Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law

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Abstract—Current International Criminal Law (ICL) suffers from at least four fairly serious theoretical shortcomings. First, as a starting point, the concept and meaning of ICL in its different variations must be clarified (‘the concept and meaning issue’). Second, the question of whether and how punitive power can exist at the supranational level without a sovereign (‘the ius puniendi issue’) must be answered in a satisfactory manner. Third, the overall function or purpose of ICL as opposed to national criminal law (‘the overall function issue’) must be more convincingly explained. Fourth, the purposes of punishment in ICL, as opposed to the traditional purposes discussed in national criminal law, must be elaborated (‘the purposes of punishment issue’). There is a partly vertical and partly horizontal relationship between these issues. It is, for example, of course impossible to reflect upon ius puniendi, overall function and purposes of punishment without having clarified the concept of ICL in the first place. Also, a treatment of overall function and purposes of punishment seems to be predicated on the justification of the ius puniendi. Indeed, the lack of a satisfactory answer to the ius puniendi issue is maybe the most important theoretical weakness of current ICL. This article therefore aims to demonstrate that a supranational ius puniendi can be inferred from a combination of the incipient supranationality of the world order (understood normatively as an order of values) and the concept of a world society composed of world citizens whose law—the ‘world citizen law’ (‘Weltbürgersrecht’)—is derived from universal, indivisible and interculturally recognized human rights predicated upon a Kantian concept of human dignity. The incipient world order and the world society are

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represented by the international community (to be understood as a community of values) which becomes the holder of the *ius puniendi*.

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## 1. Introduction: Noble Goals and High Expectations

The goals of International Criminal Law (ICL) are noble and the expectations high. The preamble of the Rome Statute of the International Criminal Court (ICC), the Court’s founding document, states that ‘the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured’. It recognizes that ‘such grave crimes threaten the peace, security and well-being of the world’ and expresses determination ‘to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.’

Thus, clearly, the mission of ICL and its first permanent World Court is a twofold one, consisting of an *individualistic and a collective side*: on an individual level, it aims to protect fundamental human rights by prosecuting and punishing international crimes violating these rights; on a collective level, it strives to contribute to the ‘peace, security and well-being of the world’ by the effective prosecution of international crimes threatening these values. Yet, just how difficult it is to accomplish this mission has become evident since the effective establishment of the Court in 2003. It is not surprising then that some scholars warn of too high expectations, in particular with regard to the ICC’s collective peace and security limb going beyond the classical function of a criminal tribunal, ie, to bring the responsible to book. In addition, scholars have become increasingly aware of the theoretical shortcomings of the ICL project. These shortcomings can be grouped around the issues described above in the abstract. I will focus here, after having clarified the ‘concept and meaning issue’, on the ‘*ius puniendi* issue’. I will thereby prepare the ground for

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1 See also art 5(1) Rome Statute.

2 The ICC Statute was adopted in Rome 17 July 1998 and entered into force 1 July 2002; however, the Court only started to function in spring 2003 with the election of the Chief Prosecutor, the first 18 Judges and the Head of the Registry.


4 For a general critique see CF Stuckenberg, ‘Völkerrecht und Staatsverbrechen’ in J Menzel, T Pierlings and J Hoffmann (eds), *Völkerrechtsprechung* (Mohr Siebeck 2005) 768, 772.
a later treatment of the ‘overall function issue’ in a separate paper. In that paper I will also deal, by way of a corollary, with the ‘purposes of punishment issue’.  


7 ibid 266–71: ICL ‘in the meaning of internationally prescribed municipal criminal law’, ‘internationally authorized municipal criminal law’ and ‘municipal criminal law common to civilised nations’.

8 This applies to the fourth group insofar as it includes ‘principles of municipal criminal law which civilised States have de facto in common or consider it opportune to assimilate to a common standard by means of international conventions or by parallel municipal legislation’ (ibid 271).


10 Schwarzenberger (n 6) 264–66; Kreß (n 9) paras 2–3; see also K Ambos, Internationales Strafrecht (3rd edn, Beck 2011) part I (ss 1–4).

11 Schwarzenberger (n 6) 271–72; Kreß (n 9) paras 4–5.

ICL scholarship accepts the distinction between treaty-based or transnational crimes and supranational, ‘true’ international crimes. Examples of the latter are the core crimes of articles 5–8 of the ICC Statute, while treaty-based crimes are essentially transnational crimes, objects of the so-called suppression conventions such as the UN Torture Convention, the Terrorist Bombing Convention or the UN Drugs Conventions.

ICL stricto sensu (‘Droit pénal international’, ‘Derecho penal internacional’, ‘Diritto penale internazionale’, ‘Völkerstrafrecht’), which is of interest here, is, of course, not limited to the kind of crimes mentioned above. Rather, it comprises, to quote a well-accepted definition of Otto Triffterer, ‘the totality of international law norms of a penal nature which conjoin typical legal consequences of criminal law with a decisive conduct – namely the international crime – and as such can be applied directly’. If one accepts this


14 See Ambos, (n 10) § 5, mn 3, § 7, mn 117; G Werle, Principles of International Criminal Law (TMC Asser Press 2009) 29; Kreß (n 9) para 15; Cryer and Wilmshurst (n 13) 4; Gaeta (n 13) 66ff; A Cassese, International Criminal Law (2nd edn, OUP 2011) 12 extends this list to torture and ‘some extreme forms of international terrorism’. R Kolb, Droit International Penal (Helbing Lichtenhahn 2008) 68–69, recognizes, in addition to the ICC core crimes, ‘international crimes’ because of their ‘nature intrinsique’ distinguishing between public (state) and private (ordinary) crimes; yet, he does not provide criteria of delimitation of transnational crimes.


16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984) 1465 UNTS 85 (‘Torture Convention’).


19 On the sometimes ambiguous terminology see—from a German perspective (where the broader term ‘Internationales Strafrecht’ was traditionally used, first by Ernst Beling) – L Gardocki, ‘Über den Begriff des Völkerstrafrechts’ (5th edn, Duncker & Humboldt 1996) 119; F Neubacher, Kriminologische Grundlagen einer internationalen Strafgerichtsbarkeit (Mohr Siebeck 2005) 31ff. From the Anglo-American perspective Cryer and Wilmshurst (n 13) 3–5. From the Spanish-speaking perspective, see Pastor (n 13) 28–33.

20 O Triffterer, Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg (Alburt 1966) 34 (‘Völkerstrafrecht im formellen Sinne . . . die Gesamtheit aller völkerrechtlichen Normen strafrechtlicher Natur, die an ein bestimmtes Verhalten—das internationale Verbrechen—bestimmte, typischerweise dem Strafrecht vorbehaltene Rechtsfolgen knüpfen, und die als solche unmittelbar anwendbar sind’ (author
definition, ICL consists at its core of a combination of criminal law and public international law principles.  

The idea of individual criminal responsibility and the ensuing prosecution of individuals for specific (macro-criminal) conduct is derived from criminal law, while the classical (Nuremberg) offences form part of (public) international law and thus the respective conduct is directly punishable under ICL (principle of direct individual criminal responsibility in public international law). This strong grounding in criminal law, together with the actual enforcement of ICL by way of international criminal tribunals and the ICC, converts ICL into criminal law on a supranational level, fully encompassing the well-known principles of a liberal criminal justice system, in particular the principles of legality, culpability and fairness. The institutionalization of ICL with the establishment of the ICC entails the creation of a single penal system of the international community—understood as a major group of States bound together by common values—extending beyond the
core areas of substantive and procedural law towards other branches of criminal law (law of sanctions, enforcement of sentences, judicial assistance, etc). This new penal system, however, represents only one—the supranational—element of the new ‘International Criminal Justice System’ which, in turn, may be conceived as an instrument of global (judicial) governance operating through legalization and formalization.

3. The Ius Puniendi Issue: Towards an Individualistic–Collective Value-based Justification

ICL lacks a consolidated (supranational) punitive power in its own right; it is, in the words of some recent critics, a ‘penal system without a State’ and thus ‘without a sovereign’. Does this mean that ICL also lacks the power and legitimacy to make use of criminal law to impose punishment on individuals, ie, does it lack a ius puniendi in its own right? The final answer is no, but we have to overcome some obstacles to get there.

A. ICL and the Normative Defence of the Incipient International Order

The international community today finds itself where the Nation-State stood when it came into existence: charged with the building-up and consolidation of a monopoly of power, ie, at the stage of an incipient State-like order at best. Of course, the Nation-States as the classical subjects of international law are called on to enforce not only their domestic but also international criminal law. This is also reflected in the relevant ICL treaties which regularly contain no directly applicable provisions but rather call on the States for the implementation of their punitive provisions. For a classical example of the decentralized implementation of ICL obligations to punish, see arts V, VI, Convention on the Prevention and Punishment of the Crime of Genocide (New York, 9 December 1948) 78 UNTS 277 (‘Genocide Convention’).
of a treaty (ICC) or by way of a Security Council resolution under chapter VII of the UN Charter (International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda)—although this does not automatically imply the creation of a new supranational sovereign power. In addition, under the special legal regime of occupation the occupying power has the right to set up criminal tribunals as was done in Nuremberg, Tokyo or Iraq. Yet, State delegation powers offer only a formal explanation of a supranational ius puniendi, they do not provide for normative reasons which would justify such a supranational authority in its own right.

A normative approach must take on those theories for which the use of criminal law is predicated upon the existence of a State-like legal order, worthy of being defended by (supranational) criminal law in the first place. The argument has in our times been made with great force by the German legal theorist Günther Jakobs. His argument goes like this: punishment is predicated on an existing normative order, ie, an order where norms are

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34 Rather, the delegating States remain always in control of this process; cf F Meyer, Strafrechtsgenein in Internationlen Organisationen (Nomos 2012) 650–51.


36 The same formal material dichotomy exists with regard to European Criminal Law: while one may argue that with the enhanced position of the European Parliament as a legislator under the Lisbon Treaty there is no longer a democracy deficit of European (Criminal) Law, the normative legitimacy of such a supranational law continues to be controversial; see C Mylonopoulos, ‘Strafrechtsdogmatik in Europa nach dem Vertrag von Lissabon – Zur materiellen Legitimation des Europäischen Strafrechts’ (2011) 123 ZStW 633, 636–37.

recognized by the society as a whole and determine the contents of social
communication.38 If such an order is absent or, as on the international level,
only exists in an incipient stage, violent human acts are not directed against
real norms, but are only the expression of brute force of a powerful individual
or group of individuals against powerless victims. These may rise up against a
despot, even kill him, but such reactions have nothing to do with punishment
in the ordinary sense, even if meted out by an international criminal court.
Speaking of punishment where the destruction of an existing (normative) order
is not at issue, but such an order is, at best, still in the making, means ignoring
the liberty of individuals, be it the perpetrators or the victims, who are not
bound by any order in the first place. It confuses ‘punishment in the State’
with ‘punishment in the natural state’, ‘criminal law’ with ‘mere punitive force’,
‘punishment through law’ with ‘punishment through force’.39

Jakobs’ line of argument is irrefutable if one is willing to share his
fundamental premise, ie, that the existence of law and of any legal order is
predicated on the existence of a State with the respective monopoly of power.
This, of course, corresponds to the old Hobbesian view, according to which
‘law’ cannot exist without the State as the Leviathan which creates this law and
makes sure that it is enforced and thus recognized as ‘law’ in the first place.40
Kant has taken the same position predicking the existence of law on its
enforceability by a public power which disposes of the necessary force.41 In a
way, also Kelsen followed these views in his Reine Rechtslehre,42 but he
nevertheless accepted—given the existence of an albeit incipient international
order at his time, represented mainly by the League of Nations and later the
United Nations (UN)—that (international) norms can be enforced by
sanctions and that these may be imposed by other entities than States, for

38 G Jakobs, ‘Strafrechtliche Zurechnung und die Bedingungen der Normgeltung’ in U Neumann and L
Schulz (eds), Verantwortung in Recht und Moral. ARSP-Beilage 74 (Franz Steiner 2000) 57, 58–59; G Jakobs, ‘Das
Selbstverständnis der Strafrechtswissenschaft’ (n 37) 49.
39 Jakobs, ‘Das Selbstverständnis der Strafrechtswissenschaft’ (n 37) 55: ‘Strafe im Staat’ vs ‘Strafe im
41 I Kant, Handschriftlicher Nachlaß/Reflexionen zur Rechtsphilosophie – Ius publicum universale in genere (c 1772–
75) in Preussische Akademie der Wissenschaften (ed), Gesammelte Schriften (1st edn, De Gruyter 1934)
<www.korpora.org/Kant/aa19/482.html> accessed 24 January 2012 (‘Demnach ist kein Recht ohne eine
Unwiderstehliche Gewalt’); I Kant, Metaphysik der Sitten (1797) in Gesammelte Schriften vol VI (1st edn, Reimer
1907) 231 <www.korpora.org/Kant/aa06/231.html> accessed 24 January 2012 (‘mithin ist mit dem Rechte
zugleich eine Befugniß, den, der ihm Abbruch thut, zu zwingen, . . . verknußpt’).
and ‘Wirksamkeit’ (efficacy) and arguing that a ‘minimum’ of the latter is the prerequisite of the former (‘ein
Minimum an sogenannter Wirksamkeit ist eine Bedingung ihrer Geltung’) and 290: State as a social community
constituted by a normative order which, as the ‘one’ order can only be the ‘relatively centralized coercive order’
recognized as the State legal order (‘Wird der Staat als eine soziale Gemeinschaft begriffen, kann diese
Gemeinschaft, . . . , nur durch eine normative Ordnung konstituiert sein. Da eine Gemeinschaft nur durch eine
solche Ordnung konstituiert sein kann (ja, mit dieser Ordnung identisch ist), kann die den Staat konstituierende
normative Ordnung nur die relativ zentralisierte Zwangsordnung sein, die wir als staatliche Rechtsordnung
erkannt haben’; [emphasis in the original]). On Kelsen’s concept of law, see R Alexy, Begriff und Geltung des
Rechts (Karl Alber 1992) 139–41, 201–6 (arguing that norms that are complied with and enforced have a higher
degree of validity than those that are not).
example within the system of collective security pursuant to chapter VII of the UN Charter.43 Admittedly, sociological positivists like Jakobs may go beyond a State-centred approach in that they require social recognition of norms,44 but these must always be backed up or at least complemented by State-like enforcement as an expression of real validity or efficacy.45 In any case, these (State-centred) views, of course, entail the rejection of international law as (public) ‘law’.46 Further, ICL cannot exist—actually it is not law at all—because there is no State-like international order to enforce it and thus to be defended in the first place. Indeed, for these reasons George Schwarzenberger did not recognize ICL \textit{stricto sensu} as \textit{lex lata}, but referred to it as ‘\textit{lege ferenda}’ and called it a ‘contradiction in terms’.47

However, notwithstanding the apparently compelling logical sequence of Jakobs’ argument, it is not compelling enough. It does not get the whole picture since it fails to do justice to the international limb of ICL. And it takes too narrow a perspective on the fundamental issue of the validity of (international legal) norms. To begin with the latter: validity of norms may be predicated on their real, actual existence in a given society, but validity can also be linked to the material (normative or moral) foundation of their claim of being obligatory. In this sense one can distinguish between social and material validity or, what is the same for our purpose, (factual) validity and (material) legitimacy of norms.48 In fact, the question of legitimacy plays a fairly

43 cf H Kelsen, ‘Sanctions in International Law under the Charter of the United Nations’ (1945/46) 31 Iowa L Rev 499, 500–2 (eg at 500: ‘International law is law in the true sense of the term, for its rules, regulating the mutual behavior of states, provide sanctions to be directed against the state which has committed an international delict’). See also on the State ‘as something different from the legal order’ (‘als ein von der Rechtsordnung verschiedenes \textit{Wesen}’) H Kelsen, \textit{Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht} (Mohr 1922) 208.

44 Jakobs, ‘Das Selbstverständnis der Strafrechtswissenschaft’ (n 37) 58 (arguing that a norm is only effective if it determines social communication, ie, if it formulates socially accepted and stable expectations (‘Eine Norm \textit{gilt}, wenn sie den Inhalt möglicher Kommunikation bestimmt, wenn also die an eine Person gerichtete Erwartung stabil ist’). For a similar approach see Hart (n 51). However, even Kelsen, \textit{Reine Rechtlehre} (n 42) 11 (contrary to Jakobs’ critique) acknowledges the importance of social recognition as he states that ‘Wirksamkeit’ does not only refer to the actual imposition and enforcement of a norm but also to compliance by the persons subject to it (‘daß die Sanktion in einem konkreten Fall angeordnet und vollstreckt wird, sondern auch…, daß diese Norm von den der Rechtsordnung unterworfenen Subjekten befolgt…wird’).

45 See the quotes in n 37.


47 Schwarzenberger (n 6) 293, 295.

48 For a good summary of the debate see M Mahlmann, \textit{Rechtsphilosophie und Rechtstheorie} (2nd edn, Nomos 2012) 261ff. Also see in this context the threefold distinction between positivism (positive law), realism (its practical application) and moralism (justice, natural law) by U Neumann, ‘Rechtspositivismus, Rechtsrealismus und Rechtsmoralismus in der Diskussion um die strafrechtliche Bewältigung politischer Systemwechsel’ in C Prittwitz and others (eds), \textit{Festschrift für Klaus Lüderssen} (Nomos 2002) 109, 112–14 and Y-W Kim, ‘Vergangenheitsbewältigung durch das Strafrecht?’ (1998) 84 ARSP 505, 515.
important role in all theories of validity of norms, though the theories of (law as) force are the exception to the rule. Indeed, even for (moderate) positivists like Kelsen, Hart or Alexy, the positive (empirically existing) law ultimately operates with a legitimacy reservation, ie, it also requires a plausible claim of material (moral) validity. The famous Radbruch formula, starting from the validity of positive law in principle but setting a limit to unbearable ‘flawed law’ (‘unrichtiges Recht’) by recourse to a principle of material justice (‘Gerechtigkeit’), is but another consequence of this legitimacy reservation. In international law, the power of legitimacy is recognized at least since Thomas Franck’s seminal study on the subject. Thus, while there is a tension between validity and legitimacy, the latter is making ‘room for something grander.’ Pluralist accounts of international law go even further and recognize—in contrast to the State-centred, top-to-bottom approach of the so-called realist, interest-based theories—different sources of international law outside the realm of State authority with ‘varying degrees of impact.’ The ‘jurisgenerative’ force of non-State

49 Mahlmann (n 48) 262–65 with detailed references. For a supra-positive concept of validity with regard to human rights see also Reuss (n 26) 8–9.
50 Kelsen, Reine Rechtslehre (n 42) 7–8, 196–97, 200–9 arguing, on the basis of his juridical theory of validity (‘juristische Geltungstheorie’), that any norm requires objective validity to be derived from a supreme ‘Basic Norm’ (‘Grundnorm’) whose own legitimacy however remains unclear; cf A Funke, ‘Rechtstheorie’ in J Krüpker (ed), Grundlagen des Rechts (Nomos 2011) 45, 52.
51 HLA Hart, Concept of Law (2nd edn, Clarendon Press 1994) 211–12. Hart however misses in international law, in line with his positivist approach (for a masterful summary see Mahlmann (n 48) 161–63), a ‘unifying rule of recognition specifying “sources” of law and providing general criteria for the identification of its rules’ (214); although he admits that international law is ‘in a stage of transition towards acceptance’ of generally recognized rules (236).
52 Alexy (n 42) 70–117, 201–6 discussing the ‘Unrechtsargument’, following Radbruch’s argument of the limits of flawed law (see (n 54)) and limiting his concept of a ‘by and large socially efficient constitution’ (‘im großen und ganzen sozial wirksamen Verfassung’) by the criterion of ‘extreme injustice’ (‘extreme Ungerechtigkeit’).
53 On Radbruch as a positivist see K Adomeit, Rechts- und Staatsphilosophie II. Rechtsdenker der Neuzeit (2nd edn, Müller 2002) 148, 161; critically Mahlmann (n 48) 166.
54 Accordingly the ‘precedence’ of ‘positive law . . . even when its content is unjust and fails to benefit the people’ ceases to exist if ‘the conflict between statute and justice reaches such an intolerable degree that the statute, as “flawed law”, must yield to justice’, G Radbruch, ‘Gesetzliches Unrecht und Übergesetzliches Recht’ (Statutory Lawlessness and Supra-Statutory Law) (1946) 1 Süddeutsche Juristenzeitung 105, 107; for an English translation see (2006) 26 OJLS 1, 7. For an analysis, see eg Neumann (n 48) 115–16 with further references in (n 24).
56 Koskenniemi, ‘Legal Cosmopolitanism’ (n 55) 480.
57 See PS Berman, ‘A Pluralist Approach to International Law’ (2007) 32 YJIL 301, 302, 307, 311–22 (discussing the ‘new’ New Haven school of Yale University and the different areas where pluralism operates, in particular where a disaggregation of the State can be identified). On the basis of legal pluralism Greenawalt (n 20) 1064, 1122–27 advocates a four-tiered, pluralist theory of ICL, however, his approach does not capture the full variety of (non-State) norm creation in ICL and is, as to the parallelism between international and domestic criminal law, only a result of the recognition of traditional general principles (derived from national law) in the default rule of art 21(3)(c) ICCSt. In any case with Greenawalt the pluralism debate has reached ICL, for a recent overview see E van Sliedregt, ‘Pluralism in ICL’ (2012) 25 LJIL 847 (invoking, inter alia, at 850 Pauwelyn’s metaphor of a universe of interconnected islands).
social processes\textsuperscript{58} is particularly dependent on and, at the same time, advanced by the moral authority of norms,\textsuperscript{59} ie their legitimacy.

From this broader perspective Jakobs’ approach can and in fact has been rightly criticized\textsuperscript{60} for he puts ‘validity’ (in the sense of Geltung in a material-normative sense) and ‘order’ (Ordnung) on an equal footing\textsuperscript{61} and thus ignores the potential force of norms as per their material, normative legitimacy, independent of an enforcement order in the form of a State or otherwise. In fact, such a concept of validity or existence of norms does not only negate the possibility of law at the international level, but also quite often at the domestic level, namely with regard to those States which do not possess a fully functioning monopoly of (State) power or where norms do not enjoy full social recognition. The criminal law of these States would then not even accord a normative value due to the absence of enforcement power.

As to ICL’s international limb, the more fundamental question arises as to whether it makes sense at all to apply the theories of validity of norms, developed with the classical Nation-State in mind, to a supranational order which follows different rules of organization than a Nation-State. In any event, Jakobs and similar critics usually argue from a classical State-centred and national law perspective and are unconcerned with the complex subtleties of the emerging international order (which, of course, did not exist at the time of the Hobbesian and Kantian critique of the possibility of an international ‘law’) and the ensuing judicialization of international law.\textsuperscript{62} Neither do they inquire into the role and competence of the UN Security Council in the UN’s system of collective security, in particular with regard to the establishment of international criminal tribunals and the enforcement of their decisions and judgments, nor do they deal with the possibility of decentralized prosecutions by third states. Thus, they ignore, in a slightly thoughtless way, that there is already an existing, albeit incipient, supranational (legal) order\textsuperscript{63} at work—as

\textsuperscript{58} Berman (n 57) 322. See also P Kastner, ‘Towards Internalized Legal Obligations to Address Justice and Accountability? A Novel Perspective on the Legal Framework of Peace Negotiations’ (2012) 23 CLF 193, 218-19 on the ‘jurisgenerative’ force of consensus-oriented negotiations within the framework of peace processes entailing, in the best case, fidelity to the norms agreed upon.

\textsuperscript{59} Berman (n 57) 324–26.

\textsuperscript{60} For criticism in the context of ICL, see C Stahn and SR Eiffler, ‘Über das Verhältnis von Internationalem Menschenrechtsschutz und Völkerstrafrecht anhand des Statuts von Rom’ (1999) 82 Kritische Vierteljahresschrift (KritV) 253, 254, and with regard to Hobbes, see H Bielefeldt, Philosophie der Menschenrechte (Wissenschaftliche Buchgesellschaft 1998) 153ff, 156.

\textsuperscript{61} Jakobs, Norm, Person, Gesellschaft (n 37) 54. In a similar vein, see Jakobs, ‘Strafrechtliche Zurechnung und die Bedingungen der Normgeltung’ (n 38) 57, 58–59 on Kelsen’s thesis of the ‘Grundnorm’.

\textsuperscript{62} On this judicialization and an ‘international constitutional judiciary’ see T Broude, ‘The Constitutional Function of Contemporary International Tribunals, or Kelsen’s Visions Vindicated’ (2012) 4 GoJIL 519, 528ff (discussing at 536ff by way of example the ICJ, the WTO dispute settlement system and ECtHR).

\textsuperscript{63} See eg O Höffe, Demokratie im Zeitalter der Globalisierung (2nd edn, Beck, 2002) 279 (‘globaler Ultraminimalstaat’); Koskenniemi, ‘Legal Cosmopolitanism’ (n 55) 485 (emerging global community ‘irresistibly under way’); J Habermas, Zur Verfassung Europas. Ein Essay (Suhrkamp 2011) 34 (‘in Bruchstücken institutionalisierte Weltordnung’). See also Merkel (n 46) 327 (recognizing, after his critique on the too ‘rigid’ Kantian concepts of ‘Law’ and ‘Sovereignty’, international law as ‘unvollkommene...defizitäre, aber...durch Rechtsordnung’).
one expression of the institutionalization or even constitutionalization of international law where community interests prevail over unilateral or bilateral state interests. In fact, it is not overly idealistic to claim that the different mechanisms of criminal accountability, existing both at the national and international level, have merged into the already mentioned international criminal justice system which may be considered either the product of a certain normative criminal law order or in and of itself amount to such an order.

B. Enforcement of Fundamental Human Rights by ICL

The argument that there is a normative international order, based on certain values worthy of being defended by ICL, can be traced back to the Kantian idea of human dignity as a source of fundamental human (civil) rights which, ultimately, must be enforced by a supra- or transnational (criminal) law. For Immanuel Kant, dignity is opposed to value: everything which is replaceable

64 There are, of course, different constitutionalist approaches. See, as perhaps the most important precursor of the contemporary debate, A Verdross, Die Verfassung der Völkerrechtsgemeinschaft (Springer 1926) and for a modern version of this markedly legalistic position see B Passbender, The UN Charter as the Constitution of the International Community (Nijhoff 2012) discussing Verdross, at 28ff. See also T Kleinlein, ‘Alfred Verdross as a Founding Father of International Constitutionalism’ (2012) 4 GoJIL 385 and A O'Donoghue, ‘Alfred Verdross and the Contemporary Constitutionalization Debate’ (2012) 32 OJLS 799. For a comprehensive treatment of the debate see T Kleinlein, Konstitutionalisierung im Völkerrecht (Springer 2012) esp 5–97 and the special issue of (2012) 4 GoJIL 343–647 with an excellent introduction by T Broude and A Paulus, 349ff. Kleinlein offers a thorough discussion of the conditions of a ‘constitutionalization’ (as opposed to ‘fragmentation’) of international law distinguishing between an (autonomous) ‘order of values’ (in the sense of the concept of international community used here, see n 27) and the institutionalization within international organizations. He identifies the writings of Kelsen, Lauterpacht, Verdross and Scelle as the most important precursors of the constitutionalization debate (157–234, 694–95, 708) and sees its roots in the theories of natural law (Spanish late scholasticism and German rational philosophy) and in Kant’s philosophy of the Enlightenment (235–314, 695–96, 709). The common thread in these theories is the development of a supranational order (totus orbis, communitas humani generis, civitas dei, civitas maxima) which can be traced back to individual (human) rights, ie, which marks the transfer of international law from a neutral, inter-State law to a law for human beings (311, 314, 686). Kleinlein concludes, however, that one should rather speak of a ‘constitutionalization in’ instead of a ‘constitutionalization of international law’ (emphasis added). The constitutionalization debate offers above all criteria for the legitimacy of international law (685). For an application of constitutional thinking to the pluralist international legal order see G Ulfstein, ‘The Relationship between Constitutionalism and Pluralism’ (2012) 4 GoJIL 575 and in a similar vein speaking of ‘constitutional pluralism’, see L Viellechner, ‘Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law’ (2012) 4 GoJIL 599, 620. For a functional approach to ‘constitutionalizing’ international law, see M Kotzur, ‘Overcoming Dichotomies: A Functional Approach to the Constitutional Paradigm in Public International Law’ (2012) 4 GoJIL 558. For criticism of ‘global constitutionalism’, see C Volk, ‘Why Global Constitutionalism does not Live up to its Promises’ (2012) 4 GoJIL 551, arguing that it is a ‘de-politicized mode of global governance’ ignoring the ‘contingency of political processes’ and the ‘political character of international law and decision-making’ and instead calling for ‘a version of constitutionalism which gives place to dissent and political struggle’ at 567 and at 570, ‘a republicanism of dissent’. For criticism with regard to the European Union, see D Grimm, Die Zukunft der Verfassung II - Auswirkungen von Europäisierung und Globalisierung (Suhrkamp 2012) 239–40, 261.

65 For a summary see B Simma, ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 EJIL 265, 267–8, albeit critical of the need of a ‘constitutionalization’ at 297.

66 See n 28.


68 But note that for Kant such an (international) law was predicated on the existence of a public power to enforce it (n 41 and main text).
has relative worth or value, but that which cannot be replaced has intrinsic
worth or dignity. Accordingly, anything which is a mere means to satisfy wants
has value; and that which constitutes the condition under which anything can
be an end in itself has dignity. Thus, 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.69 Human
dignity so understood is a self-sufficient, humanist concept which claims
recognition and respect for and among human beings based on their status
as persons with common peculiar characteristics (eg reason).70 It accords any
person a legal status for being human, independent and before the existence
of community constituted as a State. It conceives of the State as a rational,
instead of national, State whose authority is based exclusively on the rule
of law.71

Kant’s conception of human dignity is complemented by his vision of an
‘eternal peace’.72 To be ‘eternal’, ie, permanent and sustainable, such a peace
presupposes the fulfilment of at least two conditions: most importantly,
that the States have a republican constitution guaranteeing the liberty and
equality of their citizens as ‘inalienable rights’;73 further, a world citizen
law (Weltbürgerrecht) which entails the ‘right of hospitality’ (Recht der
Hospitalität),74 ie, that each citizen must not be treated in a hostile way by
another State.75 From this, as rightly argued by Klaus Günther,76 a two-step argument follows: first, a just and thus permanent peace is predicated on the recognition and respect for the rights of the citizens, ie, in modern language, human rights. Secondly, violations of these rights have to be stigmatized as serious wrongs and punished. Also, what is important in Kant’s idea of a Weltbürgerrecht is the recognition of a (minimum) set of rights of each person, overcoming the individual’s classical mediatization within the State order and in a world order between States.77 In sum, with this conception, Kant laid the foundations for all current conceptions of human dignity and world peace. Indeed, the human dignity concept found its way into national legal instruments the 19th century78 and into international instruments in the 20th century.79 Thus, it was formally recognized as a legal concept and constitutes the basis and moral source of any subsequent codification of human (civil) rights. It serves as an interface between moral and positive law, preparing the ground for a transition from moral to (subjective) rights.80

Following Kant, a series of other, in particular German, scholars have argued that the State and the international community is called upon to protect the human dignity by way of criminal law.81 According to Max Weber, human dignity is the

75 The limitation to the right of hospitality may be explained by the historical fact that at the time of Kant’s writing, visit in a foreign country was the only point of contact with a foreign sovereign power (Kleinlein (n 64) 302).
76 KG ünther, ‘Falscher Friede durch repressives Völkerstrafrecht?’ in W Beulke and others (eds), Das Dilemma des rechtsstaatlichen Strafrechts (Berliner Wissenschafts-Verlag 2009) 83–85. In a similar vein Merkel (n 46) 348–49 sees arguments in favour of an International Criminal Court already in Kant’s work on the eternal peace.
77 Kleinlein (n 64) 301–3, 695–96, 709.
78 See the French ‘Decree of the abolition of the slavery’ of 27 April 1848 (slavery as an attempt on human dignity; quoted by C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 EJIL 655, 664) and sec 139 Paulskirche Constitution of 1848 (respect for human dignity even in case of criminals; quoted by Habermas, Zur Verfassung Europas (n 63) 15).
79 On an international level most prominently in art 1, Universal Declaration of Human Rights (1848) (referring to ‘human beings…free and equal in dignity and rights’); cf McCrudden (n 78) 665–66.
81 See for example J Wolter, ‘Menschenrechte und Rechtsgüterschutz in einem europäischen Strafrechtsystem’ in B Schünemann and J de Figueiredo Dias (eds), Bausteine des europäischen Strafrechts - Coimbra Symposium (Heymanns 1995) 3, 4ff, 13; J de Figueiredo Dias, ‘Resultate und Probleme beim Aufbau eines funktionalen und zweckrationellen Strafrechtssystems’ in Schünemann and de Figueiredo Dias (eds), 357–66, 358; C Roxin, ‘Die Strafrechtswissenschaft vor den Aufgaben der Zukunft’ in Eser, Hassemer and Burkhart (eds) (n 37) 369–95, 389–90 (stressing the need to punish international crimes unreservedly). See also Stahn and Eißler (n 60) 267ff (268, 277) identifying a ‘Wertekonsens der internationalen Gemeinschaft’ and Paulus, Die Internationale Gemeinschaft im Völkerrecht (n 27) 260–62 considering ICL as an ‘expression of a minimal consensus’ of the international community with regard to the fundamental human rights. For a combination of the Kantian idea of a global peace with the punishment of serious international crimes, Zaczyk (n 71) 705 and F Melloh, Einheitliche Strafzumessung in den Rechtsquellen des ICC-Statuts (Duncker & Humblot 2010) 84. GP Fletcher and JD Ohlin, Defending Humanity (OUP 2008) apply the Kantian theory of self-defence in criminal law—as a defence not only of one’s own rights but (also) of the legal order as a whole (at 76, 79, 83–85)—to the international order, and advocate on this basis a presumptive right of every State to intervene against aggression.
origin of each criminal law system and a prerequisite to guarantee its functionality and ability to fight crime effectively. She considers that 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. Thus, the international wrong has to be negated by way of (supranational) punishment. In a similar vein, Reinhard Merkel and Klaus Günther demand stigmatization and punishment with a view to the confirmation and reinforcement of fundamental human rights norms. Last but not least, Frank Neubacher sees the legitimacy of international criminal tribunals in the gravity of the crimes to be prosecuted and thus the protection of universal legal interests.

Other scholars employ a more cosmopolitan vision which can also be traced back to the Kantian idea of a Weltbürgerrecht, and to his concept of human dignity, focusing on people instead of States as subjects of the international law.
order. Human dignity is here also understood as a moral source of subjective rights of all people, of universally recognized human rights which ultimately have to be protected by a universal, interculturally recognized criminal law. It is a form of cosmopolitanism based on principles of reason with a claim of universal validity. Indeed, there is a unique mixture of a concrete consideration and an abstract claim which dismisses any general relativistic cultural challenge, partly as a result of post-modern theories of legal pluralism.

supranational powers) see recently P-A Hirsch, ‘On the (Im)Possibility of a Constitutionalization of International Law from a Kantian Point of View’ (2012) 4 GoJIL 479, 483ff, 500ff.

90 cf J Rawls, The Law of Peoples (Harvard University Press 1999) 23ff and passim. In a similar vein A Buchanan promotes ‘a conception of international law grounded in the ideal of protecting the basic rights of all persons’ in Justice, Legitimacy and, Self-Determination: Moral Foundations for International Law (OUP 2004) 290. See also Koskenniemi, ‘Legal Cosmopolitanism’ (n 55) 473 distinguishing ‘cosmopolitans’ from ‘internationalists’ in that the former ‘had little faith in States and saw much more hope in increasing contacts between peoples’. Last but not least, a (pluralist) conception of international law focusing on micro legal processes at the grassroots level also starts from the people (bottom) instead of the State (top): see Berman (n 57) 306 referring to Michael Reisman’s approach. For such a bottom-to-top approach most recently see Reuss (n 26) 68–69 (‘horizontal’ human rights between and from human beings) arguing that the rights coupled to the individual’s position as subject of international law also entails duties (71–78).

91 See n 81.


94 From this the duty to prosecute and punish often alluded to in human rights law. See for example D Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’ (1991) 100 YJIL 2537.

95 Koskenniemi, ‘Legal Cosmopolitanism’ (n 55) 475–77 distinguishing between three types of cosmopolitanism (deep-structural, rational/principled and postmodern/legal pluralist).

96 In a similar vein rejecting the relativistic challenge to a universal concept of human rights MJ Perry, ‘Are Human Rights Universal? The Relativist Challenge and Related Matters’ (1997) 19 Hum Rts Q 461 (471: ‘Human beings are all alike in some respects that support generalizations both about what is good and about what is bad, not just for some human beings, but for every human being’) and Bielefeldt (n 60) 10ff, 12–13, 17, 115ff, 145ff (identifying a ‘core of an intercultural, overlapping consensus’). See also Fisher (n 27) 61 and Mahlmann (n 48) 330–33.

97 This is, in a way, the flip side of the pluralist, democratic, grassroots account discussed above (n 57 and main text): legal pluralism is a descriptive, not normative theory; it does not provide for a hierarchy of norms but accepts all norms and sources recognized, in principle, as equal; see Berman (n 57) 327–28. Of course, there must be at least some order: see in this sense for an ‘ordering pluralism’ M Delmas-Marty, Ordering Pluralism – A Conceptual Framework for Understanding the Transnational Legal World (tr from French by Naomi Norberg, Hart Publishing 2009) and the instructive review by M Kubiciel, ‘Book Review: Mireille Delmas-Marty, Ordering Pluralism – A Conceptual Framework for Understanding the Transnational Legal World, Hart Publishing, Oxford Journal of Legal Studies
The concrete consideration consists of the reference to concrete violations of fundamental human rights, translated into severe crimes against fundamental legal values of humanity and codified as international core crimes in articles 5–8 of the ICC Statute, which can hardly be approved of by any culture.\textsuperscript{98} The abstract claim refers to the underlying moral position of the universal reach of these fundamental human rights and their punishment as international core crimes.\textsuperscript{99} As a philosophical universalist position, it cannot be geographically restricted or culturally challenged since there is ‘nothing about the way in which moral judgments are formed…which restricts the range of their appropriate application’.\textsuperscript{100} Or, in other words, the validity of a moral claim is independent from its historic–geographical roots.\textsuperscript{101} Indeed, nobody would seriously claim that Einstein’s theory of relativity applies only in Switzerland since it was mainly the fruit of Einstein’s Swiss years.

In line with this argument, Tübingen philosopher Otfried Höffe has proposed a philosophical justification of an international criminal order based on human rights and justice as universally and interculturally recognized principles. In his view, the protection of human rights is the most important duty of the complementary world republic and this protection must ultimately be secured by a world criminal law.\textsuperscript{102} This protection by criminal law is the flip side of the prohibition of conduct violating of human rights.\textsuperscript{103} The legitimacy of this world criminal law can be guaranteed by limiting its application to the protection of the most basic human rights, to a kind of ‘ethical minimum’ (Minimalmoral).\textsuperscript{104} Such a criminal law, grounded in human rights in normative terms and universally recognized by and adaptable to all cultures, is itself intercultural and thus may be applied across nations and cultures on a universal scale.\textsuperscript{105} In a similar vein, Jürgen Habermas defends a

\textsuperscript{98} Also Islamic scholars recognize that there is ‘a sufficient degree of cultural consensus regarding…the protection and promotion of human rights’. AA An-Na’im, ‘Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cultural, Inhuman, or Degrading Treatment or Punishment’ in Human Rights in Cross-Cultural Perspectives (University of Pennsylvania Press 1992) 27.

\textsuperscript{99} The fact that States frequently fail to punish such crimes is generally due to reasons related to national power politics and less to an (open) rejection of the underlying value systems.

\textsuperscript{100} Waldron (n 92) 307 distinguishing on this basis between respectable concrete (relevant) and non-respectable general (irrelevant) relativist challenges (307–9).

\textsuperscript{101} cf Mahlmann (n 48) 331.

\textsuperscript{102} Höffe, Demokratie im Zeitalter der Globalisierung (n 63) 296ff.

\textsuperscript{103} Höffe, Gibt es ein interkulturelles Strafrecht? Ein philosophischer Versuch (n 93) 78–79.

\textsuperscript{104} Höffe, Demokratie im Zeitalter der Globalisierung (n 63) 35, 368–69 (‘Die Rechtigung eines weltsstaatlichen Strafrechts verbindet sich mit dessen Einschränkung auf den Schutz der Menschenrechte’).

\textsuperscript{105} Höffe, Gibt es ein interkulturelles Strafrecht? Ein philosophischer Versuch (n 93) 107–8 (‘Rechtskulturen, die so grundsätzlich anders sind, daß sie die menschenrechtlich begründbaren Delikte gar nicht kennen, sind schwer zu finden; eher dehnt man den Umfang der Strafbefugnis aus….Das, wofür wir uns nachdrücklich einsetzen, finden wir in anderen Kulturen auch; insbesondere über das, worüber wir uns empören, empören sich die Menschen anderswo ebenfalls’); Höffe, Demokratie im Zeitalter der Globalisierung (n 63) 370.
concept of human dignity which serves as a moral source of enforceable (subjective) human (civil) rights. It is complemented by a theory of a cosmopolitan community with world citizens and States as legal subjects whose primary purpose is to safeguard world security and fundamental human rights as minima moralia. On this basis he argues that the ‘establishment of a world citizen State of affairs’ entails that ‘infringements of human rights…are to be prosecuted as criminal acts within a domestic legal order’.

Anglo-American theorists come to similar results, albeit focusing more strongly on international law considerations. Some start from a State’s duty to protect basic human rights and thus punish offenders. Failing to do so, a State cannot legitimately object to (international) humanitarian intervention in the form of supranational prosecutions and punishment. It loses, from a sovereignty perspective, the legitimacy to invoke the (absolute) sovereignty defence. In fact, this line of argument is based on the understanding of the international community as a community bound together by common values and the existence of an international constitutional order rooted in the same values (constitutionalization thesis). A value-based international community does not only stand for ‘State values’ but also for ‘community values’ of concern to humankind as such, eg universal peace and the protection of fundamental human rights. As to the latter there exists a minimum, ‘overlapping’ consensus regarding the universal normative validity of fundamental human rights. As a consequence, the international community, as the holder of the international ius puniendi, has a right to take criminal action against the perpetrators of international core

106 See text to n 80 and J Habermas, *Die Zeit* (Hamburg, 29 April 1999) 1, 6–7, 7: human rights as subjective rights ‘which have to be implemented in a legal sense’ (‘die im juristischen Sinne implementiert werden müssen’ (author translation)) yet, only if the human rights have found their ‘seat’ (‘Sitz’) in a global legal order, similar to the fundamental rights of our constitutions, ‘we can take it for granted at the global level that the addressees of these rights will at the same time be considered as their agents’ (‘werden wir auch auf globaler Ebene davon ausgehen dürfen, daß sich die Adressaten dieser Rechte zugleich als deren Autoren verstehen können’).

107 Habermas, *Zur Verfassung Europas* (n 63) 86, 92–93. Of course, Habermas acknowledges that his theory has a utopian element given the current, incipient state of the international order and the cultural contingency of a transnationalization of sovereignty (at 89 acknowledging that the lack of a common culture makes a transnationalization difficult). See also Habermas, *Die Zeit* (n 106) where he speaks of a ‘sub-institutionalization of the world citizen law’ (‘Unterinstitutionalisierung des Weltbürgerrechts’).

108 Habermas, *Die Zeit* (n 106) (‘angestrebte Etablierung eines weltbürgerlichen Zustandes’ means that ‘Verstöße gegen die Menschenrechte…wie kriminelle Handlungen innerhalb einer staatlichen Rechtsordnung verfolgt werden’).

109 See text to n 64.


111 See n 27.

112 In the sense of J Paulus, ‘International Law’ (n 27) 49. The sovereignty argument, of course, presupposes that one accepts the underlying concept of absolute sovereignty in the first place; for a more flexible, relative concept and a discussion see Cryer (n 32) 981–82.

The existence of an international legal framework in the sense of a ‘constitutional order’, which protects certain common values, in particular fundamental human rights, entails, as just mentioned, a limitation of classical State sovereignty (in the sense of a genuine domaine réservé) in that States can no longer claim this right if they fail to protect or even actively violate fundamental human rights. In other words, the legitimacy of the exercise of State power is predicated on the respect for fundamental human rights. Thus, in essence, the common values recognized by both the international community and the international constitutional order limit the sovereignty of Unrechtsstaaten (outlaw States). Such a combined rights and constitutionality approach is, for example, advanced by Altman and Wellman when they invoke a concept of functional sovereignty according to which ‘states that do not sufficiently protect the basic rights of their people have no legitimate objection to the imposition of ICL on them’. In a similar vein, for Allan Buchanan a State’s legitimacy hinges on its ability and willingness to protect the human rights of its citizens; only then is the State delivering justice and can be considered as a rights-protecting institution. If it fails to do so, alternative (international) institutions must afford this protection. The same idea is embodied in Larry May’s security principle, according to which a State’s sovereignty may legitimately be abridged if it fails to protect the security of some of its citizens by failing to prosecute other citizens for committing egregious rights violations.

Other Anglo-American authors focus rather on a human rights and human dignity approach stressing the—already mentioned—cosmopolitan vision of a world society composed of citizens as subjects in their own right with their own world citizen law. Thus, for example, Mark Osiel argues that criminal prosecution of State-sponsored mass atrocities contributes to social solidarity ‘embodied in the increasingly respectful way that citizens can come to

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114 See O Triffterer, ‘Der ständige internationale Strafgerichtshof – Anspruch und Wirklichkeit’ in K-H Gössel and O Triffterer (eds), Gedächtnisschrift für Heinz Zipf (CF Müller 1999) 495, 511ff. See also Paulus, ‘International Law’ (n 27) 53 arguing that the supranational prosecution of international crimes ‘is a shortcut for the direct and indirect dealings of state authorities, non-state organizations and businesses, as well as individual citizens, beyond state boundaries, and for the endeavor to tackle common problems, from the protection of the environment to the prevention of genocide and famine, for which states alone are unwilling, incapable, or illegitimate to act unilaterally’.

115 Kleinlein (n 64) 689, 703, 705–6; in the same vein for a full (judicial) review of domestic human rights issues see Broude (n 62) 526 (invoking Kelsen’s restrictive reading of art 2 (7) UN Charter).


118 Buchanan (n 90) 87–88.

119 I May, Crimes against Humanity (CUP 2005) 63–79 (esp 68–71), 80–95: security and international harm principles operate as a twofold justification for international criminal prosecutions. For criticism on the harm, but agreement on the security principle, see Greenawalt (n 20) 1096–97 (but relating this principle to the failure of domestic enforcement to be compensated by ICL).

120 Focusing on national law, a similar approach is taken by the theory of ‘legal republicanism’ according to which the law in general and the criminal law in particular shall strengthen and promote the idea of a citizens’ society with citizens’ values and virtues. See for a summary of the different approaches R Dagger, ‘Republicanism and Crime’ in S Besson and JL Marti (eds), Legal Republicanism: National and International Perspectives (OUP 2009) 147ff, 157 and for a discussion and transfer to ICL see Reuss (n 26) 42–52.
acknowledge the differing views of their fellows'. 121 David Luban claims with regard to crimes against humanity that the assault on ‘the core humanity that we all share and that distinguishes us from other human beings’, 122 on ‘the individuality and sociability of the victims in tandem’, 123 converts the perpetrator into an enemy and a legitimate target of all humankind—a hostis humani generis. 124 Adil Ahmad Haque, in his ‘retributivist theory of ICL’, 125 brings the (State’s) duty to protect 126 together with the group character of international crimes 127 and the human dignity of each individual worthy of protection. 128 For him the duty to punish rests on the ‘relational structure of retributive justice’, ie, the ‘offender’s violation of the victim’s right gives rise to a duty of the punishing agent, owed to the victim, to punish the offender’. 129

Thus, the State’s duty to punish is ‘grounded in the relationship between the three actors’: the perpetrator, the victim and the State as the intermediary. 130 The State is premised on the effective discharge of its duty to punish—if it fails to do so international intervention is warranted. 131 Mark Drumbl wants to replace pure criminal law by a broader, albeit highly abstract, concept of justice: a ‘cosmopolitan pluralist vision’ fostering ‘an obligation-based preventative model, operationalized from the bottom-up through diverse modalities that contemplate a coordinated admixture of sanctions calibrated to each specific atrocity’. 132 Kirsten Fisher, drawing in particular on May and Luban, proposes a double ‘severity’ and ‘associative’ threshold which has to be reached

123 ibid 120.
126 ibid 305: ‘bear the same duty of equal justice to their citizens, and this duty requires the prosecution and punishment of non-state actors’; 328: ‘response to a failure to protect’, ‘ground of the duty to punish … in an earlier dereliction of duty’ to protect.
127 ibid 30–4: crimes against humanity as ‘committed by politically organized groups’ and ‘inflicted on victims based on their group membership’ albeit considering the group element rather as an aggravating factor (at 308): 326–27: ‘Group perpetration and group victimization challenge the legitimacy of the state, and thereby explain and justify international intervention’.
128 ibid 320 (‘reassert the primacy of shared humanity over group difference and dismantle regimes founded on the premise of unequal moral worth’), 322 (‘conception of human beings as members of a single moral community in virtue of their shared status as persons’, ‘broader moral community founded…on shared humanity’ discussing universal jurisdiction).
129 ibid 278; as to the duty owed to the victim see also 288.
130 ibid 283.
131 ibid 297, 304: ‘Once the moral authority of the state is so thoroughly compromised, the task of meting out retributive justice falls to the international community”; 306: ‘danger of state indifference or co-option posed by organized groups and the resulting need for a legal basis for international intervention’. Haque is however critical of the international community as the agent of this intervention since the claim that it is ‘our fundamental moral and political unit remains an aspiration rather than a social fact’ (296–97).
132 M Drumbl, Atrocity, Punishment, and International Law (CUP 2007) 207, for more details and concrete adjustments see 181ff, 206ff.
to justify the application of ICL.133 The former requires that the most basic human rights protecting the physical security of human beings, being a prerequisite for the enjoyment of other rights, are jeopardized by the respective conduct, ie it relates to the gravity of the harm caused with a view to physical security.134 The associative threshold represents the group or organizational element in international crimes in a double sense, ie, the political organization or group as the aggressor (‘travesty of political organization’) or as the object of the aggression with the victims belonging to this organization.135

Ultimately, an approach based on the core human rights of world citizens makes us see that a universal legal order, ie, the order of the world society of world citizens, is possible by the force of the intrinsic value of its norms136 ‘without a central legislator and a judiciary’ (Luhmann)137 and ‘without the monopoly of power of a world State and without world government’ (Habermas).138

Thus, it links human dignity and rights with the idea of a normative international order. The above-mentioned international criminal justice system, if it does not amount in itself to a proper legal order, rests on this value-based order, its ius puniendi is derived from autonomous persons united in a world society: ubi societas ibi ius puniendi.139 It represents a value judgment expressing the legal and moral necessity to punish macro criminal conduct.140 Its law, the ICL, can be considered a progress of civilization141 and, in this sense, an ethical project.142 The international crimes to be prevented or punished by this law concern the fundamental international values of our international order and the world society; they may even amount to ius cogens crimes, ie crimes of a

133 Fisher (n 27) 17–26, 30–31, 186.
134 ibid, 17–22, 26, 30–31. For a critical view of the gravity element see Greenawalt (n 20) 1089–95, arguing that it is insufficient to explain ICL since it does not explain every aspect of it, especially not why certain crimes are codified as international ones, yet, this reads too much into this element which is only, as later correctly acknowledged by Greenawalt (1122–23), an important consideration to distinguish ICL from domestic criminal law.
136 This intrinsic value manifests itself in the acting of different agents at different levels (cf Burchard (n 29) 77, 79, 81 with regard to global governance and ICL).
137 N Luhmann, Das Recht der Gesellschaft (reprint, Suhrkamp 1997) 574 (‘Weltgesellschaft auch ohne zentrale Gesetzgebung und Gerichtsbarkeit eine Rechtsordnung hat’, ‘Indikatoren eines weltgesellschaftlichen Rechtssystems’). Of course, Luhmann’s approach is premised, in line with his system theory, on (worldwide) social communication within the one single (global) social system whose subsystems are held together by certain basic values, in particular fundamental human rights, cf C Mattheis, ‘The System Theory of Niklas Luhmann and the Constitutionalization of the World Society’ (2012) 4 GoJIL 625, 637–38, 643, 644–45.
138 Habermas, Die Zeit (n 106) (normative regulation ‘auch ohne das Gewaltmonopol eines Weltstaates und ohne Weltregierung zu erreichen’).
139 Meyer (n 34) 695, 931.
142 I agree with Dubber (n 30) 923 yet he goes too far if he argues that ICL is not law and rather an ‘ethical-administrative enterprise’ than a legal one. Dubber presents his critique in a grandiose, overblown rhetoric but hardly supports it with substantial arguments, let alone with inquiries into the concrete law. In fact, Dubber is unconcerned with the realities and technicalities of current ICL, ie, he does not speak to those who either as practitioners or academics or both apply and shape ICL.
peremptory, non-derogable and overriding character. As a consequence, a State on whose territory such crimes have been committed cannot hide behind the curtain of a post-Westphalian, Grotian sovereignty concept, but must make sure that the responsible are held accountable; otherwise the international community or third States (universal jurisdiction) will have to take care of them.

4. Conclusion

A supranational ius puniendi can be inferred from a combination of the incipient stages of supranationality of a valued-based world order and the concept of a world society composed of world citizens whose law—the ‘world citizen law’ (Weltbürgerrecht)—is derived from universal, indivisible and interculturally recognized human rights predicated upon a Kantian concept of human dignity. In fact, this combination of the collective and the individual is implicit in the preamble of the ICC Statute referred to at the beginning of this article: on the one hand, it relates to the collective level—‘international community’, ‘peace, security and well-being of the world’—and on the other hand to the individual level—crimes, perpetrators, victims. As to the collective level it has been argued here that international core crimes affect the international community as a whole and thus this value-based community has a right to take criminal action against the perpetrators of these crimes. This community is the holder of the international ius puniendi. In a similar vein, according to the constitutionalization thesis, the justification of authority under international law, i.e. the

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143 See the definition in art 53 Vienna Convention on the Law of Treaties. It is however controversial how far this ius cogens claim can reasonably go, i.e. whether it extends beyond the international core crimes as codified in art 5 ICCSt or if it even encompasses all these crimes, including for example all war crimes of art 8. There is only clear case law in this respect regarding genocide: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro, ICJ Rep 2007, 43, sec 161; Armed Activities on the Territory of the Congo (New Application: 2002): (Democratic Republic of the Congo v Rwanda), Jurisdiction and Admissibility, ICJ Rep 2006, 6, sec 64; Reservations to the Convention on Genocide, ICJ Rep 1951, 15, 23; Judgment, Radoslav Brdanin (TF-99-36-T) Trial Chamber, 1 September 2004, sec 680; Judgment, Goran Jelisic (TF-95-10-T), Trial Chamber, 14 December 1999, sec 60; Judgment, Radislav Krstic (TF-98-33-T), Trial Chamber, 2 August 2001, sec 541; Judgment, Milomir Stakic (TF-97-24-T), Trial Chamber, 31 July 2003, sec 500; and on torture, most recently: Othman (Abu Qatada) v UK (8139/09), sec 266, 17 January 2012, ECHR 56; see also Judgment, Anto Furundzija (IT-95-17/1-T), Trial Chamber, 10 December 1998, secs 153–57; Judgment, Zojil Delalic et al (TF-96-21-T), Trial Chamber, 16 November 1998, sec 454; Judgment, Zoran Kupreskic et al (TF-95-16-T), Trial Chamber, 14 January 2000, sec 520 has taken a broader approach ('Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or ius cogens'); in the same vein Bassiouni (n 13) 178. Further, the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No 10 (A/56/10), chp.IVE.1, 112 <www.unhcr.org/refworld/docid/3ddb8f804.html> accessed 24 January 2013 lists aggression, slavery, slave trade, racial discrimination and apartheid as ius cogens crimes. Some scholars take the same view regarding rape. Also see D Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine' (2004–05) 15 Duke J Comp Intl L 219, 219; S Sungi, 'Obligatio Erga Omnes of Rape as a Jus Cogens Norm: Examining the Jurisprudence of the ICTY, ICTR and the ICC' (2007) 7 Eu J L Reform 113, 127, 140ff.

144 For an inspiring critical account of the Westphalian system (which allegedly established the basis of the community of sovereign states and thus of the current international legal order where political authority is primarily conceded to states) see S Strange, 'The Westfailure System' (1999) 25 Rev Intl Studies 345, 345 pointing to its failures with regard to the worldwide financial and environmental crisis.

145 See on this value-based conception of international community nn 110, 112–114 and main text.
legitimacy of the exercise of State power, is predicated on the respect for fundamental human rights.\textsuperscript{146} As to the \textit{individual level}, the starting point is a conception of international (criminal) law which focuses on the people and takes their rights seriously.\textsuperscript{147} Taking human rights, and citizens as subjects of these rights, seriously shifts the focus from the collective (sovereign States) to the individual (citizens as subjects of rights) and derives the \textit{ius puniendi} from the violations of universally, transnationally and interculturally recognized rights of \textit{individuals}.

\textsuperscript{146} See nn 111, 115 and 116 and main text.

\textsuperscript{147} See n 90.