The Mirage of International Criminal Law

The Mirage of International Criminal Law:

Kant's Metaphysics of *Mens Rea*

By

Farhad Malekian

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To

My father

Mohammed Taghi Malekian

and

Mohammed Mossadegh

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INTRODUCTION

Once upon a time, Alexander the Great captured a notorious pirate and asked him, why are you plundering the high seas? The pirate replied, why are you plundering the lands? I am the king. If you are the king of the lands, I am the king of the high seas. What is the difference? The business is the same for both of us. This book elaborates the metaphysics of the monopolisation of the Security Council in conjunction with Kant's philosophy of self-love and radical evil in human nature, or the inclination to evil, or the propensity to knowingly commit unlawful behaviour. This implies the fact that *mens rea* is the mental element of the commission of the crime within the content of certain resolutions of the Security Council.

The book identifies the new methods of resolution used by the permanent members to reap economic gains from the oil pipelines. Kant's metaphysics describe the notion of international criminal law in combination with human rights law that characterizes the Security Council resolutions. This comes across as a mirage or an optical illusion − a disseminated interconnectedness in the guise of an inter-subjective icon for reliability − that tricks us into foretelling our individual or collective self-defence.

Consequently, the moral and political philosophies of Kant in conjunction with the monopolisation of international criminal law by the big political powers are the main subjects of this work. Accordingly, Kant's views are interwoven with certain recognized principles of international criminal law, which encourage states to refrain from conduct or decisions that violate the principles of peace, justice, equality, and proportionality.

Kantian philosophy is a philosophy that has had a profound impact on almost all sciences of law. Yet, it is an unfortunate fact that Kantian philosophy has not dealt with international criminal law to any degree up until today. One reason may be that the entire system of international criminal law has a double morality and is not as pure it seems to be.

The key phrases in the book are Kant's Metaphysics, international criminal law, radical evil, propensity to evil, Security Council resolutions, the principle of morality, means rea, supreme principles of morality and the concept of mirage.

Writing about the mirage of international criminal law has not been difficult. What has been the most complex part of this metaphysical study,

however, was convincing the world that most rules of law, most provisions of international human rights law, most assurances of the Charter of the United Nations, the most integral content of national legislations, and the overall majority of the provisions of the Statute of the International Criminal Court − including our own existence − are proof of strong mirages.

I am delighted to thank the Max Planck Institute for Foreign and International Criminal Law, Freiburg, Germany for permitting to carry out this research in the Institute's friendly working environment. It goes without saying that Professor Hans-Jörg Albrecht and Professor Ulrich Sieber have been a key impetus for my personal growth during the writing of this book. Professor Albin Eser was also exceedingly kind whenever I asked for his time to give legal advice. Dr. Knust Nandor from the International Criminal Law Section of the MPI was available at all times with his sincere personal encouragement and critical views from the outer reaches to the depths of the academic mind. Words are not enough to thank him for his time and valuable discussions. Some words of encouragement and the occasional laugh with Sandra Reiling, one of the librarians, have also been a great help in cooling down the churning of the author's brain. Thanks to every single person.

In analogy to *the Sound of Music*, the strong and ceaseless psychological support that I have received from my Romanian-born colleague Dr. *Johanna Rinceanu* could be called *the Sound of Academics* − from its lasting music to the present piece of metaphysical scholastic melody. This also includes her extensive intercultural and intellectual wisdom.

I also sincerely thank the publishing body (CSP) for all forms of friendly facilities under the process of publication of the book.

However, responsibility for the subject matter of this work is solely mine alone.

Written in the Sovereignty of the European Union;
With full love for my family unit
Max Planck Institute for Foreign and
International Criminal Law Freiburg, Germany***;***
and others, *Alvan12 September 2017*

Farhad Malekian
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International Criminal Law
Uppsala, Sweden

CHAPTER I

THE OPTICAL DELUSION IN INTERNATIONAL CRIMINAL LAW

1. The Mirage of the Rule of the Law

It is of no significance what rules are called, which authorities implement them, and how political or philosophical arguments are laid down, but instead how they treat and respect the integrity of our national, regional, and international personality together. Ultimately, they show us the real nature of categorical justice, which may be a mirage that can never be created.

Since this work will explore the system of international criminal law in conjunction with the Security Council in the United Nations Organisation, it may be a good idea to see what is meant by the key word in the title, namely the "mirage." The word mirage is derived from the Latin word *mirare.* The Oxford Dictionary of English defines a mirage as an optional illusion caused by atmospheric conditions, especially the appearance of a sheet of water in a desert or on a hot road, caused by the refraction of light from the heated air of the sky.

For our intents and purposes, the same dictionary gives a precise definition of mirage, which aptly describes the subject matter of this book. It says that a mirage is "an unrealistic hope or wish that cannot be achieved: *the hope of sanctuary initially proved in mirage*." Scientifically, the most superior mirage is called a *fata morgana*. This is a narrow band right above the horizon. *Fata morgana* mirages deform the object(s) onto which they are reflected. This causes the object to become completely impossible to recognize. This will also serve as a metaphor for the facts of this book. A *fata morgana* can be seen on the sea, land, desert, and the sky like a flying object. All these appearances are called mirages.

The *fata morgana* of international criminal law and justice is similar to a natural *fata morgana*, with the difference that one relies on a natural phenomenon and the other relies on the content of the Security Council resolutions. The content of the resolutions ultimately modifies the

substance of the object or objects and in this way creates such serious, large, and complicated conflicts that one can easily lose sight of the reason we are facing certain problems. A clear example from the last century and the new one is the situation of the populations of Iran, Iraq, Palestine, Syria, Vietnam, Libya, and Afghanistan. The resolutions of the Security Council created such serious and controversial problems in the world that the essence of the problem changed, and these civilisations have become the instrument of the entire mirage system.

2. Reaching the Definition of Mirage

The term "mirage" in international criminal law or in the system of international human rights law may be defined as a good promise which drives you towards it, but is, in reality, an illusion. Examples are the provisions of the Declaration of Human Rights and all other international conventions promising the rights of man and the rights of nations, when achieving them is practically only a beautiful picture and a big legal promise without real effect.

In 1950, Lauterpacht, in his 475-page book *International Law and Human Rights,* recognized this problem of the Declaration: that the Declaration has no legal force and is solely based on moral standards. According to him, even this moral authority of the Declaration is misleading in the final stage of application (419-423). Still, the problem remains that Lauterpacht does not see the basic problem of the Declaration and its content, which is that it is just a mirage, even almost seventy years after adoption by the General Assembly. The gap between reality and the words of the Declaration can even be seen in other international human rights instruments. If this gap did not exist, we would not have the ISIS problem as well as underground assistance to this criminal and terrorist group by the biggest and most powerful nations in Europe or the Middle East.

A similar conclusion can be drawn about the United Nations provisions concerning "equality between nations" that have a solely psychological, hortatory effect for human beings or the population of different nations and are practically only useful for the top nations or a certain few European nations and other nations in the world. The whole structure of the United Nations is a mirage of good provisions, or the existence of international democracy in human rights norms is exclusively a democratic illusion and non-existent. How can states pay out millions of dollars or Euros for the development of terrorism and at the same time claim they are preventing terrorists under the framework of international

criminal conventions and regional conventions in Europe, including human rights law?

Even in times of armed conflict, the notion of an international humanitarian law of armed conflict is solely an illusion, and this major illusion has been witnessed in all wars, particularly since the adoption of the 1949 and 1977 international conventions and protocols applicable to armed conflict. For example, one of the serious criticisms against Germany was its violations of the law of armed conflict adopted in the provisions of the Hague conventions in the twentieth century and in the rules of customary international criminal law. Since the establishment of the United Nations Organisation and the creation of the Security Council as a central body of the Charter of the United Nations, however, it has been proven beyond any reasonable doubt that the concept of international humanitarian law of armed conflict is a hypothetical notion and a distant mirage in the face of justice.

The system of international criminal law constitutes a body of law consisting of a large number of criminal provisions, whether substantive or procedural, aiming at the prevention of international crimes. This body of law also derives greatly from conventional and customary international human rights law. Conventional human rights law refers to the provisions of international conventions and customary international human rights law to the provisions, for example, of the Universal Declaration of Human Rights law that have become a part of customary law. This is because the Declaration was adopted as a resolution and not as an international convention. The reason for this was that the drafters of the declaration did not want to have conventional provisions.

A resolution meant nothing in reality, but was a document showing the tendency of the members of the United Nations. This meant that, in practice, the powerful nations were against the adoption of an international law-making treaty which would oblige their governments to obey certain definite provisions of international human rights. However, the Declaration today constitutes an integral part of the international law of *jus cogens*, customary international law, and general principles of law that are obligatory for all states of the world. The international conventions on international criminal law and international conventions, including resolutions on human rights law, establish nothing more than an illusion because of their instability for justice. They are also an illusion because they condemn the weak and indirectly support the strong, also because of the impunity of the permanent members and the non-applicability of the principle of proportionality.

This in turn means that there is a discrepancy between facts and actual practice. This is what I call, to use one of Kant's favourite expressions, departing from the categorical imperative, from pure rules of law, from justice, and creating injustice with the cloth of threadbare justice. Kant says act on that maxim by which you can at the same time will that it should be a universal law. It implies the far distance of a mirage. The distinction between true and illusion. In other words, with the big political powers creating illusions, we never apply true justice in the permanent International Criminal Court. The ICC turns out to have been a permanent member of this mirage in the context of international criminal justice as a whole.

It is therefore rightly asserted that the international criminal court

> cannot be effective if it is subservient to the vacillating interests of nation-states. Such subservience delimits the true and illusory adjudication powers of the court. …The lack of coercive power to bring an accused before the court emasculates the legal character of an international criminal body. Merely branding an individual as an "international fugitive" is adding little to the success of either Tribunal. As the current situation indicates, international criminal law cannot depend on the acquiescence of powerful nations. Otherwise, international tribunals return to the setting of "victors' justice," which begs the question whether international criminal law is capable of equitable distribution. *Without salient enforcement, international criminal law provides only the enticing mirage of justice.*[1]

It is useful to remember that "Rawls considers his theory to be Kantian yet believes that there is a disparity in strength between the demands of justice on the national versus international levels. As is well known, Kant's moral conception is summed up in his categorical imperative." Nonetheless, "the categorical imperative is given more than one formulation and two of them are quite distinct in content although Kant seems to believe that the three are equivalent. The greatest discrepancy comes between the 'universal law' and the 'end in itself' formulations, which are so distinct as to aspire substantially distinct conclusions."[2] The end in itself certainly does not mean the concept of selectivity, but rather a pool of justice, the principle of

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[1] Mary Margaret Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law *An Essay on the Nature and Immutability of Truth'*, 15 (2) *American University International Law Review* (1999), pp. 321-394, at 363-4. *Italics mine.*

[2] Steven Luper-Foy, 'Introduction: Global Distributive Justice' in Steven Luper-Foy (ed.), *Problems of International Justice* (London: Westview Press, 1988), pp.1-24, at10.

which is equality that has harmony. It follows that it has to be applied in accordance with the principles of equality. However, it is not.

The offenders of the rules of international criminal law in the Court are selective. This can be seen in the works of two British writers. One is Robert *Cryer* in his book *Prosecuting International Crimes:* Selectivity *and the International Criminal Law Regime*. The other is *Geoffrey Robertson* in his prominent book *Crimes Against Humanity: The Struggle For Global Justice,* which delivers the same message without seeing that it is the mirage of international criminal law. The sole problem with these two excellent books is that neither of them discovered the right image of international criminal law, although both unknowingly reflected the illusion or the mirage of international criminal law. This is the general problem of all such books. The reason is that they do not have the vision that the entire system of international criminal law is potentially an illusion and, in some cases, a superior mirage or *fata morgana*. As Cryer asserts, one of the reasons for this is that the enforcement of the system is selective. "The Critique enforcement relates at the more general level to arbitrariness, part of which is taking irrelevant criteria into account. This also includes discrimination, which is taking into account of irrelevant and illegitimate criteria." Cryer further describes, "This includes cases where a political body interferes with a duly authorised prosecutor applying standards applied to all other cases. The underlying value implicated is equality before the law and before courts and tribunals. This is a right accepted at the international level and is clearly an appropriate criterion against which to evaluate a criminal enforcement regime."193

Indeed, this is what Kant is against when he tries to prevent bad maxims, which applies even to the proceedings of international criminal courts. The reason is very simple: everyone should be treated as equal before the law, during implementation of the law, and after it.

3. Illusion of *Mens Rea* in Justice

It is a universally consolidated principle of criminal law that, under criminal provisions, the imputation of any harm to a person necessitates not only a basic logical connection between the conduct of the person and the incident, but also a mental connection between the person and the occurrence. This is also the focus of this book in connection with the metaphysics of Kant and in conjunction with the provisions of Chapter VII of the United Nations Charter. The intention is to grasp whether the permanent members of the Security Council have, in relation to the circumstances of certain resolutions of the Council, committed or commit

serious international crimes against international criminal justice knowingly or with knowledge.

I am not going to write here about Roman law or Canon Law as laid down by papal pronouncements unless it is necessary. I am also not going to deal here with the philosophy of Islamic law as created and presented by the holy Mohammed.[3] And neither will I discuss the theory of Marxism, one of the most powerful theories in the world of justice. Although coherence, rationality, and unity should be the sole message of most legal disciplines and theories, the reality is different, particularly when we analyse the legal validity of the body of international criminal law and the virtue of its mirage norms.

International Criminal Law is a law that exists and does not exist, depending on the strength of political wrestling campaigns, which is sometimes the most brutal form of legal conflict. This is what I will juxtapose with the philosophy of Kant or the propensity to evil in human nature within the virtues of international criminal law, in the rosiness of human rights law, and in the nature of impunity of the Permanent International Criminal Court.

The term 'propensity to evil in human nature' also implies the existence of the notion of *mens rea* or the residing mental element in the philosophy of Kant. This is because the basic element of *mens rea* is the concept of intention to commit criminal behaviour. In other words, *the actor may not be culpable unless the mind is guilty*. This is known in Latin as *se actus reus non facit reum nisi mens sit rea*. It is rightly asserted that:

> A great strength in Kant's theory being based on a priori reason is that it highlights the importance of intention, something which can be overlooked in theories based upon sentiments. Although tests on Actus Rea (such as those based on the outcome of visible moral actions) may be useful to legislators, judges and those involved in upholding societal laws, these do not challenge the heart of issues. Whilst tests on outside actions may elicit or prevent agents from performing certain actions, it is highly unlikely, if not impossible, for such regulations and legislations to change the Mens Rea, or inner intentions of an agent.[4]

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[3] Farhad Malekian, *Corpus Juris of Islamic International Criminal Justice* (Newcastle: Cambridge Scholars Publishing, 2017).

[4] Reason vs Sentiment as a Basis for Morality: 'Does Kant prove that reason rather than sentiment provides us with the basis for morality? Should we prefer Kant's view of morality to Hume's view?' Available at https://beatsviews.wordpress.com/2013/06/27/reason-vs-sentiment-as-a-basis-for-morality/ (Visited on 27 August 2017).

Throughout our examination, we will address the fact that the concept of *mens rea* concerning the big political parties is an illusion in international criminal justice, and claims of *mens rea* in connection with formulations of the Security Council resolutions are actually a taboo. Kant obviously did not mean propensity to evil in the nature of some men and non-existence of the inclination to evil in the nature of other men. He elaborated his thoughts throughout his works and concluded that a propensity to evil, an evil mentality, an evil decision, or a one-eyed-decision over the wealth of other nations is of a criminal nature and constitutes the attempt to commit core international crimes. The notion of *mens rea* clearly applies to several elements.

In the case of international criminal law, we have exceptionally original and advanced international conventions without any particular power of legal enforceability. Here, a considerable number of international criminal conventions may be mentioned, drawing on the list of core international crimes, their identification, methods of proceedings, and implementation of punishment. Some clear examples are the 1948 Convention on the Prevention and Punishment of Genocide, the 1971 Convention on Prohibition of Apartheid, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1998 Statute of the International Criminal Court constituting the main international convention ratified in the system of international criminal law.

All the above conventions represent the most significant and realistic principles of international criminal law concerning their identification and prosecution in an international criminal court, including *ad hoc* tribunals. The subject matter of all these conventions is also, in one way or another, interwoven with the element of *mens rea*. For instance, genocide as an international crime coincides with two separate mental elements. One is the element of 'general intent' known as *dolus*. The other is the element of 'intent to destroy.' The entire philosophy of Kant concerning the existence of evil in the nature of man also aims to reduce the gravity of *mens rea*. He aims to make us aware of the fact that, if this *mens rea* grows, it develops into a bad maxim and ultimately increases the volume of the commission of crimes such as genocide, crimes against humanity, war crimes, or aggression.

These issues deriving from Kant's points of view are not, unfortunately, discussed by Professor Michael Reisman in his distinguished article dealing with *Legal Responses to Genocide and Other Massive Violations of Human Rights*. The question is particularly crucial when considering that his article appears in a journal dealing with contemporary problems. In any

event, Reisman lays the concept of responsibility for all these difficult questions on individuals. His analysis is therefore very useful in his excellent book entitled *The Quest for World Order and Human Dignity in the Twenty-first Century: Constitutive Process and Individual Commitment*. In several sections of the book dealing with the concept of the use and abuse of force, *jus in bello*, Reisman examines the questions of aggression, but still does not directly consider, e.g., the ethical argumentation surrounding the supreme principle of morality within the body of law or the distinguishing lack of recognition of *mens rea* in the Security Council.

Even the entire theory of aggression and its lack of definition because of military and political battles has been based on the element of *mens rea*. This is also obvious in Chapter VII of the Charter of the United Nations and its provisions. In fact, Chapter VII shows its crippled function as to the concept of *mens rea*, the existence of *mens rea* in the provisions of Chapter VII, and also practical implementation of the definition of the elements of *mens rea*.

This chapter is restricted to the metaphysics of international criminal law. With this, we mean what is laid down as its basis and which philosophy is in its nature. As to the question of philosophy, I do not necessarily mean the prevention of crimes and the prosecution of international criminals in an international criminal court. I do, however, mean the way in which we can understand its substance, intentions, aims, and modalities within the framework of a theoretical approach to justice, whether or not this legal body of law exists and, if it does, in that case, to what level and degree. This is what I will put on the scales of the mirage of justice and, in certain highly serious cases of genocide such as in Rwanda, Sierra Leone, and Srebrenica, on the scales of *fata morgana*. For instance, concerning the International Criminal Tribunal for the former Yugoslavia the

> gesture was to promise an international tribunal to prosecute the guilty. The *mirage* that some hoped to create is that even if not acting then to confront the killers and violators of international humanitarian law, nonetheless such would ultimately have to face justice. This promise of justice in the future to excuse no action then though was perhaps also lacking sincerity/commitment; however, then who would really care once the conflict ended and in particular if BiH disappeared?[5]

[5] Muhamed Sacirbey, 'International Criminal Tribunal Born as Bastard?' The World Post, https://www.huffingtonpost.com/ambassador-muhamed-sacirbey/international-criminal-tribunals_b_3344169.html (visited on 4 November, 2017).

The significant fact is that *mens rea* exists behind all these theories, which literally means knowing the full intention of the inclination to commit evil conduct or serious international crimes. For instance, "the knowledge-based standard of genocidal intent is established when the perpetrator's knowledge of the consequences of the overall conduct reaches the level of practical certainty."[6]

I will focus here on the reality of the system of international criminal law and the mirage that mars its real discipline. With the term "mirage of international criminal law," I will prove that the forum of international criminal law does not exist in reality and that it is an illusion between reality and what we call conventional international criminal law. All these aspects are discussed in conjunction with the Kantian philosophy of the propensity to evil in human nature or as regards good interpretation of the law or bad deduction from a legal discipline.[7] We will face the contradictions between the means, practice, and the end.

4. Knowing Iniquity on Kant's *Mens Rea*

Mens rea means what an accused was feeling before the actual commission of the crime and what the accused intended when the criminal act was committed. *Mens rea* guides the system of criminal justice to distinguish between a person who did not mean to commit a crime and a person who deliberately decided to commit a crime. Whilst *mens rea* refers to a guilty mind, criminal justice is a process of differentiating between intentional and unintentional purpose.

In other words, *mens rea* is the criminal identification of controllable and uncontrollable conduct. There are different degrees of punishment for both concepts. Still, the definition of *mens rea* varies, depending upon the gravity of negligence. Therefore, if negligence is not serious, it may not fall under the concept of *mens rea*, but if it has seriously harmed the victim, the concept of *mens rea* may be raised in the context of criminal liability.

Obviously, a criminal decision, criminal behaviour, criminal conduct, or a hidden criminal attack carried out in self-defence comes within the

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[6] Hans Vest, 'A Structure-Based Concept of Genocidal Intent', *Journal of International Criminal Justice* (2007), pp.781-797, at 793.

[7] See *also* Felix Grayeff, *Kant's Theoretical Philosophy* (Barnes & Noble, 1970); Moltke S. Gram (ed), *Kant: Disputed Questions* (Quadrangle, 1967); Alic Halford Smith, *Kantian Studies* (Greenwood Press, 1974); Otfried Hoffe, *Immanuel Kant* (State University of New York Press, 1994); C. W., Hendeled (ed.), *The Philosophy of Kant and Our Modern World* (Liberal Arts, 1957).

ambit of criminal law or international criminal law. Yet, unintentional criminal conduct or behaviour may be treated under the concept of *mistake of fact* or *mistake of law*.

The concept of a mistake of fact refers to a situation when we are engaged in a lawful conduct, the object of which is actually unlawful such as selling boxes of food that contain drugs. The possibility of *mens rea* will not be obvious. The reason is for this is that we simply did not have the intent to commit a criminal act because the payments were very low and for the value of food.

Concerning the mistake of law, however, the accused cannot go free and assert that he knew he was selling drugs, but thought that selling drugs was not prohibited. Nevertheless, it is a recognised principle that *ignorance of the law is no excuse*. The extrapolation is that any statement by the permanent members of the Security Council claiming that they did not know, that they were not informed, or that they were cheated by another state or by one of the other permanent members certainly cannot be considered an excuse for escaping criminal liability.

A clear example of this is found in the statements of former British Prime Minister Tony Blair regarding questions of serious criminal acts committed in Iraq. Here, according to Kantian philosophy, Blair is subject to strict liability, since he should have known about the criminal intentions of relevant resolutions of the Council, due to his political position and the position of the United Kingdom as a permanent member of the Security Council.

In our systems of criminal justice and proceedings, knowingly means to be aware of what we are doing. It is the opposite of unknowingly, unintentionally, undeliberately, unconsciously, unwillingly, and mistakenly. This is what Kant's metaphysics teaches us concerning the existence of certain facts within our intentions, in our personalities; in other words, the propensity to evil in human nature has to be controlled in order to create a good maxim.[8] Rosen correctly presumes that:

> These readings of Kant are close enough to the truth to be initially plausible, yet far enough off the mark to be seriously misleading. In one sense it is perfectly correct to hold that Kant believes justice or law should be indifferent to inner states; but in another sense nothing could be farther

[8] Consult also Martin Gottfried, *Kant's Metaphysics and Theory of Science* (Manchester University Press, 1974); Herbert James Paton, *Kant's Metaphysic of Experience* (Humanities Press, 1961); Martin Heidegger, *Kant and the Problem of Metaphysics* (Indiana University Press, 1962); Douglas P. Dryer, *Kant's Solution for Verification in Metaphysics* (Allen and Unwin, 1966).

> from the truth. Kant regards justice as purely external in the limited sense that the sole purpose of judicial laws is to regulate external conduct. However, this does not mean that justice has no interest in inner states. As is evident from the long history of the legal concept of *mens rea* [a guilty mind], as well as from recurring debates in the legal community about the role of intentions and motives in the criminal law, jurists have traditionally supposed that mental states are of concern to the law. Kant shares this assumption and in at least three respects regards inner states as vital to justice and jurisprudence.[9]

The intention of Kant is to prevent the commission of wrongs, immoralities, iniquities, and crimes. However, he insists that we should commit to good action with good thought − not for the purpose of good itself, but for the purpose of good reason. This is the only appropriate way to mitigate the various concepts of *mens rea* in the nature of man. He means categorical evil inclinations must submit themselves to the supreme principle of morality. This is in order to create good universal law and promote the supreme principle of morality with good maxims against bad maxims.

One should take into consideration that the concept of *mens rea* arises whenever there is an intention to commit a crime, a bad action, unlawful conduct, or immoral behaviour according to the law. It therefore refers to the knowledge that its implementation or omission causes a crime to be committed. Ultimately, *mens rea* is often a necessary corollary element for the recognition of crimes. According to the *Kayishema* case in the International Criminal Tribunal for Rwanda, *mens rea* means knowingly.

This is what Kant also writes about – to knowingly borrow money from our neighbour with the promise that we are going to pay tomorrow; when the storekeeper knowingly cheats his customers and pays less change, while we are completely aware of the fact that we are not going to pay; knowingly formulating provisions in the Security Council resolutions that are going to be used for criminal purposes, for the destruction of countries, for the killing of children, men, and women; knowingly shedding blood for economic income; and knowingly creating the Abu Ghraib prison to horrify all inhabitants of the world in order to demonstrate that the policy of the Security Council is correct, thus confusing them with different matters in order to mislead the facts.

This is what Shadi Mokhtari intensively probes in the book *After Abu Ghraib*, which is explained in the subtitle *Exploring Human Rights in America and the Middle East*. She correctly asserts that "Abu Ghraib temporarily froze the mounting prescriptions for torture as 'necessary evil'

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9 Allen D. Rosen., *Kant's Theory of Justice* (Ithaca, London: Cornel University Press, 1996), p.85.

by pushing the issue out of the realm of the abstract, theoretical, and hypothetical into the realm of the stark, explicit, and real." There were at least 1800 images depicting Abu Ghraib torture. Although the international public has not seen all these hidden and evil *mens rea* offences, the pictures were so immoral that one could not look at them and well assert that those who were tortured had an evil mentality. Shadi's analysis should further on continue with Tassing description of torture in the context of colonial slavery in Congo and Peru:

> The system of torture they (the colonisers) devised … mirrored the horror of the savagery they so feared, condemned – and fictionalised … The mimesis between the savagery attributed to the Indians by the colonists and the savagery perpetuated by the colonists in the name of … civilisation. This reciprocating yet distorted mimesis has been … the colonial mirror that reflects back onto the colonists the barbarity of their own social relations, but as imputed to the savage … And what is put into discourse through the artful story telling … is the same as what they practiced on the bodies of Indians.[10]

What is, really, the definition of *mens rea* in international criminal law? The definition implies the intent of a criminal act. In other words, when Kant says the propensity to evil is in the nature of man, he legally means *mens rea* in the stage of the mind and not at the level of action. For example, the relevant resolutions of the Security Council after 11 September 2001 all have a high level of inclination towards the *mens rea* concept: bearing the mental element, committing unlawful actions for personal or entities' advantages, exhibiting self-love, displaying self-interest, and having full evil intentions. Are these not crimes? Is this not *mens rea*? Is this not aiding, abetting, supporting, assisting, and serving criminal intent? It is indeed rightly stated that "if one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor. To hold otherwise would to negative the rule that *mens rea* is a matter of intent only and does depend on desire or motive."[11]

The International Criminal Tribunal for Rwanda, in the *Kayishema* case correctly asserts that:

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[10] Michael Taussing, 'Culture of Terror –Space of Death: Roger Casement's Putumayo Report and Explanation of Torutre', in *Interpretive Social Science: A Second Look*, Paul Rabinow & William Sullivan, eds. PP. 241, 276-278, 245, 262 (1987). Quoted in Mark Osiel, The end of Reciprocity (2009), p.255.

[11] National Coal Board v Gamble (1959), 1 QB 11. Cited in Barad, 75.

> The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused. This requirement further complements the exclusion from crimes against humanity of isolated acts carried out for purely personal reasons.[12]

5. Publicists Missing Kant's Theory of *Mens Rea*

It is indeed one of the despondent facts that Badar, a good scholar of international criminal justice, like many other writers on criminal law and international criminal law failed to spot the theory of Kant in his book published by Hurt on *The Concept of Mens Rea in International Criminal Law*. He neglected the metaphysics of the supreme principle of morality and the propensity to good and evil in human nature. In such an accomplished, heavy volume, including an investigation of the legal systems of a considerable number of countries, he should have addressed the fact that the whole theory of *mens rea* or 'intention,' '*culpa*,' or '*dolus*' overlaps with the concept of Immanuel Kant's philosophy. Even the blind peer reviews of the publisher Hurt did not identify this significant fact as missing.

Therefore, the question then arises as to who is going to convey Kant's message? Who will understand that Kantian philosophy refers to hidden *mens rea* in the nature of man to a great degree? The same implicit approach to Kant's approval of *mens rea* is revealed in the eager insistence that:

> For Kant, it is evident that intention is important as his theory is deontological; he believes one ought to do good because doing so is the morally correct way to act. Some may raise the objection that maxims are not always observable or reliably inferable and therefore the outcomes of universality tests to onlookers may be incorrect. An example of this could be that a would-be-murderer could intend to shoot an innocent child, which would be a guilty act (or '*Actus Rea'*), but misfires and kills the vicious dog which was about to attack the child. The outcome of the action of the

[12] *Kayishema* (*ICTR-95-1-T*), *Judgement*, 21 May 1999, paras. 155-154.

> would-be-murderer is a positive one, and it could appear to be a morally good action, however the would-be-murderers intention (or '*Mens Rea*') would be a morally repulsive one. Such issues however do not raise problems for Kant; *in the application of his universality test, the importance lies in the agents underlying principles or 'intentions'*. [13]

Even Cherif Bassiouni, the well-known international criminal lawyer, with his wealth of books and articles has not interpreted this valuable philosophy of Kant as governing the notion of *mens rea*, knowingly or intention in the nature of man. Similar shortcomings can be found in the works of William Schabas, who is also well established in the system of international criminal law theory with his accumulated works concerning the abolition of capital punishment and international criminal courts.

The works of Mark Osiel have also encountered similar problems in not tackling the philosophy of Immanuel Kant regarding the propensity to evil in human nature and within the provisions of the Security Council. Osiel, with his potentially valuable books on torture and atrocities, should have realised that the German philosopher Immanuel Kant was referring to the prevention of atrocities in international criminal law several hundred years before him. Definitely, atrocities indicate the highest stage of *mens rea* in the nature of man or the uppermost level of immorality in the action and propagation of supreme bad maxims. Let us call it international *actus reus*.

Even Michael Scharf, professor of international criminal law in the USA with a prolonged cooperation with the CIA, such as the establishment of the show tribunal for Saddam Hussein, did not acknowledge this fact in his serious commitment to international criminal law and justice. Many comparative criminal lawyers from Germany have also unfortunately failed to understand the concept of *mens rea* in the theory of Kant.

Kant did not refer to genocide and, beyond that, he also did not refer to crimes against humanity. Above and beyond such atrocities, he also did not specify the core crimes in international criminal law, but formulated them with a clear philosophy of metaphysics of ethics that a bad maxim creates a bad maxim and ultimately generates extreme immorality and large-scale criminality such as genocide.

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[13] Reason *vs* Sentiment as a Basis for Morality: 'Does Kant prove that reason rather than sentiment provides us with the basis for morality? Should we prefer Kant's view of morality to Hume's view?' Available at https://beatsviews.wordpress.com/2013/06/27/reason-vs-sentiment-as-a-basis-for-morality/ (Visited on 27 August 2017). *Italic* added.

Kant has raised and addressed many questions for the international lawyers of contemporary time. He simply says that the propensity to evil in human nature, the propensity to gain money from the miserable situations of victims, and the propensity to occupy high international positions for having the highest international seat create a bad maxim and, in the end, the aim of justice is lost. Even if the idea is good, it has still not been done for the reason of good, but for the reason of personal advantage. That is why, in its practical aspects, the system of international criminal law is indeed suffering from many problems of proper implementation and justice. It is also why the entire permanent International Criminal Court is occupied by those who do not even have the primary necessary understanding or knowledge of the principles of the German philosopher. They are working for criminal justice, not in the pursuit of justice, but because of their duties. This is why Kant criticises and prohibits the performance of duty for the sake of duty being recognised as a good maxim. He says we do not even have a contractual duty in this regard; we should carry out such good actions with good reason.[14] He says:

> One oughtn't to venture anything that risks being wrong — that is a moral principle that needs no proof. Hence, the consciousness that an action that I intend to perform is right is an unconditional duty. Whether an action is over-all right or wrong is judged by the understanding, not by conscience. And it's not absolutely necessary to know, concerning all possible actions, whether they are right or wrong. But concerning the action that I am planning to perform I must not only judge and form an opinion that it is not wrong but be certain of this; and this requirement is a postulate of conscience, to which is opposed probabilism, i.e. the principle that the mere opinion that an action may well be right is a good enough reason for performing it. So conscience could also be defined as follows: *Conscience is the moral faculty of judgment.*[15]

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[14] Consult *also* Francis, X. J. Coleman, *The Harmony of Reason: A Study in Kant's Aesthetics*. (University of Pittsburgh Press, 1974); Norman Kemp Smith, *Commentary to Kant's 'Critique of Pure Reason"* (Humanities Press, 1962); A. C. Ewing, *A Short Commentary on Kant's "Critique of Pure Reason"* (Methuen, 1978); N. A. *Sense,* Nikam, *Understanding and Reason* (Asia Publishing House, 1966); Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge University Press, 1989); P. F. Strawson, *The Bounds of Sense: An Essay on Kant's " Critique of Pure Reason"* (Methuen, 1966).

[15] Immanuel Kant, *Religion within the Limits of Bare Reason* (1793). Launched by Jonathan Bennett, available at http://www.earlymoderntexts.com/pdfs/kant1793 part4.pdf (Accessed 25 August 2017).

6. Moral Faculty of Judgment

An unknown, but good American legal philosopher correctly writes that "there can be no crime large or small, without an evil mind. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist."[16]

Kant shares the opinion of Hart as regards the position of motives and intentions in criminal law. Consequently, he expresses that the mental or inner states of man are a concern of criminal law from three perspectives. The philosophy of Kant concerning *mens rea* can also apply to the inner states of the permanent members of the Security Council, e.g., how they think and act, how they interpret the law, how they use their position, and how they obliterate a nation. First, he explains that,

> even though judicial laws do not *require* any special motives, they nonetheless provide a motive for compliance; fear of coercion or punishment. All that is strictly necessary for the performance of a juridical duty is the external action itself, but in order to ensure external compliance the law supplies an 'incentive or motive to include compliance by threatening to punish compliance. Kant's view is therefore like T.H. Green's belief that while 'in enforcing its commands by threats, the law is presenting a motive, and thus … affecting action on its inner side, it does this solely for the sake of the external act.'[17]

Kant's second assumption of mental states in criminal law concerns the end of an action. He means an end is merely a state of affairs that an agent intends to bring about through its conduct. This can be a single individual act, joint conduct of a group of individuals, or the decisive behaviour of such a legal body as the Security Council of the United Nations. Rosen interprets Kant's metaphysics in the following terms:

> Judicial laws are concerned with inner states insofar as some such states, notably intentions, are constitutive of human actions. Kant recognizes as much when he asserts that every action contain an 'end', for an end is simply a state of affairs an agent intends to bring about through his actions. Because intentions are part of the fabric of human action, they must be taken into consideration by jurisprudence. For criminal law, especially, they are of great interest. Very often for instance in cases of murder,

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[16] *Joel Prentiss Bishop Criminal Law* (9th ed. 1930), p.287.

[17] Allen D. Rosen., Kant's *Theory of Justice* (Ithaca, London: Cornel University Press, 1996), pp.85-6.

> burglary, robbery, fraud, larceny, and criminal conspiracy, intentions figure conspicuously in the definitions of criminal offenses. Kant is aware of this. In the *Rechtslehre*, he characterizes a crime as an 'international transgression of the law. Committing a murder, Kant insists, involves more than killing a human being, it requires in addition the intention to do so under particular circumstances.[18]

Kant derives his opinion concerning *mens rea* from law and ethics. Both intend to prevent individuals from harbouring bad motives and to guide them to moral faculty of judgment, which means the mental faculty of cognition by reference to reasoning or intuition as to whether an act is right or wrong, whether an act is good or bad, or whether a decision in the Security Council is just or unjust.[19] Kant believes that a judgment is a particular type of cognition, which constitutes the mental representation of a decision or an object. The law and ethics also aim to prevent the permanent members of the Security Council from bad motives, too. In fact, the law and ethics are complements of one another. Therefore, Kant shares Hart's opinion concerning the role of motives and intentions as proof of guilt. The third mental state or inner state in Kant's philosophy of *mens rea* is explained in the following way:

> inner states are relevant to jurisprudence because they affect ascriptions of legal responsibility. Kant argues that imputations of responsibility must take into consideration 'the state of mind of the subject, namely, whether he committed the deed with emotion or in cool deliberation.' Nor formula is provided by Kant for determining how to factor different kinds of mental states into assessments of legal responsibility, but the direction of his thinking is clear from his examples. In the case of a starving man who seals food to survive, Kant holds that the 'degree of his responsibility is diminished by the fact that it would have required a great deal of self-restraint for him not to do it."[20]

In other words, Kant stipulates that "punishments and legal responsibility should be pointed out with due attention to motives, intentions, and other mental states. We should therefore not accept the suggestion that Kant regards justice and law as purely external in the sense that intentions,

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[18] Allen D. Rosen., Kant's *Theory of Justice* (Ithaca, London: Cornel University Press, 1996), pp.85-6.

[19] Consult also Johan Zammito, *The Genesis of Kant's Critique of Judgment* (University of Chicago Press, 1992); John Watson, *The Philosophy of Kant Explained* (Garland, 1976); R. P. Wolf (ed.), *Kant* (Doubleday, 1967); Bella K. Milmed, *Kant and Current Philosophical Issues* (New York University Press, 1961).

[20] Rosen *note* 18, p.86.

motives, and other inner states are of no consequence for jurisprudence, such as view is far from Kant's."[21]

Let me sum up the matter of the '*moral faculty of judgment*' in this way: we or over the majority of states cannot be cognisant of the permanent members' hidden purposes in respect of any provision of certain resolutions of the Security Council.[22] As a result, we may not interfere with that purpose by limiting the authority of the Council concerning the determination of the existence of any threat to the peace, breach of the peace, or act of aggression. However, without knowing the fact that the whole theories of certain provisions of the Security Council are solely a mirage, this mirage creates a bad illusion. Edgar Allan Poe correctly puts forth, "those who dream by day are cognizant of many things which escape those who dream only by night."

7. Divorcing from Criminal Justice

The system of international criminal law, the system of international criminal justice, and the system of international human rights law in the world and their relevant courts are suffering from the impunity of big criminals, or the Godfathers.[23] What Kant did was simply to prevent a bad maxim. What term is more reasonable than 'moral faculty of judgment?'[24] This also means 'passing judgment in the legal sense' on oneself. For instance, when the system of the ICC was established, it became the biggest competition between various individuals in the world to put their feet and, if necessary, their knees into the Court. This was not in pursuit of justice, but to secure a place in the festive boat of justice, regardless of the fact that sailing the boat of justice cannot function properly in the right sea if there is a lack of the categorical imperative and if it is steered with the propensity to self-interest, self-position, and ultimately self-love from the beginning. Do we really respect these ethical principles and standards? Kant explains this in connection with spiritual understanding. He says that:

> We have seen that it is a uniquely special duty to unite oneself with an ethical commonwealth; that if everyone performed his own private duty,

[21] *Id*., p.87.
[22] Consult also note 19, Watson, *The Philosophy of Kant Explained*; Zammito, *The Genesis of Kant's Critique of Judgment.*
[23] Matthew Parish, **'**International criminal law – justice or mirage?' (2013), http://www.transconflict.com/2013/05/international-criminal-law-justice-or-mirage-025/ (visited on 2 November 2017).
[24] *Id*.