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Towards reinstating the balance of legal accountability in the field of transitional justice

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I. Introduction

The unspeakable cruelty displayed during the Russian aggression in Ukraine left the world in shock – and such shock persists for more than 264 days now. In the midst of horrifying news, desperate calls for help, and powerless attempts to force the aggressor to stop the pointless murder and torture of the people of Ukraine, today's international lawyer is bound to be reminded of international human rights obligations and the laws of war – much of which more and more frequently seems to be an empty promise as the days of the war continue to go by.

These events called for action on many levels these past few months. As an international attempt to address the situation, through the adoption of resolution 49/1 of 4 March 2022, the Human Rights Council appointed the Commission of Inquiry. In its resolution, the Council stressed the importance of ensuring accountability for violations and abuses of human rights and international humanitarian law in order to end impunity and ensure accountability for those responsible. With this goal in mind, the Council provided the Commission with the mandate of (1) identifying those *individuals and entities responsible* for violations or abuses of human rights or violations of international humanitarian law, or other related crimes, in Ukraine, (2) with a view to ensuring that *those responsible are held accountable*, and (3) to make recommendations on accountability measures with a view to *ending impunity* and *ensuring accountability*.

If we stop and think about this wording for a minute, we can see the infinite broadness of such mandate. The Commission was called upon to investigate *all* violations of human rights and humanitarian law and to make attributions of responsibility for those violations to both individuals and entities, the latter probably referring to the Russian State as well as military groups and units under its command. The exhaustive and comprehensive execution of such task seems to be an almost unfulfillable goal. However, in an ideal world, where the Commission is successful in fully carrying out this mandate, we ought to see Russia, Russian military units, and also individual military officials brought before judicial bodies and held accountable for the horrendous atrocities. And this mandate, as proposed by the present paper, projects the ideal conception of legal accountability in this field. The ideal conception being the realization of the goals of State responsibility

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and individual criminal liability in a parallel, coordinated, and cooperating manner in response to the same international conflict. Put it simply, if the Commission succeeds, that will be through attributing violations through both the concept of State and individual responsibility. But why would it be 'ideal'?

There is an apparent tendency in the field of transitional justice to view Nuremberg as a template for the ideal accountability model for dealing with instances of mass atrocities. Without disputing the positive effects of the Military Tribunal and its long-lasting effect on the development of this field, such a unidirectional approach seems to overly individualize the notion of justice when attempting to hold perpetrators of mass violence accountable. One relevant aspect of this tendency is the shift of balance from holding states responsible towards a focus on individual liability regarding mass atrocities. Arguments for this shift include the condemnation of a society's collective guilt for State actions, the lack of a mechanism to ensure the enforceability of a decision against a State for committing mass atrocities, especially regarding the payment of reparations to victims, and the long-standing scholarly debate about the relationship between States and the concept of international crimes. In short, legal accountability in transitional justice largely centers around the concept of individual criminal liability, and the concept of State responsibility seems to be sidelined in the matter, disappearing from the discourse.

The present research addresses this phenomenon, and through analyzing the merits of these accountability models, aims to argue that a balance should be restored in how transitional justice approaches the question of accountability for mass atrocities. Among others, the research uses the examples of the Myanmar case and Ukraine to illustrate *first*, that such a conceptualization is the ideal way to approach this area, and *second*, that how the international community handles the atrocities against the Rohingya and the Ukrainian people will greatly define the future structure and effectiveness of the legal accountability system of the field.

The paper will progress as follows. Since its focus is the apparent imbalance of the international accountability system within the framework of transitional justice, by way of background, the first half of the paper will introduce the reader to the concepts of State responsibility and individual criminal liability (Part II), and the three main accounts on how transitional justice approaches the question of legal accountability (Part III). In Part IV, after recalling those general interdependent aspects of State responsibility and individual criminal liability which inherently support a more balanced approach to accountability, the paper will reflect on those specific characteristics of State responsibility which might be overlooked and sidelined in the current conception of accountability in transitional justice, but which could fill gaps in the current, more individual-focused approach.

Two caveats are due before delving into the substance. *First*, the present paper argues for a holistic approach regarding legal accountability in terms of international court proceedings. As such, the scope of the paper does not include either national court

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proceedings, nor other mechanisms applied within the transitional justice field, such as truth commissions. This certainly does not mean that such mechanisms should not form part of a holistic accountability concept, solely that the focus of this research is the complementary nature of State and individual responsibility in the framework of international dispute settlement, and the paper therefore limits itself to international judicial procedures. *Second*, the points made in the paper are made without regard to the practical viability of the proceedings and the enforceability of the decisions of the international courts in question. As such, the paper aims to highlight the potential of the regimes of State and individual responsibility, and does not attempt to assess the likelihood of their success as transitional justice measures.

II. State Responsibility and Individual Criminal Liability in International Law

Legal accountability refers to the processes by which a breach of an obligation and the appropriate legal consequences are determined. Under international law, this can take the form of both State responsibility, referring to the attribution of responsibility to a nation, and individual criminal liability, where the criminal liability of an individual for an international crime is established. The concurrence of these two regimes can be relevant from several perspectives, and is subject to attention through parallel cases where State responsibility is accompanied by prosecutions of individuals whose acts also established the State's responsibility. An example specific to the field of transitional justice might be the parallel attempt to attribute genocidal acts in the former Yugoslavia to both Yugoslavia before the International Court of Justice ('ICJ') and Slobodan Milošević before the International Criminal Tribunal for the Former Yugoslavia ('ICTY'). In order to understand how the two accountability modes could ideally complement each other when operating in the transitional justice arena, what advantages the intentional and well-directed recognition of their interrelation might have, it is beneficial to first have a general look into how State responsibility and individual criminal liability operate in international law.

A. State Responsibility

That States incur liability for breaches of their obligations under international law, provided that the breach is attributable to them, is a long-known concept of customary international law.[1] This mode of responsibility flows from statehood itself, from the fact

[1] For early accounts of the development of the field, *see*: Roberto Ago, *Eighth Report on State Responsibility*, YILC, vol. II(1), 43 (1979); Roberto Ago, *Obligations Erga Omnes and the International Community, in* INTERNATIONAL CRIMES OF STATE. A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 237–239 (J.H.H. Weiler et al. eds., De Gruyter, 1989), DOI: https://doi.org/10.1515/9783110901603.237; James Crawford, *On Re-Reading the Draft Articles on State Responsibility*, 92 ASIL PROC. 295 (1998), DOI: https://doi.org/10.1093/ejil/12.5.963; James Crawford, Pierre Bodeau & Jacqueline Peel, *The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading*, 94 AJIL 660 (2000), DOI: https://doi.org/10.2307/2589776; James Crawford, Simon Olleson &

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that States are the primary bearers of international obligations.[2] It has emerged for the purpose of reacting to particularly serious breaches of international obligations and protecting the collective interests of the international community.[3] Ever since its initial appearance in the early 20th century, State responsibility is now already codified by the work of the International Law Commission of the United Nations ('ILC') reflecting the progressive development of the field.

The currently codified concept of state responsibility, adopted by the ILC in 2001 in the framework of its Articles on the *Responsibility of States for Internationally Wrongful Acts* ('ARSIWA'), includes four main elements: attribution, breach, circumstances precluding the wrongfulness of the State, and the consequences for the wrongfulness. State responsibility arises for direct violations of primary obligations of international law—e.g. the breach of a treaty or the violation of another State's territory.[4] Such breach must be attributable to the State under one of the customary configurations for attribution,[5] in most cases through its governmental organs, or others who have acted under the direction, instigation, or control of those organs, therefore as agents of the State.[6] ARSIWA also codifies six circumstances precluding the wrongfulness of conduct that would otherwise not be in conformity with the international obligations of the State. As such, the conduct in question is not unlawful if the victim State has consented to it, it constituted a legitimate countermeasure against an internationally wrongful act or a lawful measure of self-defense, it was due to an irresistible force or an unforeseen event, or has been carried out in distress or necessity. If such precluding circumstance does not exist, the international responsibility of the State involves the legal consequences set out in the Articles, forming part of customary international law.

What amounts to a breach of international law depends on the actual content of the particular State's international obligations in force at the time of the commission of the act, varying from one State to the next. With respect to international crimes relevant to

Jacqueline Peel, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EJIL 963 (2001), DOI: https://doi.org/10.1093/ejil/12.5.963

[2] James Crawford, *State Responsibility* (September 2006)*, in Max Planck Encyclopedia of International Law* (online ed.), p. 1, DOI: https://doi.org/10.1093/law:epil/9780199231690/e1093

[3] Beatrice Bonafè, THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES 18 (BRILL, 2009), DOI: https://doi.org/10.1163/ej.9789004173316.i-284

[4] ARSIWA, arts 2 (b) and 12.

[5] ARSIWA includes the following different modes for attributing a conduct to the State. Art. 4 regarding the conduct of State organs, art. 5 regarding persons or entities empowered to exercise elements of governmental authority, art. 6 regarding organs of one State is placed at the disposal of another State, art. 7 regarding the exceeding of authority or contravening instructions, art. 8 covering the conduct carried out on the instructions of a State organ or under its direction and control (an actual or constructive agency), art. 9 on persons exercising elements of governmental authority in the absence of constituted authority (an agency of necessity), art. 10 on conduct of insurrectional movements, and art. 11 regarding conduct adopted by the State as its own, either expressly or by conduct.

[6] Crawford, *State Responsibility* (MPEPIL), *supra* note 2 p. 18.

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the field of transitional justice, initially the ILC included the distinct category of international crimes of states in its first draft on state responsibility,[7] defining them as wrongful acts resulting "from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole."[8] This article, however, was removed from the eventually adopted version of the text following extensive debates, and there remained a fundamental doubt about what it means to say that a State has committed a crime.[9] The question was further deferred by the development of the notion of individual criminal responsibility, which is also the focus of accountability for mass violence in the field of transitional justice.[10]

B. Individual Criminal Responsibility

It is virtually undisputed in international law that customary international law provides for a regime of criminal responsibility for individuals who commit certain offences considered by the international community to be of the most serious character.[11] These offences include the initially prosecuted circle of Nuremberg crimes,[12] as well as the crimes of genocide and torture, later included by the development of customary rules of international criminal law and the Rome Statute.[13] Criminals brought to trial on allegations of commission of these crimes, after having been found guilty, face criminal punishment.[14] The rationale behind the creation of individual criminal responsibility was to enhance the effective functioning of international law through holding accountable individuals playing a substantial part in the commission of such grave international offences.[15] The individualistic nature of this mode of accountability has its roots in the the 'subjective element' of international crimes, namely that individuals are the subjects who can commit international crimes and can be prosecuted for them accordingly.

The central principle underlying individual criminal liability is the principle of legality

[7] Crawford, *State Responsibility* (MPEPIL), *supra* note 2 p. 13.
[8] Art. 19 of the 1996 ILC Draft Articles, citing aggression, self-determination of peoples, slavery, genocide, apartheid, and massive pollution of the atmosphere or of the seas.
[9] Crawford, *State Responsibility* (MPEPIL), *supra* note 2 p. 13.
[10] Laurel E. Fletcher, *A Wolf in Sheep's Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes*, 39 FORDHAM INT LAW JOURNAL 447, at 473 (2016).
[11] M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework, in* INTERNATIONAL CRIMINAL LAW, VOL. I 21 (M.C. Bassiouni (ed.), Ardsley, Transnational Publishers, 1999); Farhad Malekian, *International Criminal Responsibility, in* Bassouni, INTERNATIONAL CRIMINAL LAW, at 157.
[12] London Agreement of 8 August 1945, 59 Stat. 1544, E.A.S. No. 472 (crimes of aggression, crimes against humanity, war crimes).
[13] André Nollkaemper, *Systemic Effects of International Responsibility for International Crimes*, 8 SANTA CLARA J. INT'L L. 313, 332 (2010); Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002, Art 5.
[14] Bonafè, *supra* note 3 at 13.
[15] Andreas Gordon O'Shea, *Individual Criminal Responsibility* (May 2009), *in Max Planck Encyclopedia of International Law* (online ed.), p. 2, DOI: https://doi.org/10.1093/law:epil/9780199231690/e1852

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enshrined in the *nullum crimen sine lege* maxim. It posits that individual criminal responsibility under international law must be based on legal norms recognized under the provisions of national or international criminal law.[16] In practice, at the international level, this requirement has its manifestation in customary international law, as well as the provisions of the Rome Statute of the International Criminal Court ('ICC').[17]

For the purposes of the present paper, the focus of which is the role of different forms of legal accountability within the selection of transitional justice measures, I will concentrate on the mechanisms which give effect to the rules underlying the concept of individual criminal responsibility, namely domestic and international prosecutions for international crimes. Although domestic prosecutions might have more impact within the society where the crimes themselves occurred, post-conflict societies in transition may lack the political will needed to prosecute the crimes in question. As a response to this political impasse were international criminal courts created to redress international wrongdoings with the help of international pressure and best practices. As will be addressed in the next section, significant steps were taken for the prosecution of individuals in post-conflict and post-authoritarian circumstances by international criminal courts and tribunals, such as among others the ICC, the ICTY or the International Criminal Tribunal for Rwanda ('ICTR').

III. Legal Accountability and the Field of Transitional Justice

The concept of transitional justice emerged in the late 1980s following the breakup of the Soviet Union and the failure of Latin American dictatorships.[18] It aimed to provide a normative framework addressing how post-conflict and post-authoritarian States transitioning to democracy should handle the events of the past and aim for international accountability for mass atrocities. The following section will aim to briefly introduce the development of legal accountability in the field of transitional justice, the role of the work of international courts within the arsenal of transitional justice measures, and demonstrate the existing shift in focus on individual accountability, sidelining State responsibility as a viable means to the overall objectives of the field.

The below described models are not consecutively applied in time, but exist in parallel and embody different approaches as to how to handle questions of accountability in the field of transitional justice and to what extent this area should put judicial enforcement in focus. We will see based on how transitional justice approaches the notion of accountability, that although it draws roots from the concept of criminal liability emerged

[16] Claus Kreß, *Nulla poena nullum crimen sine lege* (February 2010), *in Max Planck Encyclopedia of International Law* (online ed.), p. 1, DOI: https://doi.org/10.1093/law:epil/9780199231690/e854
[17] *Id.* p. 19; Kenneth S. Gallant, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 411-424 (Cambridge University Press, 2008), DOI: https://doi.org/10.1017/CBO9780511551826
[18] Ruti Teitel, *Human Rights in Transition: A Transitional Justice Genealogy*, 16 HARV. HUM. RTS J. 69, 70 (2003); Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321, 332 (2009), DOI: https://doi.org/10.1353/hrq.0.0069

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via the Nuremberg trials, at its current state it understands legal accountability to mean individual criminal liability, and State responsibility seems to lie outside the ambit of transitional justice theorizations of legal justice.

A. The Nuremberg model: individual criminal accountability in focus

The first real leap forward concerning the application of international criminal law came about at the end of World War II with the Nuremberg trials. The Nuremberg International Military Tribunal ('Nuremberg Tribunal') was a system of trials established by the Allies to prosecute Nazi leaders for war crimes and crimes against humanity. The Nuremberg Tribunal was the first to proclaim the importance of the principle of individual criminal responsibility,[19] pulling away from the idea of collective guilt so that subjects are not punished for the acts of their rulers.[20] One of its striking aspects was that it applied international law doctrines and concepts to impose criminal punishment on individuals for the commission of the different types of crimes under international law – crimes against peace, war crimes, and crimes against humanity – described below. As mentioned before, although this was the first step towards an individual-centered criminal law, it resulted in the long-term lack of interest in holding States accountable for mass atrocities[21] and a shifted focus from inter-State to criminal trials.[22]

From the perspective of transitional justice, the Nuremberg trials were considered as a triumph for transitional justice measures in international law.[23] They provided safeguards against threats to universal values posed by mass violence,[24] which was "a growing shift [...] away from a tolerance for impunity and amnesty and towards the creation of an international rule of law."[25] From the perspective of the present paper focusing on different constructions of legal accountability, we may highlight three relevant characteristics of the Nuremberg trials and the resulting model.

First, the Nuremberg trials focused on specific types of international crimes[26] the commission of which creates liability for the individual. Perpetrators' liability was

[19] Jain Neha, PERPETRATORS AND ACCESSORIES IN INTERNATIONAL CRIMINAL LAW: INDIVIDUAL MODES OF RESPONSIBILITY FOR COLLECTIVE CRIMES 18 (London: Hart Publishing, 2014).
[20] *Id*.
[21] Gabriella Blum, *The Crime and Punishment of States*, 38 YALE J. INT'L L. 57 (2013).
[22] Fletcher, *A Wolf in Sheep's Clothing?, supra* note 10 at 483; Naomi Roht-Arriaza, *Editorial Note*, 7 INT'L J. TRANS. JUST. 383, 388-90 (2013); Jaime Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, *in* STATE CRIMES: PUNISHMENT OR PARDON: PAPERS AND REPORT OF THE CONFERENCE 71-88 (Aspen Institute, 1988).
[23] Teitel, *supra* note 18 at 70.
[24] Fletcher, *A Wolf in Sheep's Clothing?, supra* note 10 at 488.
[25] U.N. Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, U.N. Doc. S/2004/616 (Aug. 23, 2004), p. 40.
[26] *See* footnote 12 above.

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recognized for the first time for the commission of crimes against peace, such as crimes of aggression, and for crimes against humanity incurring not only individual liability, but also State responsibility on an *erga omnes* basis;[27] and prosecutions took place under the less contested category of war crimes too.[28] Starting from their inclusion in the Charter annexed to the London Agreement on the constituting the Nuremberg Tribunal, these different types of international crimes crystallized into the generally accepted list of crimes included in the Rome Statute of the ICC, forming part of customary international law.

Second, the Nuremberg trials also shifted the focus of legal accountability to institutionalized accountability mechanism. Starting from 1945, the trial catalyzed the creation of several specialized international courts, tribunals, and further mechanisms aiming to address mass atrocities within the framework of institutional proceedings. Despite initial skepticism,[29] the approach was later further articulated and developed by the setting up of *ad hoc* criminal tribunals addressing specific international conflicts.[30] Events in Yugoslavia and Rwanda catalyzed the movement for international prosecutions of war criminals, manifesting in Security Council resolutions establishing the ICTY in 1993 and the ICTR in 1994. This eventually led to the 1998 Rome Conference adopting the Rome Statute establishing the ICC. The creation of these institutions modified the viability of transitional justice measures, opening up the possibility for change and accountability not only from the beginning of a political transition, but much earlier, form the commission of the violent act itself.[31] Such criminal trials have an important role in the field of transitional justice. They bring to justice those responsible for serious human rights violations, help victims by securing them justice and dignity, and assist them in seeing perpetrators made to answer for their crimes, prevent recurrence, re-establish the rule of law and contribute to the restoration of peace.[32]

Thirdly, this mode of accountability aims to exclude collective guilt. The goal of holding Nazi leaders accountable was to separate the responsibility of Germany from its people, not to make a pronunciation on the guilt of German leaders getting the society involved in it too.[33] This point will be addressed in detail in the next section of the paper, therefore for now what is important to note is that the Nuremberg trial was the first intentionally

[27] André de Hoogh, OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES. A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES (The Hague, Kluwer, 1996); Jean Graven, *Les crimes contre l'humanité*, 76 RCADI 433–607 (1950); M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, in Bassiouni, *supra* note 11 at 617–642.
[28] Commentary on Article 40, ILC, 'Report on the Work of its 53rd Session', YILC (2001), vol. II(2), 113, p. 5; Bonafè, *supra* note 3 at 27.
[29] Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE LAW JOURNAL 8, 2619– 2640, 2638–2639 (1991), DOI: https://doi.org/10.2307/796904
[30] Fletcher, *A Wolf in Sheep's Clothing?, supra* note 10 at 489.
[31] *Id.*
[32] Rule of Law and Transitional Justice Report, *supra* note 25 at pp. 38-39.
[33] Karl Jaspers, THE QUESTION OF GERMAN GUILT 32, 51-52, 73-74 (E.B. Ashton Trans., 1947).

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decoupling the responsibility of the State from its people.

Acknowledging the above benefits and novel contributions of Nuremberg and its aftermath, the stark shift to an individual-centered approach is nevertheless clearly visible, and can be aptly summarized by the following quotation from the judgment of the Nuremberg Tribunal itself: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[34] What is proposed here is that the dominant tendency to hold up Nuremberg as a template for defining responsibility for mass violence is only one side of the coin, and it tends to sideline advantages of the State-centered form of accountability which could make the fight against impunity more holistic and effective in the long run.

B. The holistic model with a victim-centered approach

Whereas the Nuremberg model's main focus was on the pursuit of justice via holding individual perpetrators accountable, another model emerged with the setting up of the South African Truth and Reconciliation Commission (TRC). It was set up during the post-Apartheid transition in South Africa, following the end of a period of legally enforced racial segregation and political and economic discrimination against nonwhites. Shifting its focus from strict legal accountability, the TRC's main aim was rather the acknowledgement of the past in return for granting immunity to perpetrators from prosecution.[35] This was certainly a considerable change from the trial-centered handling of the atrocities of World War II, however, as Mamdani suggests, it was not an alternative to Nuremberg, rather a response to a different set of circumstances.[36]

Without evaluating the effectiveness or success of either the TRC or other similarly constructed mechanisms, it suffices to say for the purposes of the present paper that this approach necessarily drives away from the accountability-centered stance of Nuremberg, and considers international and national court proceedings solely *one of many* goals of transitional justice.[37] This accountability concept is part of the holistic approach promoted by the UN Secretary-General in his 2004 report on the rule of law and transitional justice, in which he posits that the nature of challenges in the field of transitional justice necessitates balancing "a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law."[38]

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[34] Trial of the Major War Criminals before the International Military Tribunal, vol. I, Nürnberg 1947, at 223.
[35] Mahmood Mamdani, *Beyond Nuremberg: The Historical Significance of the Post-apartheid Transition in South Africa*, 43 POLITICS & SOCIETY 1, 61-88, 66 (2014), DOI: https://doi.org/10.1177/0032329214554387 („Forgive but not forget.").
[36] *Id.* at 67 (pointing out that whereas the Nuremberg Tribunal was set up following a military victory, the conflict has not ended yet when CODESA was born.)
[37] Rule of Law and Transitional Justice Report, *supra* note 25 at p. 25.
[38] *Id.* at p. 25.

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As such, criminal prosecutions may be important elements of holistic transitional justice, but certainly not the only ones.

The impact of this change in perspective is of paradigmatic significance: Nuremberg was engaged with justice as punishment, whereas the South African approach aimed at a balance between the past and the future, focusing on survivors' justice and providing them with an opportunity to close the past and progress towards healing.[39] As such, the holistic model put the victim into its center, not the perpetrator. This binary option between criminal accountability and truth commissions was theorized by Martha Minow, an early advocate of the holistic, victim-centered model. She advocated for shifting the attention of transitional justice measures to be more responsive to the experience and needs of victims.[40] Comparing criminal trials and the TRC, she proposes that truth commissions generally, and the TRC specifically, can facilitate the reconciliation of victims and perpetrators in a way trials are not able to, which makes truth commissions a legitimate alternative to criminal trials.[41] She asserts that the explicit focus on promoting a narrative of truth allows the commission to pursue a goal of restorative justice rather than retributive justice.[42]

It must be noted, however, that even in this holistic approach the emphasis is put on individual criminal liability when discussing legal accountability. Except for recalling the definition of rule of law, the Secretary-General's report hardly makes mention of court proceedings against States as a viable tool for addressing past crimes and atrocities. If we take a closer look, we may see that the balance it tries to achieve is not between legal accountability in the broad sense and other transitional justice measures, but rather between the latter and a narrower conception of legal accountability involving solely individual criminal liability.[43]

C. The transformative justice approach

The third conception of legal accountability in transitional justice is the most recently developed among all the approaches. Coined by Paul Gready and Simon Robins, the focus of transformative justice is shifted from the legal to the social and political, and is more concerned about everyday issues than larger, institutional questions.[44] As they define it, transformative justice is "transformative change that emphasized local agency and resources, the prioritization of process rather than preconceived outcomes and the

[39] Mamdani, *supra* note 35 at 68.
[40] Martha Minow, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).
[41] *Id.* at 57.
[42] *Id.* at 70.
[43] Fletcher, *A Wolf in Sheep's Clothing?, supra* note 10 at 496).
[44] Paul Gready & Simon Robins, *From Transitional to Transformative Justice: A New Agenda for Practice, in* FROM TRANSITIONAL TO TRANSFORMATIVE JUSTICE 32 (CUP, 2019), DOI: https://doi.org/10.1017/9781316676028

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challenging of unequal and intersecting power relationships ad structures of exclusion at both the local and the global level."[45]

Their main criticism with the 'traditional' understanding of transitional justice concerns the overly State-centric and not sufficiently flexible nature of measures, incapable of addressing the root causes of the problems within the specific circumstances they arise.[46] Accountability in transformative justice therefore has a more bottom-up understanding, and is built on community-based action instead of judicial enforcement. It aims at shifting the focus from legal accountability to the social and political context, by arguing that criminal accountability diverts attention from systemic violence and socio-economic inequities underlying and, to a significant extent, also catalyzing conflicts.[47] Instead of resorting to individual criminal liability to address past human rights atrocities, or focusing on enforcing the legal obligations of States, transformative justice draws support from scholarly opinions advocating for addressing more structural, economic and social root causes.[48]

Transformative justice is therefore much less formal, systematic and law-based than the previous models. It focuses on looking at local priorities, and through a bottom-up approach involving the civil society as its largest base for carrying out its measures, intends to trigger societal transformation. This is done through political support, generating political pressure for a policy reform addressing structural inequalities and curing systemic defects.[49] As such, although it accepts criminal accountability as one component of transitional justice, transformative justice prioritizes the future over the past, therefore the welfare of citizens, especially subordinated groups over retributive justice over criminally liable individuals and responsible States.[50]

IV. Merits and disadvantages of the different forms of accountability

Despite the above discussed developments and the necessarily positive shift in addressing the need to fight impunity regarding mass human rights violations, what is apparent in current transitional justice approaches to legal accountability is the shift of the balance from State responsibility to individual liability. All the above accounts – *albeit* for entirely different reasons – seemingly miss focusing on how holding States accountable fits the larger picture of transitional justice. The question inherently arises –

[45] *Id*. at 340.
[46] *Id.* at 350; Fletcher, *A Wolf in Sheep's Clothing?, supra* note 10 at 498.
[47] Gready & Robins, *supra* note 44 at 345-348; Fletcher, *A Wolf in Sheep's Clothing?, supra* note 10 at 499.
[48] Fletcher, *A Wolf in Sheep's Clothing?, supra* note 10 at 499.
[49] Dustin N. Sharp, *Interrogating the Peripheries: The Preoccupation of Fourth Generation Transitional Justice*, 26 HARV. HUMM. RTS. J. 149 (2013); James L. Cavallero & Sebastian Albuja, *The Lost Agenda: Economic Crimes and Truth Commission in Latin America and Beyond, in* TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE 15, 24 (Kiernan McEvoy & Lorna McGregor, ed. 2008).
[50] Fletcher, *A Wolf in Sheep's Clothing?, supra* note 10 at 501.

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but do we really need to focus on that? In the following, after reflecting on two general characteristics of mass atrocities and transitional justice underpinning the main hypothesis of the paper, I will also demonstrate those specific inherent advantages of the concept of State responsibility that the current, more individual-centered approach tends to sideline. The goal of this exercise is to advocate for a more systematic conception of legal accountability in transitional justice.[51] The fact that none of the models described in the previous section of the paper has succeeded in becoming a sort of "generally accepted approach" to legal accountability, and the general paucity of scholarship arguing for more balance between the two regimes signal the lack of consensus on the matter.

Before delving into the specifics, however, let me point out three aspects which even at the outset indicate the validity of arguing for a more balanced, complementary conception on legal accountability in transitional justice. *First*, we shall just take a look at the often-quoted definition of transitional justice from Teitel. Transitional justice is commonly understood as "the conception of justice associated with periods of political change, characterized by legal responses to confront the *wrongdoings of repressive predecessor regimes*."[52] Even from this formulation we can see that transitional justice primarily confronts regimes, not just its constituting individual perpetrators. And confronting regimes necessarily means confronting the State itself, attempting accountability for more systemic violations created by the government or ruling party.

Second, the interrelation and interdependence of State responsibility and individual criminal liability is necessarily reflected in the dual nature of the acts underlying accountability. They give rise to a dual responsibility under international law, as both states and individuals can incur international responsibility if they commit such serious breaches.[53] It is generally acknowledged that certain most fundamental human rights are of an *erga omnes* nature, and their violation incur both the responsibility of states and the criminal responsibility applicable to individuals. As Judge Mindua highlighted it in his Separate Opinion to the ICC's decision on the investigation in Afghanistan, "we must not forget that the ICC deals with war crimes, crimes against humanity and other crimes very often committed by individuals in position of State power or on behalf of the State." Indeed, most of the acts adjudicated upon under either accountability regime before any of the international judicial institutions could be factually associated with a proceeding ongoing under the other regime. Individuals prosecuted before the ICC are also State agents, their conduct, even if legally possible, factually is hardly separable from conducts

[51] On the need for a more systematic conception on transitional justice in general, *see:* Pablo de Greiff, *Theorizing Transitional Justice* at 32, in TRANSITIONAL JUSTICE: NOMOS LI (Rosemary Nagy, Melissa S. Williams, & Jon Elster ed., New York University Press, 2012), DOI: https://doi.org/10.18574/nyu/9780814794661.003.0002
[52] Teitel, *supra* note 18 at 69 (emphasis added).
[53] For a detailed account on acts leading both to State responsibility and individual liability, see André Nollkaemper, *Concurrence between Individual Responsibility and State Responsibility in International Law*, 52 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 3, 615-640, 618-619 (2003), DOI: https://doi.org/10.1093/iclq/52.3.615 and corresponding footnotes.

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litigated under the regime of State responsibility.[54]

The parallel existence of the concepts of State responsibility and individual criminal liability in international law results in a duplication of responsibilities: if the act of an individual is attributable to a State, this incurs not only individual criminal liability, but also the State's responsibility for that act under the rules codified in ARSIWA. Alain Pellet deemed this dual liability concept an "intrusion of criminal responsibility into international law [which] constitutes one of the causes of the loss of conceptual unity of the notion of responsibility in international law."[55] As the present paper posits, it is rather the interrelation of the two concepts, and their balanced application results in conceptual unity. It is rooted in the fact that both accountability concepts have advantages for addressing different aspects of mass atrocities, but both are needed for a holistic and comprehensive approach to the application of legal accountability as a transitional justice measure.

The following section will therefore comparatively assess these two concepts along the lines of their main conceptual differences. Given that there is an imbalance towards individual criminal liability in the field of transitional justice, focus will be put on aspects in which State responsibility could yield further benefits for the efficiency of transitional justice measures in case of a more balanced accountability approach.

A. Avoiding collective guilt versus highlighting the accountability of the wider society

The phenomenon of collective guilt has impacted post-conflict societies over time. The legacy of Nuremberg, as shown above, has positioned individual criminal accountability to be the primary form of legal accountability for mass atrocities and gross human rights violations. One of the main reasons for this was the rejection of the idea of holding responsible all members of a group or society for the harms produced by particular group members in cases where not all group members caused the harm directly. Authors like Karl Jaspers, Hannah Arendt, and H. D. Lewis all extensively wrote on whether or not the German people can legitimately be held collectively responsible for Nazi crimes in World War II.[56] The denial of societal criminal liability has persisted ever since, and remains an undisputed principle of transitional justice which the present paper does not contest

[54] As stated by the Permanent Court of International Justice in its *Case of Certain questions relating to settlers of German origin in the territory ceded by Germany to Poland*, Advisory opinion: "States can act only by and through their agents and representatives" PCIJ Series B, No 6, 22.
[55] Alain Pellet, *The Definition of Responsibility in International Law, in* THE LAW OF INTERNATIONAL RESPONSIBILITY 8 (James Crawford, Alain Pellet, Simon Olleson, Kate Parlett ed., Oxford Commentaries on International Law, 2010).
[56] See: Hannah Arendt, *Collective Responsibility, in* AMOR MUNDI (James Bernhauer (ed.), Dordrecht: M. Nijhoff, 1987), DOI: https://doi.org/10.1007/978-94-009-3565-5_3; Jaspers, *supra* note 33; Hywel D. Lewis, *Collective Responsibility*, PHILOSOPHY, 24: 3–18 (1948), DOI: https://doi.org/10.1017/s0031819100065943

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either.

The question of the role of State responsibility in transitional justice, however, is not comprehensively addressed without discussing the shortcomings of an overly individualistic adjudicatory system from the perspective of this debate. Discarding State-level accountability for the sake of avoiding collective guilt and stigmatisation carries its own risks. *First*, the individualization of guilt may create impunity gaps ignoring the political and legal framework in which these individual wrongdoings were allowed to occur.[57] If transitional justice only focuses on bringing the concrete individual perpetrators to justice, it may lose sight of the bigger, and much more structural, therefore also much more resistant problems. *Second*, an overly individualistic approach disregards the individual's responsibility as the constituent of the society. As Jaspers wrote, "political guilt involves liability for the consequences of the deeds of the state whose power governs me and under whose order I live. Everybody is co-responsible for the way he is governed."[58] Under the concept of political guilt he proposed that everybody is responsible for the way they are governed.[59]

As such, the present paper argues that State responsibility is the adequate tool for reaching the middle ground between collective guilt and the impunity gaps left by an individual criminal liability centered adjudicatory approach. It balances the avoidance of the criminalization of moral and metaphysical guilt[60] and the need for the recognition of a certain level of societal responsibility in mass atrocities. One conception of this middle ground was proposed by legal scholar Mark Drumbl to be 'collective responsibility', a form of legal sanction rejecting that bystanders are entirely blameless and arguing for the inappropriateness of their legal (and moral) acquittal on account of the prosecution of the "most notorious".[61] As his theory stresses, even if bystanders to a conflict are not held criminally liable, law should not be enforced so as to promote a myth of collective innocence.[62] It is argued here that the regime of State responsibility and proceedings against States can act as not promoting collective innocence but a balanced understanding of societal responsibility.

And advantages do exist from the perspective of the collective responsibility of the

[57] Kora Andrieu, *Political liberalism after mass violence: John Rawls and a 'theory' of transitional justice, in* TRANSITIONAL JUSTICE THEORIES 91 (Buckley-Zistel, Beck, Braun, & Mieth eds., Routledge, 2014), DOI: https://doi.org/10.4324/9780203465738; C. S. Nino, RADICAL EVIL ON TRIAL 145 (Yale University Press, 1999).
[58] Jaspers, *supra* note 33 at p. 25 and p. 35.
[59] *Id.*
[60] *I.e.* bystander complicity rejected by Jaspers (*Id*.).
[61] Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 573 (2005). ("(...) such individuals are blameless, or that they ought to be considered as blameless, or that they are entitled to the law's intervening in a manner that pronounces their innocence. Trying the most notorious should not ineluctably lead to absolving the rest.").
[62] Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT'L L. 1013, pp. 1037-1038 (2005).

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society. Trials possess a pedagogical function for the society as a whole as a way of restoring a lost social harmony.[63] Émile Durkheim considered them to be essential means of reviving social solidarity as through them society can commonly reject crime and reaffirm its moral values.[64] It is submitted here that this should be true regardless of whether individuals or the State in general is held accountable. Additionally, another direction of scholarly opinion recognizes the benefits of war reparations cast out on States as impacting members of the society financially but without implying their guilt.[65] The importance of economic factors in political violence and the structural inequalities of post-conflict societies increasingly indicate that payments by individual perpetrators to a certain number of victims cannot restore the balance and peace.[66] They propose that this collective form of reparations can be separated from guilt and can be regarded as an effective way to redistribute the goods of society by giving priority to the previously targeted and marginalized group.[67] Experience shows that post-conflict societies might tend to accept this arrangement, as happened with German nationals regarding post-Second World War reparation payments,[68] or the collective responsibility of the apartheid privileged in South Africa.[69] The advantages of collective, State paid reparations are two-fold: whereas they implicate the 'bystander' society's certain level of responsibility without stressing guilt, they also aim to compensate for the wider social impact, and caused systematic and structural effects of gross human rights violations[70] – which an individual focused trial with reparations to be paid by the convicted individual could hardly achieve.

B. Subjective versus objective approach: the requirement of a psychological element

[63] Kora Andrieu, *Political liberalism after mass violence: John Rawls and a 'theory' of transitional justice, in* TRANSITIONAL JUSTICE THEORIES p. 91 (Buckley-Zistel, Beck, Braun, & Mieth eds., Routledge, 2014), DOI: https://doi.org/10.4324/9780203465738-12

[64] Émile Durkheim, THE RULES OF SOCIOLOGICAL METHOD, 1895 (W. D. Halls (trans.), New York: Free Press, 1982), DOI: https://doi.org/10.1007/978-1-349-16939-9

[65] Therese O'Donnell, *Executioners, bystanders and victims: collective guilt, the legacy of denazification and the birth of twentieth-century transitional justice*, 25 LEGAL STUDIES 4, pp. 627-667, 662 (2005), DOI: https://doi.org/10.1111/j.1748-121X.2005.tb00687.x

[66] Kora Andrieu, *Political liberalism after mass violence: John Rawls and a 'theory' of transitional justice, in* TRANSITIONAL JUSTICE THEORIES p. 96 (Buckley-Zistel, Beck, Braun, & Mieth eds., Routledge, 2014), DOI: https://doi.org/10.4324/9780203465738-12

[67] *Id.* Scholarship proposes this to be the idea of non-transitive associative guilt whereby guilt remains in the nation but has nothing to do with individuals' guilt. George P Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 11 YLJ 1, 1499, at p. 1549 (2002), DOI: https://doi.org/10.2307/797532

[68] G. P. Fletcher, *The Storrs Lectures, supra* note 67 at p. 1567.

[69] Kader Asmal, Truth, Reconciliation and Justice: the South African Experience in Perspective 63 (1) MLR 1, p. 12 (2000), DOI: https://doi.org/10.1111/1468-2230.00248

[70] Pablo de Greiff, *Repairing the Past: Reparations for Victims of Human Rights Violations, in* THE HANDBOOK ON REPARATIONS (de Greiff, P. (ed.), Oxford: Oxford University Press, 2006), DOI: https://doi.org/10.1093/0199291926.001.0001

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One of the most striking differences in the approaches of state responsibility and individual criminal liability lies in the requirement of a psychological element as a constitutive requirement for establishing accountability. The intention to produce the consequences of the prohibited act (*mens rea*) is a distinctive element of crimes in all criminal systems, as it is under rules of international criminal law based on the pattern of national criminal law.[71] Accordingly, individual criminal liability is grounded in the principle of personal culpability, and for establishing the criminal liability of an individual, proof of the alleged perpetrator's psychological participation in carrying out the crime is required.[72] They must intend the consequences of their acts.[73] This subjective, culpability-based conception of liability sets a necessarily higher standard than that of state responsibility operating in practice with a rather objective standard.[74]

Under the regime of state responsibility, although the ILC avoids strictly accepting the terminology,[75] primary obligations mostly operate with an objective standard. In case it is proved that the State has breached a primary obligation which is attributable to it, its responsibility is established regardless of intention or knowledge about the consequences, or the diligence of its conduct.[76] In the absence of a specifically required mental element within the rule, only the act of a State matters, independently of intention.[77]

Although the element of 'fault' is not a requirement of the internationally wrongful act of a State, there exists a limited circle of obligations which makes the occurrence a breach dependent on the intention or knowledge of relevant State organs or agents. In the specific case of genocide, for instance, genocidal intent is required both under State responsibility and in international criminal law.[78] However, besides the limited instances of such obligations, and existence of certain debate as to the requirement of a psychological element,[79] the general stance of international law is not based on a

[71] Antonio Cassese, INTERNATIONAL CRIMINAL LAW 57 (Oxford, Oxford University Press, 2003).
[72] *Id*. at 137; Bonafè, *supra* note 3 at p. 15.
[73] William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 New Eng. L. Rev. 4, p. 1015 (2002-2003).
[74] Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, 281 RECUEIL DES COURS 9, pp. 281-282 (1999).
[75] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (November 2001) Supplement No. 10 UN Doc A/56/10) commentary (3) to Article 2 ARSIWA, 34.
[76] Nollkaeamper, 2003*, supra* note 53 at p. 617.
[77] ARSIWA Commentary, supra note 75, commentary (10) to Article 2 ARSIWA, 36.
[78] ARSIWA Commentary, supra note 75, commentary (3) to Article 2 ARSIWA, 34. It must be noted that the two types of intent for genocide under the two different regimes necessarily differ, for a detailed analysis on the difference between the legal standards, *see*: Sangkul Kim, A Collective Theory of Genocidal Intent (Georgetown University Thesis Repository, 2015), DOI: https://doi.org/10.1007/978-94-6265-123-4
[79] Ian Brownlie, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES p. 166 (Oxford, Clarendon Press, 1963), DOI: https://doi.org/10.1093/acprof:oso/9780198251583.001.0001; Pierre-Marie Dupuy, *Faute de l'Etat et "fait internationalement illicite"*, 5 DROITS pp. 51–63 (1987); Gaetano Arangio-Ruiz, *Second Report on State*

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culpability.

C. Nature and scope of obligations and forms of attribution serving as possible basis for accountability

The nature and scope of those primary obligations which may serve as the basis for holding the State or the individual accountable, as well as the options for attributing a breach also greatly differ. This is essentially due to the fact that State and individual responsibility are different regimes, dealing with different subjects, applying different legal standards, and having different functions within the international legal system.[80] The advantages of these differences, however, are not adequately exploited when we think of how transitional justice utilizes international proceedings.

It is submitted that (i) the circle of obligations underlying State responsibility is much wider than the exhaustive list provided in the Rome Statute based on which individual responsibility can be founded; (ii) the nature and type of obligations allows for the more extensive establishing of the accountability of States; and (iii) State responsibility offers a wider range of attribution formulas for establishing responsibility than rules on individual criminal liability do. All these differences further validate resorting more frequently to the State-responsibility regime in remedying mass atrocities.

As for the scope of obligations, it must be noted that whereas individual criminal responsibility may rest on one of the main four international crimes stipulated in the exhaustive list of the Rome Statute, any primary obligation of the State may serve as the basis of its State responsibility. Individual criminal liability relates to a narrower range of conduct, whereas the scope of primary obligations is much broader under State responsibility, since a breach by a State of any primary international legal obligation may give rise to State responsibility. It shall be stressed again at this point that the paper does not argue for the exclusive application of either accountability mode,[81] rather advocates for their parallel, complementary application. State responsibility can offer the litigation of those violations taking place in the conflicts addressed in the transitional justice context which cannot be prosecuted against individuals. These may include systemic human rights violations not falling under the scope or reaching the threshold of crimes stipulated

Responsibility, II(1) YILC 1 (1989); Gaetano Arangio-Ruiz, *State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance, in* LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX DE LA JUSTICE ET DU DÉVELOPPEMENT pp. 25–42 (Mélanges Michel Virally ed., Paris, Pedone, 1991); Andrea Gattini, *Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility*, 10 EJIL, pp. 397–404 (1999), DOI: https://doi.org/10.1093/ejil/10.2.397

[80] Bonafè, *supra* note 3 at p. 237.

[81] In fact, several authorities recognized ed the non-exclusive nature of individual and state responsibility, see: *Prosecutor v Furundžija*, ICTY, Judgment of 10 Dec 1998, 38 ILM 317 (1999), p. 142; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn.-Herz. v. Serb. and Mont.), Preliminary Objections, 1996 I.C.J. Rep., p. 32 (July 11).

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in Article 5 of the Rome Statute. Violations which transitional justice at the moment attempts to deal with through non-judicial enforcement mechanisms and approaches.

The nature of obligations underlying State responsibility is also distinctive. If we look at for instance the crime of genocide, a criminal concept existent both under the Genocide Convention and customary international law underlying States' obligations, and in international criminal law regulating individual criminal conduct, we may see that the circle of specific conduct establishing responsibility under the regime of State responsibility includes a prevention obligation, contrary to individual liability established only for the specific, intentional conduct of genocidal acts.[82] Based on Article I of the Genocide Convention,[83] and its interpretation provided by the ICJ,[84] there is a duty on each and every State party to the Convention to take measures to prevent genocide.[85]

Lastly, it is relatively easier to prove the State's responsibility for an international violation under the framework of State responsibility codified in ARSIWA, given the availability of several attribution formulas allowing for a link between various actors within the State and the breach of the obligation. As described above in Section II.A, customary international law provides for eight different constructions for the different avenues to attribute responsibility to the State. There are several alternative scenarios for attribution, even for instances where it was not directly the State (organ or official) committing the violation. In contrast, individual criminal liability can only be established if the individual can be held directly liable for the commission of the crime in question.

D. Jurisdiction for court proceedings and questions of complementarity

When one intends to examine the viability and effectiveness of a judicial procedure, the preliminary procedural question of jurisdiction inherently arises. This is no different with analyzing legal accountability for mass atrocities. Proceedings before inter-State courts such as the ICJ, and institutions criminally prosecuting individuals such as the ICC both trigger this issue – although from very different perspectives, and both having their own distinct advantages.

Regarding jurisdiction for war criminals in international conflicts, the International Criminal Court's competence may face two obstacles: the Rome Statute's limitations on the exercise of jurisdiction and the complementarity principle. As it will be demonstrated,

[82] Marko Milanović, *State Responsibility for Genocide: A Follow-Up*, EJIL Issue 4, 669–694 (2007), DOI: https://doi.org/10.1093/ejil/chm043
[83] Convention on the Prevention and Punishment of the Crime of Genocide, 9 Dec. 1948, 78 UNTS 277, Art I.
[84] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) 2007, I.C.J. Rep., pp. 429-431 (February 26).
[85] Bjorn Schiffbauer, *The Duty to Prevent Genocide under International Law: Naming and Shaming as a Measure of Prevention*, 12 GENOCIDE STUDIES AND PREVENTION: AN INTERNATIONAL JOURNAL, 3, pp. 83-94, 86 (2018), DOI: https://doi.org/10.5038/1911-9933.12.3.1569

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both constitute an expression of the principle of state sovereignty, making the fight against impunity obviously more complicated.[86] They carry with themselves both legal and political implications as to the procedures of the ICC, and have already given space for extensive scholarly debate in relation to the effectiveness and legitimacy of the court.[87]

Pursuant to Article 13 of the Rome Statute, three avenues exist for bringing a case before the ICC. Under Article 13(a), a State Party may refer a situation[88] to the Prosecutor, provided that "one or more crimes within the jurisdiction of the Court appear to have been committed."[89] Under Article 13(b), the Security Council may also refer a situation to the Prosecutor acting under Chapter VII of the UN Charter.[90] And thirdly, the Prosecutor may commence proceedings on its own initiative.[91] Article 13(a) is the most commonly invoked, base-provision for the exercise for jurisdiction, centering around the specific crimes for which the jurisdiction may be triggered. It has already been addressed above that these crimes under Article 5(1) of the Rome Statute include genocide, crimes against humanity and war crimes. However, this reach of the ICC, its *ratione materiae* jurisdiction is further limited territorially: namely the ICC will only have jurisdiction if the conduct in question was committed on the territory of a State party. As such, the ICC will not have jurisdiction over an individual who committed crimes on the territory of a non-State party and who is a national of a non-State party. This limitation necessarily constrains the possibilities of the ICC to address mass atrocities.

This territorial limitation is further encumbered by the complementarity principle, a founding principle of the ICC. The main rationale behind the principle is to leave the primary competence for addressing the crimes in question to national jurisdictions, and vest the ICC with a power to prosecute war criminals only as a secondary option. The ICC therefore only has competence to deal with the above crimes when a State shows its genuine inability or unwillingness to investigate or prosecute the alleged offenders.[92] As

[86] Commentary by G. Arangio-Ruiz, 1994 meeting of the International Law Commission, ILCYB 1994, Vol. 1, pp. 33-34.
[87] Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice; A Pluralist Process Approach*, 32 MJIL 1, 12 (2010); Bertram Kloss, THE EXERCISE OF PROSECUTORIAL DISCRETION AT THE INTERNATIONAL CRIMINAL COURT: TOWARDS A MORE PRINCIPLED APPROACH 20 (Herbertz Utz Verlag, 2017); Rod Rastan, *Complementarity: Contest or Collaboration?, in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 106 (M. Bergsmo (ed.), Torkel Opsahl, 2010); Chandra Lekha Sriram & Stephen Brown, *Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact*, 12 INTERNATIONAL CRIMINAL LAW REVIEW 44 (2012), DOI: https://doi.org/10.1163/157181212X633361; William Burke White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice,* 19 CRIMINAL LAW FORUM (CLF) pp. 59–85 (2008), DOI: https://doi.org/10.1007/s10609-007-9050-9
[88] 'Situation' refers to a territorial area where "one or more crimes within the jurisdiction of the Court appear to have been committed" within a given time period. Situation in the Democratic Republic of Congo, Case No. ICC-01/04, Decision to Hold Consultation under Rule 114, at p. 2 (21 April 2005).
[89] Rome Statute, *supra* note 13 art 13(a).
[90] *Id.* art 13(b).
[91] *Id.* arts 13(c) and 15(1).
[92] *Id.* art 17(1).

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such, besides the significant limits on its jurisdiction, the ICC also provides an out for States willing to investigate the situation themselves and prosecute potential crimes in a serious way, and it does not investigate a situation if a State has adequately dealt with it itself.

State responsibility and the jurisdictional conditions before the ICJ – although having their own caveats – may alleviate certain aspects of these obstacles. As a starting point, the principle of complementarity, evidently, does not apply to the International Court of Justice. This difference reflects the lack of relevance of national courts regarding State accountability, and the dual nature of judicial enforcement when it comes to holding individuals criminally accountable. As for the basis of the ICJ's jurisdiction, differently from the ICC where party status to the Rome Statute is a prerequisite, the ICJ's jurisdiction may be founded not only on State declarations to the ICJ Statute accepting the compulsory jurisdiction of the Court, but, among others, also on certain treaty provisions submitting to the ICJ's jurisdiction.[93] There is a variety of treaty provisions which may be invoked to this end, especially in fields relevant to transitional justice. The Genocide Convention, underlying several of the currently ongoing disputes before the ICJ, serves as a stark example of a widely ratified treaty sufficient to be invoked as a jurisdictional basis – as it happened most recently in the case of Ukraine, discussed below.

Nevertheless, the inherent jurisdictional obstacles applicable to both State and individual centered proceedings must be conceded. At the end of the day, the jurisdiction of both international courts will depend on State consent – this is an inherent characteristic of the international dispute resolution system. Despite this, from the above it can be observed that, although proceedings before the ICJ conducted under the framework of State responsibility also encounter significant jurisdictional obstacles, the jurisdiction of the ICC has been even more extensively limited by the drafters of the provisions of the Rome Statute. One of the main reasons for this, of course, is the hybrid, international-national nature of criminal law, and the underlying aim of holding individuals primarily accountable before national courts. The difference is aptly captured by the commentary of G. Arangio-Ruiz made at the 1994 meeting of the International Law Commission, preceding the adoption of the Rome Statute:

> "There was an enormous difference between [the] ICJ and the proposed international criminal court. The compulsory jurisdiction of the ICJ affected States in their relations with one another as sovereign states. The jurisdiction of the international criminal court would affect States in the exclusive "control" that they exercised over their nationals and most particularly over their leaders or officials. The very fabric of states would be penetrated; there would be a break in the veil of sovereignty in that they would [be] sending

[93] Statute of the International Court of Justice art 36 p. (26 June 1945) 59 Stat 1055, 1060.

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> individuals in high Government posts to the court for trial and possible sentencing. [...] [T]he individual who might be brought before the court, tried, condemned and compelled to serve a sentence could be a head of State, a prime minister, the supreme commander of the armed forces or the minister of defense of any given country."

This discrepancy and dilemma can be illustrated through two examples. First, we might compare the number of proceedings before the ICC against American nationals and the number of cases filed against the United States. The difference is apparent. Meanwhile the United States has been involved as a respondent in sixteen cases before the ICJ, there is not a single instance where the ICC even launched an investigation in a matter where the liability of US nationals involved in the situation might be implicated. This is, of course, a highly political question, and the procedures of the ICC oftentimes receive criticism in this regard. For instance in the Afghanistan situation, the controversy surrounding the Pre-Trial Chamber's decision rejecting the start of an investigation opened the ICC up to allegations regarding possible political pressure having motivated its approach.[94] Possible obligations and effects of Rome Statute provisions on non-State parties necessarily entail political repercussions given the impacts on the interests of States involuntarily involved in ICC processes. In the case of Afghanistan such repercussions were heightened given that it was the United States, a powerful critique of ICC procedures, which might have been impacted by the investigation despite its non-Member status.

Jurisdictional deficiencies and differences between the two accountability regimes are also apparent in the escalating Ukrainian conflict. Ukraine has already filed its claim against Russia before the ICJ, asking it to order Russia to suspend military operations and ensure all actors take no further action in support of any such operations. Despite Russian claims that the aggression is carried out as lawful self-defense under Article 51 of the UN Charter,[95] the ICJ has granted provisional measures by accepting the *prima facie* jurisdiction of the Court under the Genocide Convention to which Russia is a party.[96] As such, we can see how international obligations undertaken within treaties and conventions may broaden the jurisdictional reach of the Court compared to a general

[94] Alex Whiting, *The ICC's Afghanistan Decision: Bending to the U.S or Focusing Court on Successful Investigations?,* Just Security (12 April 2019) www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations

[95] It is worth to note in this respect that if the jus contra bellum norms are interpreted and applied with proper methodology, then the Russian claim is untenable, i.e. there was no legitimate self-defense situation. Gábor Kajtar: *Self-defence against non-state actors – Methodological Challenges* ANNALES UNIVERSITATIS SCIENTIARUM BUDAPESTINENSIS DE ROLANDO EÖTVÖS NOMINATAE - SECTIO IURIDICA 54, pp. 307-332., 2013. *See* also: Kajtár Gábor: *Az általános erőszaktilalom rendszerének értéktartalma és hatékonysága a posztbipoláris rendszerben*, *in* Kajtár Gábor; Kardos Gábor (szerk.) NEMZETKÖZI JOG ÉS EURÓPAI JOG: ÚJ METSZÉSPONTOK: ÜNNEPI TANULMÁNYOK VALKI LÁSZLÓ 70. SZÜLETÉSNAPJÁRA (Saxum, 2011) pp. 60-85.

[96] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Provisional Measures, Order, 2022 I.C.J. Rep., pp. 36-46 (March 16).

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subscription to the proceedings of the ICC.

Russia and Ukraine not being parties to the Rome Statute certainly makes the possibilities of bringing individuals partaking in the execution of the attacks on Ukraine scarcer. Russian military officials, commanders and unit members alike, hide behind the statehood of Russia as a shield from their own personal accountability in lack of a jurisdictional link to the ICC.[97] Despite the lack of party status, however, the International Criminal Court still has potential to address the situation. In 2014, following the annexation of Crimea by the Russian Federation, Ukraine agreed to submit events taking place in Ukraine to the ICC's jurisdiction, and then extended the time period on an open-ended basis.[98] With this second submission still in place, and based on referrals by 43 individual States parties to the Rome Statute, the Prosecutor announced that it is opening an investigation for all crimes having taken and taking place on any part of the territory of Ukraine by any person from 21 November 2013 onwards.[99] This necessarily includes events taking place since February 24, 2022. Therefore, even though Ukraine is not a party to ICC, the crimes committed in Ukraine that are within the scope of the crimes that can be prosecuted under the Rome Statute will be subject to investigation and prosecution by the ICC.

E. Availability of remedies for victims

Lastly, an obvious but all the more important comparative aspect of the two accountability modes is the question of reparations to victims. This question is an especially critical point of the present paper as reparations and other remedies for victims is a cornerstone of transitional justice, and as we have seen above, it is the focus of models departing from Nuremberg's strict accountability approach. In case of mass atrocities, due to the flagrant violations of the most highly regarded prohibitions and obligations of international law, the role and importance of adequate reparation is even more important.

To formulate the difference at the simplest level: while state responsibility entails the right of the injured State to monetary damages and other forms of remedies, in cases of individual criminal liability, reparations are not in issue.[100] The primary goal of individual criminal liability is to punish the perpetrator, whereas the goal of State responsibility is to

[97] The problem with individuals shielding from responsibility behind the State apparatus is adequately flagged by Philip Allott: „(…) the moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally both from the duties the law imposes and from the responsibility which it entails." Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARVARD INTERNATIONAL LAW JOURNAL 1, p. 14 (1988).

[98] https://www.icc-cpi.int/sites/default/files/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine

[99] Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation, 2 March 2022.

[100] *Prosecutor v. Tadić*, ICTY, 1997, p. 28 (May 7) (dissenting opinion by McDonald, J.).

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decide about the cessation of the breach and order reparation for the damage. As such, in State responsibility a reparative rather than punitive outlook is taken.[101] And is not this punitive approach at heart of the criticism towards the strictly court procedure-based Nuremberg model, and doesn't this reparative approach form the basis of the holistic, victim-centered model? Therefore, as a preliminary point, it is posited that even on the outset, just looking at the role of reparations and the goal of the two accountability models, oddly the reparative aim of State responsibility seems to be overlooked, even in the context of the victim-centered area of transitional justice.[102]

The above formulation of the differences regarding the attitude towards remedies further incurs issues regarding the legal basis for reparations, the circle of possible remedies, and the viability of enforcement – all of which provide ample ground for further comparison. Starting with the legal basis for reparations, it must be noted that both forms of accountability include a reparation mechanism. As for State responsibility, the Articles on State Responsibility outline the customary rules on remedies for breaches of international obligations, and more specifically, the ICJ Statute also mentions reparations as falling within the Court's jurisdiction subject to the parties' claims, and their declarations and special agreements made pursuant to Article 36.[103] Regarding individual criminal liability, the Statute of the ICC also regulates reparations for victims.[104] The realization of these different reparation types and the particularities of their enforcement however greatly differ.

Despite the corresponding provision of the Rome Statute, the ICC and the Trust Fund for Victims[105] are struggling to make the promise of reparations a tangible reality for victims

[101] Antonio Cassese, INTERNATIONAL LAW 271 (Oxford University Press, 2001); Pierre-Marie Dupuy, *International Criminal Responsibility of the Individual and International Responsibility of the State, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT. A COMMENTARY, VOL. II p. 1097 (Cassese et al. (eds.), Oxford, Oxford University Press, 2002); Maurice Kamto, *Responsabilité de l'Etat et responsabilité de l'individu pour crime de génocide. Quels mécanismes de mise en oeuvre?, in* GENOCIDE(S) p. 500, 509 (K. Boustany and D. Dormoy (eds.), Bruxelles, Bruylant, 1999); Gerhard Werle, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW pp. 35-36 (TMC Asser Press, 2005).

[102] As a step towards a less punitive and more victim-centered procedure, the reparations judgment issued in the ICC's Ntaganda case must be acknowledged. In its order the ICC concentrated on repairing the harm caused *to* victims and *not by* the convicted individual. ("Mr Ntaganda [is found] liable to repair the full extent of the harm caused to the direct and indirect victims of all crimes for which he was convicted, regardless of the different modes of liability [...] and regardless of whether others may have also contributed to the harm" (*Ntaganda case*, Reparations order, ICC-01/04-02/06, 8 March 2021, p. 218). See: Marina Lostal, The Ntaganda Reparations Order: a marked step towards a victim-centred reparations legal framework at the ICC, EJIL:Talk, May 24, 2021.

[103] ICJ Statute, *supra* note 93 art 36 p. (2)(d).

[104] Rome Statute, *supra* note 13 art 75.

[105] The Trust Fund for Victims (TFV) was created by the Assembly of States Parties in 2004 in accordance with article 79 of the Rome Statute. Its mission is to support and implement programmes that address harms resulting from the crimes falling under the ICC's jurisdiction. The TFV has a two-fold mandate: (i) to implement Court-Ordered reparations and (ii) to provide physical, psychological, and material support to victims and their families.

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on the ground.[106] One of the main reasons behind this, besides the practical challenges of the application process for reparations which sets several criteria for victims to be eligible for reparation, is the implementation of reparations awards issued by the ICC against a convicted person. It is the convicted person who is responsible for paying the awarded amounts[107] and the Trust Fund's mandate involves the implementation of such awards.[108] Pursuant to Article 79(2), the Court may order the collection of money and other property through fines or forfeiture and its transfer to the Trust Fund for the purposes implementing the award. As we can expect, however, in reality most convicted persons possess no money or property which could serve as a basis for indemnifying victims.[109] Although in these circumstances the Trust Fund is to use other resources made available to it, e.g. funds from voluntary or State contributions,[110] such scenario is neither ideal, nor just. It raises problems such as the fact that in case the convicted individual remains indigent indefinitely, the amount due will never be recovered by the Trust Fund.[111] Additionally, it might result in failing to adequately and comprehensively compensate victims for their damages, and they might end up with a rather symbolic amount instead of total indemnification.[112]

What is proposed here is that certain aspects of these practical problems are absent under the regime of State responsibility. The indigency or insolvency of a State is much less likely to occur or cause a problem for the implementation of a damages award in an inter-State case than against an individual. The existence of State resources provides further assurances to both the viability of the enforcement of an award, as well as with regard to the volume of the remedies granted. Even if the convicted individual possesses certain resources which can be transferred to the Trust Fund, it is obviously of a lesser magnitude than in which the State could be ordered to compensate victims of its violations.

One practical question undoubtedly arises, however, in the inter-State context, namely whether there is an obligation on the State to provide the victims with the reparations

[106] REDRESS, Making Sense of Reparations at the International Criminal Court, https://redress.org/wp-content/uploads/2018/06/Making-sense-of-Reparations-at-the-ICC_Background-paper_20062018.pdf (accessed 7 May, 2022).
[107] Rome Statute, *supra* note 13 art 75(2)
[108] *Id.* art 79; Currently four reparations awards are under implementation by the TFV (Lubanga case, Katanga case, Al Mahdi case, Ntaganda case).
[109] ICC Trust Fund for Victims Management Brief, October – December 2020, https://www.trustfundforvictims.org/sites/default/files/reports/TFV%20Management%20Brief%20Q4%202020.pdf
[110] Regulation 56 of the Regulations of the Trust Fund; Lostal, *supra* note 101.
[111] TFV Management Brief, supra note 108.
[112] Under total indemnification it is not proposed that victims can ever be fully compensated or indemnified for their material and immaterial damages and sufferings, rather that the actual amount paid is likely to be even less than what the ICC could actually quantify in its decision. It is further noted that the ICC also awards symbolic reparations.

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sued for and granted in the inter-State proceedings. When it comes to claims relevant to the field of transitional justice, e.g. gross human rights violations, allegations of genocide and breaches of humanitarian law, claims are brought before the ICJ by States on behalf of individuals or groups of individuals suffering those violations by way of the invocation of diplomatic protection or *erga omnes* obligations. As such, the legal basis of remedies is necessarily the breach by the State of the international obligation causing damage to the individual or group of individuals,[113] and the applicant State suing on their behalf has standing to claim those remedies either because the victims are its nationals, or because the breached obligation is of an *erga omnes* or *erga omnes partes* character and is owed to the entire international community or a group of States parties to a treaty.[114]

Scholarly debate surrounds the question of a duty on the State to pay the reparations directly to the victims advocated for, and – although different opinions accompany diplomatic protection and *erga omnes* in this respect - the answer as per the current status of international law is sadly uncertain. There is no existing obligation on States to pay the victims of the litigated violations. With respect to diplomatic protection, this gap was attempted to be filled through the International Law Commission's Draft Articles of Diplomatic Protection. The ILC posited that the State exercising diplomatic protection should pay the sum awarded to the victim on behalf of whom it is making the case.[115] However, as inherent to the nature of such articles, and in lack of a corresponding customary rule, this obligation remains on the level of a suggested direction for progressive development. As such, since the claimant State submits the claims in its own right, it has no legal obligation to distribute the compensation received among the injured nationals.[116] Nevertheless, in practice we may see no examples for States suing on behalf of victims and keeping the sum awarded. In the compensation judgment of the *Diallo* case, for instance, the ICJ explicitly recalled that "the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury."[117] The issue is somewhat different in case of *erga omnes* obligations. Although there is a legal possibility for claiming reparations even as a non-injured State in the interest of the beneficiaries of the obligation breached,[118] due to the paucity of case-law in this respect, no state practice can be recalled as regards payment made to victims.

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[113] Christine D. Gray, JUDICIAL REMEDIES IN INTERNATIONAL LAW 28 (Oxford: Clarendon Press, 1987); Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 234-236 (Stevens and Sons, 1953).

[114] Giorgio Gaja, *Standing: International Court of Justice (ICJ)* (June 2018), *in Max Planck Encyclopedia of International Law* (online ed.), ¶¶ 5, 25, DOI: https://doi.org/10.1093/law-mpeipro/e3661.013.3661

[115] UN ILC 'Draft Articles on Diplomatic Protection' (2006) GAOR 61st Session Supp 10, 16, art. 19 (c).

[116] John Dugard, *Diplomatic Protection* (June 2021), *in Max Planck Encyclopedia of International Law* (online ed.), ¶ 73, DOI: https://doi.org//10.1093/law:epil/9780199231690/e1028; affirmed by both international tribunals (*Administrative Decision No V* (1925) 152) and national courts (*Lonrho Exports Ltd v Export Credits Guarantee Department* [1996] 687).

[117] *Ahmadou Sadio Diallo* (Republic of Guinea v Democratic Republic of the Congo), Judgment on Compensation, 2012, I.C.J. Rep 324, ¶ 57 (June 19); Dinah Shelton, *Reparations* (August 2015), *in Max Planck Encyclopedia of International Law* (online ed.), ¶ 30, DOI: https://doi.org/10.1093/law:epil/9780199231690/e392

[118] ARSIWA art 49.

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Regarding the circle of possible remedies, mention must be made of the wide circle of different remedies available under the framework of State responsibility. Besides the above discussed monetary reparation, courts in inter-State cases, based on the specific circumstances of the case, may also order cessation, restitution, or satisfaction. Certain remedies, by nature, cannot be claimed in a trial against an individual. To mention a recent example, in the interest of the Rohingya victims of the genocidal acts of Myanmar, the Gambia requested the ICJ to order Myanmar to perform reparations such as "allowing the safe and dignified return of forcibly displaced Rohingya and respect for their full citizenship and human rights and protection against discrimination, persecution, and other related acts," and to "offer assurances and guarantees of non-repetition of violations."[119] These forms of reparations are essentially State-focused, and form an important part in remedying the atrocities and assisting victims in returning to their life preceding the violation. As such, they should be regarded as playing a valuable role in a victim-centered transitional justice.

Although the requests formulated in provisional measures are not strictly speaking remedies, due to the self-evident overlap between the requested measures and claimed non-monetary remedies, their contribution, besides the fact that they are logically not even available in cases for individual criminal liability,[120] must also be appreciated. The ICJ has granted provisional measures of unprecedented and historical importance in both the Myanmar and the Ukraine cases. In the case of Myanmar, the ICJ ordered Myanmar to "take all measures within its power to prevent the commission of" genocidal acts, to ensure that military units and organizations under its control, direction or influence do not commit such acts, and to "take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations".[121] This order is a very significant decision for the rights of the Rohingya people, and in the fight against impunity, as not only did it accept the *erga omnes* standing of the Gambia, but also recognized "the Rohingya (…) to constitute a protected group within the meaning of Article II of the Genocide Convention". As such, the ICJ underscored Myanmar's obligations under the Genocide Convention and put in place "a rigorous compliance schedule" to protect the Rohingya.[122]

In the case of Ukraine, the ICJ, going even further than what Ukraine requested, ordered Russia to stop its military operations[123] which is a significant step ahead compared to

[119] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Application instituting proceedings and Request for the indication of provisional measures, 2019, ¶ 112 (November 11).
[120] Except for provisional arrest under Article 92 of the Rome Statute.
[121] *Gambia v Myanmar*, *supra* note 118, Order on Provisional Measure, ¶ 86 (January 3, 2020).
[122] Priya Pillai, *ICJ Order on Provisional Measures: The Gambia v Myanmar*, OPINIO JURIS (January 24, 2020).
[123] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Order on provisional measures, 2022 I.C.J. General List 182, ¶ 81 (March 16).

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similar ICJ cases brought under the Genocide Convention.[124] As per the Court's order, Russia was requested to "immediately suspend the military operations," and to "ensure that any military or irregular armed units which may be directed or supported by it (…) take no steps in furtherance of the military operations", and the parties were ordered to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."[125]

Putting aside the enforceability[126] and the non-final nature[127] of the above orders, for the purposes of the paper we shall note two things. *First*, that the ICJ's competence necessarily extends to issuing orders regarding States' behavior which are by their nature cannot be requested from individuals associated with the same conflicts. And *second*, the ICJ seems to take so-far unparalleled steps in the direction of addressing and, as much as it is in its power, stopping gross human rights violations such as genocidal acts implicated in these cases.

As seen above, the different types of reparations under the two accountability concepts complement each other in providing a holistic remedy for victims of gross human rights violations.[128] Although these reparation options may be found in the toolkit of courts and tribunals handling cases against both individuals and States, different reparation types can be applied most effectively and advantageously by either of the two accountability mechanisms. Even though an accountable State may have the capacity to provide larger sums of damages to injured individuals and groups, that accountability may not compare to the victims seeing its tormenter, the face associated with their suffering, brought to justice. Monetary and symbolic remedies cannot, and in fact should not be made exclusive of each other. This further underlies the ideally complementary nature of individual criminal liability and State responsibility.

V. Conclusions

Within the field of transitional justice, the individual-centered legacy of Nuremberg is

[124] *See* the *Bosnian Genocide* and the *Legality of Use of Force* cases of the ICJ.
[125] Ukraine order, *supra* note 122, ¶ 81.
[126] It is to be noted that Russia is not participating in the proceedings, and its likely failure to comply with the provisional measures order will have similar effects as its non-appearance – a showing of disrespect for international law and institutions and reputational harm. Marko Milanovic, *ICJ Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelled from the Council of Europe*, EJIL:TALK, (March 16, 2022).
[127] In the sense of the whole dispute, as the decision in the actual claims of the parties are still awaited, provisional measures are based on prima facie findings. Nevertheless, orders of provisional measures are just as binding on parties as final judgments. See LaGrand case (Germany v. United States), Judgment, 2001 I.C.J. Rep. 466, ¶ 109 (June 27).
[128] Luke Moffett, *Transitional justice and reparations: Remedying the past? in* RESEARCH HANDBOOK ON TRANSITIONAL JUSTICE 380 (Cheryl Lawther & Luke Moffett eds., Elgar, 2017), DOI: https://doi.org/10.4337/9781781955314.00028

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apparent, and the dualistic nature of gross human rights violations from the perspective of the intertwinement of committing States and individual perpetrators still poses a dilemma. As presently conceived and practiced, transitional justice largely ignores the fact that States may have legal responsibility for mass human rights violations, and focuses on punishing individuals involved in these State-perpetrated atrocities. It rejects the punishment for States, and under the guise of arguments of legality, reconciliation and the avoidance of collective guilt, focuses its judicial enforcement measures on international criminal courts prosecuting individuals. This, however, necessarily results in an impunity gap, and the "acquittal of bystanders on account of the most notorious." The present paper did not argue for an opposite approach, however, rather tried to advocate for a more balanced conception of legal accountability in transitional justice through displaying the normative advantages of State responsibility gap-filling the individual criminal liability model.

We may see a step in this direction already in the case of Myanmar and its treatment of the Rohingya. Parallel proceedings are ongoing for more than two years now before both the ICJ and the ICC in order to ground the accountability of the State of Myanmar, as well as those members of its official apparatus who might have played part in the atrocities. These proceedings, however, although being parallel, due to their obvious institutional separateness, started independently from each other, not with a concerted accountability approach in mind. And this is what makes the case of Ukraine different, and indicates a further push in the above proposed direction. Despite the distinct ICJ and ICC procedures, the mandate of the Commission of Inquiry seems to adopt this more dualistic approach and does not specify a focus on one or another accountability. Although an ambitious task, the Commission's goal seems to be an extensive and overall fight against impunity. The mandate itself is already a win in this fight, sending the message to both victims and the international community in general that neither States', nor individuals' violations can go unanswered.

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