Law Review*, 1946, vol. 31, pp. 499–500.

¹⁹⁰ *Ibid.*

¹⁹¹ Hans Kelsen, *General Theory of Law and State*, Transaction Publishers, London, 2006, p. 36.

state involves a relationship between a superior (the legislator) and an inferior (the people obeying the laws), whereas a number of nations forming one state would constitute a single nation. And this contradicts our initial assumption, as we are here considering the right of nations in relation to one another in so far as they are a group of separate states which are not to be welded together as a unit. (*Perpetual Peace*, p. 102)

and not under other human beings (“leave the state of nature”).

[U]nless [the individual] wants to renounce any concepts of Right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by law and is allotted to it by adequate power (not its own but an external power); that is to say, it ought above all else to enter a civil condition. (*The Metaphysics of Morals*, p. 124 [312])

The coercive authority of the ICC can therefore be justified by a combination of Kant’s *de iure* approach to coercion on the one hand, and his ‘negative substitute’ on the other. Thus, even though Kant’s cosmopolitan right requires an hierarchical authority, “its success depends upon its legitimacy, not its coercive power alone”.¹⁹² Antonio Franceschet seems to borrow from Kelsen when he opines that the “ICC’s coercive authority has moral legitimacy if and when it effectively supports (or substitutes for) the default role of sovereign states in systematic rights vindication”, which basically means that the coercion of States would be legitimate as long as this establishes freedom at the national, international, and supranational level.¹⁹³ This resembles Koskenniemi’s reading of Kant and Kelsen:

If for Kant (and for Kelsen) the transition from the realm of nature (or from raw desire and violence) to the realm of freedom in a ‘kingdom of ends’ takes place through law, this transition depends less on the inner force of (external) legis-

¹⁹² Huntley, 1996, pp. 45, 60, see *supra* note 74. See also Franceschet, 2002, pp. 93–94, *supra* note 52.

¹⁹³ Franceschet, 2002, pp. 93, 98–99, see *supra* note 52.

lation than on the moral rectitude of those whose task is to apply it.¹⁹⁴

11.7. Can the ICC Statute Live up to the Institutional Justification of the ICC?

Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom. (*The Metaphysics of Morals*, p. 56 [230])

Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. (*The Metaphysics of Morals*, p. 63 [238])

Kant placed human rights in his doctrine of right: human beings (merely by virtue of their “humanity”) have one and only one innate right, namely the right to freedom of action.¹⁹⁵ In other words, human rights can only exist within an existing legal order, whether it is domestic or international legal order.¹⁹⁶ The latter requires a certain form of institutionalisation.¹⁹⁷ In Jürgen Habermas's view, the constitutionalisation of international law is a complementary project of cosmopolitanism – a way to renew or sustain the cosmopolitan project at a time in which it is threatened by alternative visions of world order, such as a US hegemonic liberalism or a global Hobbesian order.¹⁹⁸

With the establishment of the ICC, the international community practically ‘amended’ the global constitutional order.¹⁹⁹ This amendment, however, must meet the requirements of constitutionalisation – “cosmopolitan ends must include cosmopolitan institutional means”.²⁰⁰

¹⁹⁴ Koskenniemi, 2007, p. 11, see *supra* note 30.

¹⁹⁵ Hans Reiss, “Introduction”, *Kant: Political Writings*, H.S. Reiss ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1991, p. 11; Habermas, 1997, p. 140, see *supra* note 141.

¹⁹⁶ Habermas, 1997, p. 140, see *supra* note 141.

¹⁹⁷ *Ibid.*

¹⁹⁸ Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community*, Martinus Nijhoff Publishers, Boston, 2009, p. 162.

¹⁹⁹ Roach, 2009, pp. 196–97, see *supra* note 182.

²⁰⁰ *Ibid.*, p. 198.

11.7.1. Constitution and Constitutionalism

There are numerous ways to conceptualise the term ‘constitution’.²⁰¹ I have described above how Kant envisioned a constitution. Read in conjunction with the Second Definitive Article, “constitutions can be seen as a conscious contract between mutually agreed participants, outlining the terms and conditions of a juridical order while also providing possible limitations to the reach of those constitutions”.²⁰² Kelsen distinguishes between a constitution in a material and formal sense.²⁰³ While a formal constitution “is a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which it is to render the change of these norms more difficult”, a constitution in a material sense “consists of those rules which regulate the creation of the general legal norms, in particular the creation of statutes”.²⁰⁴ In a formal understanding, the constitution is the “highest level of positive law” and the centre of a hierarchical system,²⁰⁵ resting on an “ultimate source of law” called the *Grundnorm* (“basic norm”)²⁰⁶ or a “rule of recognition”.²⁰⁷

Joseph Raz observes the use of the term ‘constitution’ in a “thin” and “thick” sense. As to the former, a constitution “is simply the law that establishes and regulates the main organs of government, their constitution and powers”, including “law that establishes the general principles under which the country is governed: democracy, if it establishes democratic organs of government; federalism, if it establishes a federal struc-

²⁰¹ Julian Arato, “Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations”, in *Yale Journal of International Law*, 2013, vol. 38, no. 2, pp. 289, 296.

²⁰² Brown, 2006, pp. 661, 675, see *supra* note 62.

²⁰³ Kelsen, 2006, p. 124, see *supra* note 191.

²⁰⁴ *Ibid.*

²⁰⁵ Hans Kelsen, *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law*, Bonnie Litschewski Paulson and Stanley L. Paulson trans., Clarendon Press, Oxford, 1997, p. 64.

²⁰⁶ *Ibid.*, p. xxviii. See also Andreas Paulus, “The International Legal System as a Constitution”, in Jeffrey Dunoff and Joel Trachtman (eds.), *Ruling the World? Constitutionalism, International Law & Global Government*, Cambridge University Press, Cambridge, 2009, pp. 69, 74.

²⁰⁷ Hart, 1994, pp. 100 ff., see *supra* note 186.

ture; and so on”.²⁰⁸ With regard to the latter, “thick” sense of a constitution, Raz identifies seven features: “constitution and powers of the main organs of the different branches of government”; a long duration and stability; the existence of a canonical formulation; the constitution of “superior law”; justiciability, that is “judicial procedures by which the compatibility of rules of law and of other legal acts with the constitution can be tested”; entrenchment, that is, constitutional amendment procedures that are legally more difficult to secure than ordinary legislation”; and principles of government (“democracy, federalism, basic civil and political rights, etc.”).²⁰⁹

Alec Stone Sweet differentiates between three types of constitution. First, the ‘absolutist constitution’, where “the authority to produce and change legal norms, including the constitution, is centralised and absolute”.²¹⁰ Constitutional norms are categorised as “meta-norms” that “reflect, rather than restrict, the absolute power of those who govern”.²¹¹ The second type is the ‘legislative supremacy constitution’, where “the constitution provides for a stable set of governmental institutions and elections for the legislature”.²¹² Within this type, the constitution is not entrenched, which means that “no special, non-legislative procedures exist for revising it”; there is no judicial review of statutes, because “any act that conflicts with a statute is in itself invalid”; and there is “no layer of substantive constraints in the form of rights”.²¹³ Sweet’s final type of constitution is the so-called ‘higher law’ constitution.²¹⁴ Compared to the ‘legislative supremacy constitution’, this type establishes “substantive constraints to

²⁰⁸ Joseph Raz, “On the Authority and Interpretation of Constitutions: Some Preliminaries”, in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations*, Cambridge University Press, Cambridge, 1998, pp. 152–53.

²⁰⁹ *Ibid.*, p. 153.

²¹⁰ Alec Stone Sweet, “Constitutionalism, Legal Pluralism, and International Regimes”, in *Indiana Journal of Global Legal Studies*, 2009, vol. 16, no. 2, pp. 621, 629.

²¹¹ Stone Sweet provides the French Charter of 1814 as an example, see *ibid.*

²¹² *Ibid.*, pp. 629–30.

²¹³ *Ibid.*, p. 630. Stone Sweet uses “the Australian parliamentary system, the British system through much of the twentieth century, and the French Third (1875–1940) and Fourth (1946–1958) Republics” as examples. See also Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law*, 3rd edition, Foundation Press, St. Paul, 2014, p. 297.

²¹⁴ Stone Sweet, 2009, pp. 620, 630–31, see *supra* note 210. See also John F. Hart, “Higher Law, and Property Rights: Judicial Review in the Federal Courts, 1789-1835”, in *San Diego Law Review*, 2008, vol. 45, pp. 823 *et seq.*

the exercise of public authority in the form of fundamental rights and establishes independent, judicial means of enforcing rights, even against legislative authority”.²¹⁵ Here, “the higher law is entrenched with this type of constitution specifying amendment procedures which, typically, make it more difficult to change the constitution”.²¹⁶

The term ‘constitution’ must be distinguished from the term ‘constitutionalism’,²¹⁷ which can also be defined in various ways. For Kant, constitutionalism “seems to refer mainly to a condition of right under a mutually recognised collection of laws. This legal condition can include both codified law and extra-legal principles of convention that act to underpin a universal condition of right”,²¹⁸ as I have described above. Neil Walker suggests that “[c]onstitutionalism is the set of beliefs associated with the idea of constitutional government”;²¹⁹ Ulrich K. Preuss views constitutionalism as “the basic ideas, principles, and values of a polity [that] aspires to give its members a share in the government”, drawing on the “thick” features of a constitution identified by Raz.²²⁰ For Jon Elster, constitutionalism is a “state of mind – an expectation and a norm – in which politics must be conducted in accordance with standing rules or conventions, written or unwritten, that cannot be easily changed”.²²¹

11.7.2. Other Concepts of a Constitution on the Global Scale

In general terms, law-making at an international stage has been described in several ways, such as “legal and constitutional pluralism”,²²² “multi-

²¹⁵ Stone Sweet, 2009, p. 630, see *supra* note 210; Jackson and Tushnet, 2014, p. 267, see *supra* note 213.

²¹⁶ Stone Sweet, 2009, pp. 621, 630, see *supra* note 210.

²¹⁷ Jon Elster, “Constitutionalism in Eastern Europe: An Introduction”, in *University of Chicago Law Review*, 1991, vol. 58, no. 2, pp. 447, 465.

²¹⁸ Brown, 2006, pp. 661, 673, see *supra* note 62.

²¹⁹ Neil Walker, “European Constitutionalism and European Integration”, in *Public Law*, 1996, vol. 40, no. 2, pp. 266–67.

²²⁰ Ulrich K. Preuss, “The Political Meaning of Constitutionalism”, in Richard Bellamy (ed.), *Constitutionalism, Democracy and Sovereign*, Avebury, 1996, pp. 11–12.

²²¹ Elster, 1991, pp. 447, 465, see *supra* note 217; see also KUO Ming-Sing, “The End of Constitutionalism as We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering”, in *Transnational Legal Theory*, 2010, vol. 1, no. 3, pp. 329, 334.

²²² See, for example, Neil Walker, “The Idea of Constitutional Pluralism”, in *Modern Law Review*, 2002, vol. 65, no. 3, p. 317; Prosser, 2017, pp. 1040 ff., see *supra* note 105.

level governance”,²²³ “societal or civil constitutionalism”,²²⁴ or “transnational government networks”.²²⁵ All these terms revolve around the question of “how to conceptualize the juridification of the new world order”,²²⁶ whereby “globalisation” describes “the blurring of the line” between “domestic” and “international” concerns in areas from economic policy to the environment to human rights.²²⁷ In today’s globalised world, elements of international law overlap with those of a constitution, such as the setting up of legislative, executive and interpretative structures that might well be viewed as a ‘government’ in a domestic understanding.²²⁸

Thus, the question of whether the concept of a constitution can be transferred to the global stage raises fundamental questions such as law’s relationship to morality in the context of international law.²²⁹ Within the myriad of scholarly works that have been produced on the matter, some main strands or traditions can be identified.

²²³ See, for example, Ingolf Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, in *Common Market Law Review*, 1999, vol. 36, no. 4, p. 703; Ingolf Pernice, “The Treaty of Lisbon: Multilevel Constitutionalism in Action”, in *Columbia Journal of European Law*, 2009, vol. 15, no. 3, p. 349.

²²⁴ See Gunther Teubner, “Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?”, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds.), *Transnational Governance and Constitutionalism*, Hart, Oxford, 2004, pp. 3–28; Gunther Teubner, “Fragmented Foundations: Societal Constitutionalism beyond the Nation State”, in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism?*, Oxford University Press, Oxford, 2010, chap. 16; see also pp. 309, 313.

²²⁵ See Anne-Marie Slaughter, *A New World Order*, Princeton University Press, Princeton, 2004, p. 8; Anne-Marie Slaughter, “Sovereignty and Power in a Networked World Order”, in *Stanford Journal of International Law*, 2004, vol. 40, pp. 283, 288; KUO, 2010, pp. 329, 354, see *supra* note 221; Jean L. Cohen, “Whose Sovereignty? Empire Versus International Law”, in *Ethics & International Affairs*, 2004, vol. 18, no. 3, pp. 1–2.

²²⁶ *Ibid.*, p. 2.

²²⁷ Scott A. Young, “The Trouble with Global Constitutionalism”, in *Texas International Law Journal*, 2003, vol. 38, no. 3, p. 527. Another definition is provided in Rod Jensen, “Globalization and the International Criminal Court: Accountability and a New Conception of State”, in Ige F. Dekker and Wouter G. Werner (eds.), *Governance and International Legal Theory*, Hart, Oxford, 2004, pp. 159, 166.

²²⁸ Jensen, 2004, pp. 159, 166, see *supra* note 227.

²²⁹ Ruti Teitel, “Humanity Law: A New Interpretive Lens on the International Sphere”, in *Fordham Law Review*, 2008, vol. 77, no. 2, pp. 667–68.

The rationalist strand argues that the main motivation of States to obey international law is their own interest.²³⁰ Thus, in the evolution of international law State consent plays a central role.²³¹ For Rationalists, “state practice is embedded in the institutions of diplomacy and customary international law, which articulate an ethic of coexistence based on sovereign equality and non-intervention”.²³² This ‘Westphalian model’, where the world consists of national jurisdictions, has widely been challenged. Globalists doubt that State consent is a necessary requirement for today’s world order.²³³ Instead, this world order “emerges out of a global process of juridification independent of an individual state’s will as well as of its constitutional framework”.²³⁴ A pluralist constitutional ordering involves “multiple sets of norms that intersect, overlap, divide the field, or relate to one another horizontally rather than vertically” and therefore differs heavily from the domestic (nation-State) constitutional order.²³⁵

Of course, the variants of constitutionalism promoted in international law are manifold. In the twentieth century, a shift can be witnessed “from a formal concept of constitutionalism – such as the existence of a formal unity of international law derived from one single, hierarchically superior source – to a more substantive conception that deals with the emergence of formal and substantive hierarchies between different rules and principles of international law”.²³⁶ Drawing on what has been previously described, Kelsen assumes that “unity” of an international legal system presupposes a legal system “coordinating” State legal systems

²³⁰ Tatiana Sainati, “Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts”, in *Vanderbilt Journal of Transnational Law*, 2016, vol. 49, no. 1, pp. 191, 215.

²³¹ Jason Ralph, “International Society, the International Criminal Court and American Foreign Policy”, in *Review of International Studies*, 2005, vol. 31, no. 1, pp. 27, 32.

²³² *Ibid.*, p. 30.

²³³ KUO, 2010, p. 354, see *supra* note 221.

²³⁴ *Ibid.*

²³⁵ Michael Rosenfeld, “Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism”, in *International Journal of Constitutional Law*, 2008, vol. 6, nos. 3–4, pp. 415, 417:

A pluralist constitutional ordering will require harmonization through the spread of a normative congruence that weaves together a plurality of legal regimes and of world views.

²³⁶ Paulus, 2009, p. 71, see *supra* note 206.

“and separating them from each other in their spheres of validity”.²³⁷ The general norms of the international legal system are, in Kelsen’s view, created “by way of custom or treaty”.²³⁸ The rejection of a “national reliance on a single domestic legal order for establishing a hierarchy of norms”, however, was subjected to dispute in the years between the First and Second World War.²³⁹ In its famous *Lotus* case, the Permanent Court of International Justice emphasised the importance of State sovereignty for the “family of nations”.²⁴⁰ The principle of non-interference is now to be found in Article 2(1) of the UN Charter establishing, in turn, the sovereign equality of States.

Indeed, today Kelsen’s view is criticised as issuing the following challenge, well-articulated by the pluralist Jean L. Cohen: “Either we embrace the further integration and constitutionalisation of the global political system involving the step to a monist global legal order based on cosmopolitan principles (especially human rights), deemed primary and hierarchically superior to domestic legal orders. Or we accept a disorderly global legal pluralism that acknowledges the multiplicity of autonomous political and legal orders but renounces any attempt to construct an order of orders, leaving this up to contestation or, alternatively, to the power of the powers that be”.²⁴¹ Moreover, Kelsen’s above-mentioned view that the general norms of international legal systems are created “by way of custom or treaty”²⁴² was rejected by H.L.A. Hart, for whom international law dissolves the unity of primary and secondary rules, to the extent that only primary rules exist.²⁴³ Nevertheless, international law today is certainly more complete than it was at the time Hart wrote his *Concept of Law*.²⁴⁴ It can therefore certainly be said that there is something as a constitution beyond State boundaries. This, however, presupposes some sort of legal

²³⁷ Elster, 1991, pp. 447, 465, see *supra* note 217.

²³⁸ *Ibid.*, p. 108.

²³⁹ Paulus, 2009, p. 73, see *supra* note 206.

²⁴⁰ *The Case of the S.S. “Lotus” (France v. Turkey)*, para. 104, see *supra* note 165. See also Paulus, 2009, p. 73, see *supra* note 206.

²⁴¹ Jean L. Cohen, “Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)”, in *Humanity*, 2011, vol. 2, no. 1, pp. 127–29.

²⁴² Kelsen, 2002, p. 108, see *supra* note 205.

²⁴³ Hart, 1994, pp. 213 ff., see *supra* note 186. See also Paulus, 2009, p. 74, *supra* note 206.

²⁴⁴ *Ibid.*, p. 75, citing Thomas M. Franck, *Fairness of International Law and Institutions*, Clarendon Press, 1995, pp. 3–6.

organisation, institutionalisation²⁴⁵ and a higher, hierarchically superior law in Kelsen's sense.²⁴⁶

11.7.3. The ICC Statute as a Constitution?

The ICC Statute is not only the “culmination of international law-making”.²⁴⁷ Rather, it codifies the customary international humanitarian laws,²⁴⁸ and the jurisprudence of previously established international or internationalised tribunals such as the ICTY and ICTR.²⁴⁹ Thus, the law with regard to grave international crimes, customary and treaty-based international law, the applicable general principles of law and internationally recognised human rights, “consolidated over a century's worth of jurisprudence and customary law”, have been “constitutionalised” by the ICC Statute.²⁵⁰ These declarations are significant, but in terms of the constitutional elements of the ICC Statute, they are rather vague. The statute contains limitations – the complementarity principle – and describes restrictions of the organs of the ICC, especially the chambers and the Office of the Prosecutor. Those two elements are important components of the Kantian constitution.²⁵¹

11.7.3.1. Human Rights as a Mainstay of the Statute and Blueprint for the Common Good

Even though human rights have a dual character as constitutional norms and super-positive value,²⁵² they first took on concrete form as basic rights within constitutions or constitutional instruments.²⁵³ As Habermas explains about human rights and basic rights:

²⁴⁵ See especially David Kennedy, “The Move to Insistutions”, in *Cardozo Law Review*, 1987, vol. 8, no. 5, pp. 841 ff.

²⁴⁶ Paulus, 2009, p. 75, see *supra* note 206.

²⁴⁷ Weller, 2002, p. 693, see *supra* note 23.

²⁴⁸ Mendes, 2010, p. 22, see *supra* note 24.

²⁴⁹ *Ibid.*, p. 24.

²⁵⁰ *Ibid.*, pp. 15, 21–22.

²⁵¹ Brown, 2006, pp. 661, 675, see *supra* note 62.

²⁵² Habermas, 1997, p. 137, see *supra* note 141:

[A]s constitutional norms they enjoy a positive validity (of instituted law), but as rights they are attributed to each person as a human being they acquire a suprapositive value.

²⁵³ *Ibid.*

As constitutional norms, human rights have a certain primacy, shown by the fact that they are constitutive for legal order as such and by the extent to which they determine a framework within which normal legislative activity is possible. But even among constitutional norms as a whole, basic rights stand out. On the one hand, liberal and social basic rights have the form of general norms addressed to citizens in their properties as “human beings” and not merely as member of a polity.²⁵⁴

Article 21(3) of the ICC Statute forms part of the provisions that identify the applicable law of the Court. It states that the “application and interpretation of law [...] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender [...],²⁵⁵ age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status”.²⁵⁶ ICC judges therefore draw from a large body of human rights law with ample discretion to guarantee the most basic and important protections.²⁵⁷ Article 21(3) thus reflects support for the view “that the nature of human rights is such that they may have a certain special status or, at a minimum, a permeating role within international law”.²⁵⁸

²⁵⁴ *Ibid.*

²⁵⁵ As defined in Article 7(3), the term ‘gender’ “refers to the two sexes, male and female, within the context of society” (fn. added).

²⁵⁶ ICC Statute, Article 21(3), see *supra* note 22.

²⁵⁷ See also Adrian Bos, “1948–1998: The Universal Declaration of Human Rights and the Statute of the International Criminal Court”, in *Fordham International Law Journal*, 1998, vol. 22, no. 2, pp. 229, 234.

²⁵⁸ Rebecca Young, “‘Internationally Recognized Human Rights’ Before the International Criminal Court”, in *International & Comparative Law Quarterly*, 2011, vol. 60, no. 1, pp. 189–90; Michael Reisman, “Sovereignty and Human Rights in Contemporary International Law”, in *American Journal International Law*, 1990, vol. 84, no. 4, pp. 866, 872:

The international human rights program is more than a piecemeal addition to the traditional corpus of international law, more than another chapter sandwiched into traditional textbooks of international law. By shifting the fulcrum of the system from the protection of sovereigns to the protection of people, it works qualitative changes in virtually every component.

James D. Fry, “International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity”, in *Duke Journal of Comparative & International Law*, 2007, vol. 18, no. 1, pp. 77, 123:

Within the context of the ICC Statute, human rights reached the status of basic rights. In this context, human rights violations “are no longer condemned and fought from the moral point of view in an unmediated way, but are rather prosecuted as criminal actions within the framework of state-organised legal order according to the institutionalised legal procedures”.²⁵⁹ The Statute translates general human rights norms “into the language of criminal law”, not only by defining the core international crimes, but also by providing procedural guarantees and a canonical formulation of the role of internationally recognised human rights.²⁶⁰ The Appeals Chamber of the ICC has ruled, with regard to the role of human rights in the interpretation of the Statute, that “[h]uman rights underpin the Statute; every aspect of it [...]. Its provisions must be interpreted, and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety”.²⁶¹ In other words, human rights can certainly be seen as the mainstay of the ICC Statute.²⁶² The mere existence and work of the Court help to promote human rights by: creating a historical

The possibility exists that the field of human rights is an extra-special type of specialized regime that impacts all aspects of international law, and should not be seen as just another specialized body of law that other specialized bodies might use to reinterpret their own rules in its light, but is one that requires other specialized bodies to be reinterpreted in its light.

Dinah Shelton, “Normative Hierarchy in International Law”, in *American Journal International Law*, 2006, vol. 100, no. 2, pp. 291, 294; Schmahl, 2018, p. 101, see *supra* note 18; McDermott, 2018, p. 288, see *supra* note 26.

²⁵⁹ Habermas, 1997, p. 140, see *supra* note 141.

²⁶⁰ See, for instance, ICC Statute, Article 21(3), *supra* note 22:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.

²⁶¹ ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 37 (fn. omitted) (www.legal-tools.org/doc/1505f7/). The ICC Pre-Trial Chamber I referred to that Judgment in ICC, Situation in the Republic of Côte d’Ivoire, *Prosecutor v. Laurent Gbagbo*, Pre-Trial Chamber I, Decision on the fitness of Laurent Gbagbo to take part in the proceedings before this Court, 2 November 2012, ICC-02/11-01/11-286-Red, para. 45 (www.legal-tools.org/doc/4729b8/).

²⁶² Benjamin Perrin, “Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials”, in *Ottawa Law Review*, 2007–08, vol. 39, no. 2, pp. 367, 398.

record for past wrongs;²⁶³ offering a forum for victims to voice their opinions and receive satisfaction and compensation for past violations;²⁶⁴ creating judicial precedent; and deterring potential violators of the gravest crimes²⁶⁵ while punishing past offenders.²⁶⁶ Thus, human rights norms in the Statute “provide a blueprint for the common good of a community” in the Aristotelian sense²⁶⁷ – which is at the same time the link to Habermas’s interpretation of Republicanism.²⁶⁸ Kant laid the foundations for all current conceptions of human dignity and world peace. As I have explained above, for Kant, a permanent peace is predicated on the recognition and respect for human rights and gross human rights violations rights have to be stigmatised as serious wrongs and punished.²⁶⁹ Kant’s language in this regard resonates in the following statement by the ICTY Appeals Chamber:

A State-sovereignty-oriented approach has been gradually supplanted by a human-being oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings)

²⁶³ United Nations Security Council, Statement of Judge Claude Jorda, UN Doc. S/PV.4161, 20 June 2000, p. 3 (www.legal-tools.org/doc/365c3f/); Jens David Ohlin, “A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law”, in *UCLA Journal of International Law & Foreign Affairs*, 2009, vol. 77, no. 1, pp. 86 ff. For more detail, see Alexander Heinze, *International Criminal Procedure and Disclosure*, Duncker & Humblot, Berlin, 2014, pp. 218 ff.

²⁶⁴ Ben Swart, “Foreword”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 1, pp. 87, 100; Minna Schrag, “Lessons Learned from ICTY Experience”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, pp. 427–28. For Ralph, this helps to constitute a world society: see Ralph, 2005, p. 39, *supra* note 231.

²⁶⁵ Ambos, *Treatise on International Criminal Law*, vol. 1, Oxford University Press, Oxford, 2013, p. 71.

²⁶⁶ International Criminal Tribunal for Rwanda (‘ICTR’), *The Prosecutor v. Omar Serushago*, Trial Chamber, Sentence, 5 February 1999, ICTR-98-39-S, para. 20 (www.legal-tools.org/doc/e2d4db/); ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Trial Chamber, Judgement and Sentence, 6 December 1999, ICTR-96-3-T, para. 455 (www.legal-tools.org/doc/f0dbbb/); ICTR, *The Prosecutor v. Emmanuel Ndingabizi*, Trial Chamber, Judgement and Sentence, 15 July 2004, ICTR-2001-71-I, para. 498 (www.legal-tools.org/doc/272b55/); ICTR, *The Prosecutor v. François Karera*, Trial Chamber, Judgement and Sentence, 7 December 2007, ICTR-01-74-T, para. 571 (www.legal-tools.org/doc/7bc57f/).

²⁶⁷ John M. Czarnetzky and Ronald J. Rychlak, “An Empire of Law: Legalism and the International Criminal Court”, in *Notre Dame Law Review*, 2003, vol. 79, no. 1, pp. 55, 110.

²⁶⁸ Llano, 2017, p. 506, see *supra* note 113.

²⁶⁹ Ambos, 2013, pp. 293, 306, see *supra* note 49.

has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.²⁷⁰

11.7.3.2. A Public Sphere and a Constitutional Moment: Humanity as a Political Community

As I have shown, rising public spheres create new institutions and according to Bohman, these institutions “are often radical and innovative enough to constitute new ‘constitutional regimes’ within the nation state”.²⁷¹ Bruce Ackerman argued that the creation of these new constitutional regimes occurs when there are unusually high levels of sustained popular attention to questions of constitutional significance.²⁷² These high levels of sustained popular attention occur in large part because actors take part in a political discourse that is both mediated and staged by mass media. In this debate, the public sphere in the context of an international society is

²⁷⁰ International Criminal Tribunal for the former Yugoslavia (‘ICTY’), *Prosecutor v. Duško Tadić*, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, para. 97. For an analysis, see Luigi D.A. Corrias and Geoffrey M. Gordon, “Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public”, in *Journal of International Criminal Justice*, 2015, vol. 13, no. 1, pp. 100–01.

²⁷¹ Bohman, 1997, p. 192, see *supra* note 146.

²⁷² Bruce Ackerman, *We The People*, vol. 1, Harvard University Press, Cambridge (MA), 1991, p. 51; Daniel Tailor Young, “How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modeling To Evaluate Bruce Ackerman’s Theory of Constitutional Change”, in *Yale Law Journal*, 2013, vol. 122, no. 7, p. 1990.

cosmopolitan and the ‘constitutional moments’²⁷³ go hand in hand with “moral appeals, which are often said to be higher than existing law and which draw attention to the existing injustice”.²⁷⁴ In Bohman’s words: “In these cases, the public declares its sovereignty not simply by influencing existing institutions, but by creating new frameworks in which to organise itself. To make violations of human rights public is precisely to make such a moral appeal that questions the legitimacy and sovereignty of current institutions”.²⁷⁵

Prior to the ICC’s establishment, the responsibility to protect humankind lied mainly in the hands of States, when the (rationalist) principle *aut dedere aut judicare* (either extradite or prosecute) was the key element of international criminal justice.²⁷⁶ This changed dramatically with the creation of the ICC. Thus, the ICC Statute might be viewed as a “revolutionary document that helps to legally constitute a world society of humankind beyond that expressed by the society of states”.²⁷⁷ From a cosmopolitan perspective, the ICC “was a manifestation of the international community’s self-constitutionalisation incorporating individuals as ‘world citizens’”.²⁷⁸ Drawing on this revolutionary moment, for Sadat, therefore, the adoption of the ICC Statute represented a “constitutional moment”²⁷⁹ – albeit in respect to the UN System and, more specifically, the UN Charter as a constitution. In her view, the adoption of the Statute was “a decision to re-equilibrate the constitutional, organic law governing international relations, albeit *sotto voce*, by making an end run around, rather than a formal amendment to, the Charter”.²⁸⁰ It is comparable to

²⁷³ Ackerman, 1991, pp. 51, 84, see *supra* note 272; Jackson and Tushnet, 2014, p. 358, see *supra* note 213, citing Bruce Ackerman, *The Future of Liberal Revolution*, Yale University Press, New Haven, 1992.

²⁷⁴ Bohman, 1997, p. 192, see *supra* note 146.

²⁷⁵ *Ibid.*

²⁷⁶ Ralph, 2005, pp. 27–28, 32–33, see *supra* note 231.

²⁷⁷ *Ibid.*, pp. 27–28.

²⁷⁸ Padraig McAuliffe, “From Watchdog to Workhorse: Explaining the Emergence of the ICC’s Burden-sharing Policy as an Example of Creeping Cosmopolitanism”, in *Chinese Journal of International Law*, 2014, vol. 13, no. 2, pp. 259, 287. In a similar vein, Gerben Kor, “Sovereignty in the Dock”, in Jann K. Kleffner and Gerben Kor (eds.), *Complementarity Views on Complementarity*, T.M.C. Asser Press, The Hague, 2006, pp. 53, 71.

²⁷⁹ Ackerman, 1991, pp. 51, 84, see *supra* note 272; Jackson and Tushnet, 2014, p. 358, citing Ackerman, 1992, see *supra* note 273.

²⁸⁰ Leila Sadat, “The Legacy of the ICTY: The International Criminal Court”, in *New England Law Review*, 2002, vol. 37, pp. 1073, 1079; Leila Sadat, *The International Criminal Court*

instruments such as the Universal Declaration of Human Rights,²⁸¹ “which collectively narrate a world order of independent states, each based on democratic governance and protection of individual rights, engaged in a network of trade and peaceful interaction”.²⁸² Instruments like this qualify as a ‘constitutional moment’ in the history of humankind and as a Kantian system in which States interact with each other in a context of co-operation and law, and on the basis of the respect for the ‘right’.²⁸³ They speak the language of Kantian constitutional revolution, that is, his turn to worldwide rights.²⁸⁴

Thus, when the ICC represents humanity, it thereby represents a political community.²⁸⁵ In Anthony Duff’s words:

We can also see the creation of the ICC as one of the ways in which the moral ideal of a human community might be given more determinate and effective institutional form: the existence of a community is often a matter more of aspiration than of achieved fact, and a recognition of human community could be a recognition of what we should aspire to create.²⁸⁶

This very much applies to the ICC. The list of goals outlined by international criminal courts is manifold and actors of international criminal tribunals face a herculean task to achieve these goals. Apart from retribution, deterrence and rehabilitation,²⁸⁷ further goals include, *inter alia*: the

and the Transformation of International Law, Transnational Publication, New York, 2002, p. 277. See also McAuliffe, 2014, p. 287, *supra* note 278.

²⁸¹ Universal Declaration of Human Rights, 10 December 1948 (www.legal-tools.org/doc/de5d83/).

²⁸² Martinez, 2003, pp. 429, 462–63, see *supra* note 72.

²⁸³ *Ibid.*

²⁸⁴ Hauke Brunkhorst, “Constituent Power and Constitutionalization in Europe”, in *International Journal of Constitutional Law*, 2016, vol. 14, no. 3, pp. 680, 682; Vischer, 2017, p. 325, see *supra* note 31.

²⁸⁵ Anthony Duff, “Authority and Responsibility in International Criminal Law”, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, p. 600; Corrias and Gordon, 2015, p. 100, see *supra* note 270. Cf. Stein Sundstøl Eriksen and Ole Jacob Sending, “There is no Global Public: The Idea of the Public and the Legitimation of Governance”, in *International Theory*, 2013, vol. 5, no. 2, p. 225.

²⁸⁶ Duff, 2010, p. 601, see *supra* note 285.

²⁸⁷ Cf. Albert Alschuler, “The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next”, in *University of Chicago Law*

restoration of international peace and security; strengthening the protections of international humanitarian law; to change a culture of impunity; creating a historical record of atrocities; punishing perpetrators of international crimes; to provide satisfaction to the victims of crimes committed by an offender; and to promote a process of reconciliation.²⁸⁸ The promotion of these goals was met with criticism from the beginning. First, international criminal tribunals promote too many goals that are hardly ever achievable; even national law enforcement systems would buckle under the weight of these goals.²⁸⁹ The UN Secretary-General recognised that “achieving and balancing the various objectives of [international] criminal justice is less straightforward”.²⁹⁰ International criminal justice necessari-

Review, 2003, vol. 70, no. 1, p. 1; see generally Leslie P. Francis and John G. Francis, “International Criminal Courts, the Rule of Law, and the Prevention of Harm”, in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2010, pp. 58 ff.

²⁸⁸ Heinze, 2014, pp. 216 ff., see *supra* note 263; Flavia Lattanzi, *International Criminal Justice*, 2010, pp. 181, 205; John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence*, Cambridge University Press, Cambridge, 2012, pp. 111–12 (using the term ‘purpose’); Jens David Ohlin, “Goals of International Criminal Justice and International Criminal Procedure”, in Göran Sluiter *et al.* (eds.), *International Criminal Procedure*, Oxford University Press, Oxford, 2013, pp. 55, 58–60; Jenia I. Turner, “Plea Bargaining”, in Linda Carter and Fausto Pocar (eds.), *International Criminal Procedure*, Edward Elgar Publishing, Northampton, 2013, pp. 34, 51; Douglas Guilfoyle, *International Criminal Law*, Oxford University Press, Oxford, 2016, p. 89; Nerida Chazal, *The International Criminal Court and Global Social Control*, Routledge, London, 2016, p. 2; Olásolo, 2018, p. 7, see *supra* note 20, who divides the goals of international criminal law into two main groups:

- (i) ICL goals related to the maintenance of international peace and security as a collective value protected by international crimes; and (ii) ICL goals that have traditionally been considered by national criminal law as goals of punishment.

For arguments for restorative justice or healing, see, for example, Mark J. Osiel, “Ever Again: Legal Remembrance of Administrative Massacre”, in *University of Pennsylvania Law Review*, 1995, vol. 144, no. 2, pp. 463, 471–78, 512.

²⁸⁹ Mirjan Damaška, “The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals”, in *North Carolina Journal of International Law and Commercial Regulation*, 2010, vol. 36, no. 2, pp. 365, 376; Jean Galbraith, “The Pace of International Criminal Justice”, in *Michigan Journal of International Law*, 2009, vol. 31, no. 1, pp. 79, 94.

²⁹⁰ United Nations Secretary-General, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, 23 August 2004, para. 39 (www.legal-tools.org/doc/77bebf/).

ly exhibits a disparity between ideals and reality, between *Idealpolitik* and *Realpolitik*,²⁹¹ or between a Kantian and managerial mindset.²⁹²

In this political community, gross human rights violations are felt everywhere. In *Blaškić*, the ICTY held that “persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind”.²⁹³

11.7.3.3. Solidarist Exceptions of the Statutes’ Cosmopolitan and Constitutional Dimension

Of course, Leila Nadya Sadat herself points out that this “revolution” was somehow restricted by several factors.²⁹⁴ During negotiations of the Statute, many objections were made against a cosmopolitan dimension of the Statute, emphasising the Grotian or Neo-Grotian tradition of solidarity between sovereign States as a requirement for an international community. These objections also originate from the express rejection of the constitutional view, mainly advocated by jurists from the US.²⁹⁵

11.7.3.3.1. Dependence on State Co-operation

For instance, contrary to the Nuremberg International Military Tribunal, the International Military Tribunal for the Far East, and the Iraqi Special Tribunal (before it was turned into a national tribunal),²⁹⁶ ‘ordinary’ international criminal tribunals²⁹⁷ depend, as a general rule, on the co-operation of the relevant territorial State(s), with regard to both the inves-

²⁹¹ Chazal, 2016, pp. 5, 28, see *supra* note 288.

²⁹² Koskeniemi, 2007, pp. 9 ff., see *supra* note 30; Brunkhorst, 2016, pp. 680 ff., see *supra* note 284.

²⁹³ ICTY, *Prosecutor v. Tihomir Blaškić*, Trial Chamber, Judgement, 3 March 2000, IT-95-14-T, para. 227 (www.legal-tools.org/doc/e1ae55/). See also Corrias and Gordon, 2015, pp. 97, 100, *supra* note 270.

²⁹⁴ Leila Nadya Sadat, *The International Criminal Court and the Transformation of International Law*, Transnational Publishers, Ardsley, New York, 2002, p. 1079.

²⁹⁵ Mendes, 2010, p. 22, see *supra* note 24.

²⁹⁶ Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, Oxford, 2002, pp. 1711–12.

²⁹⁷ On the ICC’s approach to co-operation generally, see Rod Rastan, “The Responsibility to Enforce – Connecting Justice With Unity”, in Carsten Stahn and Göran Sluiter (eds.), *Emerging Practice*, Nijhoff, Leiden, 2009, pp. 171 ff.; Karin N. Calvo-Goller, *Cour Pénale Internationale*, Gazette du Palais, Paris, 2012, p. 133.

tigation and prosecution of crimes committed on State territory, and enforcement of the respective sentences.²⁹⁸ States remain the key actors in co-operation in criminal matters.²⁹⁹ In this regard, the ICC Statute promotes the Grotian solidarist international society.³⁰⁰ At the same time, the ICC's dependence on State co-operation would be supported by Kant in two ways. First, State co-operation is a characteristic of Kant's Second Definitive Article. Second, from a cosmopolitan perspective, Kant "does not share the widespread view that we can turn our attention to the issue of cosmopolitan Right only after we have settled the matter of domestic justice. The grounds of cosmopolitan justice are identical with those of domestic justice: both follow from the claim to external freedom of each under conditions of unavoidable empirical constraints".³⁰¹ By referring to different levels of institutionalising his cosmopolitan conception of Right,³⁰² Kant proposes constitutional pluralism "in that the system is comprised of discrete hierarchies, national and Treaty-based, each of which has a claim to autonomy and legitimacy".³⁰³ State co-operation is one aspect of that and in fact a necessary requirement.

11.7.3.3.2. Trigger Mechanism to Exercise the Jurisdiction of the Court

A second example of a restricted cosmopolitan dimension are the Statute's so-called trigger mechanisms. One of these trigger mechanisms is a *pro-*

²⁹⁸ See generally Claus Kreß and Kimberly Prost, "Part 9 – Preliminary Remarks", in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck, Munich, 2016, mn. 1; Yvonne M. Dutton, "Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge", in *Columbia Journal of Transnational Law*, 2018, vol. 56, no. 1, pp. 76, 82.

²⁹⁹ Darryl Robinson, "Inescapable Dyads: Why the International Criminal Court Cannot Win", in *Leiden Journal of International Law*, 2015, vol. 28, no. 2, p. 339. For a comprehensive overview of states' non-cooperation and the ensuing non-cooperation-decisions of the ICC see Alexandre Skander Galand, "A Global Public Goods Perspective on the Legitimacy of the International Criminal Court", in *Loyola of Los Angeles International and Comparative Law Review*, 2018, vol. 41, no. 2, pp. 130–31.

³⁰⁰ Ralph, 2005, pp. 27, 37, see *supra* note 231.

³⁰¹ Katrin Flikschuh, *Kant and Modern Political Philosophy*, Cambridge University Press, Cambridge, 2000, p. 170.

³⁰² *Ibid.*

³⁰³ Stone Sweet, 2012, pp. 53, 61, see *supra* note 27.

prio motu investigation of the Prosecutor,³⁰⁴ which underlines the constitutional force of the Statute and its cosmopolitan/revolutionary impact.³⁰⁵ However, because this trigger mechanism was passionately criticised by the same people that oppose a constitutional view of the Statute, further trigger mechanisms were established (Article 13 of the ICC Statute):³⁰⁶ a referral of a State Party and a referral of the UN Security Council.³⁰⁷ Moreover, the revolutionary trigger mechanism of a *proprio motu* investigation by the Prosecutor is subject to restrictions. Even if the Prosecutor were of the opinion that a reasonable basis for an investigation existed, she would have to apply to the Pre-Trial Chamber of the Court for an authorisation to proceed with the investigation.³⁰⁸

11.7.3.4. The Complementarity Principle

Another bar to the Court's exclusive power is the so-called complementarity principle built in the Statute. The ICC regime opts for a subsidiarity approach, that is, it grants, as a matter of principle, primacy to the respective national jurisdiction.³⁰⁹ More precisely, *any* State (not necessarily a State Party), "which has jurisdiction over" a case,³¹⁰ that is, which can ground its jurisdiction on one of the recognised jurisdictional titles under

³⁰⁴ That is the power of the Prosecutor to initiate investigations *ex officio*, Article 13(c), in conjunction with Article 15, see ICC Statute, *supra* note 22.

³⁰⁵ Ralph, 2005, pp. 27, 36, see *supra* note 231.

³⁰⁶ For a summary of the situations over which the Court has exercised jurisdiction and the respective mechanism that triggered it, see William Schabas, "Selecting Situations and Cases", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 366–67. On the negotiations of this "most complex and most sensitive" provision (Philippe Kirsch and John T. Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process", in *American Journal of International Law*, 1999, vol. 93, no. 1, p. 8), see William A. Schabas and Giulia Pecorella, "Article 13", in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck, Munich, 2016, mns. 1–13.

³⁰⁷ It should be noted that a Security Council referral cannot bind the Court, since the latter is an autonomous organ of international law whose obligations only follow from the Rome Statute. Therefore, this referral might also support (at least in part) the constitutional quality of the Statute.

³⁰⁸ ICC Statute, Article 15(3), see *supra* note 22.

³⁰⁹ Stressing the function of complementarity "as primary right" to investigation, prosecution and adjudication of States, Sarah M.H. Nouwen, *Complementarity in the Line of Fire*, Cambridge University Press, Cambridge, 2013, pp. 338–39.

³¹⁰ ICC Statute, Articles 17(1)(a) and (b), see *supra* note 22.

international law, may claim primacy towards the ICC.³¹¹ This is a clear reflection of a solidarist international community promoted by Grotius and seems to stand against the constitutional quality of the Statute.³¹² In the eyes of McAuliffe, the establishment of the complementarity regime is even a “counter-revolution”.³¹³ This, however, does not diminish the quality of the Statute as “an international constitutional organ to organize the exercise of jurisdiction in relation to universal crimes by way of multi-level international governance”.³¹⁴

Moreover, the ICC developed appropriate standards in order to determine when it is allowed to supersede the judgements of national courts.³¹⁵ In these standards, assessing whether national proceedings are carried out genuinely, the ICC relies on human rights concepts through Article 17(1)(a) of the ICC Statute.³¹⁶ The term “genuinely” was included to give the unwillingness or inability test respectively a more concrete and objective meaning.³¹⁷ Yet, as Ambos emphasises, “the term is highly normative, calling for good faith and seriousness on the part of the respective State with regard to investigation and prosecution”.³¹⁸ It is human rights

³¹¹ Roger O’Keefe, *International Criminal Law*, Oxford University Press, Oxford, 2015, p. 554.

³¹² Ralph, 2005, p. 30, see *supra* note 231.

³¹³ See also McAuliffe, 2014, pp. 259, 287, 274, *supra* note 278.

³¹⁴ Weller, 2002, p. 693, see *supra* note 23.

³¹⁵ Harmen van der Wilt and Sandra Lyngdorf, “Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of ‘Unwillingness’ and ‘Inability’ in the Context of the Complementarity Principle”, in *International Criminal Law Review*, 2009, vol. 9, no. 1, pp. 39, 41.

³¹⁶ Manisuli Ssenyonjo, “The Rise of the African Union Opposition to the International Criminal Court’s Investigations and Prosecutions of African Leaders”, in *International Criminal Law Review*, 2013, vol. 13, no. 2, pp. 385, 406.

³¹⁷ Cf. John T. Holmes, “Complementarity”, in Roy S.K. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Martinus Nijhoff Publishers, Leiden 1999, p. 50; John T. Holmes, “National Courts vs ICC”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, Oxford University Press, Oxford, 2002, p. 674; see also Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law*, Martinus Nijhoff Publishers, Leiden, 2008, pp. 163–70 (especially p. 166); Mohamed El Zeidy, “The Principle of Complementarity: A New Machinery to Implement International Criminal Law”, in *Michigan Journal of International Law*, 2002, vol. 23, no. 4, p. 900; Claudia Cárdenas, *Die Zulässigkeitsprüfung vor dem Internationalen Strafgerichtshof*, Berliner Wissenschaftsverlag, Berlin, 2005, p. 110.

³¹⁸ Kai Ambos, *Treatise on International Criminal Law*, vol. 3, Oxford University Press, Oxford, 2016, p. 306 with further references.

jurisprudence that obliges the State “to use all the legal means at its disposal” to conduct serious and effective investigations and prosecutions leading to the identification and punishment of the responsible;³¹⁹ only then can one speak of a “genuine” investigation or prosecution.³²⁰ As Harmen van der Wilt and Sandra Lyngdorf analysed in a comprehensive study of the jurisprudence of various human rights courts, the ICC and the European Court of Human Rights “both share considerable common ground in the normative assumption that states are under an obligation to conduct effective and independent criminal investigations into flagrant violations of human rights which amount to international crimes”.³²¹

Human rights instruments also play an important role when assessing an unwillingness pursuant to Article 17(2) of the ICC Statute. Since the Statute lacks a definition of “unjustified delay” in Article 17(2)(b), human rights law provides the necessary tools to shape the contours of the concept,³²² taking recourse to criteria such as the complexity of the case and the conduct of the parties.³²³ Similarly, a broad reading of

³¹⁹ See, for example Inter-American Court of Human Rights (‘IACtHR’), *Case of Paniagua Morales et al. v. Guatemala*, Judgment, 8 March 1998, Series C, no. 37, para. 173 (www.legal-tools.org/doc/99fda3/). See also IACtHR, *Case of Zambrano-Vélez v. Ecuador*, Judgment, 4 July 2007, Series C, no. 166, para. 123 (www.legal-tools.org/doc/ace324/); IACtHR, *Case of Escué-Zapata v. Colombia*, Judgment (Background, Reparations, Costs), 4 July 2007, Series C, no. 165, para. 106 (www.legal-tools.org/doc/0af455/). For more recent case law, see Ambos, 2016, p. 296 with fn. 661, *supra* note 318. See for an extensive study of applicable human rights standards in this context: Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions*, Martinus Nijhoff Publishers, Leiden, 2008, pp. 219–29; El Zeidy, 2008, pp. 175–80, see *supra* note 317.

³²⁰ Harmen van der Wilt, “States’ Obligations to investigate and prosecute perpetrators of international crimes: the perspective of the European Court of Human Rights”, in Carsten Stahn and Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2011, pp. 686–705. See also El Zeidy, 2008, p. 167, *supra* note 317.

³²¹ van der Wilt and Lyngdorf, 2009, pp. 39, 74, see *supra* note 315.

³²² See in more detail Ambos, 2016, pp. 90 ff., *supra* note 318.

³²³ See generally Markus Benzing, “The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity”, in *Max Planck Yearbook of United Nations*, 2003, vol. 7, pp. 610–11; Sophie Morel, *La mise en oeuvre du principe de complémentarité*, Bis et Ter, Lausanne, 2007, p. 122; Olympia Bekou, “Complementarity and the ICC: A Dangerous Gamble?”, in George Ulrich, *The International Criminal Court: Challenges and Prospect*, Marsilio Editori, Venice, 2005, p. 74; Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, Oxford, 2008, pp. 140–41; El Zeidy, 2008, pp. 183 ff., see *supra* note 317.

“unavailability” of a State’s national judicial system pursuant to Article 17(3) of the ICC Statute – combining systematic and teleological arguments – would cover situations “where a legal system is generally in place but *in concreto* does not provide for effective judicial remedy or access to the courts, be it for political, legal, or factual reasons (capacity overload), or is not able to produce the desired result (bring the responsible to justice)”.³²⁴ As a result, human rights law could provide important guidelines as to whether effective judicial remedies against serious human rights violations are in place.³²⁵ Exemption provisions “conceded in processes of transition may not only be considered as a problem of unwillingness, but also as one of inability in the sense of ‘human rights unavailability’, that is, a lack of an effective judicial remedy or access to the courts”.³²⁶ This *de facto* monitoring function of the ICC is reminiscent of some features of the international human rights setting, where human rights bodies engage in independent monitoring through country visits and reporting, and review States’ reports on their own compliance with human rights standards.³²⁷ The ICC’s interpretation of the term “unwillingness” in Article 17(2) of the Statute has raised particular concern that the ICC would function as an appeals court.³²⁸ This was especially voiced by China during the negotiations of the ICC Statute: “The Court seemed to have become an appeals court sitting above the national court. As stipulated in article 17, the Court could judge ongoing legal proceedings in any State, including a non-party, in order to determine whether the intention existed to shield the

³²⁴ Ambos, 2016, p. 319, see *supra* note 318. For a detailed discussion, see Stigen, 2008, pp. 319–24, *supra* note 319; Benzinger, 2003, p. 614, see *supra* note 323 (“capacity overload”); El Zeidy, 2008, pp. 127–28, *supra* note 317; Florian Razesberger, *The International Criminal Court: the Principle of Complementarity*, Lang, Frankfurt, 2006, p. 49; Nouwen, 2013, p. 65, see *supra* note 309; Harmen van der Wilt, “Self-Referrals as an Indication of the Inability of States to Cope with Non-State Actors”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, p. 220.

³²⁵ Ambos, 2016, p. 319, see *supra* note 318.

³²⁶ *Ibid.*

³²⁷ “Overview of the Human Rights Framework”, available on the web site of the International Justice Resource Center.

³²⁸ ZHU Dan, “China, the International Criminal Court, and International Adjudication”, in *Netherlands International Law Review*, 2014, vol. 61, no. 1, pp. 43, 63.

criminal or whether the trial was fair, and could exercise its jurisdiction on the basis of that decision”.³²⁹

Thus, the fact that the ICC indirectly strengthens domestic human rights protections not only goes back to Kant’s admission that the rule of law can hardly be imposed by external institutions or entities, but must also develop on its own in accordance with the characteristics of each nation;³³⁰ but also demonstrates that the international criminal justice system³³¹ has what Kant calls a ‘provisional right’ to coerce alongside national authorities.³³²

Since a state of nature among nations, like a state of nature among individual men, is a condition that one ought to leave in order to enter a lawful condition, before this happens any rights of nations, and anything external that is mine or yours that states can acquire or retain by war, is merely provisional. (*The Metaphysic of Morals*, p. 156 [61])

What Kant creates here is a “moral justification for states to be governed by an omnilateral will that matches the argument in his general legal theory”.³³³ At any moment in time, positive laws “are not fully laws”, since the “ideal of a just world order is an intelligible ideal and as such is unachievable”.³³⁴ This is something the ICTY Trial Chamber seems to hint at when it stated: “[P]rinciples of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent”.³³⁵

³²⁹ United Nations General Assembly, Statement by Qu Wensheng (China), UN Doc. A/C.6/53/SR.9, 4 November 1998, para. 42, cited in Dan, 2014, pp. 43, 63, see *supra* note 328.

³³⁰ Huntley, 1996, pp. 45, 71, see *supra* note 74. See in this regard also the ICC’s Outreach Section, described by Dutton, 2018, pp. 102 *et seq.*, see *supra* note 298.

³³¹ The ‘international criminal justice system’ is a transnational regime as Gunther Teubner understands it. While the (political) system of states is based on the presumption that it has the power of a wide scale regulation into all sorts of fields, transnational regimes are specialised on one or two fields – just as the international criminal justice system is specialised on the regulation of international criminal justice (and not, for instance, trade law), see Teubner, 2018, p. 188 see *supra* note 105.

³³² Franceschet, 2002, pp. 93–94, see *supra* note 52.

³³³ Capps and Rivers, 2010, pp. 229, 243, see *supra* note 75.

³³⁴ Lucas Thorpe, *The Kant Dictionary*, Bloomsbury, London, 2015, p. 108.

³³⁵ ICTY, *Prosecutor v. Vlatko Kupreškić et al.*, Trial Chamber, Judgment, 14 January 2000, IT-95-16-T, para. 527 (www.legal-tools.org/doc/5c6a53/). See also Corrias and Gordon, 2015, pp. 97, 101, see *supra* note 270.

Franceschet concludes from this that the “ICC’s complementary regime is appropriate to its provisional moral authority to support the reconstruction of state sovereignty in the aftermath of atrocity”.³³⁶ Indeed, as long as mass atrocities are the reality and far from a just world order, the ICC’s complementarity regime is the provisional basis for a coercion of States to achieve Kant’s cosmopolitan ideal. In Franceschet’s words: “States have a default primacy in terms of preventing and punishing these crimes within their own constitutional ambit; but the complementarity principle assumes that, because states are imperfect, they often have a title without capacity or have a capacity unworthy of the title”.³³⁷ In a way, the complementarity regime therefore sets limits to the Realist notion of international law being dominated by States acting as rational egoistic agents.³³⁸

On a critical note, however, this reading of the ICC’s complementarity regime pushes the ICC more into the direction of a human rights body than a criminal court. The invisible tie between the ICC’s complementarity regime and its human rights monitoring function becomes most controversial when applied to Article 17(2)(c) of the Statute. Here, the vital question is: were proceedings not conducted independently or impartially if the domestic judicial procedure did not satisfy due process standards?³³⁹

³³⁶ Franceschet, 2002, pp. 93–94, see *supra* note 52.

³³⁷ *Ibid.*, pp. 93, 99–100.

³³⁸ In a similar vein, see Koskenniemi, 2007, pp. 9, 15, *supra* note 30.

³³⁹ See for a fundamental critique of this ‘due process thesis’, Kevin Jon Heller, “The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process”, in *Criminal Law Forum*, 2006, vol. 17, nos. 3–4, pp. 260 ff. See in the same vein, Enrique Carnero Rojo, “The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court”, in *Leiden Journal of International Law*, 2005, vol. 18, no. 4, pp. 836 ff.; Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC*, Duncker & Humblot, Berlin, 2011, pp. 306–08; Frederic Mégret, “Too Much of a Good Thing?: Implementation and the Uses of Complementarity”, in Carsten Stahn and Mohamed El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2011, p. 372; Christoph Safferling and Hilde Farthofer, *International Criminal Procedure*, Oxford University Press, Oxford, 2012, pp. 102–03; Nouwen, 2013, pp. 67–70, see *supra* note 309; John Trahan, “Is Complementarity the Right Approach for the ICC’s Crime of Aggression? – Considering the Problem of ‘Overzealous’ National Court Prosecutions”, in *Cornell International Law Journal*, 2012, vol. 45, no. 3, pp. 584–86, 596–97; Carsten Stahn, “Admissibility Challenges”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 244–46 (cf. with regard to the stricter deferral standard of ICTY, *Rules of Procedure and Evidence*, 11 February 1994, amended 22 May 2013, Rule 11*bis* (www.legal-tools.org/doc/950cb6/)). For a more nuanced approach, see

The wording of Article 17(2) of the ICC Statute seems to suggest this consequence (“having regard to the principles of due process recognized by international law”), as do the due process elements “unjustified delay in the proceedings” (Article 17(2)(b) of the ICC Statute) and “[t]he proceedings were not or are not being conducted independently or impartially” (Article 17(2)(c) of the ICC Statute).³⁴⁰ If, however, the ICC was clearly a criminal court, a teleological interpretation would allow for a reduced impact of due process standards on the determination whether proceedings were conducted independently or impartially. In this vein, Ambos takes recourse to the “anti-impunity function of Article 17” that merely enables the ICC “to put pressure on States to prosecute and punish international core crimes”, but does not “guarantee [...] due process”.³⁴¹ Explicitly emphasising the Court’s nature as a criminal and not a human rights court,³⁴² he summarises that “Article 17 is about admissibility, not due process”.³⁴³ In the ICC’s case law, PTC I clarified in *Al-Senussi* that “alleged violations of the accused’s procedural rights are not per se grounds for a finding of unwillingness or inability under article 17 of the

Frédéric Mégret and Giles Samson, “Holding the Line on Complementarity in Libya – The Case for Tolerating Flawed Domestic Trials”, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 574 ff., developing, on the one hand, a ten-step argument in favour of tolerance with regard to flawed domestic proceedings (pp. 577–83), but, on the other, acknowledging that minimum due process must always be fulfilled; for a moderate approach, see also Elinor Fry, *Contours of International Prosecutions: As Defined by Facts, Charges, and Jurisdiction*, Eleven International Publishing, The Hague, 2015, pp. 115–16, 120–35.

³⁴⁰ Ambos, 2016, p. 313, see *supra* note 318; Heller, 2006, pp. 258–59, see *supra* note 339. See also Kleffner, 2008, pp. 127–52, *supra* note 323; El Zeidy, 2008, p. 169, *supra* note 317.

³⁴¹ Ambos, 2016, p. 313, see *supra* note 318. See also Stigen, 2008, p. 221, *supra* note 319; Jakob Pichon, “The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb before the International Criminal Court”, in *International Criminal Law Review*, 2008, vol. 8, nos. 1–2, p. 193; Kleffner, 2008, p. 152, *supra* note 323 (“blind spot vis-à-vis unfair proceedings”); Anna Bishop, “Failure of Complementarity: The Future of the International Criminal Court Following the Libyan Admissibility Challenge”, in *Minnesota Journal of International Law*, 2013, vol. 22, no. 2, pp. 411–12.

³⁴² See also Mégret and Samson, 2013, p. 581, see *supra* note 339. In the same vein, see Nouwen, 2013, pp. 67–68, see *supra* note 309; O’Keefe, 2015, p. 561, see *supra* note 311; see also Libya’s submission in ICC, Situation in Libya, *The Prosecutor v. Saif Al-Islam Gaddafi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red, para. 195 (www.legal-tools.org/doc/339ee2/).

³⁴³ Ambos, 2016, p. 313, see *supra* note 318.

Statute”.³⁴⁴ Although the Chamber acknowledged that certain rights violations “may be relevant to the assessment of the independence and impartiality of the national proceedings”, it stated that these criteria have to be read together with the intent to bring the person to justice.³⁴⁵ The Appeals Chamber explicitly rejected the notion of the ICC as a human rights court³⁴⁶ and inferred that the due process part of Article 17(2) “should generally be understood as referring to proceedings which will lead to a suspect evading justice, in the sense of not appropriately being tried genuinely”.³⁴⁷ Nevertheless, the Chamber recognised that in some circumstances the genuineness of the proceedings may be frustrated by “egregious” rights violations “so that they should be deemed, in those circumstances, to be ‘inconsistent with an intent to bring the person to justice’”.³⁴⁸ This is symptomatic of the bifurcated nature of the ICC between a human rights court and a criminal court: the Chamber, on the one hand, downplays the role of due process rights within the complementarity regime, while, on the other hand, it leaves the door open for human rights considerations.³⁴⁹ This might be – as Ambos rightly concludes – the best solution “one can achieve under the ambiguous wording of Article 17 (2)”, is however unsatisfactory, since it is based on the rather shaky ground that is the assumption that the ICC is not a human rights court. From a logical perspective, this also paves the way for a common circular argument: the ICC’s nature as a criminal court renders due process considerations within the complementarity regime as secondary, which leads to the conclusion that the ICC is not a human rights court.

³⁴⁴ ICC, Situation in Libya, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red, para. 235 (www.legal-tools.org/doc/af6104/).

³⁴⁵ *Ibid.*; Ambos, 2016, p. 313, see *supra* note 318.

³⁴⁶ ICC, Situation in Libya, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, Judgment on the appeal of Mr. Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”, 24 July 2014, ICC-01/11-01/11-565, para. 219 (www.legal-tools.org/doc/ef20c7/).

³⁴⁷ *Ibid.*, paras. 2–3, 230.

³⁴⁸ *Ibid.*; Ambos, 2016, p. 314, see *supra* note 318.

³⁴⁹ *Ibid.*

11.7.3.5. The ICC and the Purposes of Punishment

11.7.3.5.1. Retribution

Retribution as a goal of criminal justice (just deserts) not only goes back to Immanuel Kant³⁵⁰ but also to Georg W.F. Hegel³⁵¹ and basically prescribes that the offender should not be punished for any purpose but retribution,³⁵² which sees punishment as a fair balance for the wrong of the offence (*punitur, quia peccatum est*).³⁵³ Consequently, Kant believed that the State has a moral duty (not just a right) to execute murderers.³⁵⁴ This punishment is not free of criticism.³⁵⁵ As Mark Drumbl remarks: “The retributive function is hobbled by the fact that only some extreme evil gets punished, whereas much escapes its grasp, often for political reasons

³⁵⁰ See, for example, Immanuel Kant, in Wilhelm Weischedel (ed.), *Kants Werke in sechs Bänden*, vol. 4, Wissenschaftliche Buchgesellschaft, Darmstadt, 1983, sect. 49 E I.; Darryl K. Brown, “The U.S. Criminal-Immigration Convergence and its Possible Undoing”, in *American Criminal Law Review*, 2012, vol. 49, no. 1, pp. 73, 89.

³⁵¹ See only Georg W.F. Hegel, *Grundlinien der Philosophie des Rechts*, Berlin, 1821, § 101 (www.legal-tools.org/doc/ceb813/). See *infra* chap. 13 for a discussion on Hegel.

³⁵² See also BVerfGE 22, 125 (132); Brown, 2012, pp. 73, 76, 89 ff., see *supra* note 350:

Retributivists give desert a dominant, presumptively controlling role as the purpose for punishment and give the consequences of punishment no role in justifying punishment (fn omitted).

Raising questions as to whether international justice should pursue policies of retribution or policies of restorative justice, See, for example, Mark Findlay, *Transforming International Criminal Justice*, Routledge, London, 2005.

³⁵³ See Ambos, 2013, p. 67, see *supra* note 265.

³⁵⁴ Kant, 1991, p. 143, see *supra* note 91:

Accordingly, every murderer – anyone who commits murder, orders it, or is an accomplice in it – must suffer death; this is what justice, as the Idea of judicial authority, wills in accordance with universal laws that are grounded a priori.

³⁵⁵ See, for example, Ambos, 2013, p. 68, see *supra* note 265:

Just as at the domestic level, retribution at the international level must be rejected as a ground or purpose of punishment. In the case of international mass crimes, a balance of the suffered wrong is plainly unthinkable (fn omitted).

But see Mirjan Damaška, “The Shadow Side of Command Responsibility”, in *American Journal of Comparative Law*, 2001, vol. 49, no. 3, pp. 455, 474:

[D]espite the merely anecdotal character of supportive evidence, a measure of deterrent influence on leaders appears intuitively plausible and should be conceded even for backward and lacerated corners of the world.

See generally Bernd Heinrich, *Strafrecht – Allgemeiner Teil*, Kohlhammer, Stuttgart, 2017, mn. 14 with further references.

anathema to Kantian deontology”.³⁵⁶ Deontological retributivists have provided the theoretical tools to measure desert: by “harm-ratings”, for instance, examining the consequences of a crime under consideration of certain assumed social situations and evaluation of the “consequences in the light of certain assumed basic values”;³⁵⁷ or by the impairment of personal interests such as “welfare interests”,³⁵⁸ which comes close to the (rather consequentialist) *Rechtsgutslehre* in Germany³⁵⁹ and might – in our view – not be a deontological tool after all. Whether these tools can be applied in practice, however, especially in the context of the ICC, seems doubtful.

That retribution is also a goal of international criminal justice can be seen in the case law of the *ad hoc* tribunals. In *Serushago*, the ICTR Trial Chamber argued that the punishment of an accused who is found guilty “must be directed [...] at retribution”.³⁶⁰ Moreover, especially in the context of sentencing, the ICTY Appeals Chamber held in its judgements rendered on 24 March 2000 and 20 February 2001 in the *Aleksovski*³⁶¹ and *Delalić*³⁶² cases “that retribution and deterrence are the main principles in sentencing for international crimes [...], these purposive considerations merely form the backdrop against which an individual accused’s sentence

³⁵⁶ Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, p. 151.

³⁵⁷ Andrew von Hirsch and Nils Jareborg, “Gauging Criminal Harm: A Living-Standard Analysis”, in *Oxford Journal of Legal Studies*, 1991, vol. 11, no. 1, pp. 6–7.

³⁵⁸ Joel Feinberg, *Harm to Others*, Oxford University Press, Oxford, 1987, pp. 41 ff.

³⁵⁹ See in more detail Kai Ambos, “The Overall Function of International Criminal Law: Striking the Right Balance Between the *Rechtsgut* and the Harm Principles”, in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, pp. 301–29; Kai Ambos, “Rechtsgutsprinzip und harm principle: theoretische Ausgangspunkte zur Bestimmung der Funktion des Völkerstrafrechts”, in Mark A. Zöller (ed.), *Gesamte Strafrechtswissenschaft in internationaler Dimension: Festschrift für Jürgen Wolter zum 70 Geburtstag am 7 September 2013*, Duncker & Humblot, Berlin, 2013, pp. 1285–310.

³⁶⁰ ICTR, *The Prosecutor v. Omar Serushago*, Sentence, 1999, para. 20, see *supra* note 266; ICTR, *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Trial Chamber I, Judgement and Sentence, 6 December 1999, ICTR-96-3-T, para. 455 (www.legal-tools.org/doc/f0dbbb/); ICTR, *The Prosecutor v. Emmanuel Ndindabahizi*, Judgement and Sentence, 2004, see *supra* note 266; ICTR, *The Prosecutor v. François Karera*, Judgement and Sentence, 2007, para. 571, see *supra* note 266.

³⁶¹ ICTY, *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber, Judgement, 24 March 2000, IT-95-14/1-A, para. 185 (www.legal-tools.org/doc/176f05/).

³⁶² ICTY, *Prosecutor v. Zejnir Delalić et al.*, Appeals Chamber, Judgement, 20 February 2001, IT-96-21-A, para. 806 (www.legal-tools.org/doc/051554/).

must be determined”.³⁶³ The ICTY Trial Chamber in *Todorović* added that the principle of retribution “must be understood as reflecting a fair and balanced approach to the exaction of punishment for wrongdoing”.³⁶⁴ Similarly, in *Erdemović*, retribution in this sense was deemed essential: “[T]he International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity”.³⁶⁵

11.7.3.5.2. Deterrence

A second traditional goal is deterrence.³⁶⁶ Deterrence emanates from Utilitarian moral philosophy and is therefore rather incompatible with Kantian views (even though this interpretation of Kant is increasingly disputed).³⁶⁷ It may occur in two forms: general deterrence and special deterrence. The

³⁶³ See also ICTY, *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Trial Chamber, Judgement, 15 March 2006, IT-01-47-T, paras. 2071–72 (www.legal-tools.org/doc/8f515a/); ICTY, *Prosecutor v. Naser Orić*, Trial Chamber II, Judgement, 30 June 2006, IT-03-68-T, para. 718 (www.legal-tools.org/doc/37564c/); ICTY, *Prosecutor v. Momčilo Krajišnik*, Trial Chamber I, Judgement, 27 September 2006, IT-00-39-T, paras. 1134 ff. (www.legal-tools.org/doc/62a710/); ICTY, *Prosecutor v. Momčilo Krajišnik*, Appeals Chamber, Judgement, 17 March 2009, IT-00-39-A, paras. 804 ff. (www.legal-tools.org/doc/770028/); ICTY, *Prosecutor v. Dragan Zelenović*, Trial Chamber I, Sentencing Judgement, 4 April 2007, IT-96-23/2-A, para. 32 (www.legal-tools.org/doc/2a9e0b/); ICTY, *Prosecutor v. Ramush Haradinaj et al.*, Trial Chamber I, Judgement, 3 April 2008, IT-04-84-T, para. 484 (www.legal-tools.org/doc/025913/); ICTY, *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Trial Chamber II, Judgement, 10 July 2008, IT-04-82-T, para. 587 (www.legal-tools.org/doc/939486/); ICTY, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Appeals Chamber, Judgement, 5 May 2009, IT-95-13/1-A, para. 145 (www.legal-tools.org/doc/40bc41/); ICTY, *Prosecutor v. Milan Lukić and Sredoje Lukić*, Trial Chamber III, Judgement, 20 July 2009, IT-98-32/1-T, para. 1049 (www.legal-tools.org/doc/af5ad0/); ICTY, *Prosecutor v. Vujadin Popović et al.*, Trial Chamber II, Judgement: Volume I, 10 June 2010, IT-05-88-T, para. 2128 (www.legal-tools.org/doc/481867/); ICTY, *Prosecutor v. Vlastimir Đorđević*, Trial Chamber II, Judgement, 23 February 2011, IT-05-87/1-T, para. 2204 (www.legal-tools.org/doc/653651/).

³⁶⁴ ICTY, *Prosecutor v. Stevan Todorović*, Trial Chamber, Sentencing Judgement, 31 July 2001, IT-95-9/1-S, para. 29 (www.legal-tools.org/doc/0cd4b3/).

³⁶⁵ ICTY, *Prosecutor v. Drazen Erdemović*, Trial Chamber, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 65 (www.legal-tools.org/doc/eb5c9d/).

³⁶⁶ See Ambos, 2013, p. 71, *supra* note 265, who calls it “prevention”.

³⁶⁷ Cf. Hill, 1997, pp. 291, 305 ff., see *supra* note 45; B. Sharon Byrd, “Kant’s Theory of Punishment: Deterrence in its Threat, Retribution in its Execution”, in *Law and Philosophy*, 1989, vol. 8, no. 2, pp. 151 ff.; Robert Hoffman, *A New Reading of Kant’s Theory of Punishment*, Publicly Accessible Penn Dissertations, 2015.

theory of the former was developed at the beginning of the nineteenth century by *Paul Johann Anselm v. Feuerbach*.³⁶⁸ General deterrence serves to discourage other persons from committing or continuing to commit similar crimes to the offender (negative general deterrence/prevention).³⁶⁹ Additionally, the punishment of the offender strengthens society's sense of right and wrong and increases trust amongst the people (positive general deterrence/prevention).³⁷⁰ This form of deterrence "has recently been re-discovered by some common law writers under the concept of 'expressivism' focusing on the (possible) communicative function of punishment".³⁷¹ Discussions of special deterrence go back at least as far as *Franz v. Liszt*.³⁷² According to the theory of special deterrence, punishment may also serve to deter the perpetrator from future crimes (positive special deterrence) and the society shall be protected against this perpetrator (negative special deterrence).³⁷³ In *Serushago*, the ICTR found that general deterrence would be the most important goal of sentencing offenders at the ICTR.³⁷⁴ It should "dissuade for good others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights".³⁷⁵ In *Tadić*, the

³⁶⁸ Cf. for instance, Anselm von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts*, Heyer, Giessen, 1832, paras. 12–13.

³⁶⁹ Swart, 2008, pp. 87, 100, see *supra* note 264. See generally, Heinrich, 2017, mn. 17, see *supra* note 355; Kai Ambos and Christian Steiner, "Vom Sinn des Strafens auf innerstaatlicher und supranationaler Ebene", in *Juristische Schulung*, 2001, vol. 41, no. 1, pp. 9, 12; Carsten Momsen and Peter Rackow, "Die Straftheorien", in *Juristische Arbeitsblätter*, 2004, vol. 36, pp. 336 ff.

³⁷⁰ Cf. BVerfGE 45, 187 (256); BVerfGE NJW 2004, 2073 (2075); Ambos and Steiner, 2001, pp. 9, 12, see *supra* note 369; Claus Roxin, *Strafrecht Allgemeiner Teil*, vol. I, C.H. Beck, Munich, 2006, sect. 3 mn. 26; Momsen and Rackow, 2004, pp. 336, 338 ff., see *supra* note 369.

³⁷¹ See Ambos, 2013, p. 71, see *supra* note 265 with further references.

³⁷² Cf. Franz von Liszt, *Strafrechtliche Aufsätze und Vorträge*, vol. I, De Gruyter, Berlin, 1905, pp. 126, 176.

³⁷³ Swart, 2008, pp. 87, 100, see *supra* note 264; see generally Heinrich, 2017, mn. 18, see *supra* note 355; Herbert L. Packer, *The Limits of the Criminal Sanction*, Stanford University Press, Stanford, 1969, pp. 39 ff.

³⁷⁴ See ICTR, *The Prosecutor v. Omar Serushago*, Sentence, 1999, para. 20, see *supra* note 266.

³⁷⁵ See ICTR, *The Prosecutor v. Jean Kambanda*, Trial Chamber I, Judgment and Sentence, 4 September 1998, ICTR-97-23-S, para. 28 (www.legal-tools.org/doc/49a299/); ICTR, *The*

ICTY found the opposite: deterrence is a factor to be taken into consideration as a justification for sentencing, but should not be given undue prominence.³⁷⁶ According to the Preamble of its Statute, the ICC seeks “to contribute to the prevention of [...] crimes”.³⁷⁷

However, read together with other utilitarian goals of the ICC, such as strengthening the protections of international humanitarian law; creating a historical record of atrocities; providing satisfaction to the victims of crimes committed by an offender; and to promote a process of reconciliation, deterrence might still be a better option for grounding punishment, since it takes into account the Court’s mandate.

11.7.3.5.3. Expressivism and Communicative Theories of Punishment

On the international level, retribution is clothed in an expressivist and communicative appearance,³⁷⁸ that is, as the expression of condemnation

Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Judgement and Sentence, 1999, para. 455, see *supra* note 266. In *Ndindabahizi*, the Trial Chamber pointed out:

Specific emphasis is placed on general deterrence, so as to demonstrate “that the international community [is] not ready to tolerate serious violations of international humanitarian law and human rights” (fn omitted).

See ICTR, *The Prosecutor v. Emmanuel Ndindabahizi*, Judgement and Sentence, 2004, para. 498 with further references, see *supra* note 266; ICTR, *The Prosecutor v. François Karera*, Judgement and Sentence, 2007, para. 571, see *supra* note 266.

³⁷⁶ ICTY, *Prosecutor v. Duško Tadić*, Appeals Chamber, Judgment in Sentencing Appeals, 26 January 2000, IT-94-1-A and IT-94-1-Abis, para. 48 (www.legal-tools.org/doc/df7618/). See also ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Trial Chamber, Judgement, 22 February 2001, IT-96-23-T & IT-96-23/1-T, para. 857 (www.legal-tools.org/doc/fd881d/).

³⁷⁷ See ICC Statute, Preamble, *supra* note 22. About the difficulty to prevent the widespread harm in the contemporary world from a practical and moral view, see Leslie Francis and John Francis, “Identifying Groups in Genocide Cases”, in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2010, pp. 58, 68 ff.

³⁷⁸ Drumbl, 2007, pp. 173 ff., see *supra* note 356; Mark A. Drumbl, “International Punishment from ‘Other’ Perspectives”, in Róisín Mulgrew and Denis Abels (eds.), *Research Handbook on the International Penal System*, Edward Elgar Publishing, Northampton, 2016, p. 386; Jonathan H. Choi, “Early Release in International Criminal Law”, in *Yale Law Journal*, 2014, vol. 123, no. 6, p. 1810; Robert D. Sloane, “The Expressive Capacity of International Punishment”, in *Stanford Journal of International Law*, 2007, vol. 43, p. 44; Kirsten J. Fisher, *Moral Accountability and International Criminal Law*, Routledge, London, 2012, pp. 51, 56–63, 65; Carsten Stahn, “Between ‘Faith’ and ‘Facts’”, in *Leiden Journal of International Law*, 2012, vol. 25, no. 2, pp. 251, 279–80; Larry May, *Aggression and Crimes Against Peace*, Cambridge University Press, Cambridge, 2008, pp. 329 ff. From a German perspective, see also Klaus her, “Criminal Law, Crime and Punishment as Communi-

and outrage of the international community, where the international community in its entirety is considered one of the victims.³⁷⁹ The stigmatisation and punishment for gross human rights violations in service of the confirmation and reinforcement of fundamental human rights norms can justify a right to punish of an international criminal tribunal that lacks the authority of a State. Given this justification of punishment, what the world community is trying to achieve through international criminal trials is a communicative effect: to show the world that there is justice on an international level and that no perpetrator of grave international crimes can escape it.³⁸⁰ That is why international criminal law seeks to achieve retributive and deterrent effects of punishment through creating a certain perception of international criminal trials; that is why the protection of due process rights is perceived as crucial in order to restore international peace and strengthen the trust of the international society in legal norms; and that is why Nazi perpetrators were not shot. Instead, the former President of the US, Harry S. Truman, remarked at the start of the trials before the International Military Tribunal at Nuremberg in 1945: “[T]he world should be impressed by the fairness of the trial. These German murderers must be punished, but only upon proof of individual guilt at a trial”.³⁸¹

cation”, in Andrew P. Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds.), *Liberal Criminal Theory*, Hart, Oxford, 2014, pp. 123 ff. About the communicative function within the (new) retributivist theories, see Michael Pawlik, “Kritik der ventionstheoretischen Strafrecht”, in Klaus Rogall *et al.* (eds.), *Festschrift für Rudolphi*, Luchterhand, Neuwied, 2004, pp. 213, 229.

³⁷⁹ Kai Ambos, “Review Essay: Liberal Criminal Theory”, in *Criminal Law Forum*, 2017, vol. 28, no. 3, pp. 589, 601.

³⁸⁰ International criminal law is also “educating society about its past” through the truth-telling function of international criminal trials, see Mina Rauschenbach, “Individuals Accused of International Crimes as Delegitimized Agents of Truth”, in *International Criminal Justice Review*, 2018, Advance Article, p. 3 with further references.

³⁸¹ Cited in Francis Biddle, *In Brief Authority*, Greenwood Press, Westport, 1962/1972, p. 372; Patricia M. Wald, “Running the Trial of the Century: The Nuremberg Legacy”, in *Cardozo Law Review*, 2005–06, vol. 27, pp. 1559, 1574. US Chief prosecutor Jackson famously argued:

Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during war. We must establish incredible events by credible evidence.

See Telford Taylor, *The Anatomy of the Nuremberg Trials*, Back Bay Books, Boston, 1992, p. 54. Or, in the words of British International Military Tribunal Judge Geoffrey Lawrence, one wanted to punish “those who were guilty”, to establish “the supremacy of international law over national law” and to prove “actual facts, in order to bring home to the German

Even though expressivism can be traced back to Hegel's theory of punishment (for Hegel punishment is the "cancellation [*Aufheben*] of crime", which "is *retribution* in so far as the latter, by its concept, is an infringement of an infringement [of right] and in so far as crime, by its existence [*Dasein*], has a determinate qualitative and quantitative magnitude, so that its negation, as existent, also has a determinate magnitude"),³⁸² Feinberg is usually named as its proponents, especially by authors from the common law system.³⁸³ What is commonly overlooked is that Feinberg speaks of "expression" rather than "communication" of punishment: "[P]unishment is a conventional device for the expression of attitudes of resentment and indignation. [...] Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties".³⁸⁴ There are several attempts to distinguish expressivist and communicative theories of punishment, revolving around the existence of a recipient (for the purpose of this Chapter, this admittedly rough and almost simplistic identification of a common criterion needs to suffice): Expressivist theories too are based on communication but that communication does not require a recipient and is audience-independent while communicative theories are based on an communicative act that is aimed at a certain recipient and is audience-dependent.³⁸⁵ Communicative punishment theories therefore recognise social communication between offender, victim and

people and to the peoples of the world, the depths of infamy to which the pursuit of total warfare had brought Germany", see Geoffrey Lawrence, "The Nuremberg Trial", in Guénaél Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, Oxford, 2008, pp. 290, 292.

³⁸² Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, Allen W. Wood ed., H.B. Nisbet trans., Cambridge University Press, Cambridge, 1821/1991, § 101, emphases in the original; see Antje Du Bois-Pedain, "Hegel and the Justification of Real-world Penal Sanctions", in *Canadian Journal of Law & Jurisprudence*, 2016, vol. 29, no. 1, pp. 37, 42; see also the analysis of Thom Brooks, *Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right*, 2nd edition, Edinburgh University Press, Edinburgh, 2013, p. 172. See also *infra* chap. 13.

³⁸³ For more references see Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense*, Cambridge University Press, Cambridge, 2017, pp. 61 *et seq.*

³⁸⁴ Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility*, Princeton University Press, Princeton (NJ), 1974, p. 98, emphasis in the original.

³⁸⁵ See, e.g., Andy Engen, "Communication, Expression, and the Justification of Punishment", in *Athens Journal of Humanities and Arts*, 2014, vol. 1, no. 4, pp. 299, 304 *et seq.*; Bill Wringer, "Rethinking expressive theories of punishment: why denunciation is a better bet than communication or pure expression", in *Philosophical Studies*, 2017, vol. 174, no. 3, pp. 681–708.

society through punishment.³⁸⁶ This stems from the idea that a communication *with* (instead of about) the offender is both possible and necessary.³⁸⁷ The theory creates the image of a “rational, reflective perpetrator”³⁸⁸ – an image that has also been created and promoted by Kant,³⁸⁹ as I have described above. Beyond that, through punishment society not only communicated with the offender, but also “with itself”.³⁹⁰ In the words of Anthony Duff: “In claiming authority over the citizens, it [that is, criminal law] claims that there are good reasons, grounded in the community’s values for them to eschew such wrong [...]. It speaks to the citizens as members of the normative community”.³⁹¹ Thus, “communication begins with the criminal law itself”.³⁹² Here again, Habermas’ and Bohman’s public sphere, that is a necessary precondition for the creation of a Kantian constitution, is most important. The public sphere creates the platform for normative community to communicate with itself and the offender. Transferred to the level of international criminal justice: international criminal tribunals not only represent that community, they also create it. Corrias and Gordon describe this as the “paradox of representation”: “While the tribunals claim to represent a global public, they call it into being by the very same act”.³⁹³

11.7.3.6. The ICC Statute as a Mix of Natural and Positive Law

For Kant, as Garrett Wallace Brown understands it, “a cosmopolitan constitution is a mixture of what is usually called natural law and positive law”.³⁹⁴ Jeremy Waldron calls that ‘normative positivism’ – an oxymoron, as he himself admits, that refers to the combination of “the value judgments that might be required in a non-positivist jurisprudence to identify some proposition as a valid legal norm” and “the value judgments that

³⁸⁶ Ambos, 2017, pp. 589, 601, see *supra* note 379.

³⁸⁷ *Ibid.*

³⁸⁸ *Ibid.*

³⁸⁹ Sussman, 2014, see *supra* note 15.

³⁹⁰ Klaus Günther, “Criminal Law, Crime and Punishment as Communication”, in Andrew P. Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds.), *Liberal Criminal Theory*, Hart, Oxford, 2014, p. 131.

³⁹¹ Anthony Duff, *Punishment, Communication and Community*, Oxford University Press, Oxford, 2001, p. 80.

³⁹² Ambos, 2017, pp. 589, 603, see *supra* note 379.

³⁹³ Corrias and Gordon, 2015, p. 98, see *supra* note 270.

³⁹⁴ Brown, 2006, pp. 661, 678, see *supra* note 62.

support the positivist position that evaluations of the former type should not be necessary”.³⁹⁵

International criminal law is formally part of public international law and as such can make use of the classic sources listed in Article 38 of the ICJ Statute,³⁹⁶ that is, international conventions, international custom, and – *inter alia* – the general principles of law recognised by “civilized nations”.³⁹⁷ The central provision in the ICC Statute that is indicative of a Kantian cosmopolitan constitution is – again – Article 21. This provision arranges for a specific hierarchy, “intertwined with the classic sources of international law”.³⁹⁸ In the first place, the Court shall apply the Statute, the Elements of Crimes (Article 9 of the ICC Statute) and its Rules of Procedure and Evidence. According to Waldron’s categorisation, this would be the positive part of the constitution. Secondly, applicable treaties and the principles and rules of international law shall be considered, which is a direct link to Kant’s Second Definitive Article. Failing that, and if no solution to the respective legal question is achieved, general princi-

³⁹⁵ Jeremy Waldron, “Kant’s Legal Positivism”, in *Harvard Law Review*, 1996, vol. 109, no. 7, pp. 1535, 1541.

³⁹⁶ Ambos, 2013, p. 73, see *supra* note 265; Roozbeh Baker, “Customary International Law in the 21st Century: Old Challenges and New Debates”, in *European Journal of International Law*, 2010, vol. 21, no. 1, pp. 176 ff.; Eberhard Eichenhofer, “Kapitel 1”, in Hans Heiner K hne, Robert Esser and Marc Gerding (eds.), *Völkerstrafrecht*, Jonscher, Osnabrück, 2007, pp. 4 ff.; Boris Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem*, Berliner Wissenschaftsverlag, Berlin, 2008, pp. 29 ff. On the recognition of the doctrine of international law sources in international criminal law, see Otto Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg*, Albert, Freiburg, 1966, pp. 35 ff.; Otto Triffterer, “Gewalt”, in Klaus L derssen (ed.), *Aufgeklärte Kriminalpolitik oder Kampf gegen das Böse?*, Nomos, Baden-Baden, 1998, pp. 314 ff.; Claus Kreß, “Zur Methode der Rechtsfindung im Allgemeinen Teil des Völkerstrafrechts”, in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1999, vol. 111, no. 3, pp. 599 ff.; Bruno Simma and Andreas Paulus, “Role”, in Hervé Ascensio, Emmanuel Decaux and Alain Pellet (eds.), *Droit international Pénal*, 2nd edition, Pedone, Paris, 2012, pp. 55 ff.; Kai-Michael König, *Die völkerrechtliche Legitimation der Strafgewalt internationaler Strafjustiz*, Nomos, Baden-Baden, 2003, p. 208; Hervé Ascensio, “Banalité”, in Mireille Delmas-Marty, Emanuela Fronza and Elisabeth Lambert Abdelgawad (eds.), *Les sources du droit international penal*, Société de Législation Comparée, Paris, 2005, pp. 403 ff.

³⁹⁷ Cf. Karl Doehring, *Völkerrecht*, Müller, Heidelberg, 2004, mns. 271 ff.; Wolff Heintschel von Heinegg, “Vert e”, in Knut Ipsen (ed.), *Völkerrecht*, C.H. Beck, Munich, 2004, sect. 9, mns. 2–3; M. Cherif Bassiouni, *International Criminal Law*, vol. 3, Nijhoff, Leiden, 2008, pp. 8 ff.

³⁹⁸ Ambos, 2013, p. 74, see *supra* note 265.

ples of law derived from national laws can be applied, provided that those principles are not inconsistent with the ICC Statute, international law, or internationally recognised norms and standards. This might well qualify as the normative (natural law) part of the constitution. The explicit reference to “principles and rules of international law” in Article 21(1)(b) ICC Statute therefore includes customary international law and general principles in the sense of Article 38 of the ICJ Statute.³⁹⁹

11.7.3.7. The ICC Statute as ‘Higher Law’

Be that as it may, the Statute is not only the “culmination of international law-making”.⁴⁰⁰ It also codifies the customary international humanitarian laws,⁴⁰¹ and the jurisprudence of previously established international or internationalised Tribunals such as the ICTY and ICTR.⁴⁰² Thus, the law with regard to grave international crimes, customary and treaty based international law, the applicable general principles of law and internationally recognised human rights, “consolidated over a century’s worth of jurisprudence and customary law”, have been ‘constitutionalised’ by the ICC Statute.⁴⁰³ Unfortunately, most authors who employ this constitutional view fail to discuss the obstacle of Article 10 of the Statute: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”. At the time of its drafting, the provision was intended to secure that any further development of the ‘punishability’ of crimes under international law could not be limited by the Statute.⁴⁰⁴ However, Article 10 has not been created to deny the codification of international law, but to make sure that the Statute does not bar “progressive development”.⁴⁰⁵ To the

³⁹⁹ *Ibid.*

⁴⁰⁰ Weller, 2002, p. 693, see *supra* note 23.

⁴⁰¹ Mendes, 2010, p. 24, see *supra* note 24.

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*, p. 21–22.

⁴⁰⁴ Otto Triffterer and Alexander Heinze, “Article 10”, in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck, Munich, 2016, mn. 1. See also Mahnouch H. Arsanjani and W. Michael Reisman, “The International Criminal Court and the Congo: From Theory to Reality”, in Leila N. Sadat and Michael P. Scharf (eds.), *Theory and Practice of International Criminal Law*, Nijhoff, Leiden, 2008, pp. 325, 333.

⁴⁰⁵ See Statute of the International Law Commission, 21 November 1947, as amended 3 December 1955 and 18 November 1981, Article 15 (www.legal-tools.org/doc/a2d70e/).

contrary, the mere fact that a provision such as Article 10 exists, underlines the quality of the ICC Statute as a constitutional document. The Statutes of the *ad hoc* tribunals do not include a similar provision, because the jurisdiction of both tribunals, limited with regard to both the time period and territorial aspects (Article 1 of the respective Statute of the Tribunals), could neither bar the interpretation of the existing international law beyond their limited aims nor prejudice its future development.⁴⁰⁶ That the ICC Statute requires a provision such as Article 10 shows that it indeed, *argumentum e contrario*, reached a level of a constitution. That the application of a constitution is externally limited is nothing unusual.⁴⁰⁷ As I view it, Article 10 qualifies as such a limitation.⁴⁰⁸ Moreover, in practice, since the Statute has been in force, its provisions do actually influence the evolution of international law and State practice.⁴⁰⁹ Article 10 also serves as a concession for the Kantian silence on written constitutions. In both *Perpetual Peace* and *The Metaphysics of Morals*, Kant omits explicit references to written constitutions.⁴¹⁰ Brown follows from this that “Kant seems to disfavour the possibility of a drafted cosmopolitan constitutional document”.⁴¹¹ Even if this was the case, Article 10 of the ICC Statute provides openness and flexibility and neutralises the rigid features of a written constitution.

⁴⁰⁶ Triffterer and Heinze, 2016, mn. 4, see *supra* note 404.

⁴⁰⁷ See, for instance, Canadian Charter of Rights and Freedoms, Article 1. In more general terms, see Janet Hierbert, “The Evolution of the Limitation Clause”, in *Osgoode Hall Law Journal*, 1990, vol. 28, no. 1 pp. 103 ff.

⁴⁰⁸ About limitations to constitutions in the Kantian sense, see *supra* sect. 11.4. That the US delegation, as a main opponent of the constitutional view, rejected a provision such as Article 10 for the Court (together with India; the majority was in favour of it, see Young Sok Kim, *The International Criminal Court*, Wisdom House, Leeds, 2003, p. 198), conveys the impression that the positive impact of Article 10 on the constitutionality debate is certainly not totally absurd.

⁴⁰⁹ See Lena Grover, “A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court”, in *European Journal of International Law*, 2010, vol. 21, no. 3, pp. 543, 571 with further references in fn. 183. For examples, see Triffterer and Heinze, 2016, mn. 16, see *supra* note 404.

⁴¹⁰ Such a reference could maybe read into the following sentence:

By a *congress* is here understood only a voluntary coalition of different states that can be *dissolved* at any time, not a federation (like that of the American states) which is based on a constitution and can therefore not be dissolved.

See Kant, 1991, p. 156, see *supra* note 91.

⁴¹¹ Brown, 2006, pp. 661, 673, see *supra* note 62.

11.8. Conclusion

Today, on the level of world politics, Kant's cosmopolitan ideas and the ICC are similarly unpopular. Neo-realists contend that Kant overlooks the "important and unremitting force of anarchy among states".⁴¹² As if he wanted to support that statement, US President Trump recently admitted: "I like chaos. It really is good".⁴¹³ Trump and Fox News lead a new realist movement where Kantian cosmopolitanism and the ICC have nothing to offer and are left to utopians and conspiracy theorists.⁴¹⁴ This, however, omits a crucial factor in the equation of world politics: the human being. In this regard, the ICC enforces what Kant has designed over two hundred years ago: it is a widening and deepening of the enforcement of universal rights in line with the project of cosmopolitan citizenship.⁴¹⁵ Kant laid the foundations for current conceptions of human dignity, the human is central for him – and the same applies to the ICC. In that regard, the pleading speech UN High Commissioner for Human Rights Prince Zeid, mentioned at the beginning of this chapter, cannot be more Kantian:

Why do we not do the same when it comes to understanding the human world? Why, when examining the political and economic forces at work today, do we not zoom in more deeply? How can it be so hard to grasp that to understand states and societies – their health and ills; why they survive; why they collapse – we must scrutinise at the level of the individual: individual human beings and their rights. After all, the first tear in the fabric of peace often begins with a separation of the first few fibers, the serious violations of the rights of individuals – the denial of economic and social rights, civil and political rights, and most of all, in a persistent denial of freedom.⁴¹⁶

⁴¹² Huntley, 1996, p. 45, see *supra* note 74.

⁴¹³ Telegraph, "Donald Trump jokes about White House chaos at Gridiron Dinner: 'Who will be next to leave? Steve Miller, or Melania?'" , 4 March 2018.

⁴¹⁴ Ilya Somin, "A Cosmopolitan Case Against World Government", in *The Washington Post*, 18 August 2017.

⁴¹⁵ Roach, 2009, p. 192, see *supra* note 182.

⁴¹⁶ Coalition for the International Criminal Court, see *supra* note 1.

Human dignity is also the concept that makes the racism accusation against the ICC⁴¹⁷ so ironic, since this accusation can work both ways. A large majority of the victims of crimes under the jurisdiction of the ICC are from African States (Darfur: 2.5 million people; Democratic Republic of Congo: 2 million; Uganda: 1.3 million).⁴¹⁸ It can therefore also be argued that refraining from targeting African perpetrators and thus ignoring the significant numbers of African victims might be similarly racist. In fact, when the ICTY was established in 1993, some complained that no such tribunal was set up for non-European victims.

The ICC is therefore an important enforcement mechanism of the Kantian vision and its Statute qualifies as a constitution of international criminal justice.⁴¹⁹ Establishing this Statute as a constitution helps to put the current existential debate about an institution such as the ICC into perspective. A Constitution is many things, including a “covenant, symbol, and aspiration”.⁴²⁰ As Vicki Jackson and Mark Tushnet formulate it very fittingly: “Reverence for the constitution may transform it into a holy symbol of the people themselves. The creature they created can become their own mystical creator. This symbolism might turn a constitutional text into a semisacred covenant”.⁴²¹ The ICC Statute does not fall short of aspirations and symbolism. In fact, it was created as a symbol for international criminal justice and for the fight against impunity. A brief look into the Statute’s Preamble is sufficient to establish this association. It therefore does not come as a surprise that attacks against the Court by its opponents are usually answered with a counter-attack by those who passionately defend the idea of international criminal justice. The latter group defends a symbol, and rightly so. Viewing the ICC Statute as a constitution therefore mitigates the fear that the Court will cease to exist at some

⁴¹⁷ For a recent account see Dutton, 2018, pp. 109–19, see *supra* note 298; Christian M. De Vos, “The International Criminal Court”, in Philipp Kastner (ed.), *International Criminal Law in Context*, Routledge, London, 2018, p. 253.

⁴¹⁸ Sanji Mmasenono Monageng and Alexander Heinze, “The Rome Statute and Universal Human Rights”, in Evelyn A. Ankumah (ed.), *The International Criminal Court and Africa*, Intersentia, Leiden, 2016, p. 69.

⁴¹⁹ In a similar vein, but rather general, see Habermas, 2009, p. 313, *supra* note 73:

[N]ach zwei Weltkriegen hat die Konstitutionalisierung des Völkerrechts auf dem von Kant gewiesenen Weg zum Weltbürgerrecht Fortschritte gemacht und in internationalen Verfassungen, Organisationen, Verfahren institutionelle Gestalt angenommen.

⁴²⁰ Jackson and Tushnet, 2014, p. 238, see *supra* note 213.

⁴²¹ *Ibid.*, p. 239.

point. It is unlikely that the Court and its Statute will be erased, precisely because it is too much of a symbol. Even realists would admit that reversing the creation of the ICC Statute would come at a price that is disproportionate with what can be gained through such a measure. Instead, the worst-case scenario is that the Court will stop functioning at some point, due to irrelevance and the lack of funding. There will be new and innovative international criminal institutions and mechanisms.

The creation of one of these innovative institutions can currently be witnessed in the context of the conflict in Syria. When the Security Council remained inactive in ensuring accountability for international crimes committed in the war in Syria, on 21 December 2016 the UN General Assembly through Resolution 71/248 created an “International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011”.⁴²² The Syria IIIM is a subsidiary organ of the UN General Assembly and not a prosecutorial body but “quasi-prosecutorial”. It is required to “prepare files to assist in the investigation and prosecution of the persons responsible and to establish the connection between crime-based evidence and the persons responsible, directly or indirectly, for such alleged crimes, focusing in particular on linkage evidence and evidence pertaining to *mens rea* and to specific modes of criminal liability”.⁴²³ On 25 September 2018, the UN Human Rights Council voted to establish another IIIM, this time to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights in Myanmar.⁴²⁴

⁴²² United Nations General Assembly, Resolution 71/48, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/RES/71/248, 21 December 2016 (www.legal-tools.org/doc/fecaf0/). For a general overview, see Wenaweser and Cockayne, 2017, pp. 211–30, *supra* note 2; Ingrid Elliott, “‘A Meaningful Step towards Accountability’? A View from the Field on the United Nations International, Impartial and Independent Mechanism for Syria”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 239–56; Alex Whiting, “An Investigation Mechanism for Syria: The General Assembly Steps into the Breach”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 2, pp. 231–37.

⁴²³ United Nations General Assembly, 2016, see *supra* note 422; Elliott, 2017, p. 248, see *supra* note 422.

⁴²⁴ United Nations General Assembly, Human Rights Council, Situation of human rights of Rohingya Muslims and other minorities in Myanmar: draft resolution, UN Doc. A/HRC/39/L.22, 25 September 2018 (www.legal-tools.org/doc/da04e2/). See also Polina Levina

Even the way the ICC Statute was created underlines its constitutional (symbolical) quality. At the State Conference for the establishment of the Statute in Rome from 15 June to 17 July 1998, 159 governmental delegations and 250 delegations of non-governmental organisations were present.⁴²⁵ For Weller, this “virtually universal representation” turned the Conference into an “international constitutional convention”.⁴²⁶ For Kant, a constitution was more than an enumeration of principles and rights, it was a “symbolic entity, acting as the supreme reference point for a common sense global identity”.⁴²⁷ The Rome Conference even provides a suitable narrative⁴²⁸ for the Statute as a constitution. It was highly unlikely that the many delegations at the Rome Conference with their opposing views and reluctance for compromise would actually agree on a document that was about to codify the existing international humanitarian and customary law and revolutionise international criminal justice.⁴²⁹ The draft of the Statute contained more square brackets than consolidated text – the square brackets representing the unresolved issues.⁴³⁰ Only on the last day of the Conference did the bureau of the Conference present a “final, inter-coordinated” draft that led to further intense discussions and disagreements.⁴³¹ What happened then became a story that is still gladly told with verve and admiration within the halls of international criminal tribunals and wonderfully recited by Hofmann in his biography of Benjamin Ferencz:

Mahnad, “An Independent Mechanism for Myanmar: A Turning Point in the Pursuit of Accountability for International Crimes”, in *EJIL: Talk!*, 1 October 2018.

⁴²⁵ Ambos, 2013, p. 24, see *supra* note 265.

⁴²⁶ Weller, 2002, pp. 700–01, see *supra* note 23.

⁴²⁷ Brown, 2006, pp. 661, 676, see *supra* note 62.

⁴²⁸ About the narratives as a constitutional feature (and element of interpretation), see Carolyn M. Evans, “Constitutional Narratives: Constitutional Adjudication on the Religion Clauses in Australia and Malaysia”, in *Emory International Law Review*, 2009, vol. 23, no. 2, pp. 437 ff. In his famous work, “Nomos and Narrative”, Cover defined a narrative as “a story of how the law, now object, came to be, and more importantly, how it came to be one’s own”: see Robert M. Cover, “Nomos and Narrative”, in *Harvard Law Review*, 1983, vol. 97, no. 1, p. 45. In his view, those narratives “provide resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law” (p. 46).

⁴²⁹ Ambos, 2013, p. 24, see *supra* note 265.

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

A new chairman [...], Ambassador Philippe Kirsch of Canada [...], had replaced the ailing Adrian Bos of Holland. Kirsch was called “the Magician” for the many compromises he seemed to pull out of thin air. The tension was palpable on the last day of the five-week conference – July 17, 1998. As night fell, Kirsch “stopped the clock” which is a magical way of having conference time stand still even while the earth defiantly continues to rotate. [...] Finally, after many skirmishes and midnight approaching, Kirsch called for a yes-or-no vote on the statute as a whole [...]. The Americans and some others did not wish to reveal their hand, so the vote was counted without counting the vote. Delegates just held up their hands (one to a customer) while staff members verbally tallied and shouted totals. The chairman, covered with perspiration and quivering with excitement, announced that 120 had voted in favour and only seven against adoption of the ICC Statute as the constitution for the first permanent international criminal court in human history.⁴³²

⁴³² Tom Hofmann, *Benjamin Ferencz, Nuremberg Prosecutor and Peace Advocate*, McFarland & Company, Jefferson, 2014, p. 215.

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Philosophical Foundations of International Criminal Law: Correlating Thinkers

Morten Bergsmo and Emiliano J. Buis (editors)

This first volume in the series 'Philosophical Foundations of International Criminal Law' correlates the writings of leading philosophers with international criminal law. The chapters discuss thinkers such as Plato, Cicero, Ulpian, Aquinas, Grotius, Hobbes, Locke, Vattel, Kant, Bentham, Hegel, Durkheim, Gandhi, Kelsen, Wittgenstein, Lemkin, Arendt and Foucault. The book does not develop or promote a particular philosophy or theory of international criminal law. Rather, it sees philosophy of international criminal law as a discourse space, which includes a) correlational or historical, b) conceptual or analytical, and c) interest- or value-based approaches. The sister-volumes *Philosophical Foundations of International Criminal Law: Foundational Concepts* and *Philosophical Foundations of International Criminal Law: Legally Protected Interests* seek to address b) and c).

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