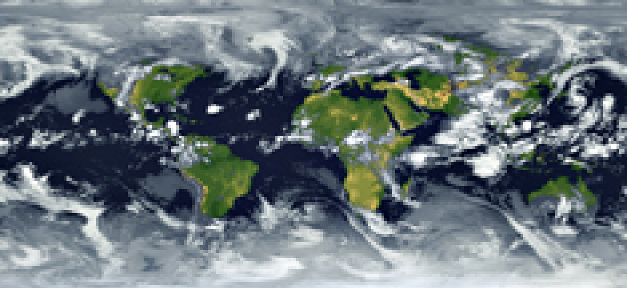

ASIL STUDIES IN INTERNATIONAL LEGAL THEORY

International Criminal Law and Philosophy

Edited by
Larry May & Zachary Hoskins

CAMBRIDGE

CAMBRIDGE www.cambridge.org/9780521191517

This page intentionally left blank

INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY

International Criminal Law and Philosophy is the first anthology to bring together legal and philosophical theorists to examine the normative and conceptual foundations of international criminal law. In particular, through these essays, the international group of authors addresses questions of state sovereignty; of groups, rather than individuals, as perpetrators and victims of international crimes; of international criminal law and the promotion of human rights and social justice; and of what comes after international criminal prosecutions, namely, punishment and reconciliation. International criminal law is still an emerging field and, as it continues to develop, the elucidation of clear, consistent theoretical groundings for its practices will be crucial. The questions raised and issues addressed by the essays in this volume will contribute to this important endeavor.

Larry May is W. Alton Jones Professor of Philosophy and Professor of Law at Vanderbilt University and Professorial Fellow at the Centre for Applied Philosophy and Public Ethics at Charles Sturt University in Canberra. He is the author or editor of more than 70 articles and more than 20 books, including *The Morality of War*; *Crimes Against Humanity: A Normative Account*, which won a best book prize from the North American Society for Social Philosophy and an honorable mention from the American Society of International Law; *War Crimes and Just War*, which won the Frank Chapman Sharp Prize for best book on the philosophy of war and peace from the American Philosophical Association; *Aggression and Crimes Against Peace*, which won a best book prize from the International Association of Penal Law; and *Genocide: A Normative Account*.

Zachary Hoskins is a doctoral candidate at Washington University in St. Louis. He is the author of "On Highest Authority: Do Religious Reasons Have a Place in Public Policy Debates?" published in *Social Theory and Practice* (July 2009).

ASIL Studies in International Legal Theory

General Editors:

Mortimer N. S. Sellers, *University of Maryland*
Elizabeth Andersen, *American Society of International Law*

The purpose of the *ASIL Studies in International Legal Theory series* is to clarify and improve the theoretical foundations of international law. Too often the progressive development and implementation of international law have foundered on confusion about first principles. This series will raise the level of public and scholarly discussion about the structure and purposes of the world legal order and how best to achieve global justice through law.

The idea for this series grows out of the International Legal Theory project of the American Society of International Law. The book series *ASIL Studies in International Legal Theory* will deepen this exchange by publishing scholarly monographs and edited volumes of essays considering subjects in international legal theory.

International Criminal Law and Philosophy

Edited by

LARRY MAY
Vanderbilt University
and
Centre for Applied Philosophy and Public Ethics

ZACHARY HOSKINS
Washington University in St. Louis

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521191517

© Cambridge University Press 2010

This publication is in copyright. Subject to statutory exception and to the provision of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published in print format 2009

ISBN-13 978-0-511-64171-8 eBook (NetLibrary)

ISBN-13 978-0-521-19151-7 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of urls for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

List of Contributors *page* ix

Introduction 1
Larry May and Zachary Hoskins

PART ONE. SOVEREIGNTY AND UNIVERSAL JURISDICTION

1. International Crimes and Universal Jurisdiction 15
   Win-chiat Lee
2. State Sovereignty as an Obstacle to International Criminal Law 39
   Kristen Hessler
3. International Criminal Courts, the Rule of Law, and the Prevention of Harm: Building Justice in Times of Injustice 58
   Leslie P. Francis and John G. Francis

PART TWO. CULTURE, GROUPS, AND CORPORATIONS

4. Criminalizing Culture 75
   Helen Stacy
5. Identifying Groups in Genocide Cases 91
   Larry May
6. Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law 108
   Joanna Kyriakakis

PART THREE. JUSTICE AND INTERNATIONAL CRIMINAL PROSECUTIONS

7. Postwar Environmental Damage: A Study in *Jus Post Bellum* 141
   Douglas Lackey

8. On State Self-Defense and Guantánamo Bay 153
Steve Viner

9. Politicizing Human Rights (Using International Law) 180
Anat Biletzki

PART FOUR. PUNISHMENT AND RECONCILIATION

10. The Justification of Punishment in the International Context 201
Deirdre Golash

11. Political Reconciliation and International Criminal Trials 224
Colleen Murphy

Index 245

Contributors

Anat Biletzki, Philosophy, Tel Aviv University

John G. Francis, Political Science, University of Utah

Leslie P. Francis, Law/Philosophy, University of Utah

Deirdre Golash, Criminal Justice, American University

Kristen Hessler, Philosophy, University at Albany, SUNY

Zachary Hoskins, Philosophy, Washington University in St. Louis

Joanna Kyriakakis, Law, Monash University

Douglas Lackey, Philosophy, Baruch College, and the Graduate Center, CUNY

Win-chiat Lee, Philosophy, Wake Forest University

Larry May, Philosophy, Vanderbilt University, and Centre for Applied Philosophy and Public Ethics

Colleen Murphy, Philosophy, Texas A&M University

Helen Stacy, Law, Stanford University

Steve Viner, Philosophy, Middlebury College

Introduction

Larry May and Zachary Hoskins

This volume brings together some of the best recent work by philosophers and legal theorists on the conceptual and normative grounding of international criminal law. Philosophers and other theorists are only just beginning to write about the emerging field of international criminal law. International law has taken a significant turn in recent years. Rather than being primarily concerned with the relations of states, one significant branch of international law – namely, international criminal law – now concerns the relations of individuals, specifically, the responsibility of individuals for mass atrocities. As with any such change, there are many questions and problems that arise. In our book, we begin with considerations of the conflict between state sovereignty and universal jurisdiction; examine thorny issues raised when the victims or the perpetrators of international crimes are groups or corporations; proceed through various specific questions related to justice and human rights; and conclude with chapters on how international criminal trials should be seen in terms of theories of punishment and reconciliation. Throughout, these chapters relate thinking in political philosophy, ethics, and jurisprudence to cases and issues in the practice of international criminal law.

The collection of authors and chapters is somewhat distinctive. More than half of the authors have law degrees and all of them have, or soon will receive, doctorates, mostly in philosophy. The authors are primarily from North America, although the collection also includes scholars from Australia and Israel; all of the authors have previously published in the fields of jurisprudence and political philosophy. The chapters were all initially written for various workshops sponsored by the Internationale Vereinigung für Rechts- und Sozialphilosophie (IVR) and reflect the broadly interdisciplinary nature of those conferences. The authors have had occasion to interact with each other, making the volume somewhat of a dialogue about these important issues. Most significantly, this is the first anthology of works by philosophers and legal

scholars on the normative and conceptual grounds of international criminal law.

The chapters here are organized into four broad themes. First, sovereignty has been a subject of political philosophy since at least the writings of Thomas Hobbes. Hobbes actually did consider some international issues, although not in the detail that his contemporary Hugo Grotius did. Both philosophers recognized that the idea of state sovereignty is in conflict with the idea that all people in the world have rights. The problem is that to protect rights it sometimes is necessary to confront what sovereigns do to people in neighboring states, or even what states do to their own people. To confront such abuse of rights, seemingly, sovereignty will have to be abrogated. If rights protection requires universal jurisdiction, then such an idea will be in direct conflict with the powerful idea of state sovereignty. At least in part, this is because international justice issues are played out in the sphere of imperfect justice. International criminal courts and tribunals have recognized this fact but have not explored the ensuing conflicts in the conceptual and normative terms offered in the chapters in our first section.

Second, there are quite controversial questions of who should be the subject of international criminal law. This field is set up to deal with individual human persons, as is true of all subfields of criminal law, but there are interesting theoretical questions about whether corporations – that is, individual nonhuman persons – should be subject to international criminal law as well. Much of this field is focused on mass atrocity cases, calling into question whether it is groups more than individuals, both as victims and as perpetrators, that should be the subject of international criminal law. Also, when we come to think of the context of such international crimes, how much should variations in culture matter, and should cultures play as prominent a role as groups and corporations?

Third, considerations of social justice also are significant in international criminal law, just as they are in other fields of law. These conflicts are perhaps nowhere clearer than in the case of Guantánamo Bay. Here, considerations of justice supposedly come up against considerations of security. In addition, there are conflicts about protecting the environment and economic prosperity. Both of these topics are addressed in the chapters in the second section. In addition, there are concerns that the very rhetoric of rights and justice might conflict with the possibility of the betterment of people's lives, calling into question the very importance of manifestos and discussion of rights.

Fourth, our authors also consider complex normative questions about how to think of punishment and reconciliation in international criminal law. Deterrence in the international arena has been notoriously difficult, but is this primarily because of conceptual or practical considerations? Given that state

leaders are the most likely to end up in the international dock, are they as prone to deterrence, or as deserving of retributive blame, as normal criminals? Also, does the holding of international trials make the prospects for reconciliation better or worse? Finally, what does reflection on such criminal trials and their rationale tell us about the nature of reconciliation or the justification of punishment? Our authors make progress on these tough questions in the final section of the book.

A. SOVEREIGNTY AND UNIVERSAL JURISDICTION

The first section addresses fundamental issues regarding state sovereignty, namely, when and to what degree (if at all) it can be overridden by international legal institutions. In the opening chapter, Win-chiat Lee takes up the conceptual question of what constitutes an international crime, as distinguished from a municipal crime. Lee contends that many crimes currently recognized as international crimes (e.g., piracy) are more properly understood as crimes against states, but that these crimes are recognized as international crimes merely as a matter of advantageous or convenient policy. Regarding those crimes that constitute international crimes in the strict sense, Lee argues that such crimes cannot be distinguished according to some independent, conceptually prior feature of the crimes themselves (e.g., that they involve more than one nation or the crossing of national boundaries), a distinction that can then be used to sort out questions of territorial, national, or universal jurisdiction. To the contrary, he contends that jurisdictional questions must be resolved first. That is, international crimes proper can be distinguished from crimes against states only because the former are properly subject to universal jurisdiction whereas the latter are subject to territorial or national jurisdiction.

Thus, the crucial question for Lee becomes, "Which crimes are properly subject to universal jurisdiction?" On his account, universal jurisdiction is appropriate in cases in which a state commits, condones, or is unable to prevent or punish serious crimes against its own citizens. In such cases, the state is in violation of the conditions under which its exercise of political authority is legitimate. Insofar as such crimes are subject to universal jurisdiction, Lee believes that they can be distinguished as international crimes in the strict sense. On his account, then, a war crime committed against a state that is able to prosecute and punish the crime itself would not constitute an international crime in the strict sense (although it might still be treated by states as an international crime for reasons of strategic advantage).

Kristen Hessler picks up the issue of universal jurisdiction, as she asks when, and to what extent, state sovereignty should constitute a hurdle to international

prosecutions. Hessler focuses on the accounts of sovereignty espoused by Larry May and by Andrew Altman and Christopher Wellman. Although Altman and Wellman's account disagrees with May's on some points, Hessler contends that the two agree on the general point that, although sovereignty can be overridden in various sorts of emergency cases, there should nevertheless remain a broad presumption in favor of nonintervention in states' affairs. It is this presumption that Hessler aims to bring into doubt. The increasing willingness among theorists to endorse limits on sovereignty in emergency cases, Hessler claims, represents an initial move away from the traditional Westphalian notion of sovereignty. On her view, this growing consensus that sovereignty may properly be overridden in certain emergency cases should spur theorists likewise to reconsider their assumptions about whether sovereignty may be overridden in other cases – cases that, although they may not rise to the level of emergency, may nevertheless be quite serious.

As an alternative, Hessler endorses a disaggregation of the elements of sovereign authority, which would allow the various claims of sovereignty to be evaluated independently. Such a strategy could actually facilitate individual states' cooperation with international criminal prosecutions because, under this disaggregated conception of sovereignty, international prosecutions might be less likely to be seen as usurping the state's sovereignty in its entirety. Thus, by jettisoning the presumption in favor of even a defeasible right of state sovereignty in the traditional all-or-nothing sense, Hessler believes that we would allow ourselves the freedom to consider how authority – specifically, the authority to prosecute or punish serious human rights abuses – might be best allocated so as to respect human rights.

Like Hessler, Leslie and John Francis worry that respect for state sovereignty may often be in tension with the goals of deterring violence and protecting human rights. More broadly, Francis and Francis are concerned with whether the International Criminal Court (ICC) and other international criminal courts, insofar as their activities are grounded in principles such as the rule of law and respect for state sovereignty, may be ill suited to achieving the goal of preventing violence. Their chapter contends that, whereas the goals of justice and prevention may be mutually supportive in ideal theory, these goals may pull apart in circumstances of partial compliance (i.e., in circumstances of widespread violence and injustice such as those we face in the world today). When these goals do pull apart – that is, when considerations of ideal justice tend to undermine the goal of preventing atrocities – the authors argue that the goal of prevention must be paramount.

Francis and Francis contend that rule-of-law restrictions such as due-process guarantees and limits on retroactivity may prevent the successful prosecution

of persons who are in fact guilty of serious crimes. Rule-of-law limits tend to make convictions more difficult to achieve – thus, they serve as protections against wrongful convictions of the innocent. Rule-of-law restrictions also will inevitably mean that the guilty will sometimes go free, however, and because deterrence requires the probability of punishment, rule-of-law limits may thus weaken the deterrent function of international prosecutions. Similarly, respect for state sovereignty, insofar as it may limit the ICC's ability to prosecute and punish the perpetrators of serious injustices, may thus tend to undermine the ICC's deterrent function. The authors call for a reevaluation of the ICC that acknowledges the circumstances in which we actually live, circumstances of grievous injustice and violence in which the goal of prevention should be given priority.

B. CULTURE, GROUPS, AND CORPORATIONS

In addition to philosophical questions about sovereignty and jurisdiction, international criminal law also has generated conceptual puzzles related to groups. International crimes – crimes against humanity, genocide, and so forth – are distinctive in that they are typically group based in the sense that they are typically either committed by groups, are targeted at groups, or both. Thus, the second section focuses on questions that international criminal law raises regarding the identity of these two groups, the perpetrators and the victims of international crimes. First, Helen Stacy asks whether international criminal law is the appropriate mechanism for addressing human rights violations committed as traditional practices of cultural groups. Stacy acknowledges that international criminal prosecutions are important in responding to the leaders (the "big fish") who commit massive human rights violations such as genocide, but many of the more common violations of human rights (e.g., female genital cutting or honor killings) are cultural practices that reflect a given community's values. As such, these practices are not likely to change merely because of the threat of criminal sanctions imposed by the international community. Instead, attempting to force changes in cultural practices through international criminal sanctions may increase hostility among community members, who may hear the intended message of public condemnation as, instead, imperialistic or culturally insensitive. Rather than preventing such practices, international criminal sanctions may only force the practices to adapt – to "go underground," so to speak – and may even result in more egregious rights violations.

Rather than emphasizing criminal prosecutions of individuals who have committed culturally based violations, Stacy suggests that human rights may be protected more effectively by stressing the role of national governments in

fostering respect for human rights among their citizens. Protecting its citizens' rights is a national government's responsibility, and this requires provision for effective institutions of education, economic development, and public health, among others. For instance, she writes, in countries where female genital cutting is an embedded cultural practice, government-sponsored education programs may do more eventually to reduce the practice than would prosecuting and punishing parents who believe they are doing what is best for their daughters. Focusing on the role of national governments in changing embedded cultural practices, Stacy contends, is thus more effective, as well as fairer, than punishing those members of the cultural group who participate in the practices.

Continuing with this issue of groups and the special concerns they raise for international criminal law, Larry May's chapter addresses the conceptual puzzle of how victim groups should be defined, which has a direct bearing on whether a charge of genocide is appropriate. May advances a nominalist account of group identification, according to which an aggregation of individuals constitutes a victim group, for purposes of a genocide prosecution, if the victim group both self-identifies and is identified by the perpetrator group as a group. Neither of these criteria is sufficient on its own: Identification by the perpetrator group is crucial to establish that the attacks are *intentional* attacks against a group. Identification by the victim group is important to establishing that the group exists in more than merely the minds of the perpetrators, so that the attacks can be seen as genuinely *group based* rather than individual.

May's nominalist account contrasts with an objective approach to group identification, according to which a group must have some objective existence to count as a group for purposes of genocide law. On one version of this view, developed by William Schabas in his book *Genocide in International Law*, the four categories of groups recognized by the 1948 Genocide Convention – racial, ethnic, national, and religious – meet the requirement of objective existence, but it would be a mistake to recognize additional groups, or especially to allow subjective determinations of group existence. May's nominalist response is that the remedy to purely subjective group identification (understood here as identification merely on the basis of what one group thinks) is not objective identification but rather *intersubjective* identification: Again, both the perpetrator group and the victim group must identify the victim group as such. Unlike Schabas, then, May endorses the recognition of more than the four categories of groups, so long as these additional groups meet his requirements of self-identification and identification by the perpetrators.

In the next chapter, Joanna Kyriakakis shifts focus from the identification of victims to the prosecution of perpetrators, specifically corporations, for

international crimes. Kyriakakis examines the use of domestic "international crimes" laws in prosecuting corporations, an issue that brings together two distinct debates in legal philosophy: whether corporations can be the subjects of criminal prosecutions, and when (if ever) states may claim extraterritorial criminal jurisdiction. She explains that criminal law has been reluctant to recognize corporate criminal liability, in particular because of doubts about whether corporations could act with intention or make moral determinations. Armed with substantial literature from recent decades on the topic of groups and collective responsibility, however, she critiques the traditional view that corporations are not the sort of entities that can be said to be criminally liable.

Regarding the question of territoriality, Kyriakakis discusses various considerations that may tend to inhibit states from establishing extraterritorial criminal jurisdiction: the international legal principle of nonintervention, which limits a state's permissible intervention in the internal affairs of another state; the principle of predictability in criminal law, which may impact whether a corporation falls under a particular jurisdiction; and the possibility of negative impacts on a state's foreign relations. Given these deterrents to prosecution of corporations for international crimes, Kyriakakis advocates including private corporations in the jurisdiction of the ICC. She contends that the ICC's complementarity model would encourage states, concerned with maintaining their sovereignty, to enact and apply domestic "international crimes" laws. Inclusion in ICC jurisdiction also would help to legitimize such national prosecutions of corporations for international crimes.

C. JUSTICE AND INTERNATIONAL CRIMINAL PROSECUTIONS

The third section moves from broad, conceptual questions regarding jurisdiction or the status of groups to focus on a variety of more particular issues surrounding the role of international criminal law in securing justice and protecting victims. In particular, the essays in this section suggest, either implicitly or explicitly, an expanded role for international criminal law in securing social justice.

The first two chapters examine questions related to just war theory, the doctrine of when and how wars justifiably may be waged. Traditionally, just war theory is divided into two areas: *jus ad bellum*, which concerns the conditions under which a state is justified in engaging in war; and *jus in bello*, which concerns the means, or tactics, that parties in a conflict may justifiably employ. In the first chapter, Douglas Lackey focuses on an often-overlooked casualty in international conflict – the environment – and he advocates

international criminal law as the appropriate domain for ensuring environmental cleanups in the wake of such conflicts. Lackey proposes, in addition to the traditional just war principles of *jus ad bellum* and *jus in bello*, a principle of *jus post bellum*, according to which parties in a war are responsible for cleanup and restoration of the environment when it is damaged by their military operations. Lackey contends that environmental damage is better addressed within the international law of war than in civil suits. In support of this conclusion, he cites the reluctance of civil courts to take sides in political controversies, and also the fact that it often may be difficult to determine a particular injured party in cases of environmental damage. In addition, he argues that locating these environmental obligations within the law of war, rather than in a system of international environmental law, would provide greater incentive for military commanders to take such obligations seriously.

Within the law of war, Lackey argues that environmental damage is not clearly addressed by the various *ad bellum* or *in bello* considerations, for a state might engage in a war for justified reasons and employ justified tactics, but nevertheless its military operations might result in damage to the environment for which the state would be responsible. Thus, Lackey's *post bellum* principle confers strict liability: A state is responsible for postwar environmental restoration simply because it caused the damage, regardless of whether it did so as part of a justified military operation in a just war. Interestingly, his view implies that a state fighting a just war according to *ad bellum* and *in bello* principles is responsible for environmental damages it causes but not responsible for the enemy state's innocent civilians whom it kills. Lackey offers several reasons to support this claim. Notably, he points out that a damaged environment often can be restored (unlike killed citizens and destroyed cultural artifacts), and that the citizens of a state are involved in the acts of their state in a way the environment is not.

Similarly to Lackey's chapter, Steve Viner's contribution focuses on a variety of injustices that can result in times of international conflict – specifically, the injustices of the U.S. policy of indefinite detention at Guantánamo Bay, part of the Bush administration's self-described "war on terror." Viner questions whether this policy can be justified, as the United States claims, according to the recognized international legal right of self-defense. He analyzes the three restrictions (immediacy, necessity, and proportionality) of the right of self-defense as it is currently recognized, and he argues that it is plausible to believe the U.S. practice of indefinite imprisonment at Guantánamo meets each of these limitations. He introduces a fourth principle, however, the due diligence principle, and he argues that it is with respect to *this* limitation

that the current U.S. policy fails. The due diligence limitation requires that a nation use all reasonable, available measures to make certain that each person subject to its indefinite detention policy is in fact a proper target (i.e., poses a sufficient threat). The U.S. policy of indefinite imprisonment at Guantánamo fails to meet this limitation, Viner claims, because the policy fails to implement sufficient "truth-conducing" procedures (essentially, the traditional due process protections) to assist in determining whether a detainee actually poses a threat.

The due diligence limitation can be seen as similar to the "principle of distinction," which is recognized in international law as a requirement that a state's military not target civilians or nonmilitary buildings because these are not legitimate military targets; however, Viner points out certain differences between the principle of distinction and his due diligence principle. Whereas the principle of distinction limits targets to legitimate military objectives, the due diligence principle limits targets to actual, or reasonably believable, threats. Thus, Viner believes his principle improves on the principle of distinction in that it would permit the targeting of civilians who nevertheless pose an actual threat to a state, and also it would prohibit the targeting of military units that pose no genuine threat to the state. Note that, by framing the issue of the detainees' treatment in terms of the international legal right of self-defense, Viner appears to imply that the detainees' cases are matters of international criminal law; thus, this account, like Lackey's, would represent an expanded role for international criminal law in the service of advancing social justice.

Anat Biletzki's chapter continues to examine the role of international law in securing social justice, this time as a vehicle for the work of human rights organizations. Biletzki begins with the observation that, despite a growing number of human rights violations by political entities, human rights groups are traditionally wary of appearing to take sides in political disputes. The practice of not mixing human rights work with politics has emerged both from the principled view that human rights are inherently universal and the pragmatic concern that appearing partisan in a political imbroglio might lead to restrictions on a group's access within a given state or region, and thus might undermine its ability to assist those most in need of aid. Drawing on the example of the Israeli–Palestinian conflict, however, Biletzki contends that maintaining a strict distinction between human rights and politics is untenable and, ultimately, undesirable. The promotion and protection of human rights is inextricably connected with the political, and thus the question becomes how human rights groups are to embrace the political without becoming bogged down in the partisan.

Biletzki encourages human rights groups to frame their work in terms of protecting victims, an ideal that is inevitably political (it sets human rights groups against abusive governments) but nevertheless also universal (victims may appear on either side, or both sides, of political disputes). The vehicle for politicizing human rights in this way, she contends, is international law. The language of international law provides a generally accepted framework within which organizations may couch their condemnation of policies that violate human rights without appearing to take sides in the relevant political dispute. Thus, international law serves as a vehicle for human rights groups to embrace as part of their mission the achievement of political results, not in service of a partisan agenda but rather in the service of a universal norm: the protection of innocent victims. Biletzki's account raises certain questions for international criminal law in particular, which may have a role in bringing human rights violators to justice, but which brings up potentially thorny issues of standing. This is especially evident in complex cases of the sort on which Biletzki focuses, in which Israeli activists protest abuses by the Israeli government against Palestinian citizens within Palestinian borders.

D. PUNISHMENT AND RECONCILIATION

The final section focuses on questions related to what comes after international criminal trials. In the first chapter, Deirdre Golash provides both a vivid illustration of the circumstances surrounding various cases of international crimes and a critique of the justification of punishment as an international response to such crimes. Her objection to punishment may seem counterintuitive, particularly for international crimes, given that such crimes typically are committed on a larger scale or are more grievous than are typical domestic crimes. Golash contends, however, that the circumstances of international crimes tend to undermine the justification of punishment as a response. Specifically, she suggests that punishment in the international context may be less effective in achieving the goals of prevention and condemnation, two frequently cited justifications of punishment.

Appealing to examples of international atrocities in Yugoslavia, Rwanda, and Uganda, Golash first considers whether the goal of prevention may be promoted by punishing international crimes. She cites various pressures that often encourage individuals to participate in wrong acts, whether direct threats from authorities or the substantial social and psychological pressures often explored in the psychological literature. She suggests that, given these pressures, the threat of punishment is unlikely to be a sufficient deterrent in many

cases. Even for political leaders, who may not face the same coercive forces as lower-level participants, their circumstances and motives are often such that the prospect of punishment is unlikely to deter. Similarly, she contends that the international context may undermine the expression of condemnation through punishment. A message of moral condemnation is unlikely to be effective with low-level offenders, whose crimes reflect not seriously defective moral character but rather susceptibility to strong social and psychological pressures. Also, an effective message of condemnation requires that the intended recipients (the perpetrators or the international community generally) respect the international punishing body and that the punishment itself be interpreted as moral condemnation rather than, say, as continued victimization by Western powers; in practice, these conditions seldom hold.

In the next chapter, the final contribution to this volume, Colleen Murphy provides an account of the contribution that international criminal trials can play in promoting political reconciliation. In particular, she claims that such trials foster the social and moral conditions necessary for law to be effective in transitional societies. Murphy draws on the work of Lon Fuller to examine the underlying conditions necessary for a legal system to regulate citizens' and officials' behavior. She cites four conditions: ongoing cooperation between citizens and officials, systematic congruence between law and informal social practices, legal decency and good judgment, and faith in law. She applies the conceptual analysis to the case of transitional societies, those societies attempting to establish peace after a period of repression or civil strife, and cites historical examples to support her contention that, in such societies, the four necessary social conditions are typically lacking.

Murphy contends that international criminal trials can play an important role in fostering the four conditions cited above and thus in facilitating the effectiveness of law in transitional societies. These trials can play an educative role by providing a model of criminal justice that contrasts sharply with the practices of the previous regime. Providing such a model, she argues, can cultivate a sense of decency among persons who make and enforce the laws in the transitional state (third condition above). Also, by exhibiting respect for due process and the rule of law generally, international criminal trials can help to restore the faith in law among community members (fourth condition). Murphy recognizes that respecting due-process guarantees may sometimes result in guilty individuals going unpunished. This concern is cited, for instance, by Leslie and John Francis in their contribution to this volume. Murphy responds that if few, or no, convictions can be achieved while respecting stringent due-process restrictions, these restrictions may have to be reconsidered. Still,

she cautions that relaxing due-process protections (and the presumption of innocence on which they are based) risks falling back into the same practices exhibited during the previous periods of civil conflict or repressive rule.

* * *

International law in general, and international criminal law in particular, are such new fields that there is a sense that the fields are being constructed from whole cloth. As in any emerging field of law, moral and other normative considerations are especially important because it is from the granite of such considerations that much of law is chiseled. It is thus highly appropriate for philosophers to engage with lawyers in discussing the future of international criminal law. In our volume, many of the authors are both lawyers and philosophers, making such a dialogue even more intriguing. In addition, in a field of law that is just emerging, there are unresolved conceptual questions. Such questions are perhaps inevitable given how quickly the field has emerged. In our view, it is now time to take a step back and address some of these larger questions.

The chapters in this anthology, as is often true of good philosophical work, ask many more questions than are answered, but there are some answers. More important, there are clearly preferred avenues for reaching answers that are sketched. Even when answers are provided, it is often true that it is the reframing of the question that is most important for practitioners to come to terms with the foundations of the field in which they work. It is thus also good that some of our authors have experience in legal practice that is relevant to the concerns of our volume. It is in the mix of legal practice, international legal theory, and traditional philosophical inquiry that progress can be made on these foundational questions. Some have said that international criminal law is vastly undertheorized, especially given its importance. Our collection of works will aid in making such criticism less apt.

PART ONE

SOVEREIGNTY AND UNIVERSAL JURISDICTION

1 International Crimes and Universal Jurisdiction

Win-chiat Lee

I. INTRODUCTION

Most crimes are municipal crimes subject to municipal criminal law. There are some crimes singled out as international crimes subject to international criminal law, however. The main purpose of this chapter is to answer the question, "What are international crimes?" One could take this to be a lawyer's question – asking for a descriptive account of the criteria used in the actual practice of international criminal law to identify international crimes. Alternatively, one could take this to be a philosopher's question – asking for a normative account of what it is about some crimes that makes it appropriate or even morally required to subject them to international criminalization. In this chapter, my approach is neither exclusively normative nor exclusively descriptive, partly because I do not believe that we can always nicely separate the two approaches in theorizing about the law.[1] The difficulty in separating the two approaches is especially acute in the case of international criminal law, not only because international criminal law is still at a relatively formative and fluid stage, but also because its legitimacy is by no means uncontroversial and, therefore, not to be taken for granted. Any plausible account of international crimes as a legal theory, therefore, has to interpret the actual practice of international criminal law without the benefit of a high degree of certainty about what the "raw data" are. For such an account, therefore, the normative issues concerning the justification for subjecting these crimes to an international criminal law regime become even more important.

[1] In this regard, my approach is close to what Ronald Dworkin calls the interpretive approach in his book, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986). On Dworkin's view, an interpretive account of a certain social practice, such as law, would involve an interplay and perhaps trade-offs between two components, fit and appeal (i.e., between consistency with facts about the practice and justification for it). See esp. Chapter 2.

There are several kinds of international crimes. I argue that only a subclass of international crimes constitutes international crimes in the strict sense because it is a matter of fundamental principle – not merely a matter of good or convenient policy – that these crimes should be criminalized internationally. I will use the term *international crimes proper* to refer to this core class of international crimes. Antonio Cassese's argument that piracy is not really an international crime will be discussed as an argument in support of my view that not all international crimes are international crimes, strictly speaking.[2] I also argue, however, that Cassese fails to identify what is distinctive about the core class of international crimes proper because he fails to explain, as in the case of piracy, what makes some crimes only crimes against states, no matter how universal their suppression is or how much international cooperation such suppression involves, and what makes some crimes crimes against the international community as a whole.

If nothing else, ultimately, the distinction between international and domestic criminalization seems to have something to do with jurisdiction in terms of both prescription and enforcement.[3] What is at issue is whether we can make a fundamental distinction between crimes against states and crimes against the international community or humanity as a whole (i.e., as a logically prior and independent distinction, on which legitimate jurisdictional claims are to be based).[4] I argue in this chapter that the relationship is in fact the reverse. In my view, the distinction between crimes against states and crimes against the international community makes sense only in that some crimes may legitimately be subject to the exclusive territorial and national jurisdictions of states, whereas others may legitimately be subject to universal jurisdiction.

[2] The main source for this argument is Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), 23–5. He has also made this argument in Cassese, *International Law* (New York: Oxford University Press, 2001), 15. See also his discussion of piracy in relation to universal jurisdiction in Cassese, "When May Senior State Officials Be Tried for International Crimes: Some Comments on the *Congo v. Belgium* Case," 13 *European Journal of International Law* (2002), 853–75, esp. 857–8.

[3] For a discussion of the distinction between prescriptive/legislative jurisdiction and enforcement/executive jurisdiction and the complications the distinction involves (especially in relation to international criminal jurisdiction), see Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept," 2 *Journal of International Criminal Justice* (2004), 735–60, esp. 736–44. There is not much in what I discuss in this chapter that turns on the distinction. Instead, the discussion of jurisdiction in this chapter can be taken to refer to both kinds of jurisdiction with perhaps a greater emphasis on the enforcement aspect.

[4] Crimes against humanity in this sense are to be distinguished from crimes against humanity as specific crimes or a specific class of crimes under international law. For the purposes of this chapter, *crimes against humanity* is not to be taken to mean the specific crimes under international law, unless specified otherwise.

Let me briefly go over these familiar principles of jurisdiction. Territorial jurisdiction is the jurisdiction that a state may exercise over a crime if the crime is committed on its territory. National jurisdiction is of two kinds: active and passive. Active national jurisdiction is the jurisdiction that a state may claim over a crime if the perpetrator of the crime is a national of that state, whereas passive national jurisdiction is the jurisdiction a state may claim over a crime if the victim of the crime is that state's national. Contrary to these limited jurisdictions, universal jurisdiction is the jurisdiction that any state may claim over a crime solely because of the nature of the crime (and, thus, regardless of whether there is any link to the crime through territory or nationality). Internationally, territorial jurisdiction and active national jurisdiction are the most established and the least controversial of these criminal jurisdictions. Passive national jurisdiction is perhaps not as well established but, in general, is considered to be permissible these days. The most controversial is, no doubt, universal jurisdiction.[5]

One can see why. Even though national jurisdiction allows states to claim jurisdiction that is extraterritorial (as when a state's national commits a crime in a foreign country), such extraterritorial jurisdiction is still not very far-reaching because of the nationality link it requires to either the perpetrator or the victim of the crime. Moreover, territorial jurisdiction would probably cover most of the cases that a state may also claim on the basis of nationality anyway. Unlike these other jurisdictions, however, universal jurisdiction does not seem to fit

[5] I have neglected to mention another principle of criminal jurisdiction in international law, namely, the protective principle. By this principle, a state may claim jurisdiction over a crime committed abroad, regardless of whether the perpetrator is its national or a foreigner, if it threatens or affects the state's fundamental national interests. The relevant national interests are perhaps not as well defined as one would like, but examples of such crimes are clear. They include counterfeiting of currency, immigration frauds, and attacks of national security (or plans thereof). So as not to make the distinction on which I focus for my argument unnecessarily cumbersome to state, I have left out the protective principle. For the purposes of my argument, the relevant issues that the protective principle presents are essentially the same as those that passive national jurisdiction presents. The main difference between the two principles is this: In the case of the protective principle, it is the nation as a whole that is harmed by the crime whereas in the case of passive national jurisdiction, it is its national who is the victim of the crime. (The protective principle thus involves crimes that are crimes against states but in a sense that is different from the sense I have been using in this chapter.) However, for the points I will make in the next paragraph, such as the extent and nature of the extraterritorial jurisdiction the principles allow or their compatibility with our preconceptions about sovereignty, what I claim about national jurisdiction applies to the protective principle as well. Readers may generally read the reference to the territorial and national jurisdictions in the distinction I draw in contrast with universal jurisdiction to include jurisdiction based on the protective principle as well.

comfortably with our idea of sovereign states, each having its own limited legitimate sphere of political authority that *mainly* does not overlap with those of others. Although universal jurisdiction usually refers to the jurisdiction that states claim over certain crimes, for the purposes of my argument in this chapter, I also include the criminal jurisdiction that international political entities, such as the United Nations (UN) and the various criminal tribunals it sponsors or the International Criminal Court (ICC), would claim over certain crimes, if such jurisdiction cannot be derived from the territorial or national jurisdictions of its member or signatory states.[6]

It is my contention in this chapter that the legitimacy of the category of international crimes proper is based on the principle of universal jurisdiction, as either exercised by states individually or by the international community collectively, and thus legitimacy stands or falls on account of that principle's justifiability in relation to those crimes. Therefore, to answer the question of whether there is a distinctive class of international crimes proper, we need to tackle more directly the justifiability of universal jurisdiction associated with these crimes. This is what I intend to do in this chapter. In a later section, I provide an account of the justifiability of universal jurisdiction for international crimes proper that is based on the nature of the crimes involved – not so much on the kind of harm they inflict (they all involve serious harm done to individuals), but more on how they pertain to the legitimacy of the political authority of states.

More specifically, I argue that international crimes proper primarily concern serious harm committed by the state against its own citizens on its own territory. I take these kinds of cases to be primary not only because they are clear cases of the state abusing its power, but also because they are the clearest cases in which universal jurisdiction applies. They include both cases of active participation in perpetrating such harm by the state through its agents and cases of inaction by the state that amount to condoning such harm when committed by nonstate actors. I contend that when the state abuses its authority and perpetrates serious harm against its citizens in either of these two ways, it violates the conditions of its legitimacy as a political authority, including the legitimacy of its monopoly of the use of force within its territory and in relation to its citizens. Because of this, as I will also argue, the state may not claim exclusive jurisdiction over these crimes and thus opens the door for universal jurisdiction over them.

[6] I have argued elsewhere that the theoretical question of its justification is the same regardless of whether the universal jurisdiction is claimed by a state or by an international body, such as the ICC. See my "Terrorism and Universal Jurisdiction" in Steven Lee (ed.), *Intervention, Terrorism, and Torture: Contemporary Challenges to Just War Theory* (Dordrecht, the Netherlands: Springer, 2007), 214–15.

I also address some of the complications that arise when we depart from the central case. For example, when the serious harm sponsored or condoned by the state is perpetrated against another state's citizens or on another state's territory, it is perhaps just as much a case of the state abusing its political authority. Whether the state's forfeiture of exclusive jurisdiction over these crimes thus will amount to universal jurisdiction over them is less clear, however, because these cases would involve another state that presumably could claim certain exclusive jurisdiction over these crimes as well.

Furthermore, some cases of inaction by the state in preventing the commission of certain serious crimes or punishing their perpetrators after they are committed are due to the state's inability to do so. This kind of inaction cannot always be construed to be acquiescence by the state. Nonetheless, it also violates the conditions of the legitimacy of the state's political authority. To be sure, it does not involve the abuse of political power by the state. Instead, the state simply fails to perform a basic function. I argue that cases of serious harm committed by individuals unrelated to the state or by agents of another state when the state is unable to prevent or punish such serious harm are also subject to universal jurisdiction. In this way, they also should be considered international crimes proper.

The account of universal jurisdiction over international crimes proper that I present here will show that universal jurisdiction is not really as radical a departure from our preconceptions about sovereign state power as one might think, unless one believes the legitimacy of such power is unconditional. As long as the legitimacy of sovereign states' separate and mainly nonoverlapping political authority has conditions and universal jurisdiction exists only as a consequence of such conditions being violated, the two are not only quite consistent with one another, but in fact could very well be part of the same overall account of political authority, as they turn out to be on the account I present.

II. INTERNATIONAL CRIMES PROPER

To repeat, the main question is, "What are international crimes?" If the question means what criteria are used in actual practice to identify an international crime, what we need to do is to get ourselves acquainted with the facts about the actual use of international criminal law. The project would be to identify a set of rules or criteria that are used to identify international crimes – something like what H. L. A. Hart calls *secondary rules of recognition*.[7]

[7] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 97–107. However, Hart himself is skeptical about the existence of secondary rules in the case of international law.

As in the municipal case, the secondary rules governing international criminal law would be a set of mostly, but not necessarily, content-independent institutional rules that exist as a sociological fact. The rules of recognition for international criminal law would involve an account of the role treaties, conventions, national criminal law, and custom play in the identification of the substance of international criminal law. On this approach, what makes a crime an international crime, as opposed to a mere domestic one, is the fact that it is recognized as a crime by a set of secondary rules that is accepted and used in the international community, as opposed to one that is only accepted and used within a state.[8] What endows the crime with its international status on this approach is simply the fact that the relevant secondary rules of recognition are accepted and used by the international community; there may be nothing distinctively international about the nature of the crime itself. To put the point in a different way, on this approach, the fact that there may be some special characteristics about certain crimes that set them apart from domestic crimes and make them particularly suitable or even morally obligatory for the international community to criminalize is entirely incidental to their status as international crimes.

The purpose of this chapter is to take the question I start with in a different direction. The thought is that there are some crimes that are international crimes and are treated as such *because of* the kind of crimes they are. I do not mean by this that there are certain crimes that typically involve more than one state or the crossing of national boundaries.[9] As I argue later, such crimes could still be only crimes against states. Nor do I necessarily want to invoke the idea that it is natural law that provides the basis for the relevant aspect of international criminal law. More important, even if we do invoke natural law, the claim that certain acts are simply wrong by nature and therefore ought to be suppressed universally does not, by itself, explain the idea that these acts should be criminalized internationally as a matter of principle. This claim could very well lead to the conclusion that each and every state has a duty to criminalize these acts within their municipal law and, furthermore, even to the conclusion that states have a duty to cooperate with each other in the suppression of these acts as, for example, in the participation in some

He writes, "It is indeed arguable . . . that international law not only lacks the secondary rules of change and adjudication which provide for legislature and change, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules" (209).

[8] What counts as acceptance and use by the international community may be controversial. This problem, although interesting, is beyond the scope of this chapter.

[9] This term "transnational" is often used to refer to "international" in this sense.

kind of extradition arrangement. It need not lead to the conclusion, however, that these acts ought to be criminalized internationally in a way that goes beyond the standard political framework of states exercising their legitimate authority within their territories or over their citizens for the suppression and punishment of crimes. It simply does not stand to reason that every act that is wrong or unjust by nature should be treated as an international crime.[10] Otherwise it would lead to the absurd conclusion that the crimes that are strictly the business of domestic criminal law could only be wrong or harmful by convention.

The basis of my claim that some crimes are international because of the kind of crimes they are is the idea that some acts of harm, because of their relation to the abuse of state authority or other violations of the state's legitimacy conditions, are such that, for their suppression and accountability, we need to appeal to an alternative framework other than the one of states exercising their legitimate authority within their territories or over their citizens. My view is that the international community exercising political authority in the form of universal jurisdiction over these crimes, either collectively through international political bodies or individually by each of the states, is that alternative political framework.

This is the class of crimes I have been referring to as international crimes proper. By using this locution, I do not mean to suggest that international crimes that do not belong to this category should not be treated as international crimes. Nor do I mean to suggest these other international crimes are less egregious or involve less serious violations of human rights. What I do mean to suggest is that these other international crimes are matters that, in principle, can be dealt with within the standard political framework of states exercising political authority within their territories or over their citizens, although in some cases there may be efficiency and effectiveness gained in the suppression of such crimes if there is international cooperation. Depending on circumstances that could change, such policy reasons for cooperation may or may not continue to exist and may or may not continue to be pressing. On my account, however, we have standing reasons in international law to

[10] Thus, those who think that international criminal law (at least the part that criminalizes certain acts as a matter of principle) is based on natural law would have to identify the further elements that would make a naturally wrongful act rise to the level of an international crime. Barbara Yarnold refers to them as "international elements," which include "shocking the conscience" of the world community and a threat to world peace and harmony. She also mentions state sponsorship or some kind of state activity as generally involved. See Yarnold, "The Doctrinal Basis for the International Criminalization Process," in Cherif Bassiouni (ed.), *International Criminal Law*, 2nd ed. (Ardsley, NY: Transnational Publishers, 1998), Vol. I, *Crimes*, 127–52, esp. 146–8.

criminalize a core class of crimes that cannot be dealt with within the standard political framework of sovereign states with, broadly speaking, nonoverlapping spheres of political authority. Such reasons are matters of principle and do not change with the times. Thus, other international crimes may come and go, but there are some core ones that are here to stay. The rest of this chapter is devoted to developing an account of this core class of international crimes.

III. IS PIRACY AN INTERNATIONAL CRIME?

As mentioned earlier, the account of the sources of international crimes or the secondary rules recognizing certain crimes as international crimes would involve an account of the role that treaties, conventions, national case law, and customary international law play in establishing these international crimes. Combing through all of the relevant sources, Cherif Bassiouni has identified twenty-five categories of international crimes ranging from crimes against humanity and genocide to piracy and traffic in obscene materials and narcotics.[11] When one looks at the list of crimes that are typically included as international crimes, however, it looks rather ad hoc and incomplete. There is clearly no systematic approach to international criminalization. The end product appears lacking in unity and consistency as to what is included and what is left out as international crimes.[12]

The fact that international criminal law appears ad hoc and incomplete in what it criminalizes is not necessarily a problem per se, especially considering the fact that part of international criminal law is simply motivated by facilitating international cooperation in extradition and the prosecution of certain crimes that are or should be already well covered in municipal criminal law. In fact, the incomplete and ad hoc nature of this part of international criminal law might be inevitable or even advantageous, given the fact that it is simply based on policy considerations for the purpose of enhancing domestic law enforcement. The completeness and consistency of the relevant criminal law is more usefully raised at the domestic level. That is not the issue here, however. My concern here is that there is another part of international criminal law

[11] For a complete list, see Cherif Bassiouni, "Sources and Theory of International Criminal Law," in Bassiouni (ed.), *International Criminal Law*, 2nd ed., Vol. I, *Crimes*, 48.

[12] The inconsistency may simply be due to the ad hoc and incomplete approach to criminalization in international criminal law. What is not prohibited is allowed even though the international community might not really want to allow these acts after they are considered. Incompleteness thus might lead to inconsistency. For a helpful discussion of the inconsistency of international criminal law, see Steven R. Ratner, "The Schizophrenia of International Criminal Law," 33 *Texas International Law Journal* (1998), 237–56.

that involves what I called international crimes proper that would require completeness and consistency because the criminalization involved here is a matter of obligation on the part of the international community. At any rate, as I will argue, it is the kind of criminal law that is fundamentally quite different in nature than typical domestic criminal law, and its existence is not simply to enhance law enforcement or prosecution domestically.

In this connection, it is useful to consider an argument put forward by Antonio Cassese. According to Cassese, piracy is not an international crime because it fails to meet the definition of an international crime. Cassese's argument is especially useful for my purpose because of his more general point that, given his account of the definition of international crimes, there are some generally recognized international crimes that should not really be considered to be such. A weaker way of putting Cassese's point would amount to drawing a distinction between international crimes proper and those that are not core to the notion.[13] How closely Cassese's distinction, on this construal, coincides with the one I have in mind remains to be seen.

Cassese's view on piracy is provocative because piracy is often cited as the classic, if not paradigmatic, example of international crimes. Although its heyday as a menace to humankind has passed,[14] piracy has the longest association with international cooperative efforts in the suppression of a crime in the modern era. Piracy has certainly all the trappings of an international crime. Pirates are considered *hostes humani generis* (enemies of humanity). Universal jurisdiction is exercised in relation to piracy with probably less controversy than any other international crime. Besides piracy, there are other crimes that Cassese does not consider to be international crimes even though there very well may be international treaties or resolutions governing them. They include illicit drug trafficking, unlawful arms trading, smuggling of nuclear and other dangerous materials, and money laundering.[15]

It would therefore be most interesting to consider Cassese's reasons for rejecting piracy and some of the other crimes as international crimes. I will begin with Cassese's definition of international crimes. He lists four conditions for international crimes. It is clear that he thinks that each is a necessary

[13] In fact, Cassese uses terms such as *international crimes proper* or *core crimes* occasionally in the book *International Criminal Law*, although it is not clear how theoretically "loaded" or consistent his use of these terms is.

[14] When I wrote this in earlier drafts, I had no idea that, off the coast of Somalia, piracy would soon become a serious international problem once again.

[15] Cassese also does not include apartheid as an international crime (*International Criminal Law*, 25). Because the reason Cassese has for rejecting apartheid as an international crime is quite far from the issues raised in this chapter, I therefore set aside this particular topic.

condition for an international crime.[16] The four conditions for international crimes are these[17]:

1. Violations of customary international rules that often originate in or are clarified by treaties.
2. Violations of rules "intended to protect *values* considered important by the whole international community and consequently binding all states and individuals."[18]
3. A universal interest in suppressing these crimes, manifested in the universal jurisdiction that states can claim in principle over these crimes.[19]
4. No *functional* immunity for perpetrators who are de jure or de facto state officials from the civil or criminal jurisdiction of foreign states.[20]

[16] It is unclear whether Cassese considers the four conditions jointly sufficient for an international crime. He phrases it this way: ". . . international crimes may be held *cumulatively* to embrace the following . . ." (*International Criminal Law*, 23).

[17] Here I am to some extent paraphrasing and summarizing.

[18] Cassese, *International Criminal Law*, 23.

[19] Although Cassese does not use the term *universal jurisdiction* in stating this third condition, what he describes certainly looks like universal jurisdiction. As he writes, "Subject to certain conditions, [the] alleged authors [of these crimes] may in principle be prosecuted and punished *by any State*, regardless of any territorial or nationality link with the perpetrator or the victim" (ibid.). I take this third condition to be Cassese's expression of the centrality of the principle of universal jurisdiction to the idea of international crimes, a view I clearly endorse and intend to substantiate philosophically in this chapter.

[20] Functional immunity is the immunity from the civil and criminal jurisdiction of a foreign state enjoyed by state officials under customary international law for acts committed in exercising the functions of their office. However, according to Cassese, under customary international law, as it has evolved since the end of World War II, such functional immunity is lifted and may not be used as substantive defense when it comes to international crimes. Therefore, state officials may be held personally accountable for the commission of international crimes even if the alleged crimes were perpetrated in an official, as opposed to private, capacity. However, Cassese is careful to point out that, under customary international law, some categories of *senior* state officials, such as heads of state, foreign ministers, and diplomatic agents may enjoy *personal* immunity from foreign jurisdictions while they are in office. (*International Criminal Law*, 23–4. See also the discussion of immunities at 264–73.) Cassese's view is perhaps not entirely uncontroversial. For example, there is one major discrepancy between Cassese's view and the judgment of the International Court of Justice (ICJ) in the Case Concerning the Arrest Warrant of 11 April 2000 (*The Democratic Republic of Congo v. Belgium*). In Cassese's view, the ICJ's failure in this case to acknowledge the customary rule lifting functional immunity for international crimes has the consequence of allowing prosecution and punishment of foreign ministers and other state officials for international crimes after they leave office only if such alleged crimes were committed in a private capacity when they were in office – a rare situation considering the kind of crimes international crimes are. For Cassese's highly critical discussion of the ICJ opinion, see "When May Senior State Officials Be Tried for International Crimes: Some Comments on the *Congo v. Belgium* Case," cited in n 2 above. Customary international law aside, it is also clear that the trend in treaty-based international criminal law, such as the torture and genocide conventions and the ICC statutes, and special legal instruments

In Cassese's view, piracy is not an international crime because it fails to meet condition 2.

Even though there was clearly an international agreement to suppress piracy and to provide for the exercise of universal jurisdiction over piracy, Cassese contends that there is at best joint interest, but no community value involved in the universal suppression of piracy. Here Cassese is pointing out that international crimes are not simply what states agree to join forces to suppress because they see it as a good policy and in their own interest to do so. What is this distinction between joint interest and community value that Cassese invokes? By community value, Cassese is referring to the set of human rights and humanitarian considerations "laid down, although not always spelled out in so many words, in international instruments," instruments such as the UN Charter and the Universal Declaration of Human Rights.[21] On this account, it would be clear that the joint interest involved in the universal suppression of piracy that Cassese has in mind, whatever else it might be, would not involve the violation of universally recognized human rights and humanitarian considerations. This explanation is clearly not adequate. Through the suppression of piracy, states presumably are also seeking to protect, besides economic interests, values such as security in person and property, which are clearly among the human rights and values laid down by the international community via various international instruments, although it might be a bit anachronistic to say so in relation to piracy. A state that does not act to protect individuals against piracy can clearly be said to have failed to respect human rights.

Cassese may not have provided the correct account of the distinction, but he is heading in the right direction. I think what Cassese is really aiming at is a more fundamental distinction between crimes committed against the international community or humanity as a whole and crimes committed against states. The latter constitutes the class of domestic or municipal crimes, even when they are suppressed universally with international cooperation in enforcement, whereas the former constitutes the class of international crimes proper. Cassese may have thought that piracy is only a crime against states because states have an interest in its suppression. The relation, in fact, is the reverse. The more fundamental notion, in my view, is crimes against states. Piracy is fundamentally

such as the statutes of international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), has been to move away from functional and in some cases even personal immunities for senior officials including sitting heads of state. Heads of state Slobodan Milošević (Yugoslavia), Charles Taylor (Liberia), and most recently Omar Hassan al-Bashir (Sudan), for example, were all charged with international crimes by special international tribunals or the ICC while they were in office.

[21] Cassese, *International Criminal Law*, 23.

a crime against states, and it is for that reason that states have an interest in its suppression. On this view, it is the distinction between crimes against states and crimes against the international community that requires a more fundamental account that is not based on a prior distinction between state interest and community value. On either approach, however, just because states, for good reasons, find it advantageous to strike some agreement among them to collaborate in suppressing a crime committed against states, does not make the crime anything more than a crime committed against states. It is not on behalf of the international community as a whole that piracy is universally suppressed; it is, rather, on the states' own behalf, or better yet, on each other's behalf, that piracy is universally suppressed.

As I have pointed out, whether the value protected is universally recognized and considered important or even "laid down" in international instruments does not explain Cassese's distinction between state interest and community value. Here I would add that, generally speaking, the issue concerning the universality of values involved also does not explain the distinction between crimes against states and crimes against the international community. Much of municipal criminal law, such as the prohibition against murder, also seeks to protect values that are equally universal values in that sense.[22] What really drives the distinction between crimes against states and international crimes proper is whether these values are violated by individuals against other individuals, or whether they are violated by states against individuals, especially if they are their own citizens. By the latter, I include both violations sponsored as well as those condoned or tolerated by a state. On this view, torture violates human rights and disrespects human dignity, whether it is used by a gangster attempting to silence a potential witness or by a security officer to extract "confessions" from a political prisoner, but only the latter involves international crimes proper unless the gangster is used by the state, as is sometimes the case, to carry out the torture. Similarly (with exceptions to be discussed later), only state-sponsored or state-condoned terrorist acts would count as violations of international crimes proper even though they may be no more egregious or no more likely to spread across national borders than those committed by individuals without being sponsored or condoned by a state. This is the case even if the individuals committing a terrorist act are foreign nationals or belong to some international network as long as they are not sponsored or condoned by a state.

There are also important similarities between international crimes such as genocide and crimes against humanity (now in the more specific sense that names a particular category of international crimes), and the kind of domestic

[22] This parallels the argument I made earlier in relation to natural law.

crimes that we call hate crimes. In both kinds of crimes, individuals are targeted for killing and other kinds of harm not for their individual identity but for a certain group identity of theirs, such as their ethnicity. My point, again, is that hate crimes – no matter how egregious, widespread, and systematic – are generally crimes against states only as long as they are not committed by individuals or organized groups of individuals under state sponsorship or acquiescence.

It is particularly telling in relation to this point that an evidence Cassese uses against counting piracy as an international crime is the fact that, during the heyday of its enforcement, universal jurisdiction (one of Cassese's necessary conditions for international crimes) was suspended when piracy was committed on behalf of a state (called "privateering" at the time).[23] This point also is presumably what explains Cassese's fourth condition for international crimes, that there is no *functional* immunity for perpetrators who are de jure or de facto state officials from the jurisdiction of foreign states.[24] It would defeat the most distinctive purpose of international criminal law, on the account I am putting forward, to allow for immunity simply on the basis that one is merely exercising the functions of one's office in perpetrating the crime.

As I have mentioned, Cassese also argues that illicit drug trafficking, unlawful arms trading, smuggling of nuclear and other dangerous materials, and money laundering are not international crimes either. This is not only because these crimes are governed by only international treaties, but no customary rules (violation of condition 1 above); more importantly, it is because they are usually crimes committed against states by private parties or criminal organizations.[25] The view implied again is that only the crimes committed by states or state agents can count as international crimes proper. Included in Cassese's list of what really count as international crimes are war crimes, aggression, genocide, crimes against humanity, torture, and serious acts of state-sponsored or state-tolerated international terrorism. These are certainly acts typically committed by states or their agents. Rather, one should say that when similar acts of harm are committed by individuals against other individuals, without being sponsored or condoned by the state, then, generally speaking, they are more properly treated as crimes against states.

[23] Cassese, *International Criminal Law*, 24.

[24] Again, this does not mean that, under customary international law, *senior* state officials may not claim personal immunity from the jurisdiction of foreign states while they remain in office. However, the movement away from both functional and personal immunity in treaty-based international criminal law, such as the ICC statutes, will only strengthen the account of international criminal law I propose here. See n 20 above for a more complete account of immunities under international law.

[25] Cassese, *International Criminal Law*, 24.

Needless to say, it is not always clear whether an individual perpetrating a crime is acting as an agent of the state, especially if such status does not require acting in a de jure official capacity. Nor is it always clear when a state's failure to prevent or prosecute a crime amounts to tolerating or condoning it. Therefore, there are fuzzy cases of whether a core international crime has been committed. This should not prevent us from claiming the conceptual point I have been making regarding international crimes proper or the factual point that it is clear in the majority of cases whether the violation involves international crimes proper.

What I have identified and discussed in this section as distinctive about international crimes proper is mostly about the kind of perpetrator they involve, namely, the state through its agents, both official and unofficial. I have not differentiated between cases in which the victims of the crimes are the state's own citizens and cases in which the victims are another state's citizens. Nor have I differentiated between cases in which the crimes are committed on the state's own territory and cases in which the crimes are committed on another state's territory. For reasons that will become clearer in the next section, however, international crimes proper *primarily* concern serious harm perpetrated by the state's agents against its own citizens and on its own territory even though there may also be cases of similar harm (that should also be included as international crimes proper) perpetrated by agents of a state against citizens of another state outside of its territory. Thus, on my view, paradoxically, it is the genocide committed by agents of the state against its own citizens on its own territory that is a more central case of *international* crimes than the genocide committed by the state against a foreign population on foreign soil.

IV. THE DISTINCTION BETWEEN CRIMES AGAINST STATES AND CRIMES AGAINST THE INTERNATIONAL COMMUNITY

I have argued that some international crimes are best seen as crimes against states. They become international crimes only because states see the advantage of cooperating with each other (what Cassese calls joint interest) in suppressing these crimes universally. Here I would also add that if there is universal jurisdiction associated with these crimes, it is only due to what one might want to describe as the pooling of all the territorial and national jurisdictions that states have over crimes committed against them.[26] Universal jurisdiction over these crimes, in other words, is the result of states making available

[26] The universal jurisdiction resulting from the pooling of territorial and national jurisdictions is presumably more amenable to an account based on the consent of states. However, I am leaving it open that consent may not be the only way of accounting for pooling territorial and

to each other to exercise, on each other's behalf, the limited, but exclusive jurisdictions they each individually have over these crimes. In the case of piracy, for example, one can understand the universal jurisdiction associated with this crime as the result of states pooling their jurisdictions over their vessels[27] and citizens, and making it available for each other to exercise. Such "jurisdiction pool" makes sense as effective means of law enforcement given the fact that piracy typically takes place on the high seas.

I have also argued that there is a distinct class of international crimes that is more properly considered as crimes against the international community. In this section, I argue that the universal jurisdiction associated with these crimes is in a more intrinsic way related to the nature of these crimes and not merely created out of pooling the territorial and national jurisdictions that states have over them.

What then justifies drawing the distinction between crimes against states and crimes against the international community and subjecting them to fundamentally different kinds of criminal law regime? This question leads us to political philosophy. Given our analysis above, the question really amounts to this: Why is it justified or even required, when it comes to serious harm perpetrated against individuals by the state through its agents, that such harm be dealt with using a different framework, political or otherwise, than the standard political framework of the state exercising authority over its territory or its citizens?

Put in this way, the question seems to suggest its own answer. The answer is twofold. First, when the state sponsors or condones harm against individuals, especially its own citizens, it indicates a dysfunction or malfunction of the state that violates and compromises its legitimate authority if it does not lead to an outright breakdown in such legitimacy, as in some extreme cases. In sponsoring or condoning harm against individuals, the state has therefore also forfeited its claim to the legitimate authority to handle the accountability for the crimes involved *exclusively* within its territory or in relation to its nationals. Otherwise, in cases involving these crimes, the perpetrators, prosecutors, and judges could very well all come from the same source, namely, the state. The situation is like the fox put in charge of guarding the henhouse. After preying on the hens, the fox needs to be dealt with, but not by the fox itself.

Second, the purpose of criminalization is in part to suppress certain harmful acts by deterrence. When it comes to possible crimes that are sponsored

national jurisdictions in suppressing certain crimes or that consent may not be necessary under some conditions, especially in cases in which the crimes involve significant harm.

[27] This kind of jurisdiction is sometimes referred to as the jurisdiction of the flag state. It can be seen as an extension of a state's territorial jurisdiction.

or condoned by the state, it would clearly not make sense as deterrence to have such crimes subject to the exclusive jurisdictions of states only. This would amount to asking each state to deter itself from perpetrating harm by threatening itself with punishment – not much of a threat and therefore not much of a means of deterrence either.

Assuming that we have a duty of justice, at least insofar as certain kinds of serious harm are concerned, there is a clear need for an alternate framework, political or otherwise, for dealing with the deterrence of and accountability for international crimes proper because the state is implicated in such crimes. The international community with universal jurisdiction over international crimes proper, exercised either by each state individually or by the community of states as a whole, is that alternative political framework, provided that they have a sufficiently just and effective process of determining guilt. It addresses most directly and effectively the concern about the impunity of perpetrators acting on behalf of the state for serious harm done to individuals and in this way also provides deterrence of such harm.[28] By contrast, the nonpolitical alternative would be something like reverting back to a Lockean state of nature in which the victim of the harm, and presumably anyone else, could seek to exercise his or her own right to adjudicate and punish the perpetrator on his or her own.[29] The feasibility of this nonpolitical solution, in terms of both accountability and deterrence, in real situations where serious harm is perpetrated by the state is at best doubtful. In addition, individual enforcement of rights is notoriously problematic also because of questions that could be raised about the reliability of the process an individual would use to determine guilt. Thus, justice would require that individuals not enforce their own rights and yield to states or international political entities if the latter are willing and able to exercise their universal jurisdiction to adjudicate these cases more reliably.

To be sure, just because the serious harm that is perpetrated against individuals is committed by the state's agent, official or not, does not necessarily mean that the state will not in fact bring the perpetrator to account.[30] Nor do we mean necessarily to exclude such a state from doing so when it shows the interest, as well as the capability, to bring justice to these cases. In fact, there may be

[28] I have argued for universal jurisdiction in relation to the concern about the impunity of perpetrators of serious harms at much greater length in "Terrorism and Universal Jurisdiction," 208–14.

[29] This is similar to what David Luban refers to as "vigilante jurisdiction" in "A Theory of Crimes Against Humanity," 29(1) *Yale Journal of International Law* (2004), 137–41.

[30] Cambodia is a case in point. However, it is only with much pressure from the international community and heavy negotiation with the UN that Cambodia has finally commenced the trial of former state officials who committed atrocities against their own people in an earlier era.

many good reasons for allowing it to do so.[31] What we mean to disallow is only the state's *exclusive* claim to prosecute, adjudicate, and punish these crimes simply because they take place on their territory or involve their nationals.

The state exists at the very least to protect individuals from harm by others. Its legitimacy in exercising authority depends on its doing a sufficiently good job in providing such protection. To perform its protective function well and, indeed, to serve justice properly, the state needs to have the monopoly of the use of force within its territory and in relation to its nationals. The state's monopoly of the use of force would include its exclusive authority to prohibit certain behavior and to adjudicate and punish cases of violation of such prohibitions that take place within its territory or involve its nationals. In terms of both the legislative and the executive aspect of criminal law, this monopoly would translate into exclusive territorial and national jurisdictions over crimes,[32] but the monopoly of the use of force has conditions in that the legitimacy of state authority has conditions. When a state fails to meet some of these conditions, one could argue that it is no longer entitled to the monopoly of the use of force, at least in matters concerning the state's failure to meet the conditions of legitimate authority.[33] My point is that when it comes to certain serious harm done to individuals that is either sponsored or condoned by the state, the state may no longer hold on to its claim to monopolize the adjudication and punishment of cases concerning the harm as part of its standing legitimate authority.

International crimes proper, in my view, involve the violation of the conditions of the legitimate authority of the state.[34] The legitimate authority of

[31] The principle of complementarity in international criminal law that gives preference to national courts in the prosecution and adjudication of international crimes seems to allow precisely for this.

[32] It is important to note that this monopoly of the use of force exercised by states is not absolute if we allow *both* territorial and national jurisdictions. In cases that involve nationals (as either victims or perpetrators of a crime) from a different state than the state on whose territory the crime is supposed to have taken place, we do have an overlap of different states' jurisdictions. I am assuming, however, that this constitutes only a very small portion of criminal cases at best. In addition, one can assume that the overlap of jurisdictions is further limited by the restrictions in the sorts of crimes that are subject to national jurisdiction and by some kind of priority rule.

[33] Here it is helpful to follow a suggestion made to me by Kristin Hessler that the legitimacy of the state is a matter of degree. A state's legitimacy may be weakened (but not entirely lost) by the harm it has perpetrated against individuals. We can take that to mean that the state might have to forfeit its exclusive jurisdiction over some matters, but not others.

[34] Readers will find parallels between some of my arguments in this section and some of the arguments put forward in two recent philosophical accounts of international crimes and crimes against humanity. One is Luban, "A Theory of Crimes Against Humanity," 85–167. The other is Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge, UK: Cambridge

the state is presumably what preempts or overrides the right, as well as the duty, of others to bring about justice in matters under its jurisdiction. In the case of international crimes proper, however, that legitimate authority is compromised by the serious harm perpetrated against individuals under either state sponsorship or state acquiescence. Therefore, it can no longer act as the preemptory or overriding moral consideration that trumps others' rights and duties to bring about accountability for these crimes. If other states or some international entities are capable of adjudicating justly cases involving these crimes, they may justifiably assert jurisdiction over them even though they have no connection to the crimes either territorially or through the nationality of either the perpetrators or the victims. In this way, universal jurisdiction over international crimes proper is really nothing more than the corollary of the state's loss of legitimacy in monopolizing adjudication and punishment, in the form of exclusive jurisdictions, in relation to these crimes.[35]

What we have accounted for so far are cases of the state abusing its political authority in sponsoring or condoning serious harm done to individuals. However, there are also cases, as I mentioned in the introduction, in which the state does not sponsor or condone the harm, but is nevertheless *unable* to prevent it and to bring its perpetrators to accountability through a credible process when the harm does occur. Such inability of the state is perhaps a less serious violation of the state's legitimate authority because the state's inability does not equal the state's abusing its political power by participating in the perpetration of serious harm to individuals under its authority. Nonetheless, the failure to provide protection against harm and to bring its perpetrators to proper legal

University Press, 2005), especially Chapter 4, in which May focuses on what he calls the security principle. Luban's discussion of jurisdictional issues in relation to crimes against humanity in his article is particularly helpful and influential in the formulation of my arguments in this section.

[35] If one incorporates what I have proposed here into a natural law framework, with a few things added, my way of thinking about universal jurisdiction turns out to be similar in some ways to John Locke's way of thinking about natural jurisdiction in the state of nature. In the Second Treatise, Locke writes, "For the Law of Nature would, as all other Laws that concern Man in this World, be in vain, if there were no body that in the State of Nature, had a Power to Execute that Law, and thereby preserve the innocent and restrain offenders, and if any one in the State of Nature may punish another, for any evil he has done, every one may do so. For in that State of perfect Equality, where is no natural superiority or jurisdiction of one, over another, what any one may do in Prosecution of that Law, every one must needs have the Right to do so." (Ch. 2, S.7) In short, there is no monopoly of enforcement and thus no exclusive executive jurisdiction in the state of nature, according to Locke. On my account, we partially (perhaps very partially) revert back to this situation if a state violates conditions of its legitimate authority by perpetrating harm to individuals under its authority, except that besides individuals, we now also have other states and the collection of states who can also assert jurisdiction to execute the relevant part of the natural law, but only more reliably.

accountability is still a failure on the part of the state to perform its proper basic function and is thus a violation of the conditions of its legitimacy as political authority, especially if the failure is not simply a matter of occasional lapses. In this way, the state has also forfeited its claim to exclusive jurisdiction over the relevant crimes and has thus opened the door to the universal jurisdiction of the international community over them. This means that serious harm perpetrated by nonstate actors when the state is unable to perform certain of its basic law-enforcement functions properly would amount to international crimes proper. In other words, these are not crimes against states – not because the state is the perpetrator, but because the state is really an absentee in the relevant way.

Genocide and crimes against humanity (as a special category of international crimes) when committed by nonstate actors often take place in situations in which the state either has already failed or is in the process of failing, or in civil war situations where the state is not in control of all of its territory if there is still a state to speak of. In fact, in some of the cases of genocide or crimes against humanity, the nonstate actors are often members of groups that exercise de facto authority and function more or less as statelike entities over certain territories. These cases involving nonstate actors, for the purposes of my account, should be seen as no different from the ones involving state agents, official or unofficial, perpetrating similar crimes under state sponsorship or acquiescence and thus should be subject to the same treatment insofar as questions about jurisdiction over them are concerned.

The account of international crimes proper I have given here, interestingly, has the counterintuitive result that these crimes are primarily crimes committed by a state on its own territory, but not their cross-border counterparts. On this account, if a crime that is otherwise similar to one of the international crimes proper is committed by a state against the citizens of another state on the latter's territory (as, e.g., in the case of an international armed conflict), then it is only a crime against the latter state and not one against the entire international community – that is, unless the latter state has failed or is failing in ways pertaining to the legitimacy of its claim to exclusive jurisdiction over such crimes. (For example, one possibility of the victim state failing or unable to perform its relevant functions is that, as a result of an armed conflict, the perpetrator state occupies and becomes the de facto political authority of the foreign territory on which the crime is committed.) Hence, on this view, genocide and crimes against humanity (as a specific category of international crimes) as international crimes proper are primarily crimes committed by a state within its own territory and not by a state on a foreign territory, unless that state commits the crimes against a background of the state on the foreign territory being nonfunctional. Similarly, an international terrorist act is primarily a

crime against the state that is the victim of the act even when it is carried out by agents of a foreign country or sponsored by a foreign country, unless the victim state has somehow failed in its function as a state. This seemingly paradoxical result highlights once again the fact that international crimes proper, on the account I am proposing, are not most directly about the international nature of certain crimes in the usual sense (i.e., in the sense of involving more than one nation or the crossing of national boundaries).

It is not hard to make sense of this result. Suppose some military officers of state A have committed war crimes against some civilians of state B on the latter's territory in a war between the two states. If any state, as a result, has thereby forfeited the legitimacy of its claim to adjudicate such crimes exclusively, it would be the perpetrator state, A, but not the victim state, B, assuming that the latter is willing and able to prosecute and adjudicate the crimes in question in a credible way. State B would seem to have been victimized twice if it has somehow forfeited its exclusive territorial jurisdiction over these crimes as a result of the agents of another state crossing borders and committing war crimes on state B's soil against state B's citizens. However, that would be precisely what it would amount to on my account if these cross-border war crimes were considered international crimes proper because they would then be subject to universal jurisdiction.

Therefore, when it comes to cross-border crimes such as war crimes and aggression committed against a functional state, either there is no universal jurisdiction associated with such crimes, or, if there is, it would require an account different from the one I have given in relation to international crimes proper. In the case of cross-border crimes, if universal jurisdiction is involved, one possibility again is to appeal to the pooling of exclusive jurisdictions of individual states, supposing that doing so would enhance deterrence and accountability and, hence, the security of states in general, in a way that is not all that different from the appeal to joint interest in universally suppressing piracy through international cooperation. This kind of consideration is particularly pressing in light of the fact that states that are victims of cross-border aggression and war crimes committed by agents of another state, for a variety of reasons, are not always in the best position to bring the perpetrators of such crimes to account or to deter would-be perpetrators from committing them.

V. THE PRIORITY OF JURISDICTIONAL CLAIMS

I now turn to a more direct discussion of a basic thesis I have been arguing for in this chapter. I start by describing the opposing view.

One approach to the question concerning international crimes and universal jurisdiction is to rely on the notion that some crimes harm humanity as

a whole whereas other crimes harm states only as the basis for drawing the distinction between crimes against the international community and crimes against states. The idea is a simple one. To answer the question, "Whose business is it anyway?" we need to know who has been harmed. On this approach, the fact that a certain crime harms humanity as a whole grounds or justifies the jurisdictional claims of the international community over this crime.[36] In this way, the universal jurisdiction exercised by the international community over international crimes is derived from a logically independent prior claim, namely, that these crimes harm or set back the interests of humanity as a whole, as opposed to those of states only. It is this approach with which I am taking issue here.

I assume that crimes against the international community or humanity as a whole are not victimless crimes in the relevant sense. By this I mean that, even if collective entities, such as humanity as a whole or states, can be made better- or worse-off in a nonreductive way (i.e., in a way that is not reducible to their individual members being better- or worse-off), that is not what the relevant part of international criminal law is fundamentally about. Take genocide, for example. Even if it is the case that the eradication of an entire ethnic group from the face of the earth makes humanity as a whole worse-off in a nonreductive way, it is the harm done to individuals who are killed, persecuted, or denied their group identity in genocidal acts that is the primary concern for international criminal law. Otherwise antigenocide law would be much like historical or cultural preservation laws. I am therefore assuming that it is the harm done to the individual that is the primary subject matter for the distinction between crimes against the international community and crimes against states. On that assumption, if we want to claim that crimes against the international community are crimes that harm humanity as a whole whereas crimes against states harm only states, we will need to explain the difference as based on or derivative of some differences among the cases of harm that are all fundamentally harm done to individuals.[37]

[36] May comes very close to taking this approach in seeing the need to articulate what he calls the "international harm principle." May's articulation of the international harm principle is an attempt to account for when the international community or humanity as a whole is harmed by a crime. He uses this principle, however, not so much to justify the jurisdictional claims of international community over international crimes, but more to justify actual prosecutions of such cases in international tribunals. The latter presumably carries a greater burden of justification. May, however, does attempt to account for what constitutes international harm independently of jurisdictional considerations. (See May, *Crimes Against Humanity*, Ch. 5, esp. 80–1.) This approach to accounting for international harms is what I take issue with in this chapter.

[37] One can get to this conclusion also by way of moral individualism, a basic tenet of liberal political theory and a view that is often called "cosmopolitanism." According to moral individualism, moral considerations are fundamentally about individuals. In this view, it is the

An individual is harmed regardless of the motivation of the harm or whether he or she is harmed as a result of a particular act or a systematic and widespread attempt. An individual is also harmed regardless of whether he or she is harmed as a result of her specific identity as an individual person, as a result of her group identity (e.g., her ethnic identity), or merely as a result of random violence. When is humanity also harmed and when is the state also harmed as a result of an individual being harmed? When an individual is harmed, other people and social groups are "harmed" or have their interests set back as a result, in a morally relevant sense, only in a derivative way (i.e., only in terms of the moral interest we should take in justice and in each other's well-being), especially when the harm involves violation of basic human rights and dignity. In this derivative sense, however, whenever an individual is harmed, both states and the international community are *equally* "harmed" in that the moral interest that we should take in justice and in each other's well-being is set back by such harm. In this sense, even humanity can be said to be harmed when many people are killed by a domestic, nonstate-sponsored terrorist act, such as the one committed by Timothy McVeigh in Oklahoma City.

Thus, if we want to draw a further distinction between the harm to individuals that also harms humanity as a whole, and the harm to individuals that also harms the state but not humanity as a whole, other considerations will have to be introduced. My proposal is that the additional consideration we need is that of the legitimate jurisdiction of these social entities. On my account, some crimes – indeed, most crimes – harm the state and are crimes against states *because* each individual state has the legitimate authority to criminalize and adjudicate exclusively most instances of harm perpetrated within its territory and in relation to its nationals. Their status as crimes against states will remain so even if the commission of these crimes in one state, in some cases, has the tendency to "spill over" or spread to others, or if they are committed by agents that are internationally connected, such as members of some international criminal or terrorist organization, or indeed, if they are committed by agents of another state crossing national boundaries. These are cases in which states may have joint interest in Cassese's sense in suppressing the crime universally. (But recall Cassese's argument that this does not constitute international crime.) There are also crimes, however, albeit not many, that are crimes against the international community *because* the criminalization and adjudication of the harm to individuals involved are not subject to the exclusive criminal jurisdictions of states. On my account, whether a crime is

harm done to individuals that matters morally in a fundamental way. It is important to note that this view does not necessarily subscribe to the claim that social groups cannot be said to be "better"- or "worse"-off in a nonreductive way. Rather, the thesis is that only individual well-being matters morally in a fundamental way.

against states or whether it is against the international community depends ultimately on who has the legitimate authority or jurisdiction over it. As I have argued in this chapter, neither the egregiousness of a crime nor the universality of the values protected is sufficient to ground the distinction.

One clarification is in order. One can more readily make sense of states' legitimate jurisdiction because states are the kind of social entities that are political in nature and thus have certain legitimate political functions and authority. It would be a stretch, however, to talk about the international community or humanity as a whole as a political entity with certain relatively well-defined functions and authority, not to mention the fact that, as the mere collection of all states or as the mere collection of all human beings, they are not even particularly robust as social entities. Even though the increase in political organization in the international realm might make it increasingly meaningful to talk about the international community as a political entity, my point is independent of that. In my view, when we refer to the jurisdiction of the international community or humanity as whole, we are referring to a jurisdiction that belongs to everyone and every state both collectively and distributively because it belongs to no one in particular. On my account, international crimes proper fall under everyone's and every state's jurisdiction almost by default because the reasons for normally subjecting harmful acts to the exclusive territorial and national jurisdictions of states as political entities no longer hold in the case of international crimes proper, but it is still morally important to deal with them in a way that would prevent impunity and provide deterrence. This default position needs to be accounted for, but I do not believe that doing so requires that we think of the international community or humanity as a whole as some kind of political entity with some special function or authority of its own.

VI. CONCLUSION

I have argued for two theses in this chapter, one more basic than the other. The more basic thesis is that the universal jurisdiction exercised by the international community, either collectively or individually through states, over some crimes cannot be grounded in or justified by a logically independent prior claim that some crimes harm humanity as a whole. I have contended that the logical and justificatory relations are in fact the reverse. Certain harm harms humanity as well in the relevant sense only because it belongs to the legitimate jurisdiction of the international community to suppress and adjudicate such harm done to the individual. No meaningful relevant distinction can be made between crimes against states and crimes against the international community without some prior claims about the legitimate jurisdiction

that may justifiably be exercised by these entities over certain crimes (i.e., without answering the question, "Whose business is it anyway?"). In short, to understand what is distinctive about international criminal law, we need a fundamental normative account of how jurisdiction is to be apportioned (and not to be apportioned) among states that does not appeal to a prior distinction between crimes against states and crimes against the international community.

I have also argued that a case can be made for the legitimacy of the jurisdiction the international community claims over what I have called international crimes proper. The argument is based on the idea that if a state perpetrates, condones, or is unable to enforce the law against certain harm to an individual within its territory, it forfeits its legitimate authority to adjudicate that crime exclusively.

It is important to note that even if this latter argument (i.e., my specific argument about the source of the jurisdiction of the international community over international crimes proper) fails, my more basic point regarding the grounding of the idea of international crimes proper in the legitimacy of universal jurisdiction may still hold. In such a case, one would be well-advised to look for other ways of justifying the jurisdictional claims of the international community over such crimes, assuming that one is interested in bearing out the idea of international crimes proper.

Suppose all such attempts would fail. One upshot of this chapter is that if one is skeptical of the idea of international crimes proper (i.e., the idea that there is something distinctive about international criminal law), it should only be because one cannot find ways of justifying the jurisdiction exercised by the international community over these crimes. It should not be because one cannot make sense of a prior claim that some crimes harm humanity as a whole, whereas others harm only states. In this way, fundamental normative issues about jurisdiction are the key to understanding the legitimacy of international criminal law.

ACKNOWLEDGMENTS

I am grateful to the participants of the faculty workshop of Wake Forest University School of Law, at which an earlier version of this chapter was discussed, for their helpful comments and suggestions. In subsequent revisions, I have benefited from the extensive written comments on an earlier draft by George Graham and Zach Hoskins. I am particularly indebted to Hoskins for helping me bring my main thesis into sharper focus. Comments by the anonymous reviewer of this volume, to whom I am also grateful, have helped me correct a few cases of imprecision and inaccuracy in the chapter.

2 State Sovereignty as an Obstacle to International Criminal Law

Kristen Hessler

> Much argument about the sovereignty of states is made hopelessly simplistic by its generality. Should we recognize state sovereignty or not? Do states have too much sovereignty or just about the right amount? And so forth. In order to get a firm grasp, we must examine specific matters over which states could be permitted or denied sovereignty of specific kinds one at a time. Sovereignty is not some mystical cloud that either envelops the state entirely or dissipates completely; there are bits and pieces of asserted sovereignty. These assertions can be granted or contested one by one and accepted in this era and rejected in the next, or vice versa. Sovereignty should, I would think, be treated more like a (crazy) quilt that can be left to cover some things but pulled off of others.[1]

I. INTRODUCTION

By now, many theorists have endorsed the notion that state sovereignty does not constitute an impenetrable barrier to international criminal proceedings, which may be justifiable if the situation within a state becomes sufficiently dismal. Focusing on the arguments of Larry May and his critics, Andrew Altman and Christopher Wellman, I argue that their reasons for concluding that state sovereignty may be overridden in cases in which states fail to protect their citizens' human rights also count against the broad presumption in favor of nonintervention for states that these theorists endorse. Moreover, the arguments they offer in favor of such a presumption betray the persistent grip of outdated Westphalian concepts that continue to influence our thinking about the international arena.

[1] Henry Shue, "Eroding Sovereignty: The Advance of Principle," in Robert McKim and Jeff McMahan (eds.), *The Morality of Nationalism* (New York: Oxford University Press, 1997), 340.

II. STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW: TWO VIEWS

I begin by considering a recent debate about state sovereignty and international criminal law between Larry May and his critics, Andrew Altman and Christopher Wellman. As we shall see, both May and these critics accept that full state sovereignty is incompatible with the legitimacy of any border crossings that are not invited or authorized by the state's government. Thus, despite adopting different conceptions of state sovereignty, both views maintain that international criminal prosecutions for human rights violations committed within a state's borders may proceed against the will of the state's government only when the state itself has forfeited its sovereignty as a result of either failing to protect or actively attacking its citizens.

A. *May's Hobbesian View*

In his book, *Crimes Against Humanity*, Larry May argues for a limited role for international criminal law in ending or redressing human rights violations that take place within a state's borders. May starts with the observation that "there is no world State that can easily protect individuals from attacks by enemy and competing States."[2] Thus, states are called on to play this role: "Since States are constituted to aim at the social order and to maintain harmonious dealings among the citizens of the State, a kind of moral presumption is given to States: As long as they are conforming to this normative aim, they should not be interfered with by other States. Social stability requires exclusive legal control over a population."[3]

In May's view, a government forfeits its right to block international efforts to protect its citizens if it cannot, or will not, protect the security and subsistence rights of its citizens. As May argues, "Some norms cross borders, as it were. The most important is the norm that people's basic security and subsistence rights should be protected from assault, whether at the hands of individuals or governments."[4] This is summed up in May's security principle: "If a State deprives its subjects of physical security or subsistence, or is unable or unwilling to protect its subjects from harms to security or subsistence, a) then that State has no right to prevent international bodies from 'crossing its borders' in order to protect those subjects or remedy their harms; b) and then international

[2] Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005), 9. Hereafter May (2005).

[3] Ibid., 10.

[4] Larry May, "Symposium: Crimes Against Humanity," 20(3) *Ethics & International Affairs* (2006), 350. Hereafter May (2006).

bodies may be justified in 'crossing the borders' of a sovereign State when genuinely acting to protect those subjects."[5] According to this principle, then, international criminal law may take precedence over any state's domestic decisions to prosecute or not to prosecute crimes against humanity committed within its borders only when the state loses its legitimacy by failing to protect (or itself attacking) its citizens' security and subsistence rights.

Even where citizens' security or subsistence rights are violated, and state sovereignty is forfeited, May argues that international prosecutions are not automatically justified. The remaining hurdle to such justification is defined by his international harm principle: "Only when there is serious harm to the international community, should international prosecutions against individual perpetrators be conducted, where normally this will require a showing of harm to the victims that is based on non-individualized characteristics of the individual, such as the individual's group membership, or is perpetrated by, or involves, a State or other collective entity."[6] Thus, only in cases in which a state is unable or unwilling to prevent, end, or redress "harms to humanity" within its borders may other states or international institutions actually intervene.

May's view is, by his own description, "morally minimalist" in that it depends only on fairly conservative moral premises. Indeed, May chooses to work from the Hobbesian perspective in part because its minimalist foundations are, as May notes, "the very standpoint often adopted by realists who claim that there are no moral restraints on a state's sovereign prerogative, especially in criminal law."[7]

In summary, then, May's view defends a strong but defeasible presumption in favor of state sovereignty, such that when states retain full state sovereignty, no international border crossings are permissible, except those authorized or requested by the government itself. However, states may forfeit their sovereignty for failing to protect their citizens, in which case they lose the right to prevent such border crossings, although only the existence of "international harms" will justify actual interventions according to the international harm principle.

B. *Altman and Wellman's View*

Andrew Altman and Christopher Wellman critique May's account for assuming that efforts to prosecute human rights abuses may only cross borders in response to "harms to humanity," which by definition "are not purely internal state matters." According to Altman and Wellman's account, May is wrong

[5] May (2005), 68.
[6] May (2005), 83.
[7] May (2006), 349.

in accepting "the received view," or the Westphalian conception, of state sovereignty, according to which "international law can reach moral wrongs committed within a state only if those wrongs literally or morally cross international borders."[8] Having accepted the Westphalian conception of state sovereignty, they argue, May has no choice but to attempt to define severe human rights violations that seem to warrant intervention as "harms to humanity," or some other kind of international concern. However, it is difficult to show that human rights violations directed at some subgroup of humanity literally, rather than metaphorically, harm humanity itself:

> Harm to humanity is a convenient but ultimately unpersuasive fiction. Harm to the international community may be real and sufficient to license prosecutorial interventions in cases such as waging aggressive war, but that does not yield jurisdiction over genocide or crimes against humanity.[9]

Altman and Wellman conclude that a more promising strategy would be to jettison the Westphalian conception of sovereignty and allow that interventions may be justified if states fail to protect, or themselves violate, the human rights of their own citizens, whether or not such violations really do constitute an international concern. They describe their own view of sovereignty as follows:

> The government rightfully possesses considerable discretion to order the internal affairs of the state, and yet there are moral limits upon how the government can treat the members of the state. These limits are set, in part, by the fact that the government has a responsibility to protect the basic rights of its constituents. Thus, when a government perpetrates or permits the violation of the basic rights of its people, third parties – in this case, other states in the international community – have a moral right, if not a duty, to interfere.[10]

C. *On the Similarities between the Views*

David Luban has described the Westphalian doctrine of noninterference as "the notorious doctrine that sovereign states are above the law and entitled to do anything." Or, more graphically: "No matter if [State] B is repulsively tyrannical; no matter if it consists of the most brutal torturers or sinister secret police; no matter if its ruling generals make its primary export bullion shipped to Swiss banks. If A recognizes B's sovereignty it recognizes B's right to enjoy its excesses without 'dictatorial interference' from outside."[11]

[8] Andrew Altman and Christopher Wellman, "A Defense of International Criminal Law," 115 *Ethics* (2004), 42.

[9] Ibid., 42–3.

[10] Ibid., 45.

[11] David Luban, "Beyond Moral Minimalism: Response to Crimes Against Humanity," 20(3) *Ethics & International Affairs* (2006), 353–60.

May's view is not, obviously, appropriately located in the Westphalian tradition in this sense, and Altman and Wellman are (rightly) not claiming that May's view makes no improvements over that tradition. For starters, May's view makes a government's possession of sovereignty contingent upon its actually protecting the security and subsistence rights of its citizens (even if failure to do so does not automatically justify any particular interventions). May's view also allows for individuals to be held criminally responsible to the international community, which would not be possible under a traditional Westphalian system.[12]

Moreover, "international harms" that may justify international interventions, as May describes these, can include events that take place entirely within a state's borders and that do not threaten to spill beyond those borders in any literal way.

> Humanity is a victim when the intentions of individual perpetrators or the harms of individual victims are based on group characteristics rather than on individual characteristics. Humanity is implicated, and in a sense victimized, when the sufferer merely stands in for larger segments of the population who are not treated according to individual differences among fellow humans, but only according to group characteristics.... The international community thus enters the picture, in order to vindicate humanity through its international legal tribunals.[13]

According to this description, a genocide that took place entirely within a single state's borders would count as a harm to humanity.

Recall that May's case for a limited international jurisdiction over crimes against humanity has two parts: first, the account of sovereignty, including the conditions under which a state forfeits sovereignty, and second, the account of what it takes to justify actual interventions. Regarding the former, May's view ends up being quite similar to Altman and Wellman's, insofar as both views make the state's possession of sovereignty contingent upon its actually protecting the security and subsistence rights of its citizens – a clearly domestic matter. Thus, we can read Altman and Wellman as critiquing May's reasoning justifying interventions, rather than (at least primarily) taking issue with the substantive recommendations of May's account. The main difference between the two views is whether the failings or wrongdoing of the state have to be

[12] "[I]n traditional, or Westphalian, international law, only states have rights and duties. Individuals are entitled to those rights guaranteed by their political systems and there is no international standard of rights to which they could appeal. Nor are individuals subject to international criminal liability since they are under the exclusive jurisdiction of the State on whose territory they live." (Kenneth Rodman, "Compromising Justice: Why the Bush Administration and the NGOs Are Both Wrong about the ICC," 20 *Ethics & International Affairs* (2006), 26.)

[13] May (2005), 83.

somehow characterized as "international" in character to justify "piercing" sovereignty to protect the rights of citizens of the offending state, or whether such interventions may be triggered by the same kinds of violations that are characterized as purely internal matters.[14]

III. WESTPHALIAN SOVEREIGNTY AND THE RISK OF ANACHRONISM

Insofar as these two views converge on these substantive points, it is possible to see May, and Altman and Wellman, as in fact working on the same side of an ongoing, cross-disciplinary project of revising the traditional understanding of sovereignty. This scholarly project itself has tracked corresponding shifts in the practices of the international community away from the traditional strictures of sovereignty. In this section, I argue that given such changes in the international community, and the evolution of international morality, any view that defends a foundational role for state sovereignty without carefully investigating the relevant institutional alternatives runs a substantial risk of importing obsolete concepts from the traditional Westphalian doctrine.

The traditional understanding of state sovereignty is generally traced back to the Peace of Westphalia signed in 1648. As John Jackson describes this treaty:

> To read the 128 clauses of that document is to wade through dozens of provisions dealing with minute details of ending the Thirty Years' War, restoring properties to various feudal entities within their territories. It is hard to surmise from these any general principles of "sovereignty," but as a "Peace Treaty Between the Holy Roman Emperor and the King of France and Their Respective Allies," the compact represented the passing of some power from the emperor with his claim of holy predominance, to many kings and lords who then treasured their own local predominance. As time passed, this developed into notions of the absolute right of the sovereign, and what we call "Westphalian sovereignty."[15]

Although the core of Westphalian sovereignty can be described as the notion that "states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior," this "fundamental norm" coevolved with other, mutually supporting tenets of sovereignty.[16] Collectively,

[14] As Altman and Wellman say in a footnote: "His two principles arguably give May the best theory of international criminal law to date, but, as we show below, the international harm principle is problematic. The security principle on its own and suitably elaborated would be theoretically preferable." Altman and Wellman (2004), 40.

[15] John H. Jackson, "Sovereignty-Modern: A New Approach to an Outdated Concept," 97 *American Journal of International Law* (2003), 786.

[16] Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 20.

the norms of Westphalian sovereignty were "not about principles of justice," but rather "about defining the prerogatives of sovereign states and facilitating diplomacy between them."[17] One, for example, is the principle of *cujus regio ejus religio* (the doctrine that the ruler's religion determines the religion of his subjects), which, according to Allen Buchanan, "was designed to prohibit religious imperialism with its inevitable destruction and instability, but [which] helped to nurture a much more general principle prohibiting intervention against sovereign states that has come to be a central tenet of the international system that grew out of the Peace of Westphalia."[18] The fact that Westphalian sovereignty developed as an effort to defend the rights of rulers as heads of state from interference by other heads of state also explains its insensitivity to the internal characteristics of the sovereign state. For example, all sovereign states, by Westphalian logic, are entitled to independence from external interference, regardless of their relative size or power. Moreover, as Jackson has noted, "one can easily see the logical connection between the sovereignty concepts and the very foundations and sources of international law. If sovereignty implies that there is 'no higher power' than the nation-state, then it is argued that no international law norm is valid unless the state has somehow 'consented' to it."

Some scholars argue that Westphalian sovereignty was never a fixed norm.[19] Even if it was at one time helpful in understanding and governing international relations, however, the international system has changed in some dramatic ways since the Nuremberg trials at the end of World War II. More recently, the establishment of institutions such as the World Trade Organization and the International Monetary Fund, and of a variety of international treaties on issues such as human rights or the environment (with associated monitoring bodies), suggests that the international community is moving even further away from Westphalian sovereignty as an organizing concept. For these reasons, when we debate the merits of various aspects of sovereignty in the transformed world of today, we should remain alert to the possibility that traditional sovereignty concepts may be neither descriptively apt nor morally justifiable outside of the international structure in which they developed.

Moreover, the term "sovereignty" is multiply ambiguous, which raises the danger that, in debating the merits of various aspects of sovereignty, we may shift from one meaning to another unnoticed. Richard Haass specifies four distinct meanings of it, as follows:

> Historically, sovereignty has been associated with four main characteristics: First, a sovereign state is one that enjoys supreme political authority and a

[17] Rodman (2006), 26.

[18] Allen Buchanan, "Rawls's Law of Peoples: Rules for a Vanished Westphalian World," 115 *Ethics* (2004), 35–67.

[19] Krasner (1999).

> monopoly over the legitimate use of force within its territory. Second, it is capable of regulating movements across its borders. Third, it can make its foreign policy choices freely. Finally, it is recognized by other governments as an independent entity entitled to freedom from external intervention.[20]

Each of these attributes may be more or less satisfied for any particular state. In particular, although some states might be more effective than others at controlling cross-border movements, no state today can control all cross-border flows effectively. Indeed, a particular state's ability to do so may change suddenly due to external factors, as when a humanitarian crisis or war in a neighboring state creates a cross-border refugee movement or an illicit arms trade. Therefore, a workable conception of sovereignty, one that is capable of discriminating between sovereign and nonsovereign entities, will have to associate sovereign status with something less than full control of the state's borders.

In addition, these multiple attributes of sovereignty do not necessarily travel together. A state's government might enjoy supreme political authority within its territory, for example, without being recognized by other governments as entitled to freedom from external intervention (perhaps because it usurped political authority from the prior government), or, conversely, gain the official recognition of other states without possessing supreme political authority within its territory.[21]

Finally, the assumptions of traditional Westphalian sovereignty are difficult to defend given today's standards of political morality. Most theorists now agree that, if conditions within a state get bad enough, some cross-border interventions may be permissible for humanitarian reasons. The emerging consensus on the view that violations of traditional sovereignty may be justified for some circumstances is part of what Michael Reisman has in mind when he says that anyone who "continues to trumpet terms like 'sovereignty' without relating them to the human rights conditions within the states under discussion" is using the terminology of sovereignty anachronistically."[22]

A serious look at different kinds of interventions and the possible justifications for prohibiting them reveals the difficulties in defending nonintervention as a foundational norm in international society. Aggressive military

[20] Richard Haass, "Existing Rights, Evolving Responsibilities," Remarks at the School of Foreign Service and the Mortara Center for International Studies, Georgetown University, 2003. Cited in John H. Jackson, "Sovereignty-Modern: A New Approach to an Outdated Concept," 97 *The American Journal of International Law* (2003), 786.

[21] Allen Buchanan, "Recognitional Legitimacy and the State System," 28 *Philosophy & Public Affairs* (1999), 46–78.

[22] Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," 84 *American Journal of International Law* (1990), 876.

interventions, in the form of invasion and occupation, are obviously problematic from a variety of perspectives; therefore, the justification for prohibiting such interventions, absent extraordinary circumstances, is fairly obvious. However, such interventions are only the most drastic kind; other kinds of cross-border interventions include a variety of diplomatic, economic, and other kinds of pressure, such as economic sanctions or divestment with the aim of changing domestic policy, deploying peacekeepers, election monitoring, aid intended to help pro-democracy factions, linking trade or aid to conditions attached to domestic policies, and the like. If interventions in general violate sovereignty as nonintervention, then a blanket presumption in favor of nonintervention implies a presumption against even these kinds of interventions. For example, Krasner describes the dismantling of the apartheid regime in South Africa as "an extraordinary accomplishment, and one that took place with little bloodshed."[23] However, because of the largely economic external pressure brought to bear on the government of South Africa at the time, Krasner concludes that this accomplishment violated South Africa's Westphalian sovereignty. Because Krasner is a realist, he is not committed to a moral condemnation of these violations. Nonrealist theorists, however, who defend a rule of nonintervention on moral grounds, should be concerned about ruling out these potentially morally beneficial forms of cross-border interventions along with more obviously problematic ones. More generally, accounts of intervention should distinguish among types of intervention, and among the moral reasons to support or oppose different sorts of intervention, rather than assuming that the reasons that count against military and other obviously problematic interventions must support a rule of nonintervention in general.

For such reasons, political and legal theorists and philosophers have increasingly argued that an accurate understanding of the current international system requires rethinking state sovereignty as traditionally understood. Louis Henkin has suggested rethinking sovereignty by "decomposing" it into its constitutive functional parts and then assessing whether those parts are useful in understanding contemporary states and the states' system.

> Sovereignty, a conception deriving from the relations between a prince and his/her subjects, is not a necessary or appropriate external attribute for the abstraction we call a state. Nor is it the appropriate term or concept to define the relation between that abstraction and its counterpart abstractions, other states. For international relations, surely for international law, it is a term largely unnecessary and better avoided.[24]

[23] Krasner (1999), 125.

[24] Louis Henkin, *International Law: Politics and Values* (Dordrecht: Martinus Nijhoff Publishers, 1995), 9–10.

John Jackson takes this line of argument further, arguing that we should replace the traditional concept of sovereignty with what he calls "sovereignty-modern," which attempts "to disaggregate and to analyze: break down the complex array of 'sovereignty' concepts and examine particular aspects in detail and with precision to understand what is actually at play."[25] This disaggregation does not necessarily require dismantling and reallocating the actual rights or prerogatives that sovereign states currently claim. What it does imply is the need to examine more specifically the components of traditional sovereignty and to reinvestigate the rationale behind them. The alternative – to continue to use sovereignty concepts without subjecting them to such analysis – threatens to obscure important dimensions of the international system and to skew our moral analysis of international norms.

IV. REFORMING SOVEREIGNTY AS A PHILOSOPHICAL AND INSTITUTIONAL PROBLEM

The upshot of my arguments so far is that understanding and reforming state sovereignty is both a moral and an institutional problem: Our moral assessment of any of the components of traditional Westphalian sovereignty will have to include a reasonable assessment of its institutional assumptions or implications, along with an evaluation of the relevant institutional alternatives.

The question that remains unanswered by authors (such as May, Altman, and Wellman) who agree that the sovereign right to exclude foreign actors is morally limited is how and whether the sovereignty that ordinary states enjoy in ordinary circumstances should be reconceived in light of the moral reasons that might justify overriding sovereignty in "emergency" conditions. Saliently, if we assume that the international community has moral justification to intervene when the human rights situation within a state deteriorates drastically enough, do we really have good reasons to leave traditional sovereign prerogatives to nonintervention in place for states whose human rights situation, although not an emergency, still may be fairly seriously problematic? Like the other questions about sovereignty that we have considered, this is both a philosophical and an institutional problem.

Obviously, the major obstacle to actually reallocating state sovereignty is the lack of appropriate international institutions that can protect the basic rights of individuals. Fifty years ago, Hannah Arendt warned against what she called the "paradox of human rights": Although states cannot be trusted to respect the human rights of their citizens, international institutions could not be relied upon to do so either – in part because international institutions lacked the

[25] Jackson (2003), 801.

capability to do so. Taking rights away from states will not actually help individuals unless there are other institutions to provide what states are normally expected to provide. As Arendt observed, "Not the loss of specific rights, . . . but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity which has befallen ever-increasing numbers of people."[26] Avoiding this calamity requires thinking carefully about how institutions are currently configured, and how existing institutions could be altered to improve rights protection, based on sober assessments of their capabilities.

Onora O'Neill, in a similar vein, exhorts us to identify all of the potential "agents of justice" that might be able to work to protect human rights when they are at risk, such as in corrupt or weak states. In such cases, especially in the case of weak states, she argues that it is essential to look for other agents of justice or actors that possess effective capabilities to achieve justice in the relevant geographical, political, and economic circumstances. As O'Neill argues, "The value of focusing on capabilities is that this foregrounds an explicit concern with the action and with the results that agents or agencies can achieve in actual circumstances, and so *provides a seriously realistic starting point for normative reasoning*. . . . "[27] She distinguishes between primary and secondary agents of justice as follows:

> Primary agents of justice may construct other agents or agencies with specific competencies: they may assign powers to and build capacities in individual agents, or they may build institutions – agencies – with certain powers and capacities to act. . . . Typically, secondary agents of justice are thought to contribute to justice mainly by meeting the demands of primary agents, most evidently by conforming to any legal requirements they establish.[28]

O'Neill's prototypical secondary agents of justice are international nongovernmental organizations and transnational corporations. Although these agents are generally expected to work within the rules set by strong states, O'Neill's argument is that, even in failed states, these actors can take on additional capabilities to achieve either justice or injustice. O'Neill does not consider the role of international legal institutions in this analysis. One way to view the utility of a system of international criminal law in cases in which states are weak, however, is to support and enable the role of the state's government as a primary agent of justice. That is, when a state is weak but its government is not corrupt, state-centered international institutions can help to bolster the

[26] Hannah Arendt, *The Origins of Totalitarianism* (New York: The World Publishing Company, 1958), 297.
[27] Onora O'Neill, "Agents of Justice," 32 *Metaphilosophy* (2001), 198.
[28] Ibid., 181.

weak government's capabilities both to govern and to identify and empower secondary agents of justice.[29]

V. ARGUMENTS FOR THE GENERAL PRESUMPTION OF INTERVENTION

The arguments of the previous section, combined with O'Neill's exhortation to look for agents of justice in challenging situations, suggest that, instead of treating state sovereignty as a good to be overridden only in emergency circumstances, we take a closer look at both the institutional assumptions and the moral arguments used to support a policy of nonintervention. In this section, I examine May's and Altman and Wellman's arguments in favor of nonintervention, and I argue that they have not clearly shown that a presumption in favor of state sovereignty is more defensible than a stronger internationalist position, which assigns (with some pragmatic limitations) international jurisdiction over human rights violations generally.

A. *May's Domestic Stability Argument*

May's account of justifying international criminal trials rightly begins with the observation that there is no world state. As a first step in his argument for the presumption in favor of state sovereignty, this observation shows that May does not take for granted that the international community can protect human rights at all, much less better than the average sovereign state. May (also rightly) goes on to argue: "In contemporary international law, enforcement mechanisms do not necessarily depend on there being a world 'king' or president. We do not need a world monarch or other world sovereign, but only sufficient agreement among the States to provide enforcement for the rulings of such international organizations as the International Criminal Court (ICC)."[30] Concluding that such "pockets of sovereignty" are sufficient to establish "valid, binding law," May argues that there is sufficient international enforcement capability to justify international criminal trials for crimes against humanity in some circumstances.

Despite starting down this road toward justifying "pockets of sovereignty" at the international level, May's view makes nonintervention in states' domestic activities the default norm, which can be overcome only by human rights violations that count as "harms to humanity." One obvious moral cost to such a policy is that it tolerates rights violations below the threshold level where

[29] This paragraph draws from Kristen Hessler, "Resolving Interpretive Conflicts in International Human Rights Law," 13 *Journal of Political Philosophy* (2005), 46–7.

international jurisdiction is triggered. However, this cost is justified, according to May, by the benefits of protecting state boundaries from interventions, as part of a kind of contract with governments: "Since States are constituted to aim at the social order and to maintain harmonious dealings among the citizens of the State, a kind of moral presumption is given to States: As long as they are conforming to this normative aim, they should not be interfered with by other States. Social stability requires exclusive legal control over a population."[31]

The meaning of sovereignty most closely connected to social stability is the notion of exclusive legal control within a state – that is, that for any domestic decision, the "sovereign" is unchallenged within the state, leaving no doubt as to who is in control. For a theorist convinced by a broadly Hobbesian view of the importance of concentrating domestic power in a single source, any external influence upon the domestic power structure, invited or not, will threaten the political stability of the state.[32] However, as David Luban and others have argued against May, domestic social stability does not, in fact, appear to depend on assigning exclusive legal authority, even if it is limited in scope and alienable, to states.[33] These theorists point to federal units such as the United States, and now to some extent the European Union, that have developed vertically nonexclusive forms of sovereignty, or with sovereign power divided among different branches of government, and that nonetheless enjoy social stability. In this case, then, May's assumptions about the exercise of sovereignty (problematically) underpin his recommendation of a (defeasible) policy of nonintervention.

We can see May's normative recommendations as implications of his institutional assumptions more clearly if we consider an alternative institutional view that has different implications. According to Anne-Marie Slaughter:

> A new world order is emerging . . . The state is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts – courts, regulatory agencies, executives, and even legislatures – are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order.[34]

As an example of such a transgovernmental order, Slaughter argues that the establishment of the Organization of the Supreme Courts of the Americas in 1995 shows that judiciaries in liberal states see themselves as "quasi-autonomous" within the state, and as engaged with judges from other countries in a common enterprise of promoting the rule of law within their respective

[30] May (2005), 17.
[31] May (2005), 10.
[32] Krasner (1999), 11.
[33] Luban (2006).
[34] Anne-Marie Slaughter, "The Real New World Order," 76 *Foreign Affairs* (1997), 184.

countries. There are also many cases in which national courts have cited international law and the decisions of other national courts in their own controversial decisions. Famously, in its 1995 decision finding the death penalty unconstitutional in South Africa, the Supreme Court of South Africa cited decisions from national courts in "Hungary, India, Tanzania, Canada, and Germany, and the European Court of Human Rights."[35] According to Slaughter, transgovernmental networks like this one can serve as a vehicle for helping to democratize currently nondemocratic states. As she describes it, "Transgovernmental ties can strengthen institutions [in nondemocratic states] in ways that will help them resist political domination, corruption, and incompetence and build democratic institutions in their countries, step by step."[36] As is probably clear, Slaughter thinks that such cross-border influences can be a good thing for reforming sovereignty. She maintains that "[d]isaggregating the state permits the disaggregation of sovereignty as well, ensuring that specific state institutions derive strength and status from participation in a transgovernmental order."[37] On Slaughter's view, a broad prohibition on cross-border interventions not only would not be morally defensible – it would not even make sense.

My point in this section is not that Slaughter's theory about transgovernmental networks is correct. Rather, I mean to point out two things: first, that there are important connections between one's assumptions about the institutional structures of the international system, on one hand, and the associated evaluation of different kinds of cross-border interventions, on the other; and second, that consequently some justification is required for adopting the particular institutional framework that informs one's normative recommendations. We should beware of importing, without independent justification, conceptual baggage from the Westphalian worldview into our arguments about how our current international system might better protect human rights.

B. Altman and Wellman's Argument from Principle

Altman and Wellman offer both principled and pragmatic reasons for granting sovereign states the defeasible right to exclude external actors. I consider the principled argument in this section, and the pragmatic argument in the next section.

Altman and Wellman write:

> The argument from principle hinges on the idea that any state that adequately protects the basic rights of its constituents has a right to order its collective affairs as it chooses. In our view, it would be impermissible for

[35] Slaughter (1997), 187.
[36] Ibid.
[37] Ibid.

> some international agency to compel Canada to spend a higher proportion of its tax revenues on its criminal justice system, even assuming that such a shift in revenues would result in fewer crimes that violated basic rights. This impermissibility rests on the right of self-determination enjoyed by legitimate states. Thus any state that adequately performs the requisite political functions possesses a right to choose how its tax dollars are allocated."[38]

This view is strikingly like May's contractualist account of sovereignty for legitimate states. Indeed, Altman and Wellman also echo May's basic account of what a state would have to do to forfeit its right to self-determination: "a state adequately protects basic rights when it neither perpetrates nor permits widespread or systematic violations of those rights."[39]

What they leave out is May's adherence to the principle that social stability requires exclusive legal control over a population. Although I have argued that this principle is problematic, Altman and Wellman do not replace it with anything more attractive – or, indeed, with anything at all. Therefore, my primary argument against their "principled" view is that it begs the question at issue: Why should we accept that self-determination is the right of barely legitimate states, whose governments might perpetrate or allow extensive, but not quite "widespread or systematic," human rights violations?

Conceptions associated with the traditional Westphalian sovereignty seem to be at work in Altman and Wellman's arguments, in particular in their reluctance to consider assigning more authority to international institutions. First, Altman and Wellman do not even gesture at any specifics about Canada, the principles that require self-sufficiency for a political community to decide without outside interference how to spend its tax dollars, or the nature of "some international agency" in support of their assertion that such an agency could not legitimately tell Canada to increase its spending on criminal justice. This omission is striking because there already exist international agencies, such as the European Court of Human Rights (ECHR), that issue such directives to state governments. Although Canada in particular is not party to such a strong supranational court, it is possible that some future, robust instantiation of the Inter-American Court of Human Rights (IACHR) could legitimately issue such a directive (at least, if the ECHR's directives are legitimate, and if the IACHR develops along similar lines).

Second, consider Altman and Wellman's analogy between state sovereignty and parental authority:

> If a parent is either horribly abusive or woefully negligent, third parties have a moral right, and perhaps even a duty, to interfere on the child's behalf. A

[38] Altman and Wellman (2004), 47.

[39] Ibid.

> parent has no right against third-party interference if he is starving, beating, or sexually abusing his child or otherwise violating his child's basic rights. A third party has the moral right to intervene in these circumstances, and it is not necessary to establish that the parent's mistreatment of his children is harmful to people outside of the family to have a nonpaternalistic justification for intervention.[40]

All this is true, and it is also a helpful explanation of why purely domestic human rights violations can be a sufficient reason to override state sovereignty. However, this example is striking because of its moral minimalism. Generally, we accept not only that third parties have the right, and even a duty, to interfere with families within which the basic rights of children are being violated, but also that society has the right to legislate certain aspects of a child's upbringing (e.g., making some form of education mandatory, where the state is the judge of whether the parents' chosen form of education is acceptable, or forbidding parents from letting their children work for wages). Altman and Wellman might argue that the right to be educated and the right not to spend one's childhood in a factory are basic children's rights. The larger point, however, is that these rights do not exist in an institutional vacuum; rather, they are made effective by a government bureaucracy with the effective authority to keep track of the children whose rights it is supposed to protect. Thus, it seems as though this analogy, fully fleshed out, best supports not a broad right to nonintervention for minimally just states, but rather the standing jurisdiction of international institutions over even domestic rights violations, to ensure that they do not reach emergency proportions in the first place.

Obviously, the most salient objection to such an arrangement is that international institutions currently lack the capabilities to exercise such jurisdiction. This consideration, however, is properly adduced in the course of a pragmatic argument, which I consider in the next section.

C. *Altman and Wellman's Pragmatic Arguments*

Altman and Wellman's pragmatic reasons are more persuasive, but they also fall short of justifying a presumption in favor of a sovereign state's claim to self-determination:

> [T]here is a strong pragmatic argument for insisting that international jurisdiction should not include every instance in which a criminal act violates a basic human right. This pragmatic argument hinges on two ideas. First, a system of international criminal law should be well designed to minimize rights

[40] Altman and Wellman (2004), 45.

> violations and maximize the prospects of effectively prosecuting whatever violations do take place. Second, states presumptively provide more efficient forums for prosecuting crimes within their territory than do international institutions. In light of these twin ideas, a system of international prosecutions should focus on crimes committed in states that either perpetrate or permit widespread or systematic violations, leaving the criminal justice systems of other states free from outside intervention.[41]

This argument appears to assume that granting jurisdiction to international institutions would be incompatible with state-level prosecutions; otherwise, the efficiency concerns that they mention would not support limiting international *jurisdiction* over human rights violations that take place within a state's borders, but rather limiting the *exercise* of such jurisdiction in deference to state authorities where this turned out to be most efficient. There are existing models for such deference, including in the international sphere, as in the ECHR's "margin of appreciation doctrine," which gives states some discretion in implementing human rights law, on the assumption that "a state knows its domestic situation better than the Court could know it;"[42] or in the ICC's principle of complementarity, according to which the ICC cannot exercise jurisdiction over a crime unless "the state of primary jurisdiction has proven itself, in the judgment of the Court, 'unwilling or unable' to carry out a good faith investigation and, when investigation warrants, prosecution of a relevant case."[43]

Moreover, although efficiency is an important concern, the pragmatic reasons that need to be considered in any argument about allocating authority over crimes against humanity to states or international institutions are many and varied. Abandoning a presumption that even minimally just states may block international investigation and prosecution of their citizens need not presuppose answers to questions about whether criminal prosecution is preferable to, or compatible with, reconciliation, nor about the relative merits of international or domestic proceedings, conducted locally or remotely. Rather, we should consider how the allocation of authority for prosecuting or punishing crimes against humanity would impact human rights in the long term. Primary but nonexclusive jurisdiction could continue to rest with states, but for reasons other than an alleged sovereign right to exclude external actors, such as how best to achieve the goals of deterrence, anti-impunity or retribution, and reconciliation. States generally might be in a better epistemological

[41] Altman and Wellman (2004), 48.

[42] Burleigh Wilkins, "International Human Rights and National Discretion," 6 *Journal of Ethics* (2002), 374.

[43] Jamie Mayerfeld, "Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights," 25 *Human Rights Quarterly* (2003), 98.

position to investigate and prosecute human rights violations that have taken place on their territory, for example, or have better incentives to find an appropriate balance between combating impunity and achieving peace. However, recognizing the right of the international community to intervene to investigate or prosecute human rights violations, not only when states have forfeited their legitimacy, might function as an international protection for the human rights guarantees found within a state, thereby possibly serving as an additional deterrent to potential violators and an additional incentive to states to refuse to allow violators simply to escape prosecution.

VI. IMPLICATIONS FOR ARGUMENTS ABOUT INTERNATIONAL CRIMINAL TRIALS

One example of the significance of this debate is the argument made by some American critics of the ICC to the effect that it constitutes an unacceptable infringement of U.S. sovereignty in allowing ICC jurisdiction over crimes against humanity allegedly committed by American nationals on the territory of a state that is a party to the ICC.[44] This view is notable for its apparent assumption that state sovereignty should never be compromised, but also for its expansive view of the set of rights that full sovereignty involves. If we start our discussions about when international criminal trials are justified with a moral presumption in favor of a blanket state sovereignty, we have to take this argument seriously and at face value. If, in contrast, we adopt a conception of state sovereignty that is compatible with certain kinds of border crossings, we are in a much better position to debate the relative merits of Article 12 provisions, as well as to assess the reasonableness of the U.S. position on sovereignty, by looking at the specific powers the United States claims for itself in making this argument. In particular, does a reasonable conception of state sovereignty require that the United States (or any sovereign state) has the right to prevent international prosecution of its nationals for alleged crimes against humanity committed on foreign soil? What value would be protected by such a right, and what, if anything, is lost if full sovereignty is construed as not including this right? In this discussion, it would seem especially important to remember Louis Henkin's caution that sovereignty is "a bad word," because it is frequently used as "a substitute for thinking and precision."[45]

[44] John R. Bolton, "American Justice and the International Criminal Court," Remarks at the American Enterprise Institute, November 4, 2003. Accessed November 30, 2007 from usinfo.state.gov archives. See also Henry Kissinger, "The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny," 80 *Foreign Affairs* (July/August 2001).

[45] Henkin (1995), 8.

Consider another argument against requiring that states forfeit their sovereignty before allowing humanitarian interventions or international criminal investigations to proceed – that states should forfeit their sovereignty for a larger set of misdeeds than May, or Altman and Wellman, allow. When a state's sovereignty or legitimacy as such must be lost for international prosecutions to be justified, there is a strong incentive to allow international criminal prosecutions in only a narrow range of cases, because depriving a state of its blanket right to exclude foreign actors is a drastic step. That is, if a state must lose its very legitimacy before any international involvement can be justified, then the cautious strategy will end up justifying international involvement in only a few circumstances. If, in contrast, we can consider the allocation of specific powers separately, and perhaps nonexclusively, then international involvement would not be predicated on states losing legitimacy altogether, and could be justified in a wider range of cases.

VII. CONCLUSION

The point of this chapter is to situate discussions of sovereignty and international criminal law within the important project now underway, in a variety of disciplines relevant to global political justice, about how to reconceive international institutions, as well as state sovereignty, so that they are more conducive to the realization of human rights. Ideally, thinking about international criminal law should keep in mind this larger project, not least because persuasive arguments about when international criminal trials might be justified can help us better understand the appropriate reach and limits of state sovereignty. My concern is that assuming that state sovereignty must include even a defeasible right for states to block international criminal trials may actually be in tension with the goal of better understanding the moral dimensions of state sovereignty, insofar as it risks perpetuating morally arbitrary statist assumptions in both theory and practice.

ACKNOWLEDGMENTS

I thank the editors for organizing this project, and, in particular, Larry May for inviting me to participate in it. For helpful comments and criticisms on this chapter, I am grateful to the participants in the working group on Philosophy and International Criminal Law at the 2007 IVR World Congress, and to an anonymous reviewer.

3 International Criminal Courts, the Rule of Law, and the Prevention of Harm: Building Justice in Times of Injustice

Leslie P. Francis and John G. Francis

In this chapter, we argue that there is a theoretical gap in justifications for the International Criminal Court (ICC) and for other recently constituted international criminal courts, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). This gap is that, on at least some accounts, these courts have been conceptualized and defended on the basis of principles of ideal justice, but they function in circumstances of grievous injustice. Recognizing this gap sheds important critical light on justifications for what we characterize as "rule of law" and "sovereignty" limits in the structure of international criminal law regimes. These limits, we contend, cast serious doubt on the ability of the ICC to achieve a preventive function as a court of law. Yet, we also argue, prevention is the function that should be paramount in circumstances of serious injustice.

On many views, justice requires that individuals accused of crimes against humanity or other serious international crimes be held accountable, regardless of the state or territory where the crime took place and the location where the accused person may be residing. At the same time, in a morally problematic world where mass violence is a recurring event, there is pressing practical need to address how such violence can be reduced. If the creation and development of an international criminal law regime provides an effective deterrent, then these goals of justice and prevention are mutually supportive. The difficulty is that the goals may not be mutually reinforcing.[1] If they are not, it is critical

[1] Efforts to ascertain any possible deterrent effects of international trial are empirically difficult. Kathryn Sikkink has begun a project of gathering data to assess whether they do. See "Do Human Rights Trials Make a Difference?" (paper presented at the American Political Science Association, Chicago, August 2007). Laurel Fletcher has argued that context and timing make a significant difference in the efficacy of criminal punishment as part of a transitional justice regime. Laurel Fletcher, "Context, Timing, and Dynamics of Transitional Justice: An Historical Perspective" (paper presented at the 23rd World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR), Cracow, Poland, August 2007). Another

to consider whether the goal of justice is being understood as a goal for an ideal world, and whether and how the goal of ideal justice can be defended in congruence with the goal of prevention in a nonideal world. We begin by exploring how requirements of ideal justice may have worked to structure at least one international court, the ICC, in a manner that casts doubt on its preventive function. We then turn to a discussion of how the need to consider a range of practical prevention strategies may not be recognized as compelling under ideal rather than partial compliance theory.

I. ARGUMENTS FOR INTERNATIONAL CRIMINAL LAW REGIMES

Although calls for prosecuting war criminals have a long history, the Nuremberg Trials in the aftermath of World War II are often seen as the critical first step toward the institutionalization of the international prosecution of individuals accused of war crimes and crimes against humanity.[2] The horrors of the Holocaust led to the International Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) of 1948 and to the recognition of genocide as an international crime against humanity and then as an international crime in its own right. Nuremberg reflected strong interest on the part of the victors to bring to justice members of the Nazi regime and the Japanese civilian and military leadership who were accused of committing acts far beyond existing understandings of the rules of war.[3] Their goal was not, however, mere victors' revenge, but punishment according to the rule of law. Another hope of the Nuremberg Trials was that violations of such rules of international criminal law would be deterred by the possibility that perpetrators would be tried and punished – that Nuremberg would stand forever as a warning to others on the brink of crimes against humanity.

These justifications of retribution and prevention are paramount in the creation of the ICC. The preamble of the Rome Statute commits member states to determining "to put an end to impunity for the perpetrators of these

possibility is that international law regimes encourage domestic law regimes modeled on them, which function as preventives within countries adopting them.

[2] See, e.g., Mark Lattimer and Philippe Sands, eds., *Justice for Crimes Against Humanity* (Oxford: Hart Publishing, 2003) and Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000).

[3] There were, of course, also concerns about whether this motivation was carried through in an even-handed way. For example, Bass (2000) notes that liberal states are far more likely to prosecute when their own nationals are the victims; in Nuremberg, the emphasis was on trials for crimes of aggression rather than for the crime of genocide against German citizens. This and many other issues about Nuremberg – such as whether any of the trials violated the maxim "nulla poena sine lege" – are far too complex to warrant discussion here.

crimes and thus to contribute to the prevention of such crimes," as well as to "recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

The ICC is seen as an institution for ensuring that people who engage in genocide or acts of war are punished fairly for what they have done. The ICC is also seen as preventive – as a way to reduce the likelihood of horrors on the scale of Rwanda, Kosovo, or Darfur. This preventive function is more than individualized deterrence; it is the idea that bringing perpetrators of mass atrocities to justice will contribute to reduced violence or perhaps long-term stability in the societies in which they operated.

A central question about these goals is whether they are compatible in practice, or whether they are at times in tension – whether efforts to bring the guilty to justice might serve as an example to others and thus as a preventive, or merely rekindle the resentments that helped to generate the initial criminal activities. That smoldering resentments may be fanned into flames by trials is a realistic objection to the establishment of international criminal law institutions such as the ICC that has been defended by scholars.[4] Bass (2000), in response, argues that, despite the realist concerns, war crimes trials are surely better than the vengeance that might occur in their stead.

ICC President Judge Philippe Kirsch, in his report on the first five years of the ICC, expressed optimism that it is functioning as a preventive: "[I]t is precisely because the ICC operates in situations where crimes are ongoing that it is today being credited with having a shorter term impact in preventing crimes than originally anticipated – and not just a long-term deterrent effect as was once thought."[5] Whether Judge Kirsch is correct is of course an empirical question, one that may not be answered for decades, if ever.[6]

Bringing the guilty to justice and preventing atrocities are not sufficient by themselves to justify the creation of an *international* criminal law regime, however. The alternative would be prosecuting offenders in domestic courts, either those of the state in which the crimes occurred or those of other states under the assertion of universal jurisdiction.[7] Nuremberg itself was criticized as a kind

[4] E.g., Kenneth A. Rodman, "The Peace vs. Justice Debate" (paper presented at the 23rd IVR World Congress, Cracow, Poland, August 2007), and Kenneth A. Rodman, "Compromising Justice: Why the Bush Administration and the NGOs Are Both Wrong About the ICC," 20(1) *Ethics & International Affairs* (2006), 25–53.

[5] Available at http://wwwold.icc-cpi.int/library/about/newsletter/16/en_01.html (accessed June 2009).

[6] See n 2 *supra*.

[7] For a discussion of universal jurisdiction in recent law, see Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005).

of victor's justice, in contrast to the establishment of the more recent courts on a genuinely international basis.[8] There are several, interrelated reasons that might be offered in favor of the creation of such an international regime.

First is the idea that some crimes are so genuinely international in scope that they can be justly punished only within an international forum. This idea does not map easily onto the crimes within the jurisdiction of the ICC, however. Genocide and crimes against humanity, as they are defined in the ICC statute, need not be international in scope, and genocide need not even be widespread. Genocide is defined in terms of the type of act – killing group members, forcibly transferring group members, among other seriously destructive acts – and the intention to destroy the group.[9] Crimes against humanity are also defined in terms of predicate acts – murder, torture, and the like – when performed as part of a widespread attack on a civilian population and with knowledge of the attack.[10] As is widely recognized, since 1945, civil wars have resulted in more than 20 million deaths and more than 67 million displaced persons.[11] Violations of the laws of war are more likely to involve more than one nation – although even here the definition does not preclude the possibility of violations committed within the borders of a single nation-state. Only the crime of aggression – not yet defined under the Rome Statute of the ICC and thus not enforced – would by its very definition be international, if any ultimately adopted definition required that the acts be by nations against one another.

Second is the concern that the exercise of universal jurisdiction is likely to be arbitrary if other states step in when the state in which the atrocities occurred fails to act. The issuance of writs of extradition by Spanish and Belgian courts on behalf of citizens of other countries who claimed that they were harmed by the regime formerly headed by autocrats now traveling to a third country captured a good deal of attention as to the value of such judicial interventions.[12] The Pinochet case is perhaps the best known of these. General Augusto Pinochet became the dictator of Chile after leading a successful coup against the democratically elected government of Salvador Allende. After 17 years, Pinochet stepped down from power. The Pinochet regime was associated with the killing, disappearance, and torture of thousands of

[8] The United Nations Security Council established the ICTY by Resolution 827 (May 25, 1993) and the ICTR by Resolution 955 (November 8, 1994). The ICC was established by international treaty; 105 countries have now joined the ICC. See http://www.icc-cpi.int/about.html (accessed November 2007).

[9] Statute of Rome, Article 6.

[10] Statute of Rome, Article 7.

[11] Paul Collier and Nicholas Sambanis, eds., *Understanding Civil War: Evidence and Analysis* (Washington, DC: World Bank Publications, 2005), xiii.

[12] See Roht-Arriaza.

Chileans. In October of 1998, Pinochet went to Britain for medical treatment. British authorities, acting on a warrant issued by a Spanish judge, detained the general. The Spanish complaint charged Pinochet with genocide, torture, and other crimes. The grounds for issuing the complaint were based not only on connections between the crimes allegedly committed in Chile and residents of the Spanish state, but also on the nature of the crimes themselves. Spain's legal justification was that certain crimes, if they are considered to be so heinous that they are disruptive to international peace, enable prosecutors of one state to claim universal jurisdiction for crimes committed in another state. If the state where the crime was committed fails to act in such cases, then other states may step in. The House of Lords ultimately ruled in 1999 that Pinochet had committed extraditable crimes and that his immunity as a former head of state did not extend to protection against these crimes. The Lords held that the United Kingdom, as a signatory to the United Nations (UN) Convention against Torture since 1988, had an obligation to act on the warrant if it covered acts committed after the United Kingdom became a signatory. In the end, the British government, partly in response to General Pinochet's deteriorating health, allowed him to return to Chile. Pinochet's return was also a response to the request of the Chilean government, however, which had continued to argue that its sovereignty had been violated. This request may have been driven in part by the government's concern that the Chilean military might intervene if Pinochet were not allowed to return to Chile.

During the Pinochet proceedings, a growing number of complaints were filed both in Belgium and in Spain – the two countries permitting the widest exercise of universal jurisdiction at the time. These complaints against high officials in other countries involved accusations of torture and mass killings. What became the most controversial part of these complaints was whether a defendant needed to be within the territorial jurisdiction of the court seeking to exercise jurisdiction. Roht-Arriaza observes that there has been a decline in such filings as international pressure mounted, especially from the United States, to tighten the rules governing universal jurisdiction, notably in Belgium.[13]

The final, and most important, concern for our purposes is that the states in which genocide or crimes against humanity occurred may be unwilling or unable to bring the perpetrators to justice. In the past 15 years or so, the concept of a failed state has gained increasing attention. Although it is a concept that is vague at best, it seems to embrace at least some cases of a state's unwillingness or inability to intervene when mass killings are occurring within its borders,

[13] Roht-Arriaza, Chapter 7.

or when the state itself has undertaken policies that appear to promote violent conduct. The Fund for Peace has placed thirty-two states on an alert list of failing states and another ninety-six states on the warning list of states that are at risk of failing.[14] A "failed" (or perhaps more to this point, politically fragile) state may conclude tactically that it is unwise to seek to prosecute former leaders who may still enjoy some measure of support in the politically fragile state. It is not clear that having a third party try the individual or individuals would resolve fundamental political tensions within the state seeking to regain a measure of coherence. Indeed it may prolong such tensions. Some victims of actions undertaken by a cruel regime no longer in power may conclude that their own newly identified leaders are unwilling or unable to punish the former leaders who caused such pain.

This last argument for the establishment of an international criminal law forum highlights the fact that the trials it conducts may often concern states in circumstances of significant injustice. Justifications for the forum must take these circumstances into account, in defending the courts themselves and in considering how they ought to be structured. Theorizing about what justice requires in circumstances of injustice is "partial compliance" theory, to which we now turn.

II. PARTIAL COMPLIANCE THEORY AND INTERNATIONAL COURTS

When John Rawls wrote *A Theory of Justice* in 1971, he distinguished between "partial compliance" and "ideal" theory. Until *The Law of Peoples* (1999), the focus of Rawls's work was ideal theory – a theory of justice understood to apply to circumstances in which the principles of justice are generally complied with. "Partial compliance" theory – theory about the principles of justice to adopt "under less happy circumstances"[15] – was largely set aside, to be addressed after principles of ideal justice had been worked out. The societies for which international tribunals have been invoked – the former Yugoslavia, Rwanda, Sierra Leone, and (more recently, before the ICC Uganda) the Central African Republic, the Congo, and Darfur – pose urgent problems of partial compliance theory of both types identified by Rawls: situations of unfavorable natural circumstances[16] and situations of widespread human injustice.

[14] Fund for Peace Failed States Index 2007. See http://www.fundforpeace.org (accessed November 2007).

[15] John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 246.

[16] Hume famously contended that justice was not possible in circumstances of severe, as opposed to moderate, scarcity. Many theorists have followed Hume in this assumption. The limitation of

Rawls's approach to partial compliance theory applied the priorities established for ideal circumstances to circumstances of injustice. In his view, partial compliance theory works with a sketch of ideal justice as a goal, and considers what it is practical to do to move toward a world in which all societies accept the principles of ideal justice.[17] Rawls also holds the empirical views that establishing just institutions (or at least decent institutions) will bring evils such as genocide to an end and that just societies do not wage unjust war.[18] This approach, of conceptualizing partial compliance theory as a matter of progress toward meeting the standards of justice set out in ideal theory (and not as a separate area of normative theorizing in which moral considerations other than progress toward ideal justice might come into play) is part of what we question in this chapter.[19] If the considerations that apply in partial compliance contexts are not necessarily the priorities that would apply in ideal contexts (e.g., if issues such as protecting the most vulnerable persons, preventing additional atrocities, or establishing institutions that will eventually work toward justice are of most importance in partial compliance contexts), then we might expect that principles of ideal justice do not necessarily comport with considerations of partial compliance theory. Instead, arguably different principles (or prioritizations of principles) apply – and arguments that might be persuasive in the ideal context might not be persuasive in the partial compliance context. To be sure, this is not to deny that the same considerations might be relevant in both contexts; it is important to distinguish partial compliance and ideal theory, however, and to consider whether a justification is being offered as a matter of one or of the other.

Presenting a full account of partial compliance theory is beyond the scope of this chapter. Rather, our aim is merely to point out that it cannot be assumed that principles that apply in ideal contexts apply in circumstances of injustice; it also cannot be assumed that the principal concern in circumstances of injustice is how to make progress toward ideal justice. To be sure, there will be differences of contexts in which principles apply, but it requires argument to show that these are the only differences between ideal and unjust circumstances. It requires an argument, however, to conclude that principles of ideal justice apply in nonideal contexts.[20] The objection that this view allows

justice to circumstances of moderate scarcity is part of what our views about partial compliance theory put into question.

[17] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 90.

[18] Ibid., 8-9.

[19] In using the Rawlsian distinction between ideal and partial compliance theory, we do not mean to be committed to any additional substantive claims that Rawls makes.

[20] Allen Buchanan also makes this point. See *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004). Liam Murphy

injustice to be done in circumstances of injustice[21] begs exactly this question, because it assumes an ideal view about what justice requires. That is, it assumes that the justice that must be done in nonideal contexts is what ideal justice requires. Without this assumption, there would be no basis for asserting that compliance with principles of justice for nonideal contexts is unjust.

Suppose we think further about what concerns might be paramount in partial compliance theory. Partial compliance contexts are contexts in which people lack basic assurances of stability. One concern, therefore, is protecting the most vulnerable individuals, those whose circumstances are most precarious as a result of the injustices that prevail. Because these people are the ones who are most likely to be slaughtered if genocide recurs, preventing the next atrocities may be what is most important by way of protecting them. Achieving such prevention may require taking steps that are different from the priorities of ideal justice. For example, Rawls defended freedom of expression as a first principle liberty that is lexically prior to the distribution of economic wealth – yet it was the exercise of this first principle liberty of expression by a radio announcer that was the call for genocide in Rwanda.

A likely objection to this view is its apparent crude instrumentalism – it apparently holds that standards of justice may be bent in the service of protecting victims. There is far more to be said about this concern than we have space to offer here, but we can sketch out the contours of a reply, beginning with the point that the standards of justice must not simply be assumed to be those of ideal justice. Partial compliance contexts are riven with instability and insecurity. The place to start in such contexts lies in providing persons with whatever stability and security can be mustered. This is central to protecting their very survival.

III. "RULE OF LAW" LIMITS

Consider much of the "legalism" that attends the structure of the ICC (and others of the international criminal courts). The Statute of Rome defined the jurisdiction of the ICC narrowly, to comport with what may be regarded as requirements of the rule of law. The Rome Statute is careful to emphasize many principles that have been thought to be core to the "rule of law" – or what Lon Fuller called the "internal morality of law." These principles

argues in contrast that principles of ideal theory set outside limits on what can be required in partial compliance contexts: People cannot be required, he contends, to give away more under circumstances of injustice than they would be required to give away under ideal circumstances. Liam Murphy, *Moral Demands in Non-Ideal Theory* (Oxford: Oxford University Press, 2000).

[21] Win-chiat Lee pressed this objection against us at IVR.

include, for example, no retroactivity (hence, no jurisdiction of the ICC over events occurring before 2002). Fuller argued that, given an understanding of German law, Nuremberg did not violate these strictures – an argument that was criticized by H. L. A. Hart[22] and others as failing to separate legality from morality. Even contemporary commentators see Nuremberg in these terms of the rule of law: "Nuremberg's true spirit is to find a legal response to man's inhumanity to man by following the due process of law and by ascribing individual criminal responsibility."[23] Is this insistence on bringing the guilty to justice – in the context of legalism defended as a matter of ideal theory – a matter of how justice should function and what courts should be like in a generally just world?[24] Or, is it viewed as a question of partial compliance theory, about how courts such as the ICC should function in a world that is deeply problematic from the point of view of justice? It seems clear that such legalism is at least a matter of ideal theory – at least, we will not question here whether it is; the question we will raise is whether it would function in the same way in partial compliance contexts.

Suppose we think that the rule of law is a principle of ideal justice – all those legalisms that have structured the ICC would then be justified as a matter of ideal theory. Protecting the most vulnerable individuals, however, is a principle of partial compliance theory – one that recommends doing all we can to prevent the next genocide. Unless the legalism of the ICC, central to its role as a retributive mechanism, can be given a partial compliance justification too, there will be a tension between the idealism of the legalism and the partial compliance nature of the ICC's preventive mission.

There are reasons for concern, however, about whether these rule-of-law limits can be given a partial compliance justification – or, at least, for thinking that the justification will not be easy. The rule-of-law limits make proof more difficult and delay whatever justice there might be. Insistence, for example, on due process guarantees may mean that some persons who were importantly complicit go free, if their accusers are not present to testify. Nonretroactivity means that some of the worst of the offenses and offenders are simply out of the scope of the ICC. There are a number of countries ranging from Bosnia to Iraq where mass killings may leave few witnesses. A darker vision

[22] H. L. A. Hart, "Positivism and the Separation of Law and Morals," 71(4) *Harvard Law Review* (1958), 593–629, 619. The example discussed in detail by Hart involved a post-War trial in the German courts.

[23] Christoph Burchard, "The Nuremberg Trial and Its Impact on Germany," 4:4 *Journal of International Criminal Justice* (September 2006), 800-29, on 800.

[24] Burchard points out specifically that the rejection of a "tu quoque" ("you also") defense – as in Nuremberg – is a matter of ideal justice, not practical justice.

would see incentives for mass murderers who are aware of the rule-of-law requirements for proof to ensure that no victims remain to testify against them. Moreover, commentators have raised concerns that rule-of-law requirements for witnesses may bear more heavily on women – as, for example, in the efforts of international justice to deal with widespread rape in the former Yugoslavia.[25] To the extent that deterrence depends on the likelihood of punishment, these restrictions are likely to dilute the preventive function of the ICC.

IV. SOVEREIGNTY

The ICC may exercise jurisdiction only for acts committed after the entry into force of the Rome Statute in 2002 – or, for states becoming members after 2002, only for acts committed after membership unless the state consents.[26] Cases may be referred to the ICC by member states, by the UN Security Council, or as a result of an investigation of the Court prosecutor.[27] Except for cases referred by the Security Council, the Court's jurisdiction is limited to events occurring in a member state or actions committed by member state nationals.[28] Since 2002, three cases have been referred by member states – Uganda, the Central African Republic, and the Congo; one case – Darfur – has been referred by the Security Council. If a case is taken up by the state's judicial system, the ICC is to stay its hand, unless the ICC prosecutor determines that the state is not "genuinely" able to carry out the investigation;[29] this is the principle of complementarity.

These limits represent strictures on retroactivity and respect for individual state sovereignty. Important reasons support the respect for state sovereignty expressed in the principle of complementarity: the recognition that national courts may be best placed to deal with events within their borders, the need to share the burden of international trials, the hope that complementarity would lead to acceptance of the legitimacy of the ICC by reluctant states, and (perhaps most crucial) the expectation that, through complementarity, states would be encouraged to develop their own institutions for bringing egregious offenders to justice.[30]

These limits on sovereignty, however, curtail the ICC's ability to act in many circumstances of grievous injustice. If the Security Council does not refer a

[25] Sara L. Zeigler and Gregory Gilbert Gunderson, "The Gendered Dimensions of Conflict's Aftermath: A Victim-Centered Approach to Compensation," 20(2) *Ethics & International Affairs* (2006), 171–92.

[26] Statute of Rome, Article 11.

[27] Ibid., Article 13.

[28] Ibid., Article 12, § 2.

[29] Ibid., Article 18, § 3.

[30] Philippe Sands, ed., *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge, UK: Cambridge University Press, 2003), 75–6.

case, or if the events took place outside the time or place of the jurisdiction of the ICC, then the ICC is powerless to act. To be sure, the ICC can act in cases within the sovereignty limits. As with the rule-of-law limits, however, the ICC's inability to act in the face of the sovereignty limits raises questions about whether these limits can be justified under the circumstances of injustice that prevail in many cases of extraordinary violations of human rights in the world today.

V. THE PREVENTION OF HARM: A ROLE FOR THE ICC?

The prevention of widespread harm in the contemporary world is obviously a difficult practical and moral matter. Effective strategies for achieving prevention often seem unavailing, given that violence may take place in areas where state authority is either complicit or ineffective. The question for our purposes is how the ICC as currently structured fits into this context. If it is viewed in terms of ideal justice, the fit is, we have argued, uneasy. The question this raises, however, is whether the best response is simply to continue to recognize that the fit is uneasy or, alternatively, to change or abandon the ICC's structure. In this final section, we sketch out the context for this discussion, and suggest that the current approach should be caution: caution in use of the ICC, in hopes for what it can achieve, and in any belief that ICC justice is likely to contribute to an overall reduction in the burden of violence in the world today.

The other traditional options that have been employed to halt mass violence have, at best, a troubled record of effectiveness. These options come in two broad categories: sanctions or military intervention. Sanctions are usually the preferred option, at least in the early stages of mass violence, as a means to end the violence without extending the loss of life to interventionist forces of other countries. Sanctions often include the imposition of restrictions on trade, travel, financial transactions, and investment on the offending state. The working assumption is that sanctions will not be lifted until the harm ends, unless the sanctions are judged to cause additional harm without reducing the mass violence. One challenge of sanctions is their effectiveness – which may depend on the offending state's reliance on foreign resources and the willingness of the world community to adhere to the sanctions regime. Another challenge is the distribution of burdens that may result from sanctions, if members of the population in general are less able to protect themselves from the effects of shortages than are elites who are complicit in the policies giving rise to the sanctions in the first place.

Military intervention is the other main option that may be undertaken either independently or in conjunction with sanctions. Military intervention

may follow the imposition of sanctions, if the sanctions are judged not to be working. Military intervention may be undertaken by a neighboring state, an association of nearby states, a defensive alliance such as the North Atlantic Treaty Organization (NATO), the UN, a superpower, or some combination of these forces. The problem of deploying troops is that it may be belated for it is not predictable when military intervention will be undertaken or whether it will lead to greater violence.

In contrast, the ICC was established fairly recently. Its operation depends to a large extent on whether a sanctions regime or a military intervention has led to the capture of persons accused of mass violence. The ICC may allow us to focus on the crimes of a few individuals, but to capture such individuals usually requires extreme pressure on a nation's population. For example, the ICC Prosecutor, Luis Moreno-Ocampo, has expressed enormous frustration about the inability of the ICC to arrest and prosecute any of those individuals accused of crimes against humanity in Darfur.[31] It took significant investigative efforts – and the accused's trip to Belgium – for the arrest in May 2008 of Jean-Pierre Bemba, who is accused of crimes against humanity in the Central African Republic.[32] It is difficult to sort out whether sanctions, military intervention, or the quality of internal politics constrains mass violence. The hope is that, in conjunction with other strategies, the ICC may help deter the violence, but whether this will actually happen remains unclear.

Moreover, cooperation or encouragement of ICC involvement may itself be a politicized process. Adam Branch, for example, has argued that ICC intervention in the Ugandan case may have served the Ugandan government's interventionist interests and prolonged conflict in Acholiland.[33] Branch documents concerns that the Ugandan government's decision to refer alleged crimes of the Lord's Resistance Army (LRA) to the ICC sought to advance its interests in entrenched power and to deflect attention from the Ugandan government's own activities. Instead of furthering peace, Branch contends, the ICC's intervention took place over the protests of Acholi peace activists and may have made it more difficult to encourage cessation of hostilities by the LRA. Calling on the ICC enabled the Ugandan government to gain legitimacy and depoliticized the Acholi victims, according to Branch.

[31] "ICC Prosecutor: Darfur Is a Huge Crime Scene." See http://www.icc-cpi.int/press/pressreleases/375.html (accessed June 12, 2008).

[32] "ICC Arrest Jean-Pierre Bemba – Massive Sexual Crimes in Central African Republic Will Not Go Unpunished." See http://www.icc-cpi.int/press/pressreleases/371.html (accessed June 12, 2008).

[33] Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," 21(2) *Ethics & International Affairs* (2007), 179–98.

Bickerton, Cunliffe, and Gourevitch suggest that the more we arrogate power to a global agency, the more we may diminish the importance of politics within states by shifting tough decisions to external decision makers that have limited powers and (because of their distant interest) generate local expectations that cannot be met.[34] If we focus on selective judicial intervention (say, in the aftermath of a civil war) that is driven by a commitment to bring individual justice, we may reinforce the need for recurring intervention that results in porous borders and erratic domestic politics. The larger goal should be how we foster nonlethal domestic democratic politics.

As a matter of partial compliance theory, the question is whether either the limits on the ICC or the use of the ICC itself can be defended in light of these political difficulties in achieving prevention. The rule-of-law limits restrict possible prosecutions, often leaving out known offenders for whom proof of linkage to particular criminal events is difficult to achieve. Sovereignty limits isolate atrocities outside the time and place restrictions of the ICC. If these limits support the thought that something is being done, while creating structures of impunity, the limits would appear problematic in partial compliance contexts.

The world of the ICC is, by its own definition, the world of a criminal court with the standards and traditions of criminal justice – which is, as we understand it, a world of justly punishing individuals who have committed genocide, crimes against humanity, and violations of the laws of war. It is not clear to us, however, that traditional arguments for criminal law – that is, special or general deterrence – can be achieved. The conditions and opportunities that lead people to commit atrocities are often distant in time, in space, and in the probability of getting caught. Deterrence requires that courts move nimbly in bringing such individuals to trial. Rule-of-law limits may preclude this possibility.

In those states in which there has been intervention, we see criminal law as not only about justly punishing individuals who committed the crimes but also about giving voice, support, and recognition to the victims. In recent years, there has been increased interest in promoting confrontations between perpetrators and victims that can result in building the future by understanding the past. This interest is understandable, but it may not be sufficient if sustained attention is not given to the hard politics of negotiating what that future will look like. In short, prevention needs to embrace that groups and individuals

[34] Christopher Bickerton, Philip Cunliffe, and Alexander Gourevitch, eds., *Politics Without Sovereignty: A Critique of Contemporary International Relations* (New York: UCL Press, 2007).

in the country have the space, the encouragement, and the local imperative to find a political resolution.

To be sure, courts such as the ICC may be seen as serving functions other than general or special deterrence. The ICC may be viewed as a rhetorical device, expressing international condemnation of horrific events. Relatedly, it may serve as an example for domestic legal systems. In addition, the Rome Statute itself contemplates the establishment of a fund for victim compensation, even when alleged perpetrators are not successfully brought to justice.[35] Whether these functions contribute to the goal of harm prevention, or whether they are sufficient in themselves to justify the establishment of the ICC, are complex empirical and normative questions that we do not address here.

Ours is not an argument against the use of criminal courts to resolve the fate of the leaders who have caused such devastating harm. Rather, we question whether, when nonlocal courts are brought into the play, the attention shifts from the broader social, economic, and political context to that of the effort to bring to justice selected individuals who committed criminal acts. The underlying context in which these crimes took place may be postponed or ignored, thereby running the risk of recurring lethal conflicts. This is the risk of the ICC. If the ICC is not evaluated in partial compliance terms, this risk may be imperfectly understood. Evaluations of the ICC in purely ideal theory terms – such as that the ICC will "bring the guilty to justice" – are thus misguided and potentially misleading.

[35] Statute of Rome, Article 79.

PART TWO

CULTURE, GROUPS, AND CORPORATIONS

4 Criminalizing Culture

Helen Stacy

I. INTRODUCTION

Human rights are the ever-expanding paradigm of international law, and criminal law is the ever-burgeoning tool of that paradigm. As the body of international human rights treaties and conventions has expanded over the last two decades, more criminal laws have been enacted by governments in the name of human rights. I argue here that although the broad objectives of human rights and criminal law share some similarities, they also have important differences. Especially in the case of bodily harms committed in the name of culture, the reflexive use of domestic criminal law as a measure to improve human rights not only risks perverse effects, but also distracts attention from the actions of governments in instituting deep human rights improvements.

Criminal law was used in the Nuremberg and Tokyo military tribunals to punish perpetrators of World War II human rights atrocities. Fifty years after the Nuremberg Trials of perpetrators of the Nazi genocide and following the hiatus of the Cold War, a multiplicity of international courts and tribunals have consolidated the use of criminal law as a tool of redress for human rights violations in postconflict situations, sometimes in the name of "transitional justice," sometimes in the name of "an end to impunity," and sometimes simply in response to international activism.

Criminal law also has expanded into other human rights contexts. For example, more than half of the nation-states of Africa have adopted criminal legislation to sanction the practice of female genital cutting (FGC). Typically, these nations have signed on to key international human rights treaties such as the international Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). These human rights treaties and the international committees that administer them have issued statements that declare FGC a human rights

violation, and the domestic African anti-FGC legislation uses criminal law as the vehicle for attaining international human rights standards.

Although there is an important role for international criminal law in prosecuting and punishing the "big fish" of mass human rights violations such as genocide, there ought also to be limitations in extending the use of the criminal law model, even when used in the name of international values. Domestic criminal laws that reflexively mimic international human rights standards by outlawing cultural practices may founder because they encounter the limits of law. Law's limits depend, in part, upon the context in which law is applied. Criminal standards and processes that are appropriate and useful in one context do not necessarily transfer to another context. Used without great attention to the context and background conditions, criminalization may add to human rights harms by driving conduct underground. Law then not only fails in its purpose; it may even harden attitudes in favor of harmful practices.

My grounds are both normative and pragmatic. Normatively, criminal law's use of individual responsibility may be misplaced when an individual's behavior is produced by historical and social habit. Pragmatically, criminal process may be a waste of resources or, even worse, counterproductive. Together, these problems reinforce the structural distinction between the two strands of international public law: international humanitarian law that is deployed in war and postconflict situations on the one hand, and international human rights standards that are intended to guide the everyday practices of government and improve the everyday standards of people on the other. Together, they show that coupling criminal law with international human rights requires precision about institutional capacity.

In what follows, I sketch the past and present use of criminal law as a mechanism of improving human rights before turning to the philosophical justifications for criminal law. I compare and contrast international humanitarian law and international human rights and the relative impact of using criminal law as part of the legal approach to achieving normative goals. Using "culture" here in its broadest meaning as sets of beliefs internal to a group and where active pursuit of the cultural belief results in bodily harm, I consider the case of FGC as an example of criminal law's bad fit within international human rights. FGC exemplifies a cultural practice resting on beliefs that may not be held by all members of the group but are upheld by those members who have status in the group. I suggest that, rather than penalizing individuals, the better approach for national governments is to work at changing the background conditions of cultural practices – less law, in other words, and more commitment to incremental and longer-term improvements in health, education, and economic opportunities. National governments ought not to be

deemed as complying with their international human rights treaty obligations simply by criminalizing individual conduct.

II. DIFFERING STANDARDS OF BODILY HARM AND CRIMINAL LAW

A. *Past Uses of Criminal Law to Change Social Practices and Cultural Habits*

Using criminal laws and criminal punishment to stop harmful social practices makes perfect sense. Indeed, it seems to have worked in the past. For example, by the beginning of the twentieth century, most Western (or Westernized) countries had criminal laws that prohibited settlement of private disputes by dueling with swords and pistols. A long history of national bans on dueling began when King Henry IV of France outlawed it in 1602, making participation in a duel punishable by death. English legislation during the seventeenth and eighteenth centuries likewise criminalized dueling. In the German Weimar Republic, a 1928 criminal code made dueling an offense punishable by imprisonment. In the United States, the District of Columbia first outlawed dueling in 1839, and then, after the American Civil War, every U.S. state introduced antidueling legislation with sanctions ranging from disqualification from public office to death.

The Hindu rite of *sati* – the practice of self-inflicted "widow-death" of a grieving widow throwing herself onto her husband's funeral pyre – was criminalized in 1821 by the British government in India, at a time when the annual count of widow deaths in a city like Calcutta was estimated to be approximately 500.[1] *Sati* was declared illegal and punishable by the criminal courts as culpable homicide amounting to manslaughter, (ironically) punishable by death. When orthodox Hindus protested the new criminal law to the Privy Council in London, the appeal was dismissed and the colonial criminal anti-sati law was upheld. The practice has virtually disappeared in today's modern India.

Similarly, the Chinese social practice of foot binding has stopped, even though approximately 40 to 50 percent of Chinese women in the nineteenth century (and virtually all women in the upper classes) had bound feet. Foot binding was first outlawed by the Qing dynasty in 1912 when government inspectors would levy fines on parents who bound their daughters' feet. When the Communists came to power in 1949, they also issued anti-foot-binding

[1] S. R. Sharma, *The Making of Modern India from A.D. 1526 to the Present Day* (Bombay, India: Orient Longmans, 1951), 478.

laws that carried criminal penalties. The practice has completely disappeared in modern-day China.

Whereas these historical examples seem to endorse the utility of criminal law as an intervention in social practices causing bodily harm, deeper analysis of the causal role of criminal penalties is less conclusive. For example, it seems that foot binding was already dying out in many parts of China by 1900 because of anti-foot-binding associations. People who joined these associations took an oath that they would not bind their daughters' feet and, perhaps even more important, that they would not permit their sons to marry women with bound feet. This created a new marriage market unpredicated on tiny 3-inch "lotus" feet in potential wives. The change in social practices was already well underway by the time the 1912 legal prohibition was enacted. By the time the Communist government issued its ban in 1949, the cultural habit of foot binding had all but vanished.

Likewise, the historical record on sati suggests that there was more to the story than the simple application of "civilized" human rights standards backed up by criminal sanction. Historians of the Indian colonial period now suggest that sati was more likely a cultural rebellion against British colonization itself, rather than a deeply ingrained practice of any long duration. This more recent research explains the demise of sati as coextensive with imperialism, such as the British using local rajahs as a means of colonial influence, which in turn altered the mechanisms of resistance to colonial rule. In other words, extinction of the practices of foot binding and widow-burning seems to be less attributable to criminalization and criminal penalties and more an outcome of other, deeper, social forces.

B. Present Uses of Criminal Process under International Humanitarian Law

The use of criminal law has intensified during the past 15 years. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are ad hoc criminal tribunals that exercise criminal jurisdiction under their United Nations (UN) Charter Chapter VII powers, as do the hybrid criminal tribunals of Sierra Leone, East Timor, and Cambodia. The new International Criminal Court (ICC) exercises criminal jurisdiction under its status as a multilateral international treaty. These legal bodies utilize criminal standards of evidence and procedure and then convict and sentence individuals for egregious human rights violations in war (or warlike) situations where the international community has sent in troops or peacekeepers.

Criminal law also has been deployed in other contexts where there is little or no connection with international intervention. For example, of the twenty or so national truth and reconciliation commissions established around the world under domestic jurisdiction, roughly one third of them have quasi-criminal power in that they can withhold amnesty and instead refer allegations to processes of domestic criminal prosecution. In other cases such as a new court in Herzegovina, the international "hybrid" criminal model seen in Sierra Leone, East Timor, and Cambodia, international humanitarian law has been "domesticated," giving local courts criminal jurisdiction under domestic law to convict and punish political leaders who have used violence on their own populations. Finally, national courts are using their national criminal powers to exercise "universal jurisdiction" in the name of international human rights, as, for example, in 2001 in Belgium, where five Rwandans were criminally charged, convicted, and sentenced for their role in the Rwandan genocide.[2]

The moral logic of universal jurisdiction is that particular human rights violations are so bad that all people and all governments are morally outraged, licensing national criminal courts to act as proxies for international sentiment. Belgium, for example, passed a law in 1993 allowing for punishment of severe violations of international human rights that occur anywhere in the world, using the standards of the 1949 Geneva Convention and the 1977 Geneva Protocols I and II. In 1999, jurisdiction was extended to include the crime of genocide. Belgium's universal jurisdiction law transformed an international moral interest into a legal right, giving Belgium the power to prosecute war crimes and crimes against humanity committed by foreigners outside its own territory.

Those opposed to universal jurisdiction argue that it breaches the principle of national sovereignty. Belgium, it is said, has no political authority to try a crime committed outside its borders, no matter how heinous.[3] Indeed, when

[2] In 2001, a Belgian court heard cases against four Rwandans – two nuns, Consolata Mukangango and Julienne Mukabutera; a businessman, Alphonse Higaniro; and a university professor, Vincent Ntezimana – alleging participation in the massacre of more than 7,600 ethnic Tutsis at the Sovu convent in Butare. After the massacre, the defendants fled to Belgium where they were ultimately arrested and charged. Following an eight-week trial, the Court of Assizes of the Administrative District of Brussels sentenced them to Belgian prisons for terms ranging from twelve to twenty years. The United States, China, and Russia reacted strongly to these trials, especially when a spate of highly political cases were deposed in Belgian courts against former Israeli Prime Minister Ariel Sharon (accused of involvement in a 1982 massacre in Lebanon), against former Palestine Liberation Organization leader Yasser Arafat (accused of terrorist actions), and against U.S. President George W. Bush, U.S. Vice President Dick Cheney, and former U.S. Secretary of State Colin Powell (accused of responsibility for the 1991 Baghdad bombings).

[3] An example of such opposition is Henry Kissinger, "The Pitfalls of Universal Jurisdiction," 80 *Foreign Affairs* (2001), 86. The "Rwandan nuns" trial also elicited mixed reactions among both

confronted with the sharp increase in deposed suits, Belgium amended its universal jurisdiction to require that the accused must either be Belgian or at least living in Belgium. Some cases that had already begun continued despite these amendments, including the indictment in 2005 of Chad's dictator Hissène Habré for crimes against humanity, torture, and war crimes, among other human rights violations.[4] Other international warrants issued by the Belgian court for Rwandans living outside Belgium are still outstanding, but only for those alleged criminals whose victims were Belgian citizens.[5]

victims of the Rwandan genocide and human rights advocates. The case was welcomed by some as an important first step in convincing nations to fulfill their commitments under the Geneva Convention and to prosecute individuals in their jurisdictions who had committed atrocities. Among other Rwandans, however, the case was criticized as an unjustified attempt by Belgium (and France) to evade responsibility for the tensions and passions that they helped generate during their periods of colonial rule. More important, the Belgian trials display many of the disadvantages of international human rights trials, with few of the advantages. The distance and isolation from the victims in the Rwandan community could not have been more pronounced – it was much greater than the distance issue that plagued the ICTR in Arusha, Tanzania – which meant that there was no engagement with domestic Rwandan judges, court personnel, or even the Rwandan public.

[4] The International Court of Justice (ICJ) has refused to rule on whether universal jurisdiction claimed by a nation-state is valid under international law. An arrest warrant was issued in 2000 under the Belgian law against the then Minister of Foreign Affairs of the Democratic People's Republic of the Congo. The warrant was challenged before the ICJ in *The I.C.J. Arrest Warrant Case. Congo v. Belgium*, 2002 I.C.J. 2 (Feb. 14). The ICJ's decision, issued in 2002, found that it did not have jurisdiction to consider the question of universal jurisdiction; the Court instead decided the question on the basis of the immunity of high ranking State officials. The ICJ held by a 13–3 vote that sitting foreign ministers, like heads of state and government, are immune from criminal process in other countries. The Court emphasized that foreign ministers need to be able to travel the world representing their nations, free from the constant fear of arrest. The ruling effectively derailed several pending Belgian cases, such as one against Israeli Prime Minister Ariel Sharon. However, several of the judges considered the matter in separate and dissenting opinions, such as the separate opinion of President Guillaume, who concluded that universal jurisdiction exists only in relation to piracy, and the dissenting opinion of Judge Oda, who recognized piracy, hijacking, terrorism, and genocide as crimes subject to universal jurisdiction.

[5] A group of scholars from Princeton University published *The Princeton Principles on Universal Jurisdiction* in 2001, aiming to clarify the jurisdiction of courts by adopting a universal approach toward jurisdiction. See *Princeton University Program in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction* (2001), available at http://www1.umn.edu/humanrts/instree/princeton.html. In their view, the crimes giving rise to universal jurisdiction include slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture. The alleged crime need not have taken place within the relevant state, nor do the victims or perpetrators need to be citizens – rather the jurisdiction stems from the severity of the alleged practice, the necessity to prevent such crimes, and the willingness of a national court to bring the issue to trial. Other principles espoused by the Princeton group include 1) government officials – including heads of state – should not be immune from prosecution based on the defense that they were acting in an official capacity; 2) there should be no statute of limitations on the prosecution of these crimes; 3) a state should refuse to extradite an alleged

All of these criminal prosecutions, in both international and national courts and tribunals, are in some sense based on the premise that every individual who causes harm to another is criminally liable for his or her actions. Important for their symbolism and their emphasis on individual responsibility, these developments in international criminal law are setting new standards of international procedure as well as creating a body of legal principles that individual nation-states look to as precedent. These laws make human agency a central feature, and start with the normative assumption that individuals who do harm must be held criminally responsible for the harm and sanctioned, somewhere and somehow. The hope is that respectable legal processes with transparent legal standards will deter human rights tyranny.

C. Present Use of Criminal Law for International Human Rights Violations

Less discussed is the use of criminal law as a mechanism to pursue human rights violations that are not a casualty of civil or political conflict – practices such as FGC that seem abhorrent to outsiders but may occur routinely within a community. Habit, in other words, has conferred legitimacy. In this sense, FGC is the contemporary analogue to dueling, foot binding, and sati, where outsiders introduce criminal penalties in the name of more "civilized" standards. Today, though, the civilized standard comes in the package of an international human rights treaty.

Each year in Africa, approximately 3 million girls and women are "cut" under a custom viewed by many traditional cultures as a necessary rite of passage. The procedure originated in Africa and remains today a mainly African cultural practice, although it also takes place in immigrant communities in the West. It predates Islam and is widely practiced in countries where the predominant religion is Christianity, such as Ethiopia and Kenya. The consequences can be dire: They include prolonged bleeding, infection, infertility, and death. For those who suffer infibulation – the most severe form of genital cutting, in which all external sexual organs are cut away – cutting is repeated with each new birth to allow passage of the baby. Approximately 130 million women in the world today, principally in Africa, have undergone some form of cutting.

There have been a small handful (most recent statistics suggest approximately eight or nine) of criminal prosecutions for cutting in Burkina Faso

perpetrator when that person is likely to face the death penalty or any cruel, degrading, or inhuman punishment, or would face sham proceedings with no assurance of due process; and 4) blanket amnesties generally are inconsistent with a nation's obligation to hold individuals accountable for these crimes.

and Ghana. In Ghana, two practitioners were convicted of second-degree felony after having performed FGC. Of the fifty-three nation-states that are part of the Africa Union, twenty-five have signed on to CEDAW[6] and forty-nine have adopted an instrument of ratification, accession, or succession into their national law.[7] FGC practices have been well documented in twenty-eight of these African States.[8] Of these nations, eight have introduced some form of sanction that seeks to prohibit and punish the commission of FGC by law.[9] This legislation ranges from one country to the next: The Djibouti law, which prohibits all forms of FGC, provides for imprisonment and/or fines for both persons who perform the procedure and persons who request, incite, or promote an excision by providing money, goods, or moral support – this in addition to its Penal Code, which outlaws FGC and includes prison terms and fines.[10] Sudan, in contrast, prohibits only the most drastic forms of FGC.[11]

Western countries have also passed criminal sanctions against FGC. For example, in the United Kingdom, the Prohibition of Female Circumcision Act was passed as early as 1985. The Act also makes it illegal to aid, abet, counsel, or procure the carrying out of these procedures. The UK Children Act of 1989 brings FGC within the ambit of child protection systems permitting removal of a child from her parents. France is the leading European nation in its criminal prosecutions of FGC, even though it does not have a specific law prohibiting the performance of FGC.[12] French prosecutions are made under

[6] These are Benin, Burundi, Cameroon, Congo, Democratic Republic of Congo, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Lesotho, Madagascar, Mali, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Sierra Leone, South Africa, Tunisia, Uganda, and Zambia.

[7] These are Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Centrafrcaine, Comoros, Congo, Democratic Republic of Congo, Côte d'Ivoire, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, South Africa, Swaziland, Chad, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.

[8] These are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Ethiopia, Egypt, Eritrea, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, and Uganda.

[9] In 1999, the following African nations had national laws prohibiting FGC in all or parts of its forms: Burkina Faso, Central African Republic, Côte d'Ivoire, Djibouti, Egypt, Ghana, Guinea, and Sudan.

[10] World Health Organization, *Female Genital Mutilation – Programmes to Date: What Works and What Doesn't – A Review 1999*, available at http://www.who.int/reproductive-health/publications/FGC/FGC_programmesreview.html.

[11] Ibid.

[12] For more on this, see Sophie Poldermans, *Combating Female Genital Mutilation in Europe*, 32–49, available at http://www.stop FGC.net/dox/SPoldermans FGCinEurope.pdf.

Article 222 of the 1992 Code Penal. Since 1979, thirty-five to forty cases have been filed for FGC practices. In the majority of these cases, the accused was not the person who carried out the procedure but rather the mother of the girl on whom FGC was performed.[13]

Criminal sanctions for FGC have recently fueled a passionate debate in the United States, reverberating on the African continent. In 2006, in the U.S. state of Georgia, a Muslim gas-station clerk from Ethiopia named Khalid Adem was sentenced to ten years in prison for aggravated battery and cruelty to his two-year-old daughter after he removed her clitoris with a pair of scissors in his suburban kitchen. At the time Adem was charged, many U.S. states – including Georgia – had no laws prohibiting FGC. Adem was charged with aggravated battery and cruelty to children, and Georgia then swiftly introduced legislation to criminalize FGC.[14] Response in Adem's native Ethiopia was mixed: A senior official in Ethiopia's Ministry of Women's Affairs praised the punishment "because what he did is a violation of child rights." Ethiopian Prime Minister Meles Zenawi, in contrast, said that although it was his government's policy to discourage the practice, it was still common, and "[i]f a whole community is involved in this practice, you cannot jail an entire community. You have to change the mindset, and that takes time."

Although no specific domestic law prohibits FGC in Ethiopia, the Ethiopian Constitution bans "harmful traditional practices."[15] More importantly, however, Ethiopia has both signed and ratified the CEDAW. In 1990, the CEDAW Committee recommended that female circumcision or FGC be viewed as a discriminatory practice against girls and women. Then in 1995 at the Fourth World Conference on Women in Beijing (the largest conference in the history of the UN), the UN called for CEDAW signatory nations to prohibit female genital mutilation "wherever it exists and [to] give vigorous support to efforts among non-governmental and community organizations and religious institutions to eliminate such practices" and to "take urgent action to combat and eliminate violence against women, which is a human rights violation, resulting from harmful traditional or customary practices, cultural prejudices and extremism."[16] In 1999, the CEDAW Committee passed General

[13] Ibid.

[14] See Patricia A. Broussard, "Female Genital Mutilation: Exploring Strategies for Ending Ritualized Torture; Shaming, Blaming, and Utilizing the Convention against Torture," 15:19 *Duke Journal of Gender Law & Policy* (2008) 19, 21.

[15] Article 35 (4) of the Ethiopian Constitution states: "The State has the duty to guarantee the right of women to be free from the influence of harmful customary practices. All laws, stereotyped ideas and customs which oppress women or otherwise adversely affect their physical and mental well-being are prohibited."

[16] Fourth World Conference on Women, Beijing Platform for Action, UN Doc. A/CONF .177/20, para. 232(h) and (g) (1995). Reprinted in 35 I.L.M. 409 (1996).

Recommendation 24, stating that "state parties should ensure . . . [t]he enactment and effective enforcement of laws that prohibit female genital mutilation and marriage of girl children."[17] In 2000, the UN General Assembly followed up with a resolution that called upon states:

> To develop, adopt and implement national legislation, policies, plans and programs that prohibit traditional or customary practices affecting the health of women and girls, including female genital mutilation, and to prosecute the perpetrators of such practices. . . . [18]

In other words, African domestic criminal laws that sanction FGC simply enact international human rights standards into national legal systems. At best, though, they are underused; at worst, they may simply increase the mortality rates of baby girls. This reality raises the question of how cultural practices ought to be viewed by the international community, and whether criminal law is the best tool for changing human rights.

III. THE RATIONALE FOR USING CRIMINAL LAW

The designation of conduct or behavior as "criminal" is its sanction by the formal apparatus of government criminal prosecution. Criminal proceedings are a highly visible use of state power undertaken (at least, in theory) by government on behalf of the entire polity. A finding of criminal guilt is explicit condemnation of an individual announced by a judge, who then delivers a public sanction that is apportioned to the wrongness of the offense or the harm it caused. As a type of legal proceeding, criminal law differs across the axis of criminal/civil procedure (domestic civil proceedings are between individuals and do not involve the nation-state, with monetary damages assessed on restoring things to their preharm state) and the national/international axis (domestic criminal law is grounded on an exercise of national sovereignty and assumptions of national political consensus, whereas international law is grounded in international norms and treaty agreements).

As a philosophical matter, criminal law has traditionally been explained in either instrumental or moral terms. The instrumental explanation for criminal law draws from Mill's Harm Principle: "The only purpose for which power can be rightfully exercised over any member of a civilized community against his

[17] CEDAW General Recommendation No. 24 (General Comments); Women and Health Committee on the Elimination of Discrimination Against Women, 20th Sess., art. 12, UN Doc. A/54/38/Rev.1, ch. I (1999).

[18] See General Assembly, A/RES/54/133, February 7, 2000.

will is to prevent harm of other."[19] The Harm Principle assesses whether a form of behavior causes substantial harm to individual or public interests that merit protection on grounds of public or private welfare. The moral explanation for criminal law seeks to punish an individual's culpability for a morally bad act. Although criminal laws that are rationalized because of their moral necessity may also reduce the incidence of harmful acts, their principle objective is to legalize morally good behavior and punish morally bad behavior. Of course, any assessment of morally good or bad behavior cannot exist in a vacuum, but must also rely on some conception of the proper role of government, of the interaction of government's mechanisms with the political preferences of any polity, and of the taken-for-granted values of that polity.

Whether rationalized through Mill's Harm Principle or under a standard of moral necessity, the calculus of criminal culpability is more complicated when a criminal sanction follows upon normative and political values that derive externally from international human rights treaty obligations. What if, for example, that new law reflects a standard of an international organization to which a national government has given its approval through ratification of an international human rights treaty, but in fact does not reflect any consensus of even a small percentage of the domestic polity? Does domestic criminal law in this situation over-reach its legitimacy?

These questions have been posed in the familiar debates about what sort of conduct ought to be criminalized. Arguments against criminal law point out that private behavior should be unregulated because it is dangerous to frame public policy on assumptions about "core values." Criminal laws imply a claim about their moral foundation as public norms that citizens share in a moral consensus, which in turn provide legitimacy to government prosecution and punishment for their breach.

IV. DISTINCTION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS

Humanitarian law is rooted in the laws of war. Genocide likewise has its genesis in military conflict between nation-states. As a body of law, humanitarian law targets behavior occurring in exceptional times – a time of war or civil conflict – and between nation–states. To the extent that it has a pedagogical purpose, humanitarian law seeks to educate governments about the rightful conduct of wartime events.

[19] J. S. Mill, *On Liberty* (1859), Chapter 1, para.9.

When Ethiopian Prime Minister Meles Zenawi expressed reservations about criminal prosecutions effecting changes to long-standing social practices, he hinted at two important differences between international humanitarian law and international human rights. First, a criminal trial of a “big fish” such as Milošević or Karadžić in The Hague is fundamentally different from the domestic trial of an individual outside the theater of war. Second, criminal prosecutions may not be the best means – either normatively or practically – of influencing everyday behaviors enacted in the name of social or cultural norms. Zenawi raised, in fact, two deep aspects of the long-standing debate about the limits of law.

First, international human rights treaties put an obligation on national governments to produce behavior that sometimes differs sharply from local practices. Given the past use of domestic laws to criminalize dueling, foot binding, and sati, it may seem logical to do the same for today’s version of harmful phenomena. Yet, contemporary data suggest that forcing social change through legal sanctions may do nothing more than increase hostility and defiance among the very people who are the target audience. Prior to recent developments in international humanitarian law that the ICTY, the ICTR, and the ICC exemplify, the “soft” law of international human rights treaties had been the main plank of the international system. From the 1950s through the early 1990s, the UN human rights treaty system developed in the hope that national governments would incorporate international standards into their own domestic legal systems.

In relation to FGC, for example, even though more and more criminal laws are being passed across Africa and in many Western countries to prohibit the practice, courts have dismissed most cases for lack of evidence. This is often despite strong evidence from the victims and even confessions from their parents or the practitioners. Data, particularly from the African nations, suggest that the criminal laws have not worked. Indeed, there is anecdotal evidence that criminalization of FGC has worsened the situation: Instead of reducing the incidence of FGC, it seems to have driven the practice underground, and with the average age of victims decreasing. Since the anticutting law in Tanzania was passed, the practice has been increasingly performed on newborn babies so as to shield death caused by a botched FGC procedure among general infant mortality rates. In Kenya, where the criminal penalty for practicing FGC on girls less than eighteen years old is imprisonment of up to fifteen years, cutting is now performed on infants with childhood illnesses so as not to arouse suspicion among neighbors and relatives. In some parts of Burkina Faso, villagers reportedly have given local leaders large sums of money so they may have their daughters circumcised without fear of arrest

or prosecution. The views of the girls themselves are rarely sought by local prosecution agencies, and in the event that they are, the girls are reluctant to testify against family members.

Perverse effects also go the other way when it comes to criminal law and cultural behavior, more directly involving governments. For example, "honor killings" – women murdered by brothers and fathers for having sex outside marriage or refusing an arranged marriage – are not uncommon in traditional, male-dominated Arab societies. Each year in the Middle East, the murders of hundreds of women and girls by male family members go unpunished.[20] The execution of a female family member for perceived misuse of her sexuality is a social and political issue that these domestic governments tacitly approve. Legitimacy for such murders stems from a complex code of honor ingrained in the consciousness of some sectors of those societies, and local activists campaigning against honor killings find it difficult to stop them.[21] Honor killings are now on the rise in Europe's Middle Eastern, Arabic, and Asian immigrant communities. For example, in 2003 in Britain, a Kurdish Muslim was sentenced by a British court to life imprisonment for slitting the throat of his sixteen-year-old daughter after she started a relationship with a Christian boyfriend. Yet, activists estimate that the number of criminal prosecutions reflects just a tiny percentage of actual killings. For example, when over a four-month

[20] Given that honor killings often remain a private family affair, no official statistics are available on the practice or its frequency. According to a November 1997 report by the Woman's Empowerment Project, published in Al-Hayat Al-Jadida, there were twenty honor killings in Gaza and the West Bank in 1996. One representative of the group added, "We know there are more but no one publicizes it." Similarly, an unofficial report given to the Palestinian Women's Working Society stated that "recently" forty women had been killed for honor in Gaza. The report defined neither the period in which these murders took place nor their exact circumstances. During the summer of 1997, Khaled Al-Qudra, then Attorney General in the Palestinian National Authority, told Sout Al-Nissa (Women's Voices), a supplement published by the Women's Affairs Technical Committee, that he suspects that 70 percent of all murders in Gaza and the West Bank are honor killings.

[21] Honor killing emerged in the pre-Islamic era, according to Sharif Kanaana, professor of anthropology at Birzeit University. It is, he believes, "a complicated issue that cuts deep into the history of Arab society." He argues that honor killing stemmed from the patriarchal and patrilineal society's interest in maintaining strict control over designated familial power structures. "What the men of the family, clan, or tribe seek control of in a patrilineal society is reproductive power. Women for the tribe were considered a factory for making men. The honor killing is not a means to control sexual power or behavior. What's behind it is the issue of fertility, or reproductive power. Punishment for relationships out of wedlock is stipulated as 100 lashes if the woman is single, or if married, death by stoning. In both cases, however, there must be four witnesses willing to testify that the sexual act took place; conditions that make punishment of the perpetrator of the rape difficult, if not impossible." See Suzanne Ruggi, "Commodifying Honor in Female Sexuality: Honor Killings in Palestine," *Middle East Report*, No. 206 (Spring 1998), 12–15, available at http://www.merip.org/mer/mer206/ruggi.htm.

period in 2005, the bodies of six Muslim women living in Berlin were discovered, family members told police that the women had brought dishonor to their families because of their "free" lifestyle, but would not provide enough evidence to help police identify a clear suspect.

Second, individualized criminal punishment, with its focus on the individual, overlooks a government's human rights obligations to embark on long-term social and economic policies to improve background conditions that ultimately enable self-help to modify harmful cultural practices. International human rights often need affirmative action on the part of governments, influencing everyday behavior through policy, opportunity, and direct regulation. This is so for the narrowest of civil and political human rights, such as freedom from arbitrary detention (it requires policies of policing, whole matrices of management of armies and courts), and broader social and economic human rights such as rights to health care and education. International human rights law implies a government's agreement to implement those rights into the fabric of its domestic governance.

The humanitarian contract, in contrast, is a requirement of how governments ought to behave in times of *extremis*, at moments of military aggression. To be sure, the growing corpus of international criminal laws on genocide and crimes against humanity now individualizes responsibility for failures of humanitarian law, using criminal trial procedures to punish them. This should be seen, however, as the exceptional crossover of two systems.

V. THE LIMITS OF CRIMINAL LAW

This is less an argument against the use of criminal methods for human rights and more an argument for careful matching of phenomena with the right institutional action. Harm arising from cultural practices within families and communities is arguably the broadest, most abstract, and most difficult category of human rights for governments to prevent. Changing this mindset, as Ethiopian Prime Minister Meles Zenawi points out, cannot be achieved by jailing a whole community.

Criminal adversarial proceedings may not be a good fit for changed embedded cultural practices, not only because it may be unfair to single out individuals for punishment, but also because it overlooks the deeper structure of the international human rights framework. Under the human rights framework, individual rights are the obligation of national governments. In other words, when a government promises to ensure gender equality through signing on to the CEDAW, that government not only endorses the principle of gender equality; it also undertakes to weave the principle of equality into the fabric of

everyday life through the everyday functions of government. Criminalization may divert resources away from other structural goals: For example, criminal sanctions against FGC may divert attention from underlying gendered social and economic structures that would be a more productive use of government resources. It may be more important that governments provide better educational opportunities for girls than punish a girl's parents for ensuring her future economic welfare and marriageability through FGC.[22]

Traditional practices justified as "culture" are the most resistant to UN pressures of "naming and shaming" because governments can discount the UN as culturally out of touch, or even imperialistic. Governments are often resistant to intervening in harmful cultural practices, and pressure from both formal international institutions and more inchoate pressure groups such as human rights lobbies have little effect on governments that isolate their countries from the international community. Like the now-contested history of widow-burning in India, the sensationalistic nature of the anticutting campaign coming from the first-world risks alienating African women prominent in the movement against FGC because of the complicated dynamics of colonial history. Given the differences in attitudes toward controversial cultural practices, it seems unlikely that a purely legal solution, such as criminal prohibition, will bring cultural practices to a halt when the major forces behind them are deeply rooted in historical, religious, and social phenomena.

VI. CONCLUSION

Laws signal the symbolic importance of collective social standards. With the advent of new institutions of international criminal law, today's international human rights system has both "hard" and "soft" law – both criminal courts and also human rights treaties. The burgeoning body of international criminal jurisprudence is providing structural and procedural examples for international and national institutions alike. International criminal law is doing important human rights work – important not just for the communities who are affected by these atrocities but also as a signaling mechanism of the collective of nation-states that make up the international community.

Different types of law serve different ends, however, and use different means. Criminal law works at the margin of human behavior, selecting the very worst behavior of individuals for prosecution and punishment. The purpose of criminal sanctions for human rights violations is to punish individuals and

[22] This is an extension of Lon Fuller's point about law overreaching itself. The methods that law uses may instead misfire. C.f., Lon Fuller, "The Forms and Limits of Adjudication," 92 *Harvard Law Review* (1978): 353–409.

(although more contestably) to deter others. Whereas criminal law is sensibly a growing tool in humanitarian law, my argument is that criminal law is an imperfect tool for human rights law, especially in relation to embedded cultural practices.

The purpose of human rights laws at the domestic level is improving the distribution of human rights across broader populations. International human rights standards are aimed at governments. Human rights need to rest upon policy frameworks and to be embedded in cross-cutting institutions of education, health, and employment. A better approach for everyday human rights violations is to reemphasize the role of governments in delivering human rights.

5 Identifying Groups in Genocide Cases

Larry May

> The [ICTR] Chamber notes that the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population. However, the Chamber notes that there are a number of objective indicators of the group as a group with a distinct identity. Every Rwandan citizen was required before 1994 to carry an identity card which included an entry for ethnic group . . . The Rwandan Constitutions and laws in force in 1994 also identified Rwandans by reference to their ethnic group . . . Moreover, customary rules existed in Rwanda governing the determination of ethnic group, which followed patrilineal lines of heredity . . . The Rwandan witnesses who testified before the Chamber identified themselves by ethnic group . . . Moreover, the Tutsis were conceived of as an ethnic group by those who targeted them for killing.[1]

Currently in the international law of genocide, there is a debate about whether groups should be defined objectively, on the basis of criteria that anyone can apply, or subjectively, in which only the perpetrators decide who is a member of a group and even what are relevant groups. Genocide is defined as "the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such,"[2] so it matters quite a bit how groups are identified. Indeed, in the Rwanda genocide there was, and remains, much dispute about whether the victim group, the Tutsis, was indeed a group of the sort that could be the subject of genocide and hence a group that could seek redress in international law for the harms that the Hutus perpetrated against the Tutsis. In the quotation that begins this chapter, the International Criminal Tribunal

[1] *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber, International Criminal Tribunal for Rwanda, Case No. ICTR-96–4-T, September 2, 1998, 170–1.

[2] Convention on the Prevention and Punishment of Genocide, adopted December 9, 1948; entered into force January 12, 1951, 78 United Nations Treaty Series 277; and Rome Statute of the International Criminal Court (ICC), Article 6.

for Rwanda (ICTR) also seemingly draws a distinction between objective and subjective factors, although what are called objective might be challenged.

William Schabas says that the subjective approach was used in the Rwanda trials when it was determined that "the Tutsis were an ethnic group based on the existence of government-issued official identity cards describing them as such." He goes on to say:

> This approach is appealing up to a point, especially because the perpetrator's intent is a decisive element in the crime of genocide. Its flaw is allowing, at least in theory, genocide to be committed against a group that does not have any real objective existence . . . Law cannot permit the crime to be defined by the offender alone.[3]

In this chapter, I discuss how a nominalist might respond to Schabas's worries.

There is another debate that bears on the first. This debate concerns whether there must be physical destruction, not merely cultural destruction, of the group for genocide to take place. The question arises most evidently in the case of putative genocide against a religious group. The religion could be destroyed without the physical destruction of the people who are the members of a religious group, for instance, when the members are forbidden to practice their religion. This so-called cultural genocide is not currently recognized as genocide proper in international law, and at least in part this is because cultural genocide mainly involves a loss to the mental lives of the people in question but seemingly not something objectively tangible. In this chapter, I also set the stage for explaining why such a view seems confused from a nominalist perspective.

From a nominalist perspective, a significant divide between objective and subjective means for identifying a group in genocide does not exist. Nominalists generally do not think that groups have reality or existence. Rather, groups are mere "names" that partially stand for our experiences and about which judgments can be made. Indeed, groups are artificial in that they are made up by humans, just as are states, universities, or corporations. Because of the lack of reality of groups, they must be identified by subjective perception and self-perception. This fact in itself is not a problem, because most identifications are made on the basis of perceptions, which are made by individuals and thus are all (to one extent or another) subjective. The problem arises when one attempts to determine what sort of test can be employed by a judge or

[3] William A. Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press, 2000), 110.

jury about whether the perceptions are stable enough to be the basis for group identification in law.

In his article "The Model of Rules I," Ronald Dworkin frames the debate about legal positivism by linking legal positivists such as H. L. A. Hart with nominalism:

> In their view, the concepts of "legal obligation" and "the law" are myths invented and sustained by lawyers for a dismal mix of conscious and subconscious motives . . . They are . . . unreal . . . We would do better to flush away the puzzles and the concepts altogether, and pursue our important objectives without this excess baggage. This is a tempting suggestion, but it has fatal drawbacks.[4]

Dworkin says that many adherents of nominalism "bluff" in that they continue to use the terms and concepts they regard as unreal. This point is important, but Dworkin also admits that when the details of the practice, of referring to such concepts, are laid bare, they may indeed be "thick with illusion." His point is that the claimed lack of reality has to be argued for, not merely bluffed. I will try to avoid this flaw in what follows.

In this chapter, I first examine a seemingly nominalist approach taken by the International Commission of Inquiry on Darfur established by the United Nations Secretary-General in 2004. Second, I build on the analysis of the Commission's findings to develop a more satisfactory account of how to identify groups for purposes of genocide law. Third, I confront arguments advanced by Schabas against the nominalist approach. Fourth, I discuss other objections that could be raised to the strategy of identification that I have sketched. Finally, I indicate how international law should change to accommodate my understanding of group identification. Throughout, I argue for a somewhat more expansive way of thinking of groups in the international law of genocide, while recognizing that there remain significant conceptual puzzles with the whole idea of group identification.

I. THE REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR

On January 25, 2005, the International Commission of Inquiry on Darfur issued a report on whether genocide was occurring in the Darfur region of the Sudan. In Section II.I of the Report, the Commission attempted to define genocide.

[4] Ronald Dworkin, "The Model of Rules I," Chapter 2 in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 15.

Here is how the Commission summarized the current state of international law:

> In short, the approach taken to determine whether a group is a (fully) protected one has evolved from an objective to a subjective standard to take into account that collective identities and in particular ethnicity are, by their very nature social constructs, "imagined" identities entirely dependent on variable and contingent perceptions, and not social facts, which are verifiable in the same manner as natural phenomena or physical facts.[5]

The Commission of Inquiry ultimately finds fault with the purely subjective approach to identifying groups.

Here is how it expresses the problem with the subjective view and also explains how it is possible to move back toward an objective view.

> Moreover, it would be erroneous to underestimate one crucial factor: the process of formation of a perception and self-perception of another group as distinct (on ethnic, or national, or religious, or racial ground). While on historical and social grounds this may begin as a subjective view, as a way of regarding the others as making up a different or opposed group, it gradually hardens and crystallizes into a real and factual opposition. It thus leads to an objective contrast. The conflict, thus, from subjective becomes objective. It ultimately brings about the formation of two conflicting groups, one of them intent on destroying the other.[6]

This complex conceptual analysis of group identification is in line with certain nominalist conceptions.

The Commission of Inquiry came up with the above proposal in response to the problem of how to characterize tribes, such as the Fur, Masalit, and Zaghawa tribes that were the object of attacks and killings in the Darfur region of the Sudan. The problem is that these tribes "speak the same language (Arabic) and embrace the same religion (Islam)" as do the tribes that were attacking them. Because of intermarriage, the groups have become blurred in social and economic terms.[7] Generally speaking, tribes have not been recognized as the objects of genocide in international law, but the tribes in Darfur appear to be different from normal tribes, at least in the Commission of Inquiry's assessment.

During the past decade, polarization has occurred to such an extent that the tribal identities of the tribes in Darfur have become "crystallized" in a way

[5] The Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of September 18, 2004, Geneva, January 25, 2005, para. 499.

[6] Ibid., para. 500.

[7] Ibid., para. 508.

that can make them count as groups for international law purposes. Mostly, such crystallization seems to have occurred because of conflicts over scarce resources that greatly intensified in-group and out-group identification. Both attacking group and victim group see one another as belonging to hostile groups. The Commission of Inquiry concludes, "For these reasons it may be considered that the tribes who were victims of attacks and killings subjectively make up a protected group."[8] The Commission implied that this was because crystallization had occurred. Nonetheless, the Commission of Inquiry said that genocide was not occurring in Darfur because of a lack of genocidal intent – that is, the attacking group was not trying to destroy the victim group as such, but rather only attacking for counter-insurgency reasons.[9] For my purposes, what is significant in the Commission of Inquiry's findings is the analysis of the way that groups are identified in hard cases such as tribes.

People generally are members of multiple groups. As a teenager, I was a member of the "religious" group of Roman Catholics, the "national" group of Americans, the "racial" group of Caucasians, the "ethnic" group of Germans, as well as many other only somewhat less significant groups, such as the "demographic" group of "Baby Boomers," the "political" group of antiwar activists, and the "informal social" group of high school debaters. In a sense, a person is merely the constellation, or intersection, of a large number of group memberships. To single out just one of these group memberships for purposes of identifying who one is misses the fact that there are many, many other groups with which that person could also be identified.

In addition, many groups are like tribes in that they blend, at least partially, into other groups of the same category. Roman Catholics and Anglicans have blended into one another, at least since Henry VIII broke the Church of England off from the Vatican. Intermarriage between Roman Catholics and Anglicans further blurs the border between these two religious groups. Racial groups, arguably the only biologically based groups recognized by the International Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), are dramatically affected by intermarriage. In 30 years of university teaching in the United States, I have observed how hard it has become to tell a student's race by observing him or her, if the category of race makes sense any more in "melting pot" societies such as the United States.

Tribes are especially problematic because they are typically defined by birth lineage and such lineages will cross between tribes because of intermarriage and cultural cross-fertilization. This reason is initially given by the

[8] Ibid., para. 512.
[9] Ibid., para. 518.

Commission of Inquiry for thinking that subjective considerations must enter into group identification. When such subjective considerations play a role in group identification, judgments by third parties are hard to make, and so it seems hard to see how an external authority, such as a judge or jury, could make such identifications in a way that would play an important if not the key role in a trial. The tribes in Darfur, as well as the ethnic groups in Rwanda, pose an especially difficult problem for courts that are mandated to determine if genocide, involving the intentional destruction of a group, has occurred. The Commission of Inquiry makes a good case for thinking that tribes are problematic, especially in light of intermarriage among tribes that already share so many features (e.g., religion and ethnicity). Subjective considerations will have to be used to differentiate the members of one tribe from another.

The Commission also makes an important point when it argues that various other factors can make group membership firmer over time, even when the group is defined initially by largely subjective considerations. In Darfur, the in-group and out-group identifications, even though both were initially based on mere subjective perception and self-perception, became solidified as a struggle for scarce resources forced an arbitrary, but nonetheless real, set of identifying markers on these two groups. If both the perpetrator group and the victim group are clear about the borders between these groups, then there is a sense that what was once merely subjective takes on the character of being objective. In the next section of this chapter, I attempt to build on this important point and to make sense of the metaphors of "crystallization" or "solidity" that occur when some groups previously merely subjectively identified seem to become objectively identifiable.

II. A CONCEPTION OF GROUP IDENTIFICATION

I wish to defend a version of the view espoused by the Commission of Inquiry on how to identify groups in difficult cases such as that of tribes. It seems to me that the Commission of Inquiry was right to say (although I am not sure that they fully understood the implications of what they said) that otherwise difficult groups can be identified as protected groups in genocide cases if there is *both* stable in-group self-perception *and* out-group perception of the members as all forming a coherent group. Here we do not run into the problem, identified by Schabas, of having the perpetrator group alone determine group membership although, as we will see in the next section, Schabas undoubtedly will object to this scheme nonetheless. If both perpetrator group and victim group members agree on the border of the group, then there is enough "reality" to the group for anyone with nominalist sympathies like me. If groups are merely artificial constructs, then it is not clear how much more we would want than that two

different kinds of people agree in naming a group and identifying who are the members of a group.

Problems result when the out-group (i.e., the perpetrator group in this case) solely defines the in-group (i.e., the victim group). It may be sufficient to say that the victim group in some limited sense has been harmed because the victim group was identified by the perpetrator group and then persecuted on this basis. That the group has been harmed, however, rather than merely that individuals were harmed because of their perceived group membership, becomes the difficulty. Things get much worse when one tries to show that there is an intentional decision to destroy a group that only exists in the minds of the members of the perpetrator group. For there to be intentional destruction of a group that warrants international intervention, it seems that there must be more to the group than this, even if one is a nominalist. This is not to deny that sorts of harm other than genocide could be occurring and would warrant international prosecutions.

For the nominalist, one of the most important conditions of identifying groups is that there be a kind of public recognition, in the manner of naming that has occurred. Private acts of identification do not rise to this level. Typically there must be some authoritative act of naming of the sort that would occur if a government were to recognize the creation of a new corporation because of the filing of articles of incorporation with the relevant branch of the government. The question before us is whether something short of such an official act could still be publicly accessible enough to constitute an identification of a group, similar to an act of "naming." It is my contention that when both the perpetrators (out-group) *and* the victims (in-group) recognize the existence of a group that is being attacked, then it is sufficient for the group to "exist" and be the subject of the sorts of harms that characterize genocide, namely, the intent to destroy the group.

One might wonder why I have placed so much weight on the publicity condition. At least in part, as I will explain, the publicity condition is a test of whether there is a consensus of sorts in the society about the naming of a collection of individual people as a group. It is possible for such a consensus to emerge without the two factors that I have stressed, namely, the in-group and out-group identification of the same collection of people as a group. Having these two factors both present is a good sign that there is a consensus of sorts within a society to name a certain group as coextensive with a certain collection of people. This consensus is then important because it means that this naming is not likely to be arbitrary or merely private and hence subject to abuse of various sorts. The publicity condition is a kind of reality check for group identification. The publicity condition makes it much more likely that there is a group to which people are referring, and that it is the same group

whether one is a member of the group or someone outside the group. Here is how we move from subjective to something approaching "objective."

One might also wonder why a group's self-identification is not sufficient for that group to count as a group that could be the object of genocide. Again, on my nominalist view, the answer would depend on the publicity condition being met. Members merely privately speaking of themselves as a group would be quite different from members publicly doing so. Private naming does not normally open up the group to public acts, such as acts of genocide. Indeed, there must be enough recognition outside of the group that there *is* a group for it to be said that an out-group is trying to destroy the in-group. Recognition of a group by an out-group cannot easily occur if the in-group only self-identifies and does not publicly proclaim its putative status as a group so that other non-group members can also identify this victim group and its members.

An objection might be raised at this stage concerning intention. If in criminal law generally it is enough to require that people have intentions to harm others, why is that not sufficient in the case of genocide, and hence why is the subjective view not my view, because one of the elements of genocide should surely be the subjective wrongful intent of the defendant? Another element of the crime of genocide, as an international crime, is that there be a genocidal campaign to which the individual is contributing, for the *actus reus* to be satisfied. We certainly might want to say that it is wrong of the individual to do what he is doing intentionally, independent of what else is going on around him, but his crime is not an international crime unless it connects to what is going on around him. The international crime of genocide is a mass crime, where the individual's act, which might otherwise just be a hate crime, is part of a larger campaign to destroy the group.

In my view, the publicity condition is one of the most important considerations in group identification. One could ask why such a condition should be given pride of place. I have elsewhere rehearsed some of the metaphysical reasons for such a view.[10] Here I instead focus on the practical reasons. The most serious practical concern is that we not undercut the value of groups by trivializing their identity conditions. A group deciding to oppress all of those people who wear eyeglasses looks like a nearly arbitrary designation of victim-group membership. Of course, if it is already well known that members of a given socioeconomic class wear eyeglasses as a way to self-identify as group members, then things seem quite different.

In this context, we can think of Pol Pot's purge of intellectuals and professionals in Cambodia. That it was well known that certain features such as

[10] See Chapter 2, "Nominalism and the Constituents of Social Groups," of my book *Genocide: A Normative Account* (Cambridge University Press, forthcoming).

the wearing of eyeglasses could identify members of a given class may not be sufficient for the group to be an object of genocide, but we are moving more in that direction than when a perpetrator group makes this determination arbitrarily or in private. The genocide in Cambodia is often called "auto-genocide" because it was perpetrated by members of one group against members of the same group. This is not quite true, however, for if the wearing of eyeglasses did mark the members of a certain class in Cambodia (both for those who were members of the class and those who were not members), then the genocide looks less like "auto-genocide" and more like other forms of genocide where one group seeks to destroy another group.

The combination of out-group and in-group recognition of certain features as markers of the "existence" of a group is generally a telling sign of the possibility that such a group could be the object of harms like genocide. The out-group identification is crucial because without it there is no good reason to see the attacks against individuals as also intentional attacks against a group. For someone to intend to attack a group, that person must believe that there is a "group" there, in some sense of that term. The attacker must have criteria that are transparent (or at least that others in the society can recognize, including the victims) for picking out the members. Ideally, one would also look for the kind of broad public recognition that goes beyond the perpetrator and victim groups, but I do not believe that it is necessary.

The in-group identification makes it more likely that the group exists in more than just the minds of the perpetrators and that the harms will be group-based and not merely individual. By this I mean that the individuals must see themselves as forming a group that is under attack for the attack to be based on group membership. If the individuals do not see themselves as forming a group, then there are no clear-cut membership conditions of the group. Of course, such conditions can be foisted upon the individuals by the out-group. If, despite what the out-group does, the in-group members simply do not see themselves as members, then it is far more likely that the group is fully a figment of the minds of the out-group than that there is a group that exists in the sense that any member of the society would recognize it.

Metaphysically, these are the identity conditions of a group:

1. individual human persons;
2. related to each other by organizational structure, solidarity, or common interests; and
3. identifiable, to the members and to those who observe the members, by characteristic features.

In the current section, I have been explaining why I think that the third condition is especially apt for the identification of groups as objects of genocide.

I have been suggesting that this last condition be called the "publicity condition" and have specified its own conditions further. If we were to accept my proposal, then the number of groups that should be officially recognized as the potential objects of genocide would increase from the current four: racial, religious, ethnic, and national groups. At least one advantage of this proposal is that some coherence will be given to the current nearly incoherent set of groups recognized as objects of genocide. In the next sections, I tackle significant objections that have been raised to my proposal, and I provide additional reasons to think that my proposal has merit from both a practical and a metaphysical perspective.

III. OBJECTIONS FROM WILLIAM SCHABAS'S PERSPECTIVE

William Schabas has taken a decidedly non-nominalist position with regard to the identification of groups in genocide cases. Indeed, he argues that there must be some "objective existence" for people to count as groups in genocide law.[11] Unfortunately, he provides little by way of details of this metaphysical view. Nonetheless, I will try to sharpen his critique and then address his various objections. Schabas's general strategy is to try to show that the four categories of groups that the Genocide Convention recognized, namely, racial, ethnical, national, and religious groups, all overlap and "define each other" as national minorities that are subject to harms based on ethnic hatred.[12] Although these groups are not completely nonvoluntary, at least they are groups that people rarely leave.[13] He then argues that it is a mistake to expand the list beyond these four categories, and certainly a mistake to allow for a subjective interpretation of which groups should be protected in genocide law, because then we would have to recognize groups with "no real objective existence."[14]

My response has several parts. First, it is not at all clear that the four categories of groups (national, racial, ethnic, and religious) can be clearly distinguished from gender groups or political groups in terms of anything approximating "objective existence." That the four groups listed in the Genocide Convention may be connected to each other is no reason to think that only these groups should be listed in that Convention. Schabas is correct to say that there is a historical reason for why just these groups are listed, namely, that the subject of the Holocaust (Jews) arguably overlapped with all four groups. That reason, however, has no bearing on the metaphysical issue he alludes to as the central issue in deciding whether to list a certain group as a possible subject of genocide.

[11] Schabas, *Genocide in International Law*, 110.
[12] Ibid., 119.
[13] Ibid., 137.
[14] Ibid., 110.

Second, it is not at all clear what Schabas means by "objective existence" when it comes to group identification. There is indeed a distinction between subjective and objective means of identifying groups – with the latter category reserved for identification that is not merely based on what the members of one group think. Indeed, the better distinction is really between subjective and intersubjective. Schabas seems to want more than this – something "physical," as he says. He then points out that there really is not any clear bloodline method of identifying even the four groups listed in the Genocide Convention. In any event, other than saying that the four categories are based in the historical fact of national minorities (like the Jews who were subject to persecution during the Holocaust), Schabas does not give us much else to go on. In the rest of this section, I try to provide an argument that could support Schabas's claims and then suggest how a nominalist like me could respond.

I suppose that the strongest argument in favor of Schabas's position is that one needs something to perceive in identification if any kind of third-party assessment, such as that in law, is going to have a chance of succeeding. We could then add to this that only certain perceptible characteristics have been the basis of persecution over the centuries – not hair color, but rather skin color; not club membership but religious membership; not geographic home, but rather home within political borders. As I wrote above, tribes pose an especially hard problem because it is implausible to say that they have not been subjects of persecution but that only ethnic groups have been. Yet, even in the case of tribes, one could regard them as merely small, close-knit ethnic groups of a certain sort, as indeed seems to be happening in discussions of ethnicity today. In any event, they are often identifiable based on perceptible characteristics such as facial features or cultural practices.

In support of Schabas's view, one could argue that if there are no clearly perceptible characteristics it will be hard for a judge or jury to ascertain whether there really is a group that was being persecuted instead of there merely being harms directed at discrete individuals. Also, unless these characteristics are in fact connected to a real existing group that remains stable over time, there will be no good reason to treat persecution based on these characteristics as normatively important. Schabas's view seems to be that grounding claims of group persecution, or genocide for that matter, in perceptible characteristics is the only real alternative to allowing the members of a particular group to have a kind of exclusive or private say over who is a group and who is a member of that group.

Nominalists, like me, could reply to this argument, which I am attributing to Schabas, that they do not deny that groups need to be identified by perceptible characteristics. What they do deny is that it makes sense to talk of these characteristics as being grounded in some objective existence of the group. In

my group-based construal of nominalism, there must be characteristic features of a group that are perceptible for it to make sense to talk of group membership at all. Group-based characteristics are common features that individuals share with other individuals. That individuals share features with one another does not mean that there are existing groups in which these features inhere. Rather there is no reason to postulate the existence of a group merely because there are common features that individuals share. Also, there is no reason that there must be such an existing group for judges and juries to be able to tell if there is persecution or genocide being conducted against individuals on the basis of common perceptible features. Of course, it will be convenient to talk about the individuals who have the common features as constituting a group, but such references need not commit us to the objective existence of this group.

It is my view that genocide as a crime still makes sense without there being objectively existing groups, for the intent to destroy a group would mean the intent to destroy all, or a significant number, of those individuals who have certain common features. There may be value to the group in that those individuals who have these common features are organized, or cohere, in a certain way that itself has value. If there is a kind of consensus that we can "name" the group and treat the group as if it were an existing thing, then that is enough for there to be genocide or persecution waged against the group. Indeed, naming is such a crucial social marker that in some ways it does not matter whether there is anything in objective reality that corresponds to the names at all. I will not make the assumption that there is no objective reality but only that whatever features there are of such reality, groups are not its constituents.

Schabas is certainly right to worry that genocide could end up being meaningless if there is nothing that corresponds to group names, but the main reason for this is that then there would be no special value to the loss of groups and hence no special harm to the destruction of a group over and above the destruction of individual persons. Suffice it here to say that whatever is the value of a group, and the disvalue of the loss of a group due to genocide, that value need not be dependent on the group having objective existence. Indeed, I have argued that the best way to characterize such value, and disvalue, is in terms of how individuals are affected when they lose a part of their identity or when others who share significant history with them no longer feel able to protect their rights in various ways.[15]

[15] See Larry May, "How Is Humanity Harmed by Genocide?" 11(1) *International Legal Theory* (Summer 2005), 1–23.

IV. OTHER OBJECTIONS

I wish now to respond to various other related objections against my account. First, let us consider a metaphysical objection. Because I earlier built on the Commission of Inquiry's model, it is appropriate that both of these objections come from the Commission concerning the way I have diverged from its initial model. While recognizing the importance of subjective factors in how collective identity can be shaped,[16] the Commission says that a group becomes subject to genocide only if there has been a transformation, a crystallization, from subjective into objective fact. Otherwise, the Commission suggests, there will not be "two conflicting groups, one of them intent on destroying the other," without such crystallization.[17]

I have agreed with the Commission that both self-perceptions and perceptions of others are crucial for group identification. The objection I have gleaned from the Commission is that this is ultimately not enough. Crystallization is not mere metaphor for the Commission, but something that factually transforms. Yet, it remains unclear what the Commission means by "factual opposition" or "social facts."[18] Nominalists can still talk of facts, and indeed, from the late Middle Ages until the present, nominalists have made their case for thinking that social facts do not turn on objective reality.[19] Social facts, like groups themselves, are individuals organized in various ways. Social facts may require more than individuals in that the way these individuals are organized or structured (the organizational or other structure) is not itself reducible to individuals, but there need not be existing groups. Also, the context will matter quite a bit. In this chapter I have restricted myself to the context of identifying groups that can be the subject of genocide. The kind of organization of individuals required for the identification of a group subject to genocide may involve more factors than if the group were being identified for other matters.

My response is to begin by noting that social facts about groups subject to genocide involve more than individual persons, but the "more" does not involve the postulation of more entities. Rather, we need only talk about shared beliefs, or "we" beliefs as Tuomela and Searle call them.[20] Individuals need to have beliefs about how they will interact with other individuals, and these beliefs need to be the same for a number of individuals for these shared

[16] Commission of Inquiry, para. 499.
[17] Ibid., para. 500.
[18] Ibid., para. 500–1.
[19] See Raimo Tuomela, *A Theory of Social Action* (Dordrecht: D. Reidel Publishing Co., 1984), and Margaret Gilbert, *On Social Facts* (London: Routledge Press, 1989).
[20] Tuomela (1984), and John Searle, *The Construction of Social Reality* (New York: Free Press, 1995).

beliefs to constitute a social fact. The agglomeration of social facts can then indeed form groups without there being social facts that have as their objects independently existing groups. I have explored this metaphysical issue in greater detail elsewhere.[21] In the case of genocide ascriptions, the facts involve the consensus among individuals and groups that I have been discussing by speaking of both in-group and out-group recognition.

Second, the Commission of Inquiry also raises a significant practical objection when it in effect declares that all identification by means of perception is really subjective, not objective.[22] Because of this supposed fact, the Commission seems to imply that there must be something stable underlying these perceptions from a legal point of view, so rules can be interpreted and applied consistently. The Commission then endorses having a list of those groups that can be subject to genocide, which allows for some expansion, but not the loose expansion that is based solely on subjective perceptions. Problems of proof seem to become quite difficult when we move beyond objective considerations.

Making a list is a way to stipulate which groups can be subject to genocide. Such a strategy surely can alleviate practical problems of proof, but solving such problems by a stipulation, especially if the list is exclusive and the exclusivity is not based on strong conceptual and normative grounds, as is seemingly the case in the Genocide Convention, makes of the law a hollow shell. Of course, it is true that criminal law generally is becoming more and more a matter of statute rather than common law, but, as Mill argued, criminal law also needs to have moral support if it is to be respected and not merely adhered to out of fear or indifference. Fidelity to law requires that law be grounded in normative concerns with which people can identify. Merely selecting four types of groups out of many other similar groups, as has been done in the case of genocide, does not breed fidelity to international law, itself already infirm in the domain of fidelity.

Third, the Commission members could respond that there is more here than a random list of four types of groups, because these groups cohere in a certain way and are normatively grounded in the worldwide horror that was expressed at the Holocaust. In the attempt to destroy the Jewish "race," Hitler targeted a group for elimination that overlapped with all four groups eventually listed in the Genocide Convention. Jews are certainly a "religious" group and, at least as far as Hitler was concerned, they were also a "racial" group. The Jews in Europe had a distinctive culture and language and so could arguably be said also to have been an "ethnic" group. Jews were not necessarily also

[21] See Larry May, *The Morality of Groups* (Notre Dame, IN: University of Notre Dame Press, 1987).
[22] Commission of Inquiry, para. 501.

a "national" group in the sense of being members of a single nation–state, but if we think of nations as extended tribes, then Jews could also be said to have been a "national" group. So, the four types of groups were not arbitrarily selected, but cohered in that they were chosen to exemplify the group that was the subject of the Holocaust and the persecution of which had given the primary impetus behind the Genocide Convention's ban.

The major problem is that, although the Jews do arguably count as a group that overlaps with all four categories of group in the Genocide Convention, there could certainly be a group that did not overlap with all four of these categories that also was targeted for elimination with horrible consequences. Another major group targeted by the Nazis, the gypsies or the Roma, also seems to meet this fourfold designation. The Nazis also targeted homosexuals and disabled people, yet they do not fit into any of the four categories. Therefore, if the Nazi practices are to be the benchmark for what counts as genocide, we still are left in the dark about why these four groups, and only these groups, are listed.[23] At the very least, the list needs to be expanded.

It would also be a strange strategy to say that as the Jews, and the gypsies, overlapped with four group categories, then any group from that set could be the subject of genocide. Why not instead say that genocide can occur only against groups that are such a mixture of religious, racial, ethnic, and national groups? Such a strategy would make the case of the Jews, and the gypsies, really paradigmatic for the international law of genocide. Unless the Jews, and the gypsies, are to be paradigmatic, then it is also no longer clear that just these four groups are the ones to count as potential subjects of genocide. Also, especially if the idea is to find a collection of groups among which known subjects of persecution overlap, it would certainly seem to make sense to add some gender and disabled groups here as well, so that the Nazi campaign against homosexuals and the disabled could count also as genocide. Indeed, ethnicity often overlaps with gender, as in the case of the persecution of the so-called "comfort women" by the Japanese during World War II. It is not at all clear how the Nazi Holocaust could be used to defend the restricted list of groups in the Genocide Convention.

V. SOME PROPOSED CHANGES IN INTERNATIONAL LAW

In light of the discussion in the previous section, I now offer some proposed changes in international law. I begin with a change in the very definition and

[23] There was debate at the time of the drafting of the Genocide Convention, and considerable debate since, about including political groups.

elements of genocide that are now listed in the ICC statute exactly as it was listed in the 1948 Genocide Convention. First, we should no longer list just four groups, but instead at very least these four groups should only be examples of groups that could be the subject of genocide. Second, a clause will need to be added after the four illustrative cases that will make it clear what the criteria are for deciding what other groups to include. Third, some kind of rule must be articulated that would make it possible to determine when a new proposed group clearly could not qualify as a group subject to genocide. I take up each of these proposals in turn in this final section.

The current formulation of the definition of genocide, in both the Genocide Convention of 1948 and the ICC's Rome Statute of 1998, reads:

> "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[24]

My first proposal is to change the end of the definition so that it now reads:

> "genocide" means any of the following acts committed with intent to destroy, in whole or in part, *a group, such as* a national, ethnical, racial or religious group, as such.[25]

Such a change will allow for other groups that are much like the four originally listed types of groups also to be the subject of genocidal harms that can be redressed in international law.

The second change is to add a clause to indicate what the four exemplary cases of groups have in common. This is a much harder task than the first, but I provide a possible construction, as follows:

> "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a group *that is relatively stable and significant for the identity of its members*, such as a national, ethnical, racial or religious group, as such.[26]

Of course, the term "relatively" is meant to give some latitude here, and would actually be needed to make sense of all of the original categories with the possible exception of racial groups, because the others can be changed, just not easily in most cases.

Given the second change, it is possible that the third change, meant to indicate what is ruled out, may not be needed because groups that lack stability or significance are also clearly ruled out. On the supposition that a bit more guidance is needed, however, I offer the following third change:

[24] Rome Statute, Article 6.
[25] Italics added to indicate proposed wording change.
[26] Again, I add italics to indicate proposed wording change.

> "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a *publicly recognized* group that is relatively stable and significant for the identity of its members, such as a national, ethnical, racial or religious group, as such.

This limitation is meant to indicate that potential groups, such as the Cambodian case of those people who wear eyeglasses, would potentially fit the definition of the group only if those people who wore eyeglasses were indeed recognized publicly as a group, and not merely recognized as such by the perpetrators. Otherwise, that group would not be a possible subject of genocide. In the Rwanda case, the issuing of identity cards by the government to those who were Tutsis would seemingly also meet this condition because the identity cards meet the publicity condition.

Putting my three proposed changes into italics, I would change the existing definition and elements now to read:

> "genocide" means any of the following acts committed with intent to destroy, in whole or in part, *a publicly recognized group that is relatively stable and significant for the identity of its members, such as* a national, ethnical, racial or religious group, as such.

Given all of these changes, the facts are such that the Cambodian eyeglass wearers would probably not constitute a group that can be the subject of genocide, but the Rwandan Tutsis would. In light of our discussion, this seems to be the result that was to be hoped for.

In this chapter, I have explored difficult conceptual and normative issues in how to identify groups that can be the subject of genocidal harm and that can potentially be redressed in international law. Also, I have made a practical proposal about how to change the identity conditions so that those conditions better reflect careful conceptual and normative thinking about these matters. I have certainly not solved all the problems in this nearly intractable problem set, but I have made a start, and one that I think is fairly plausible and can be built on by others who are also interested in solving the definitional problem that has so vexed tribunals, convention drafters, courts, and international commission members for many years. Along the way, I have also suggested that genocide may have occurred in Cambodia even though the victim group did not fit into any of the four categories of protected groups currently recognized in international law.

6 Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law

Joanna Kyriakakis

> The permissive conditions for business-related human rights abuses today are created by a misalignment between economic forces and governance capacity. Only realignment can fix the problem.[1]

In its operations in the Indonesian province of Papua, the U.S. mining company Freeport-McMoRan has been accused of assisting in serious human rights abuses, including torture committed by military and private security forces in Freeport facilities and on Freeport property.[2] In the Sudan, a number of corporations, including the Canadian company Talisman Energy and the Swedish company Lundin Oil AB, have been the targets of campaigns claiming that the companies willfully ignored, or positively assisted in, forcible depopulations occurring in and around their oil mining concession regions.[3] The U.S. company Unocal Corporation settled out of court a lawsuit alleging that it had knowingly used forced labor in its extractive operations in

[1] United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (hereafter the SRSG on business and human rights), *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, [82], UN Doc A/HRC/4/035 (2007).

[2] Catholic Church of Jayapura, *Violations of Human Rights in the Timika Area of Irian Jaya, Indonesia* (August 1995). See also Elizabeth Brundige et al., *Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control* (April 2004), 39–40.

[3] Human Rights Watch, *Sudan, Oil and Human Rights* (2003). Such allegations, among others, formed the basis of a United States Alien Tort Claims Act lawsuit. See, for example, *Plaintiffs' Second Amended Class Action Complaint*, *Presbyterian Church of Sudan v. Talisman Energy* (United States District Court for the Southern District of New York, Civil Action No. 01 CV 9882 (DLC)), available at http://www.bergermontague.com/pdfs/SecondAmendedClassActionComplaint.pdf (accessed April 28, 2008).

An abridged version of this paper was presented at the Law and Society in the 21st Century Conference, Humboldt University, Berlin, July 26, 2007.

Myanmar.[4] More recently, the Australian company Anvil Mining came under investigation for providing the vehicles that facilitated a military operation by state forces in the Democratic Republic of the Congo, an operation that allegedly involved the commission of a number of war crimes, including rape, arbitrary detentions, and summary executions.[5]

In the context of contemporary global economies, allegations of corporate involvement in breaches of international human rights standards are unfortunately not uncommon.[6] In some cases the nature and extent of wrongful conduct in which corporations are being implicated might be classified as international crimes.[7] International crimes include slavery, crimes against humanity, war crimes, genocide, and torture.[8] As in the examples mentioned, allegations of corporate involvement in international crimes often arise in the context of what has been termed "militarized commerce."[9] Particularly in the extractive industries, the often close relationship between corporations and state or private military forces to ensure access, control, and security over large areas of land and mining infrastructure can expose the companies involved to claims of complicity in serious violations by security partners, particularly where security partners have poor human rights records.[10]

[4] For materials on the Unocal lawsuit, see the Business and Human Rights Resource Centre, available at http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnocallawsuitreBurma (accessed April 28, 2008).

[5] Joanna Kyriakakis, "Australian Prosecution of Corporations for International Crimes: The Potential of the Commonwealth Criminal Code," 5(4) *Journal of International Criminal Justice* (2007), 809, 811–14.

[6] See, for example, the Business and Human Rights Resource Centre, available at http://www.business-humanrights.org/Home (accessed April 28, 2008) (presenting allegations and responses by companies regarding human rights abuses connected with their business operations).

[7] For a reference of cases of ongoing concern, see the project of the International Peace Academy and Fafo AIS, *Business and International Crimes: Assessing the Liability of Business Entities for Grave Violations of International Law* (2004), available at http://www.fafo.no/liabilities/index.htm (accessed April 28, 2008).

[8] Although there are various positions on what constitutes an international crime, this content is taken from the International Law Association, London Conference, "Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences," 69 *International Law Association Reports of Conferences* (2000), 403, 406–11, and Princeton University Program in Law and Public Affairs, 28 *The Princeton Principles on Universal Jurisdiction* (2001), Principle 2(1).

[9] Craig Forcese, "Deterring 'Militarized Commerce': The Prospect of Liability for 'Privatized' Human Rights Abuses," 31 *Ottawa Law Review* (2000), 171, 174–5; and Craig Forcese, "'Militarized Commerce' in Sudan's Oilfields: Lessons for Canadian Foreign Policy," 8(3) *Canadian Foreign Policy* (Spring 2001), 37, 37–41.

[10] The SRSG on business and human rights has reported that the extractive industries dominate in situations involving the most egregious human rights abuses implicating industry: *Interim Report of the Special Representative of the Secretary-General on the Issue of*

Despite these concerns, it is often claimed that the existing regulatory system that might be brought to bear on blameworthy behavior by corporations is either insufficient[11] or, where mechanisms for accountability do exist, underutilized in relation to corporate activity.[12] A recent phenomenon that is therefore of some consequence is the increasing adoption of national criminal laws with extraterritorial dimensions criminalizing conduct amounting to international crimes that regulate not only the behavior of natural persons but also of legal persons,[13] such as multinational corporations.[14] Part of a broader trend toward national extraterritorial law directed to different aspects of corporate activity, these recently enacted domestic "international crimes" laws are largely a consequence of national implementation of the Rome Statute of the International Criminal Court (ICC).[15] Although the laws arise under

Human Rights and Transnational Corporations and Other Business Enterprise, [25–26], UN Doc E/CN.4/2006/97 (2006). There may be many reasons for the over-representation of the extractive industries in claims involving corporations and international crimes, including that resource operations are often located in conflict or weak governance zones: Ibid., [27–30]. Concern regarding the specific risks faced in the extractive industry has led to the development of a voluntary initiative to help regulate and manage security risks particular to the sector. See *Voluntary Principles on Security and Human Rights*, available at http://www.voluntaryprinciples.org/principles/index.php (accessed April 28, 2008).

[11] See, for example, Steven R. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility," 111 *The Yale Law Journal* (2001), 443, 461–73; Olivier De Schutter, "The Accountability of Multinationals for Human Rights Violations in European Law," in Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), 227, 230–40; Sarah Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises," in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations Under International Law* (The Hague: Kluwer Law, 2000), 75, 78–80, and 85–7; Sarah Joseph, "Taming the Leviathans: Multinational Enterprises and Human Rights," 46(2) *Netherlands International Law Review* (1999), 171, 176–81.

[12] For example, on the underuse of the "horizontal" application of human rights for the purpose of indirect corporate accountability, see Sarah Joseph, "An Overview of the Human Rights Accountability of Multinational Enterprises," in Menno T. Kamminga and Saman Zia-Zarifi (eds.), (2000), 75, 78.

[13] The term "legal persons," where used in this chapter, denotes different types of collective entities deemed by national law to have legal personality distinct from that of the natural persons they comprise. Under Australian law, for example, for an artificial entity to be subject to criminal liability, it must be incorporated. This rule extends to both public and private companies, as well as both for-profit and not-for-profit companies. In contrast, it excludes unincorporated bodies such as partnerships, unincorporated associations, trusts, unincorporated joint ventures, and so forth: Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (South Melbourne: Oxford University Press, 2002), 65–6.

[14] Multinational corporations are corporations that, although incorporated in one country, operate in one or more other countries: Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford: Blackwell, 1999), 12–15.

[15] *Rome Statute of the International Criminal Court*, opened for signature July 17, 1998, 2187 UNTS 90 (entered into force July 1, 2002) (hereafter the Rome Statute).

domestic jurisdiction, they therefore reflect international standards and are primarily a by-product of developments at an international level.

On the issue of human and business rights, The United Nations SRSG on business and human rights has described these new domestic international crimes laws and their potential application to the extraterritorial activity of multinational corporations as "[b]y far the most consequential legal development" in addressing what is, in his view, an existing institutional misalignment between economic forces and their governance.[16] However, the growing existence of domestic criminal law that could be brought to bear on business-related international crimes does not necessarily herald a new era in corporate accountability, unless such laws are utilized in relation to corporate behavior in appropriate circumstances. Despite the growth in such domestic laws, many resistances to their application arise. The application of criminal law to corporations has long been a marginalized and resisted concept, in part as a result of the dominance of the philosophical tradition of methodological individualism in criminal law doctrine. The application of criminal law extraterritorially also challenges the traditional territorial bias of criminal law and state sovereignty. Examples of extraterritorial adjudication by one state of corporate activities that have taken place primarily in another state have shown that tensions can arise due to a sense of intrusion upon sovereignty such suits can engender, which may further dissuade countries from using such laws.

This chapter aims to undertake an introductory exploration of some of these issues that arise from the new domestic international crimes laws and their potential in relation to corporate crime. Section I considers the growing trend toward extraterritorial jurisdiction over legal persons and, in particular, the impact of the domestic implementation of the Rome Statute on avenues for corporate criminal accountability. As the author is most familiar with the Australian jurisdiction, the Australian example is given throughout the chapter as an example of the trend. Section II then considers some resistances to the potential application of the new domestic international crimes laws in relation to corporate activity. This section considers the individualist tradition in criminal law, the demands regarding territoriality and predictability under doctrinal international law, and the possible arguments against extraterritorial criminal prosecutions from the perspective of foreign relations. The chapter concludes with a comment on a way forward in light of these resistances.

[16] SRSG on business and human rights, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, [84], UN Doc A/HRC/4/035 (2007).

I. THE INCREASE IN DOMESTIC LAWS OVER CORPORATIONS FOR INTERNATIONAL CRIME

A significant factor in the growth of national laws relevant to the global activities of corporations is the increasing number of international and regional agreements relating to transnational crimes[17] with provision for the liability of legal persons. Examples exist in relation to bribery,[18] terrorism,[19] corruption,[20] the environment,[21] trafficking in human beings,[22] and the sexual exploitation of children.[23] These instruments require states parties or members to provide for the liability of legal persons within their national legal systems for certain crimes, and additionally they either permit or mandate the establishment of extraterritorial jurisdiction over the relevant corporate behavior.[24] Although, in general, these instruments do not mandate the imposition of corporate *criminal* liability and leave it instead to states to determine the most appropriate type of liability to impose,[25] there is at least one example where corporate

[17] The term "transnational crimes" is used to denote crimes with actual or potential trans-border effects. See Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2007), 3.

[18] See, for example, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, opened for signature December 17, 1997, 37 ILM 1, arts 2, 3(2) and 4 (entered into force February 15, 1999) ("*OECD Bribery Convention*").

[19] *International Convention for the Suppression of the Financing of Terrorism*, opened for signature December 9, 1999, 39 ILM 270, arts 5 and 7 (entered into force April 10, 2002); *Council Framework Decision of 13 June 2002 on Combating Terrorism* [2002] OJ L 164/3, arts 7, 8, and 9.

[20] *United Nations Convention Against Corruption*, opened for signature October 31, 2003, arts 26 and 42 (entered into force December 14, 2005); *Joint Action of 22 December 1998 adopted by the Council on the Basis of Article K.3 of the Treaty on European Union, on Corruption in the Private Sector* [1998] OJ L 358/2, arts 1, 5, 6, and 7; *Criminal Law Convention on Corruption*, opened for signature January 27, 1999, CETS no 173, arts 1(d), 17, 18, and 19(2) (entered into force July 1, 2002); *Inter-American Convention Against Corruption of 19 March 1996*, opened for signature March 29, 1996, art VIII (entered into force June 3, 1997).

[21] *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, opened for signature March 22, 1989, 28 ILM 649, arts 2(14) and 9 (entered into force May 5, 1992); *Council Framework Decision of 27 January 2003 on Protection of the Environment through Criminal Law* [2003] OJ L 29/55, arts 6, 7, and 8.

[22] *Council Framework Decision of 19 July 2002 on Trafficking in Human Beings* [2002] OJ L 203/1, arts 4, 5, and 6.

[23] *Council Framework Decision of 22 December 2003 on Combating the Sexual Exploitation of Children and Child Pornography* [2004] OJ L 13/44, arts 1(d), 6, 7, and 8.

[24] Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, Background Paper (December 2006), 2–6.

[25] In this way, although demanding the establishment of national liability regimes, most of these instruments "do not criminalize corporate conduct in the same way that they demand a recognition of the criminal responsibility of the individual." See Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 251.

criminal liability is required if the state party recognizes such a principle domestically.[26]

Particularly instrumental in addressing international crimes is the recent spate of national laws implementing the Rome Statute. The Rome Statute is one of the most significant achievements in the development of modern international criminal law, as it establishes the first permanent international criminal court for adjudicating violations of codified international crimes. Despite the reasonable progress of a proposal to include private corporations in the jurisdiction of the ICC,[27] the proposal was not adopted and the Court is limited to hearing matters against natural persons only.[28] Also, unlike the instruments referred to earlier in this chapter that require states to take specific steps in their domestic laws, the Rome Statute does not explicitly oblige states parties to introduce domestic law criminalizing the conduct proscribed by the Rome Statute.[29] Despite these features, the Rome Statute and the existence of the ICC seem to be having an impact, at least on paper, on the availability of national laws applicable to legal persons in their extraterritorial operations for conduct amounting to the commission of, or complicity in, Rome Statute crimes. In a recent survey of sixteen countries that, among other things, sought to assess the liability status of corporations and other legal persons under national statutes governing international crimes, Fafo reports that Australia, Belgium, Canada, the Netherlands, the United Kingdom, France, Norway, India, Japan, and the United States have all domestically enacted some or all of the international crimes of the Rome Statute as applicable to legal persons and with varying degrees of extraterritorial reach: some on the basis of the

[26] *OECD Bribery Convention*, opened for signature December 17, 1997, 37 ILM 1, arts 2 and 3(2) (entered into force February 15, 1999).

[27] In the final draft of the proposal regarding legal persons, the provision was directed at juridical persons, defined as "a corporation whose concrete, real or dominant objective is seeking private profit or benefit, and not a State or other public body in the exercise of State authority, a public international body or an organization registered, and acting under the national law of a State as a non-profit organization." *Working Paper on Article 23, Paragraphs 5 and 6*, UN Doc. A/CONF.183/C.1/WGGP/L.5/Rev.2 (July 3, 1998) (footnote omitted). For a summary of the progress of this proposal, see Andrew Clapham, "The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court," in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations Under International Law* (The Hague: Kluwer Law, 2000), 139, 143–60.

[28] Article 25 of the Rome Statute.

[29] Alain Pellet, "Entry into Force and Amendment of the Statute" in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford: Oxford University Press, 2002) 145, 152–3. One exception is the obligation that States parties adapt their domestic laws to be capable of implementing the cooperation obligations set out in Part 9 of the Rome Statute: Ibid. 152.

nationality of the offender and/or the victim and some on the principle of universality.[30] This trend might be attributed to a number of factors.

First, the Statute's preamble indicates an expectation that national laws and, in turn, national practice will be increasingly applied to address international crimes. It states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and that the most serious international crimes "must not go unpunished and . . . their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[31]

Second, and most importantly, the complementarity regime of the Rome Statute sets up a situation in which states may be required to forfeit offenders to the ICC if they are incapable of prosecuting a case under national law. This complementarity scheme has created a powerful incentive for states to ensure their legal competence for international crimes as defined in the Rome Statute. Briefly, the complementarity regime of the Court operates so that, in cases in which both the ICC and national authorities wish to take action in relation to a particular case, the national jurisdiction shall have precedence to do so, unless the ICC determines that the state is unwilling or unable to proceed genuinely with the case.[32] There are a number of commentators who argue that the inability criterion for allowing ICC jurisdiction over a given case would encompass situations in which a state is unable to prosecute a matter because of a lack of sufficient national penal legislation covering the crimes *or the accused* in question.[33] On the latter, Cassese, for example, argues that an inability to

[30] Coordinated for Fafo by A. Ramasastry and R. C. Thomas, *Commerce, Crime and Conflict. Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries* (2006), 15–16, 30.

[31] Preamble of the Rome Statute.

[32] Article 17 of the Rome Statute.

[33] See, for example, Timothy L. H. McCormack and Katherine L. Doherty, "Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation," 5 *University of California, Davis Journal of International Law and Policy* (1999), 147, 152; and Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 352. But see Michael A. Newton, "Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court," 167 *Military Law Review* (2001), 20, 70–2 (criticizing potential ICC practice leading to a demand for the strict duplication of the substantive crimes in national laws for the purpose of admissibility determinations). An alternative argument leading to a similar outcome is made by Broomhall, who argues that domestic legislative incompetence over a category of defendant would entitle ICC adjudication of a case as no action would have been taken by the state at all and hence the admissibility question would simply not arise. Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003), 89–91. For a discussion of these arguments, see Joanna Kyriakakis, "Corporations and the International Criminal Court: The Complementarity Objection Stripped Bare," 19 *Criminal Law Forum* (2008), 115, 125–9.

act includes cases in which the national court is "unable to try a person not because of a collapse or malfunctioning of the judicial system, but on account of legislative impediments, such as an amnesty law, or a statute of limitations, making it impossible for the national judge to commence proceedings against the suspect or the accused."[34] State practice since the coming into effect of the Rome Statute has certainly evidenced the view, at least on the part of a number of states, that it will be necessary to enact sufficient domestic legislation to fully avail them of the Court's complementarity regime.[35]

Finally, despite the ICC's lack of jurisdictional competence over corporate defendants, many domestic legal systems, particularly common law states, eschew any distinction on policy grounds between natural and legal persons. As a result, some states have gone a step further than the Treaty, by including corporations within the scope of their international crimes laws. Today, even numerous civil law countries, traditionally the most reluctant to recognize the possibility of corporate criminal liability, have introduced corporate criminal liability schemes,[36] creating the potential for similar extensions of domestic criminal law over international crimes despite forum limitations at the international level.

The Australian Example

Australia is a good example of these influencing factors. In June 2002, Australia enacted the offenses of genocide, crimes against humanity, and war crimes

[34] Cassese, above n 33, 352.

[35] Implementing legislation has been deemed necessary by a number of states as most did not previously provide for the offenses contained in the Rome Statute in their national laws: M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, Vol. 1 (Ardsley, Transnational Publishers, 2005), 188. See also Jann K. Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law," 1 *Journal of International Criminal Justice* (2003), 86, 88. For an overview of the status of implementation of the Rome Statute crimes, see the database of the *Coalition for the International Criminal Court*, available at http://www.iccnow.org/?mod=romeimplementation (accessed April 28, 2008).

[36] There have been numerous comparative works on this topic in recent years. See, e.g., Hans de Doelder and Klaus Tiedemann (eds.), *Criminal Liability of Corporations, XIVth International Congress of Comparative Law* (The Hague: Kluwer Law International, 1996); Albin Eser, Gunter Heine, and Barbara Huber (eds.), *Criminal Responsibility of Legal and Collective Entities* (Freiburg im Breisgau, Edition luscrim, 1999); Gunter Heine, "New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience-or Vice Versa?" *St. Louis-Warsaw Transatlantic Law Journal* (1998), 173–91; Sara Sun Beale and Adam G. Safwat, "What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability," 8 *Buffalo Criminal Law Review* (2004–2005), 89, 105–36; Allens Arthur Robinson, *Corporate Culture as a Basis for the Criminal Liability of Corporations* (February 2008).

into its federal Criminal Code,[37] offenses it described as equivalent to those within the scope of the ICC's jurisdiction. The Australian government clearly expressed that the purpose of these new crimes was to create as offenses against Australian criminal law the offenses over which the ICC has jurisdiction, so that Australia will be in a position to take full advantage of the principle of complementarity.[38]

As a result of the enactment of the international crimes within the context of Australia's federal Criminal Code, criminal responsibility for such offenses prima facie extends to corporations as well as natural persons, because the principle that all Commonwealth offenses should apply equally to both corporate bodies and natural persons is an express presumption within the Code.[39] Indeed, that was a founding principle in the development of the Code,[40] which came about as a result of a national project in the early 1990s to codify federal criminal law and to provide a national model to the Australian States and Territories for the future direction of their criminal laws.[41] The general principles contained in the Code were therefore a result of expert work and extensive consultation, and were to represent best-practice criminal law provisions.

Furthermore, the jurisdictional scope of the Australian offenses is particularly broad: Anyone, anywhere, regardless of citizenship or residence, can be tried by competent Australian courts for conduct amounting to an Australian international crime wherever in the world it is committed and without the availability of a foreign law defense.[42] The scope of the jurisdiction that attaches to the offenses therefore reflects the universality principle under international law (and also encompasses any claim involving some nexus to Australia).

Despite the enactment of laws such as the Australian international crimes laws that have the potential to address the behavior not only of individuals but also of corporations, there are various factors that weigh against the use of the criminal law over corporations and, in particular, if the conduct has taken

[37] The offenses were inserted into the *Criminal Code 1995* (Cth.) (Aus.) by the *International Criminal Court (Consequential Amendments) Act 2002* (Cth.) (Aus.), which was passed by the Senate on June 27, 2002.

[38] Commonwealth, *Parliamentary Debates*, House of Representatives, June 25, 2002, 4326 (A-G. Williams, 2nd reading speech).

[39] Section 12.1 of the *Criminal Code 1995* (Cth.)(Aus.).

[40] The application of the Criminal Code to corporations in the same way as it applies to individuals has been described as the ". . . most fundamental of the principles governing corporate criminal liability": Cth. Attorney-General's Dept. and Aus. Institute of Judicial Administration (AIJA), *The Commonwealth Criminal Code: A Guide for Practitioners* (2002), 297.

[41] For background to the Criminal Code's initial development, see M.R. Goode, "Constructing Criminal Law Reform and the Model Criminal Code," 26 *Criminal Law Journal* (2002), 152–66.

[42] Sections 15.4 and 268.117(1) of the *Criminal Code 1995* (Cth.) (Aus.).

place outside of the territory of the prosecuting state. Despite these concerns, there are sound arguments in favor of the increased application of domestic laws in relation to corporate involvement in international crime, primarily stemming from the severity of the conduct that such offenses seek to proscribe and the important normative or declaratory function of criminal law.

II. RESISTANCES

The Individual, the Corporation, and the Criminal Law

The idea of corporate criminality (which means the capacity of corporate entities to offend against criminal law) has been either excluded or marginalized in modern criminal law. A number of continental countries, for example, have traditionally taken the view that only individual human beings are the proper subjects of criminal law and that criminal law cannot be applied to associations of persons, such as corporations. Germany is an enduring example of this tradition. Whereas many civil law countries have introduced or are considering introducing corporate criminal liability,[43] German criminal law continues to make no provision for the criminal liability of associations of persons.[44] This situation rests on a number of assertions against the possibility of corporate criminality. First, the German tradition rejects the capacity of associations of people to act in a criminal law sense; it is asserted that a group, as opposed to individual human beings, cannot act willfully or intentionally.[45] Second, this view holds that associations of people cannot be the proper subjects of criminal punishment on the basis that only human beings are capable of making moral determinations in terms of what is right and what is wrong.[46] These arguments are often encompassed in the term *societas delinquere non potest*, meaning that corporations cannot commit a criminal offense.

Even in common law countries where corporate criminal liability has been recognized, corporate misconduct has predominantly been dealt with under the rubric of regulatory offenses. As Lacey, Wells, and Quick have pointed out, certain characteristics of the regulatory model reflect and reinforce a view that the behavior being addressed is less serious, less truly criminal, than the

[43] See text in n 36. Much of this development has been a result of pressures from regional supranational bodies such as the European Union.

[44] Apart from some distinctive exceptions, German law has never recognized corporate criminal liability. See Guy Stessens, "Corporate Criminal Liability: A Comparative Perspective," 43 *International and Comparative Law Quarterly* (1994), 493, 503. Contra Gerhard Fieberg, "National Developments in Germany: An Overview," in Albin Eser, Gunter Heine, and Barbara Huber (eds.), *Criminal Responsibility of Legal and Collective Entities International Colloquium Berlin, May 4–6, 1998* (Freiburg im Breisgau, Edition Iuscrim, 1999), 83.

[45] Fieberg, above n 44, 86.

[46] Ibid.

remaining bulk of offenses from which it is differentiated.[47] These characteristics include the labeling of offenses omitting reference to the consequences of harm, the prevalence of strict liability offenses, and the distinct regulatory enforcement model.[48]

Modern criminal law doctrine is heavily influenced by developments in moral philosophy,[49] which for the most part has given little attention to the nature of social groups.[50] Instead, moral philosophy and criminal law doctrine posit the individual human being as the principal referent.[51] Together with their roots in political liberalism, contemporary domestic legal systems have difficulty with concepts of collective responsibility.[52] In contrast, Wells and Elias point out that the notion of the responsibility of a group (states) is familiar in international law, leading them to argue that the leap toward recognizing corporate responsibility may be less great on the international stage than is often implied.[53] An individualistic bias remains heavily present in modern international *criminal* law, however, regardless of international law more broadly. Famously, the International Military Tribunal stated:

> 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.[54]

Echoing a similar sentiment, the delegation for Greece opposed the proposal to extend ICC jurisdiction over corporations during the Rome Conference debates on the basis that "there was no criminal responsibility which could not be traced back to individuals."[55]

[47] Nicola Lacey, Celia Wells, and Oliver Quick, *Reconstructing Criminal Law: Text and Materials*, 3rd ed. (London: LexisNexis UK, 2003), 624–76. See also Celia Wells, *Corporations and Criminal Responsibility*, 2nd ed. (Oxford: Oxford University Press, 2001), Chapters 1, 2, and 4.

[48] Lacey, Wells, and Quick, above n 47, 624–76.

[49] Wells, above n 47, 64–5.

[50] Larry May, *The Morality of Groups: Collective Responsibility, Group-Based Harm and Corporate Rights* (Notre Dame: University of Notre Dame Press, 1987), 9.

[51] See, for example, Nicola Lacey, "'Philosophical Foundations of the Common Law': Social Not Metaphysical," in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence*, 4th series (Oxford: Oxford University Press, 2000), 17, 25.

[52] Wells, above n 47, 63 and 72–4.

[53] Celia Wells and Juanita Elias, "Catching the Conscience of the King: Corporate Players on the International Stage," in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), 141, 155.

[54] *The Trial of Major War Criminals, Proceeding of the International Military Tribunal sitting at Nuremberg, Germany*, Vol. 22 (H.M. Stationery Office: London, 1950), 447. In contrast, Clapham points to a number of ways in which groups have been acknowledged in international criminal law. See Clapham, above n 27, 160–78.

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

The comments of the Greek delegation and of the International Military Tribunal reflect a view referred to as methodological individualism. This view argues on methodological grounds that social groups do not need to exist, as all social processes and events can be reduced to explanations of the behavior of individuals.[56] Claims such as those found in German legal theory, that groups, unlike individuals, cannot form intentions and therefore be understood to act or cause harm and that groups cannot be understood as morally blameworthy, come out of classical methodological individualism.[57] Both of these claims have a clear relevance to the question of the extension of criminal law to corporations for international crimes, as these are fault crimes that are predicated on the accused being shown to have committed the relevant act (*actus reus*) in conjunction with the relevant degree of knowledge or intention (*mens rea*).

There have been numerous responses to the claims of methodological individualism that attempt to show that the ascription of moral or criminal responsibility to corporations is in some cases both intellectually coherent and proper.[58] It is worth mention that legal responsibility (whether that is the ascription of criminal or other forms of liability) is not necessarily equivalent to moral responsibility. Despite the lack of equivalence between legal and moral responsibility, as Wells argues, it is fair to say that the simple fact of corporate *legal* personhood – the law's ascription of legal rights and responsibilities to corporations – is unlikely to satisfy core questions about the nature of blame, more closely connected to concepts of *moral* personhood, which are significant in the context of a debate concerning criminal law.[59] Moral dimensions are certainly present in what is usually meant by the term "person" when it is evoked in modern criminal law jurisprudence as having both the qualities of being a human being and of being "quintessentially, an intelligent and responsible subject, that is a moral agent."[60]

It is interesting to note that feminist legal theory has regularly challenged the reality of the criminal law's "responsible subject" conception of the person. This person has been described as "an undesirable caricature of a human being: impossibly self-possessed and self-reliant, will-driven, clinically rational

[56] May, above n 50, 14.

[57] Marion Smiley, "Collective Responsibility," online entry in the *Stanford Encyclopedia of Philosophy*, available at http://plato.stanford.edu/entries/collective-responsibility/ (accessed April 28, 2008).

[58] Ibid. Aside from works discussed in this chapter, there is also the important work of Brent Fisse and John Braithwaite. See, for example, Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Melbourne: Cambridge University Press, 1993), Chapter 2.

[59] Wells, above n 47, 76.

[60] In her typology of law's persons, Naffine coins this conception of the person as "responsible subject": Ngaire Naffine, "Who Are Law's Persons? From Cheshire Cats to Responsible Subjects," 66 *The Modern Law Review* (2003), 346, 350, and in general 362–5.

and individualistic. Certainly he has never been pregnant, for this would threaten his physical integrity."[61] This in itself might constitute a challenge to claims regarding the fictiveness of corporate personhood, as opposed to human personhood, as conceived in criminal law,[62] although it might simply be conceded that the human person as conceived in criminal law is an ideal type if not an actuality.[63] Building on this idea of the person in criminal law as an ideal, some theorists have argued that the ideological presuppositions of liberal legal personality are in fact more accommodating to corporate persons than to human beings. Grear writes:

> At the ideological level, the construction of the archetypal liberal actor, law's privileged insider, the acquisitive, rational, narcissistic, will-driven, self-interested possessive, quasi-disembodied individual is an almost precise match for the corporation as the acquisitive *persona* of capital.[64]

In line with this idea, that the corporation as an entity can reflect the salient qualities of criminal law's ideal moral person, is the work of Peter French. French attempts to show that corporations satisfy two conditions necessary for the ascription of moral responsibility: the capacity to act with intention and the capacity to modify behavior according to moral evaluation.[65] As corporations can satisfy both of these conditions, they, like human beings, are fully fledged members of the moral community. To make this argument, French locates corporate intentionality in a Corporation's Internal Decision Structure (CIDS), which comprises 1) an organizational or responsibility flowchart that delineates the corporate power structure and 2) corporate decision recognition rules (embedded in corporate policies and procedural rules). These structural aspects of a corporation allow it to form intentions, in terms of having reasons for acting, which are qualitatively different from the reasons of individual human beings within the corporation.[66] Furthermore, these organizational structures endow a corporation with the "capacity or ability to intentionally modify its behaviour patterns, habits or modus operandi after it has learned that untoward or valued events were caused by its past unintentional behaviour."[67]

Wells argues that, although the language of moral personhood and moral blame may withstand philosophical scrutiny as it applies to corporations, it

[61] Ibid., 365.
[62] See, for example, Lacey, above n 51, 17–39.
[63] Naffine, above n 60, 365.
[64] Anna Grear, "Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights," 7(3) *Human Rights Law Review* (2007), 519, 524.
[65] Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984), 165.
[66] Ibid., 39–47.
[67] Ibid., 165.

may be too loaded to be of utility in debates about the proper form of corporate criminal responsibility. Instead, she calls for the development of notions of accountability that take special account of corporate organizational and functional complexity,[68] which might facilitate moving away from the "anthropomorphising effects of corporate personification."[69] May takes up this challenge in his work *The Morality of Groups*,[70] in which he develops a thesis of group responsibility that he describes as a middle position between the individualists who seek to reduce all group action and responsibility to individuals and the collectivists (such as French) who claim that certain groups – such as corporations – are agents entirely in their own right.

May refutes French's claim that groups are fully fledged moral persons or even anything more than fictional entities. Instead, he argues that what is significant is that these are justifiable fictions as they refer to something in the real world that is not acknowledged by reducing groups to individuals. In particular, they refer to the structures and *relationships* between individuals that enable joint action in a fashion comparable to the criminal law concept of conspiracy. For May, what is important about whether a group can be reduced to its members and their individual behaviors is determined by "whether or not the structure of the group can facilitate joint action or common interests."[71] He further argues that, even though a corporation may only be capable of acting vicariously, in the sense of acting through other persons,[72] this does not preclude moral appraisal of its action.[73] He sets out a model for corporate responsibility that combines vicarious agency with negligent fault that aims to both distinguish between corporate agency (action involving a group of persons) and individual agency (action involving only one person) while still preserving fault or blame as a condition of responsibility.[74]

The Australian Criminal Code model for the attribution of criminal responsibility to corporations is worth noting here as it is unique in the world in its model for the attribution of corporate fault. Adopting what has been described as an "organizational approach" to the attribution of blame, the approach of the Australian federal legislation goes beyond the traditional common law attribution rules that seek to equate corporate culpability with that of an individual and instead attempts to capture the particular "corporateness" of corporate fault.[75] The Code provides that for offenses requiring intention,

[68] Wells, above n 47, 81.
[69] Naffine, above n 60, 348.
[70] May, above n 50.
[71] Ibid., 23.
[72] Ibid., 41.
[73] Ibid., 45.
[74] Ibid., 83–106.
[75] For a discussion of the different approaches to attribution in the context of the debate surrounding corporate criminal liability and international law, see Wells and Elias, above n 53,

knowledge, or recklessness, the fault element is to be attributed to the corporation "that expressly, tacitly or impliedly authorised or permitted the commission of the offence."[76] Such permission or authorization can be established through evidence of a *corporate culture* (defined as an attitude, policy, rule, course of conduct, or practice existing within all or the relevant part of the body corporate)[77] that

> directed, encouraged, tolerated or led to non-compliance, or the body corporate failed to create and maintain a corporate culture that required compliance.[78]

Field and Jorg, adopting French's approach to corporate intentionality, describe the rationale for holding corporations liable on this basis as

> . . . the policies, standing orders, regulations and institutionalised practices of corporations are evidence of corporate aims, intentions and knowledge of individuals within the corporation. Such regulations and standing orders are authoritative, not because any individual devised them, but because they have emerged from the decision making process recognised as authoritative within the corporation.[79]

The Model Criminal Code Officers Committee, which drafted the relevant legislation, points out that the "corporate culture" provisions aim to allow the prosecution of corporations where "unwritten company rules tacitly authorise non-compliance or [fail] to create a culture of compliance" and despite formal company documents suggesting otherwise.[80] This approach aims to address some of the criticisms against more traditional attribution models, particularly the "identification approach," which requires evidence of the fault and physical elements of a crime in an individual considered to "embody" the corporation.[81] Although no other country has adopted "corporate culture" as a basis for determining corporate fault, recent comparative studies suggest that, in general, the new corporate criminal liability schemes of civil law

154–161. For a description of models of corporate criminal liability from a comparative law perspective, together with discussion on the most appropriate normative models, see Wells, above n 47, Chapters 7 and 8.

[76] Section 12.3(1) of the *Criminal Code 1995* (Cth.)(Aus.).

[77] Section 12.3(6) of the *Criminal Code 1995* (Cth.)(Aus.).

[78] Sections 12.3(2) (c) and (d) of the *Criminal Code 1995* (Cth.)(Aus.).

[79] Stewart Field and Nico Jorg, "Corporate Liability and Manslaughter: Should We Be Going Dutch?" *Criminal Law Review* (1991), 156, 159.

[80] Criminal Law Officers Committee, *Model Criminal Code Chapters 1 and 2: General Principles of Criminal Responsibility* (December 1992), 113.

[81] For a consideration of the "identification" model and its limitations, see Clough and Mulhern, above n 13, 89–122.

countries are likewise reflecting a shift from liability based on imputing individual behavior to corporations to original liability based on organizational deficiencies.[82]

An interesting issue in relation to how "organizational deficiency" models of corporate fault, such as the Australian legislation, might interact with situations of international crimes in the context of militarized commerce is the potential for reactions to past violations to be considered as a factor in determining a corporation's fault. How a company has addressed the issue of violations in the past, for example, by taking steps to prevent further occurrences or by disciplining officers involved, can be an important factor in encouraging ethical patterns in a corporation. A failure in the past might, therefore, be a valid basis upon which to draw conclusions on a corporation's current "ethos."[83] This is interesting for militarized commerce cases as a company's failure to adequately address previous criminal conduct by security partners or officers might be evidence of a corporation tacitly authorizing or making possible the commission of an offense.[84]

Lynch approaches the issue of justifying corporate criminal liability from a different direction from those of French and May. Analyzing what differentiates criminal law from other branches of law, such as civil and administrative law, Lynch tries to determine whether and when the application of criminal law to corporations might be warranted based on the fundamental purposes of criminal law.[85] As Stephens has pointed out, although not all legal systems include criminal liability in their corporate accountability schemes, "[a]ll domestic legal systems recognize that corporations can be held accountable for the harm they do to others."[86] For Lynch, the distinguishing feature of criminal law is the special moral and stigmatic purposes of criminal law

[82] See, for example, Beale and Safwat, above n 36, 136–7, and Gunter Heine, OECD, Working Group on Bribery in International Business Transactions (CIME), *Corporate Liability Rules in Civil Law Jurisdictions*, DAFFE/IME/BR(2000)23, 5–6, available at http://www.coe.int/t/dg1/greco/evaluations/seminar2002/HeineOLIS.pdf (accessed March 24, 2008). But, see Allens Arthur Robinson, *"Corporate Culture" as a Basis for the Criminal Liability of Corporations* (February 2008) (describing a number of new national legislative models as adopting "corporate culture" as a criterion for corporate liability).

[83] Clough and Mulhern, above n 13, 143. See also section 12.3(4)(a) of the *Criminal Code 1995* (Cth.)(Aus.). Clough and Mulhern, however, point out that, to the extent that corporate culture relies on evidence of past offenses of the corporation, it may breach the rule against propensity evidence: Ibid.

[84] AIJA, above n 40, 311.

[85] Gerald E Lynch, "Crime and Custom in Corporate Society: The Role of Criminal Law in Policing Corporate Misconduct," 60 *Law and Contemporary Problems* (1997), 23–33.

[86] Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights," 20 *Berkeley Journal of International Law* (2002), 45, 64.

and criminal punishment. In particular, he argues that criminal law seeks to reinforce society's moral standards and the imposition of stigma on persons who violate them in a way not true of civil law. In doing so, the criminal law constructs not only the "bad" citizen, but also the "good" citizen.[87] In Lynch's view, the question regarding when corporate conduct should be characterized as criminal should not be derailed by concerns regarding the fiction of judging the "morality" of an artificial legal entity (which he takes as either an extension of the culpability of its responsible human agents or as a metaphor) but should be approached in terms of when it is appropriate to apply stigmatic sanctions to corporate entities. The appropriateness of criminal, and therefore stigmatic, sanctions against corporations needs to be assessed in light of the capability of the corporate form to diffuse individual responsibility and accountability for action and to drive individual human action by broader forces and incentives that are difficult to attribute to individual persons.[88] He writes:

> Given the power of corporations, their reification as legal "persons" and (perhaps even more important) the desire of at least some large public companies to present themselves as social and economic personalities, the same concerns about fairness and public respect for law that dictate criminal punishment of individual white collar criminals argue against letting corporations escape the moral accounting that comes with a criminal prosecution, especially (though not exclusively) when the corporate form makes it difficult to establish culpability on the part of any particular individual.[89]

His work therefore places squarely the normative or declaratory purposes of criminal law as a basis for acknowledging corporate criminal liability. In the context of international criminal law, Lynch's approach might be compared to Luban's principle of "norm projection" and in German legal theory to the concept of "positive general prevention," both of which operate to highlight the declaratory purposes of criminalization: the assertion that "condemned deeds are serious transgressions."[90]

Taking a consequentialist view, it does not make a great deal of sense to claim that a harm caused by a human being will be criminal whereas an identical harm caused by a corporation will not. This consequentialist position is bolstered by the comparative size of community harms that can be caused by corporate behavior as opposed to individual behavior, the ability of the corporate form to diffuse or hide individual accountability, and the

[87] Lynch, above n 85, 46–7.
[88] Ibid., 50.
[89] Ibid., 50–1.
[90] David Luban, "Beyond Moral Minimalism (Response to Crimes Against Humanity)," 20(3) *Ethics & International Affairs* (2006), 353, 354–5.

susceptibility of corporations to the "shaming" inherent in the stigmatizing aspect of criminal law. On the other hand, to divorce criminal wrongdoing completely from some conception of fault (as, e.g., in strict liability offenses), at least in terms of a capacity to avoid wrongdoing, would potentially undermine the very normative purposes of criminal law relied upon in Luban's and Lynch's conceptions of the value of criminal law. Taken at least collectively, theorists such as May and French, as well as the development of modern legislative models of organizational fault based on organizational deficiency, throw considerable doubt on the dogma that only individual human beings can be viewed to have acted with the kind of fault that warrants the imposition of the stigma of the criminal label.[91]

The Territoriality of Criminal and International Law

From a doctrinal international law perspective, the question arises as to whether there are any limitations under public international law for the national use of extraterritorial criminal jurisdiction over legal persons for international crimes.

Extraterritorial jurisdiction over legal persons can be described broadly as states establishing "jurisdiction over the activities of legal persons . . . in situations where such activities have taken place, in totality or in part, outside the national territory."[92] Jurisdiction refers to the "power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by judgment of a court."[93] In fact, it is useful to split jurisdiction into its three types. Extraterritorial prescriptive or legislative jurisdiction refers to "laws passed by legislative bodies purporting to have force and effect outside of the territory in which the legislature sits."[94] Extraterritorial adjudicative jurisdiction refers to the empowerment of national courts to try offenders for extraterritorial behavior. Enforcement jurisdiction refers to the power to enforce any determination made by a competent national authority, which is a strictly territorial prerogative. In criminal law, the former two types of jurisdiction, legislative and adjudicative, usually coincide.[95]

[91] My thanks to Zach Hoskins for suggesting this point.

[92] De Schutter, above n 24, 7. See also James R. Fox, *Dictionary of International and Comparative Law*, 3rd ed. (Dobbs Ferry, NY: Oceana Publications, 2003), 114.

[93] Joseph Beale, "Jurisdiction of a Sovereign State" 36 *Harvard Law Review* (1923) 241.

[94] Fox, above n 92, 114.

[95] For typologies of jurisdiction, see, for example, Council of Europe, European Committee on Crime Problems, "Extraterritorial Criminal Jurisdiction," (1990), reprinted in (1992), 3(3) *Criminal Law Forum* 441, 444–5 and 456–8 (Council of Europe Report); De Schutter, above n 24, 8–9.

Although extraterritorial legislation might involve the enactment of civil, criminal, or administrative regulation, implementation at a national level of the Rome Statute offenses is likely to be criminal regulation. Under international law, a number of grounds for claiming extraterritorial criminal jurisdiction have emerged.[96] In relation to the regulation of corporations for international crimes, two grounds for claiming extraterritorial criminal jurisdiction are likely to be most relevant. These are laws that address the behavior of the state's own corporate nationals overseas (active personality principle) or laws indiscriminately applied to all persons, natural and legal, on the basis of the universality principle due to the class of the crime in question. It is worth noting that the former is a well established and largely uncontroversial ground for claiming extraterritorial jurisdiction over a state's subjects,[97] whereas the latter is more hotly debated.

In a 1990 report, the Council of Europe's European Committee on Crime Problems (ECCP) concluded that there are two principles of public international law of binding force that may inhibit the freedom of states to establish forms of extraterritorial criminal jurisdiction.[98] These are the principle of nonintervention and the principle of predictability. More recently, a seminar of legal experts convened on the issue of extraterritorial jurisdiction and transnational corporations confirmed the principle of nonintervention as the only significant international doctrinal impediment to states exercising extraterritorial prescriptive jurisdiction.[99]

The principle of nonintervention is a binding rule of public international law arising from the "basic concepts of sovereignty and equality [that] imply that states have to observe certain limitations if their conduct is not to qualify

[96] The two most established grounds for national exercise of criminal jurisdiction are on the basis of the crime occurring on the state's territory (territorial principle) or on the basis of the nationality of the offender (active personality or nationality principle). Emerging grounds for the exercise of national criminal jurisdiction are on the basis of the nationality of the victim (passive personality or nationality principle); the protection of vital security interests, territorial integrity, or political independence (protective or security principle); or on the basis of the class of crime (universal jurisdiction). Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), 299–306.

[97] Joseph, "Taming the Leviathans," above n 11, 177.

[98] Council of Europe Report, above n 95, 458–63. In addition to those mentioned in this chapter, they also identify the principle of comity as a nonbinding notion presupposing a general attitude of moderation and restraint vis-à-vis other states when claiming to exercise extraterritorial state authority.

[99] SRSG on business and human rights, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum, Corporate Responsibility Under International Law and Issues in Extraterritorial Regulation: Summary of Legal Workshop* [42–3], UN Doc A/HRC/4/35/Add.2 (February 15, 2007).

as an infringement on the sovereignty and equality of other states and thus constitute an inadmissible [or unjustified] intervention in the internal affairs of such other states."[100] The ECCP concludes that what constitutes inadmissible or unjustified intervention in the internal affairs of another state is intervention by physical means, in particular the use of force, which leads to concrete violations of the territorial integrity of other states.[101] For example, force, arrest, seizure, search, or other coercive methods undertaken *within the physical territory of another state* would be illicit unless expressly legitimated under international law.[102] The trial of Eichmann for crimes against humanity provides an example. Eichmann was residing in Argentina when he was arrested and detained by the Israeli Secret Service and transported for trial in Jerusalem without the authority of Argentina. The two governments "cured" the breach of international law that this act constituted through a joint declaration that they viewed the matter, which had "violated the basic rights of the State of Argentina," as settled.[103]

On the question of acts of *legislation* and by extension *adjudication* by a state over events that occur outside of its borders, the ECCP concluded that this form of intervention, which has only an indirect effect on the territorial integrity of another state, cannot necessarily be considered contrary to public international law under the principle of nonintervention, particularly if it has been inspired by measures that purport to realize certain policy.[104] The question is whether the interests that inspired the creation of the legislation can be deemed sufficiently important to establish the extraterritorial jurisdiction under public international law.[105] The ECCP found that one of the accepted justifications is the "manifestation of international solidarity in the fight against crime."[106] When this is demonstrably the purpose of the extraterritorial jurisdiction, the ECCP concludes that there are no limits on the freedom of states to so legislate under public international law.[107]

In this view, national laws that implement the Rome Statute offenses while extending those to legal persons would be unlikely to fall foul of the principle

[100] Council of Europe Report, above n 95, 455. [101] Ibid., 459.

[102] Ibid., 455. This principle explains why enforcement jurisdiction (the power to enforce any determination) is strictly territorial – because without the consent and cooperation of the territorial state, any attempt to enforce determinations made by organs of the state on people or property located outside of the enforcing state's territory would amount to this kind of inadmissible interference.

[103] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Group (USA), 2006 edition), 239–44.

[104] Council of Europe Report, above n 95, 455 and 459–60.

[105] Ibid., 460. [106] Ibid., 464.

[107] Ibid., 464–5.

of nonintervention, as they are likely to have been enacted in the furtherance of international solidarity over the problem of international crime. The very nature of the crimes, the subject of such laws, goes quite some way in demonstrating this purpose. For example, states parties to the Rome Statute have identified these as crimes "so serious as to be of concern to the entire international community as a threat to world peace, security and well-being" and have also stated that they "must not go unpunished."[108] The permissibility of states to enact and use extraterritorial jurisdiction over the Rome Statute international crimes, even if extended to legal persons, seems sound under doctrinal international law, provided that it is understood that any steps that require access to people or property in the territory of another state will require the consent and cooperation of that state. This might arise when obtaining evidence for the trial, for example, or in enforcing judgment. This is not to claim that "consent and cooperation" should constitute a separate requirement for extraterritorial jurisdiction because, except where a lack of action by a territorial state arises from a failure in the state apparatus or its institutions, in many cases it is possible that a state may have an interest in ignoring international crimes committed on its territory that may implicate state agents and the state itself. Rather, it is a practical acknowledgment that, in some instances, trials of international crimes with extraterritorial dimensions may require interstate cooperation (e.g., for the purposes of enforcement or obtaining evidence). In the case of trials of multinational corporations for events that occurred primarily outside of the prosecuting state, this practical factor may commend in favor of prosecution by a state in which the corporation (including a parent corporation) is incorporated or has substantial assets, hence enabling various punishments to be effected within the territory of the prosecuting state, or by states with a significant domestic economy in which the corporation may wish to continue operating, such as the United States, which an adverse finding might jeopardize.[109]

It is interesting to contrast the position under public international law doctrine on the principle of nonintervention as described by the ECCP with May's view on the conditions that must be satisfied for international trials to be

[108] Preamble to the Rome Statute. Moreover, the very existence of these principles in an international convention aimed at addressing international crime assists in demonstrating that the relevant national implementing legislation is a manifestation of international solidarity in the fight against crime. See Council of Europe Report, above n 95, 464–5.

[109] See, for example, Jonathan Clough, "Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses," 3 *Brooklyn Journal of International Law* (2008), 899, 923 (noting that, given the impossibility of extraditing a company, economic interest nonetheless seems to compel corporate cooperation in extraterritorial criminal actions against them).

legitimized.[110] Unlike the ECCP, May notes that "international criminal law is often seen as at least as great an assault on State sovereignty as that of outright war, since it involves the prosecution of a State's subjects by a legal authority that sits, in effect, as a higher authority than the State, and thereby seemingly infringes directly on the sovereignty of the State."[111] He therefore inflates a concept of "crossing the borders" of another state to include both literal forms of intrusion into another state's territory and metaphoric or figurative incursions "by instituting legal proceedings on behalf of those who have been harmed but that are not explicitly sanctioned by the host State."[112] The greater significance of adjudicative extraterritorial criminal jurisdiction on sovereignty, in May's work, in comparison to some types of literal incursions on another state's territory is further illustrated by his conditions for legitimizing international trials, namely, the security principle and the international harm principle. The first principle provides that a state must have assaulted the physical security or subsistence rights of its population, either as a perpetrator of the relevant wrongs or by allowing those to go ahead without remedy, before the presumption in favor of its sovereignty is rebutted.[113] The second principle provides that a harm must be group-based, either in terms of the victim or the perpetrator, to justify international trials.[114] In May's view, although violations of the first principle may be "sufficient to justify humanitarian intervention into the affairs of a State, . . . in order to justify the likely infringement of liberty of individuals that comes from trials, satisfying an additional justificatory principle [the international harm principle] is necessary [to justify international trials]."[115]

May's argument is somewhat controversial, as it seems to hold that physical incursions on the territory of another state may in some cases be more easily justified than may nonphysical, figurative incursions on state sovereignty. The difference, however, between the positions held by May and the ECCP may lie in the elevated position that May gives to individuals in his theory, a consideration largely absent in public international law doctrine with its focus upon states. Furthermore, May is rightly attempting to address the moral legitimacy of international trials given the link between legitimacy and law's effectiveness.[116] Although it has been argued that May's conditions create too

[110] Larry May, *Crimes Against Humanity: A Normative Account* (New York: Cambridge University Press, 2005).

[111] Ibid., 8. This perceived assault on state sovereignty is likely to be exacerbated in the case of ICC determinations regarding the ability and willingness of a state to genuinely proceed with a trial in admissibility determinations, which might be viewed as judging a state's laws, intentions, and infrastructure.

[112] Ibid., 267.

[113] Ibid., Chapter 4.

[114] Ibid., Chapter 5.

[115] Ibid., 63.

[116] Ibid., 65.

narrow a scope for legitimizing international trials,[117] moral legitimacy may be one of the problems reflected in the foreign affairs tensions that international lawsuits can clearly engender.

Predictability

The ECCP identifies a second possible limitation to state freedom under public international law, flowing from the principle of predictability.[118] Following the principle of the rule of law, an essential requirement placed on criminal law is that its norms should be "recognizable."[119] Among other things, this means that laws should be formulated to a certain degree of detail and precision, and that both the law's geographical reach and the legal persons to which it applies should be precisely defined.[120] The ECCP recommends that any national laws purporting to regulate corporations outside of a state's territory should "unequivocally indicate the standards for considering such corporate bodies as its nationals."[121] The report further recommends that the location of the registered main office of corporate bodies is the only acceptable standard with this principle of predictability in mind.[122] These calls for predictability overlap with recommendations of the International Chamber of Commerce, which argues that, to minimize what can be the negative effects on international trade and investment of extraterritorial jurisdiction over business, national laws and regulations should be limited to matters connected to the national territory by a substantial and predictable link.[123]

It is outside the scope of this chapter to consider the issue of determining the nationality of a corporation. Furthermore, it should be noted that assessing the predictability of any laws can be determined only by an audit of those laws in question. It is worth noting, however, that when dealing with behaviors amounting to international crimes, the argument from predictability may be less cogent on the basis that such behavior is likely to be impermissible under custom and/or treaty law wherever in the world the crime is committed. In this sense, national legislation implementing the Rome Statute is not criminalizing such behavior on the international plane, but rather is reinforcing international law at a local level and, perhaps most importantly (in light of the lack of

[117] See, for example, Luban, above n 90; Jamie Mayerfeld, "Ending Impunity (Responses to Crimes Against Humanity)," 20(3) *Ethics & International Affairs* (2006), 361–6.

[118] Council of Europe Report, above n 95, 460–3.

[119] Ibid., 460.

[120] Ibid., 460–1.

[121] Ibid., 466.

[122] Ibid.

[123] International Chamber of Commerce, *Extraterritoriality and Business*, Policy Statement, Doc 103–33/5 Final (13 July 2006) 4 (recommendations 2 and 6).

forum over corporations at an international level), providing forums for the prosecution of corporate offenders. This argument, however, depends upon a position that, despite lack of forums for the prosecution of corporations for international crimes, various norms of international law apply equally to private bodies such as corporations as to individuals, a claim that has been debated.[124]

Foreign Relations

Despite whether the principle of nonintervention may have actually been breached, conduct short of force undertaken on the territory of another state can nonetheless cause concern to other states. As the right to exercise criminal jurisdiction is often considered a fundamental feature of sovereignty,[125] states are often concerned about the perceived diminution of sovereign entitlements arising from another state adjudicating matters pertaining to their territory, although such concern is by no means confined to criminal trials.

An example of the foreign policy tensions that can arise from extraterritorial lawsuits over corporations is the civil class action brought in the United States against Rio Tinto for its operations in Bougainville, Papua New Guinea. The plaintiffs, residents of the region, alleged that the company was involved in significant environmental devastations and in war crimes committed by the state's defense force during the region's civil war.[126] Both Papua New Guinea and the U.S. Department of State made claims to the U.S. District Court as to the impact the case proceeding would have on relations between the countries.[127] In a letter to the U.S. Ambassador, the Chief Secretary to the Government of Papua New Guinea stated that "the Papua New Guinea Government considers this court action as tantamount to seriously undermining and placing under strain the cordial relations and support it enjoys with the

[124] See, for example, Clapham, above n 25, 244–7.

[125] Brownlie, above n 96, 297.

[126] The claim against the company includes an allegation that the company encouraged or colluded in a military blockade, reported to have resulted in the death of 10,000 people between 1990 and 1997. Information obtained from the Web site of the plaintiff's solicitors, available at http://www.hagens-berman.com/prominent_cases.jsp (accessed April 28, 2008).

[127] Initially, the U.S. District Court determined to refrain in exercising extraterritorial jurisdiction due to, among other things, these claims: *Sarei v Rio Tinto plc* 221 F Supp 2d 1116 (CD Cal 2002). This decision has since been reversed and the reversal confirmed. Access to the judgments, as well as other background materials, can be found at the Business and Human Rights Web site, available at http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/RioTintolawsuitrePapuaNewGuinea (accessed April 28, 2008).

Government of the United States."[128] Likewise, in another civil action brought in the United States, this time against Texaco for damage to the natural environment and indigenous ways of life in Ecuador, the then Ambassador to the United States lodged a diplomatic protest, claiming that the action was an affront to national sovereignty.[129]

The possible impact that an exercise of extraterritorial (particularly criminal) jurisdiction over a corporation might have on a country's foreign relations may become an influencing factor in any determination as to whether to proceed. In the Australian international crimes offenses, certain procedural provisions create a means by which foreign relations can become an influencing factor. As prosecution of the new Australian international crime offenses can be commenced only with the written consent of the federal Attorney-General,[130] a political dimension is introduced into the proceedings, in what would otherwise be a decision based solely on prosecutorial discretion.

There are a number of arguments against too great an influence of complaints from the territorial (or other) states over the decision of a state to prosecute a corporation for international crimes abroad. First, international crimes are often described as offenses against not only those individuals and communities directly affected, but against our common humanity so that, therefore, the international community has an independent entitlement to ensure that perpetrators of such crimes are made accountable (the claim from harm to humanity). Second, the scale and (for some crimes) the elements of international crimes mean that such offenses can often occur only with the "help and assistance, or the connivance and acquiescence, of national authorities."[131] Third, typically allegations of corporate involvement in international crimes involve the corporations not as direct perpetrators but as accomplices in crimes committed by others, such as government and paramilitary

[128] Letter from the Chief Secretary to the Government of Papua New Guinea to the United States Ambassador, dated October 17, 2001, available at http://www.state.gov/documents/organization/28992.pdf (accessed April 28, 2008).

[129] Halina Ward, "Securing Transnational Corporate Accountability through National Courts: Implications and Policy Options," 24 *Hastings International and Comparative Law Review* (2001), 451, 459. In contrast, there are examples where states have supported the exercise of extraterritorial jurisdiction by other states for wrongs committed by legal persons on their territory. Ibid., 459–60.

[130] Section 268.121(1) of the *Criminal Code 1995* (Cth.)(Aus.). This decision is final and not capable of legal challenge: Section 268.122 of the *Criminal Code 1995* (Cth.)(Aus.). On the one hand, this might result in the blocking of prosecutions if there is a political will against their continuance. On the other hand, a tragedy arising from corporate extraterritorial conduct involving sufficient Australian interest may captivate the attention of the Australian public in such a way as to have an impact on political will.

[131] Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections," 10 *European Journal of International Law* (1999), 144–71 at 159.

forces.[132] This latter factor exacerbates the risk that agents of the state in which the conduct occurred may be implicated, and hence the state is averse to judicial inquiry into the conduct in question. The possible involvement of local agents may mean that national institutions are unwilling to pursue local violations. The reality of this possibility in the case of international crimes generally was one of the reasons that international courts have been pursued and is now reflected in the admissibility provisions of the ICC. Finally, there are specific concerns regarding the effectiveness of states hosting the operations of multinational corporations rigorously to enforce regulation. One example is that, with growing dependence on foreign direct investment, developing states may be unwilling or unable (e.g., under contractual terms) to exert their local laws to the full against foreign corporate investors.[133]

The claim of "harm to humanity" deserves brief attention, as it is fair to ask *how* exactly our common humanity is harmed by international crimes.[134] Although variations of this idea have obtained central significance in international discourse, it has been alternatively criticized as both politically dangerous[135] and as empty rhetoric.[136] In his work on crimes against humanity, Luban has argued that the claim that certain conduct causes harm to humanity has two senses. First, certain crimes are "universally odious" because they violate some quality that makes us human, an aspect of our humanness, and second, they give rise to an interest (or standing) for humankind – as a set of individuals – in the remedy of such violations.[137] For Luban, the pertinent aspect of our humanness arises from our political natures: namely, our status as political animals whose "nature compels us to live socially, but who cannot do so without artificial political organization that inevitably poses threats to our well-being, and at the limit, to our very survival."[138] Crimes that involve attacks by states or statelike organizations upon groups within their political

[132] International Peace Academy and Fafo AIS, above n 7, "Framing the Issues," available at http://www.fafo.no/liabilities/index.htm#framingtheissues (accessed June 14, 2007).

[133] See, for example, De Schutter, above n 11, 237–9. For an analytic investigation of the dynamic of the "race to the bottom" phenomenon, whereby developing states compete against each other for foreign direct investment through the reduction of local regulation, see Debora Spar and David Yoffie, "Multinational Enterprises and the Prospects for Justice," 52 *Journal of International Affairs* (1999), 557.

[134] Thanks again to Zach Hoskins for raising this point.

[135] For a treatment of the argument that to categorize something as a violation of humanity serves to demonize the perpetrators and risks therefore unconstrained acts against such persons, epitomized in the work of Carl Schmitt, see David Luban, "A Theory of Crimes Against Humanity," 29 *Yale Journal of International Law* (2004), 86, 120–3.

[136] Andrew Altman, "The Persistent Fiction of Harm to Humanity (Responses to Crimes Against Humanity," 20(3) *Ethics & International Affairs* (2006), 367, 372.

[137] Luban, above n 135, 86–90.

[138] Ibid., 90. See generally 109–14.

community attack our natures as political animals by attacking both our natural need to organize into groups, hence violating our sociability, *and* our individuality by treating us only as members of a group rather than according to our personal characteristics.[139] Furthermore, they constitute the point at which "politics goes cancerous" and becomes "the perversion of politics, and thus a perversion of the political animal."[140] Each human being, according to Luban, has an interest (standing) in addressing such *political* crimes on the basis that, in a world where such behavior goes unaddressed, "each of us could become the object of murder or persecution solely on the basis of group affiliations we are powerless to change."[141] Although Luban's thesis focuses solely on crimes by states or statelike organizations, it begins to set out a compelling account of harming humanity based on our common human vulnerabilities arising from our social natures and our specific political organization.

The idea that deference to the demands of states potentially implicated by judicial inquiries should be put aside due to the seriousness of the risk that certain crimes pose to the international community has been expressly confirmed in at least one international treaty. Article 5 of the *Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997)[142] states that "[i] investigation and prosecution of the bribery of a foreign public official . . . shall not be influenced by considerations of national economic interest, *the potential effect upon relations with another State* or the identity of the natural or legal persons involved." In contrast, there may be situations in which a state is genuinely willing and capable of proceeding with a prosecution of events that occurred in its territory. Given the priority of territoriality in criminal law, principles of comity may recommend that, in such cases, the matter be left to the territorial state. However, the issue should remain one of willingness and ability to serve the interests of justice. Where this cannot be guaranteed by the territorial state, the exercise of extraterritorial

[139] "Crimes against humanity assault our individuality by attacking us solely because of the groups to which we belong, and they assault our sociability by transforming political communities into death traps." Ibid., 160. On this first characteristic, harm to humanity based on the violation of individuality, May makes a similar point in his treatment of the subject, when he states: "Humanity is a victim when the intentions of individual perpetrators or the harms of individual victims are based on group characteristics rather than on individual characteristics. Humanity is implicated, and in a sense victimized, when the sufferer merely stands in for larger segments of the population who are not treated according to individual differences among fellow humans, but only according to group characteristics." May, above n 110, 85–86.

[140] Luban, above n 135, 117.

[141] Ibid., 138.

[142] *OECD Bribery Convention*, opened for signature December 17, 1997, 37 ILM 1, art 5 (entered into force February 15, 1999).

jurisdiction by another state over international crimes should be acceptable and threats regarding foreign relations implications critically evaluated and, in some cases, disregarded.

Another concern often raised in resistance to the exercise of extraterritorial jurisdiction is that such jurisdiction may constitute legal imperialism by one state (usually a relatively strong state in international affairs) over others. As Mattei and Lena point out, the hegemonic implications of the excessive and unilateral exercise of jurisdiction by one state over matters occurring outside of its territory involve the imposition of that state's standards of not only substantive law, but also its procedure and legal culture.[143]

In the context of extraterritorial jurisdiction over international crimes, it is significant that these crimes arise either under customary international law or as codified in the Rome Statute. Concern regarding the imposition of one nation's standards of local substantive law is diminished, as these standards are established at the international level as reflective of values shared by most nations of the world. This argument may not answer matters of procedure and culture. Even in relation to procedure, however, the complementarity model of the ICC may go some way to foster broader international uniformity, by demanding that certain procedural rights are ensured for the accused for a local trial to be deemed genuine. More broadly, international human rights instruments exist setting out certain basic procedural rights that must be ensured in criminal trials.

As the new domestic "international crimes" laws are a result not simply of unilateral state action but instead of the encouraging effect of the Rome Statute, claims of hegemonic implications are generally somewhat less robust. First, such an exercise of extraterritorial jurisdiction is implicitly approved by the majority of the international community of states that are parties to the Rome Statute. Second, the complementarity model of the Rome Statute particularly commends itself as it encourages *more* states to enact and apply extraterritorial jurisdiction to international crimes. In fact, it has been said that the ICC will be seen as functioning most fully when the least number of matters come before it,[144] in other words when all states parties participate in a global criminal order by applying their criminal institutions to the problem of international crime.

[143] Ugo Mattei and Jeffrey Lena, "U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications," 24 *Hastings International and Comparative Law Review* (2001), 381–400.

[144] Louise Arbour, "Will the ICC Have an Impact on Universal Jurisdiction?" 1 *Journal of International Criminal Justice* (2003), 585.

III. FUTURES

Although there may be growth in national extraterritorial legislation directed at corporate global activities, actual instances of their application are likely to be few and far between.[145] At least in relation to the recent spate of domestic "international crimes" laws there is a risk that these will amount to nothing more than paper tigers unless states are encouraged to apply those laws. History has shown that states are often reticent to prosecute international crime. The added complications that arise when considering prosecuting a corporate defendant, such as the complex organization of corporate groups in multinational enterprises and the complicated nature of doctrines of complicity, are likely to magnify the complexity of trials and hence the reluctance of states to apply international crimes laws to corporations. A highly cynical view might even suggest that both home and host states of multinational corporations may have a vested interest in turning a blind eye to corporate misbehavior. Furthermore, states are often faced with foreign affairs tensions when adjudicating matters involving the conduct of corporations in other territories and can be subject to claims of legal imperialism when doing so.

For this reason, a complementary way of improving the accountability of corporations for involvement in international crimes is through the inclusion of private corporations in the jurisdiction of the ICC.[146] The ICC particularly commends itself as a mechanism for improving corporate accountability because the complementarity model encourages not only the implementation of national legislation but also its use. A significant impetus for the application by states of their international crimes laws in appropriate circumstances is the risk of forfeiting cases to the ICC for adjudication. Compelling readings

[145] See, for example, the comment of the ECCP on the generally low usage of extraterritorial jurisdiction: Council of Europe Report, above n 95, 447–88. One exception is the pursuit by the United States of both U.S. and foreign corporations for breaches of the Foreign Corrupt Practices Act of 1977 (FCPA) relating to bribes of foreign officials. For recent trends and practices in FCPA enforcement, see Shearman & Sterling LLP, *Digests of Cases and Review Releases Relating to Bribes to Foreign Officials Under the Foreign Corrupt Practices Act of 1977 (as of March 7, 2007)* (2007) 2–9. Generally, the trend to apply laws with extraterritorial reach might be changing. In Australia, for example, a number of individuals have been prosecuted under Australian law for engaging in child sex tourism offenses overseas: Fiona David, "Child Sex Tourism," 156 *Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice* (2000).

[146] After July 2009, the Rome Statute will be open to an amendment to include corporations in the jurisdiction of the Court: Articles 121 and 123 of the Rome Statute. Furthermore, according to Article 121(6) of the Rome Statute, any state that does not agree to an amendment that becomes effective may withdraw from the Statute with immediate effect. These provisions suggest that broad agreement among state parties will be necessary, as states opting out of the Rome Statute would be an undesirable outcome.

of the operation of the complementarity regime suggest that a state unable to prosecute a case because of a lack of competence over the crimes in question *or* over the offender by failing to extend the offenses to certain categories of defendants (e.g., through amnesties, diplomatic immunities, or otherwise), may thereby forfeit the case to the ICC. Certainly, in the Australian context, Parliament was quite explicit in stating that its international crimes laws were enacted so as to secure Australian sovereignty and to ensure Australia's capacity to try international crimes rather than to forfeit offenders to the ICC. In the absence of ICC jurisdiction over legal persons, such a risk of forfeiture simply does not exist in relation to corporate offenders.

In addition, the extension of ICC jurisdiction to include corporations may have a legitimizing effect over national prosecution of corporations for international crimes. It would assist in clarifying the status of norms of international law in relation to corporations and, in doing so, assist in ensuring the predictability of law. It would also assist in reducing perceptions of legal imperialism by proclaiming the broader conformity of the community of states to the principle of corporate liability for international crimes and by encouraging more states to apply their laws for that purpose. A separate question not considered in this chapter is the difficult issue regarding the form that a provision on corporate liability in the Rome Statute should take and whether there would be reasonable grounds to recognize quasi-criminal national approaches to corporate liability in those states with enduring traditions against the principle of corporate criminality.

The ICC Statute, by virtue of the complementarity regime of the Court, revolves around a vision that the ICC will operate in a principally decentralized, state-based, international criminal order in the struggle against the most serious of human rights abuses. Certainly, the ICC is intended to have an encouraging impact on state activity regarding international crimes, primarily through its complementarity regime, but this impact is achieved through embodying a means of effective international criminal justice in the event of state inactivity. This impetus to use domestic law that could be created by ICC jurisdiction over corporations could further the process toward a functioning decentralized international criminal order, assist in diminishing the perception of imperialism by particular states, as well as serve as a means for states to politically divest their responsibility for acting in relation to corporate involvement in international crime.

PART THREE

JUSTICE AND INTERNATIONAL CRIMINAL PROSECUTIONS

7 Postwar Environmental Damage: A Study in *Jus Post Bellum*

Douglas Lackey

They made a desert, and called it peace.

– Tacitus, *Agricola* 30

The doctrine of just war, as developed by Cicero, Augustine, Aquinas, Grotius, and others, falls into two parts: *jus ad bellum* and *jus in bello*. The first part indicates *when* wars should be waged; the second part describes *how* wars should be waged. Both the *ad bellum* and *in bello* parts of the doctrine lapse when the war ends. In my book, *The Ethics of War and Peace*,[1] I suggested that the just war doctrine should be extended to conditions after the war is over: This is the category of *jus post bellum*.

In this chapter, I propose a new principle of *jus post bellum*, that participants in war have an affirmative obligation to restore the environment damaged by their military operations. Consider the following example. On April 18, 1999, during operations directed by the North Atlantic Treaty Organization (NATO) against Serbia, NATO (i.e., U.S.) bombers attacked an oil refinery, a nitrogen-processing plant, a petrochemical plant, and other industrial facilities at Pančevo (near Belgrade), resulting in widespread contamination with toxic chemicals of the Pančevo area and the Danube River. The suggested principle of *jus post bellum* implies that NATO countries in general, and the United States in particular, have a legal obligation to clean up these chemicals and restore the environment to its prewar condition.

Given current international and U.S. law, residents of Pančevo have little legal recourse. They might attempt to bring suit against NATO in U.S. Federal Court under the Alien Tort Claims Act, which gives federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." This suit

[1] Douglas Lackey, *The Ethics of War and Peace* (Upper Saddle River, NJ: Prentice-Hall, 1989).

would very probably be rebuffed because current international law does not recognize environmental damage as a "universally recognized breach" of the law of nations. The natives of Papua New Guinea whose island ecology was destroyed by a 7-kilometer-wide copper mine were allowed to sue for human rights violations, but their claims based on environmental damage were dismissed in a U.S. federal court.[2] Alternatively, residents of Pančevo might try to sue the federal government directly, under the Federal Tort Claims Act, but that suit would be rebuffed under the exception that excludes claims "arising out of combatant activities of the military of naval forces, or the Coast Guard, during time of war."[3] Likewise, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) superfund excludes responsibility for environmental damage stemming from an "act of war."[4] The cleanup of Serbia, currently directed and organized by the United Nations Environmental Program (UNEP), proceeds on a charity basis, with $7 million so far provided by donor countries.

The suggestion that there is an obligation, based in justice, to restore Pančevo is independent of *ad bellum* and *in bello* considerations. An argument might be made (I do not myself endorse it) that NATO operations against Serbia were a case of justified humanitarian intervention on behalf of Albanian Kosovars facing an imminent genocidal threat from Serbian military forces entering Kosovo in March 1999. An argument might be made that petrochemical plants and oil refineries are not forbidden targets under the existing *jus in bello*, and that oil refineries have been considered legitimate military targets under current international law. If so, the Pančevo raid was a legal military operation. Even so, the suggested principle of *jus post bellum* places obligations on those states that have caused the damage to repair the damage.

The idea that a legitimate military operation could generate such liabilities seems paradoxical. How can doing right put you in the wrong? Why not avoid the paradox by simply expanding the list of forbidden *jus in bello* targets to include "the environment?" Then the Pančevo raid would qualify as a war crime, like shooting prisoners. The difficulty with this approach is that it is nearly impossible to conduct military operations, even operations at sea, without some damage to the environment. If the "environment" is a forbidden target, then all wars are unjust. The purpose of just war theory, however, is to discriminate just wars from unjust wars. A suggestion that eliminates the just–unjust distinction defeats the purpose of the theory.

[2] *Sarei v. Rio Tanto* [221 F supp 2nd 116 CD Cal 2002].
[3] 28 USC 2680, j.
[4] Environmental Law 149EIX, Response and Clean Up 149Ek445.

A more refined *jus in bello* approach holds that *deliberate* attacks on the environment, such as the use of Agent Orange during the Vietnam War, should be forbidden under a revision of *jus in bello*. Under this proposal, we could still distinguish between just and unjust military operations, and even between just and unjust environmental damage. This principle might prove too liberal, however. The distinction between "intended" or "deliberate" damage and "unintended" or "unplanned" damage is conceptually murky and difficult to enforce as law. Even the damage done to the environment by a nuclear attack might be construed and dismissed as collateral damage, an unintended side effect of military operations. As with strategic bombing, the intended–unintended distinction yawns wide and permits nearly everything. If forbidding all strikes on the environment is too strict, forbidding only deliberate strikes is too lax.

The best way to preserve the just–unjust distinction while not invoking the intended–unintended distinction is to 1) retain the traditional *jus ad bellum* and *jus in bello* requirements, while 2) adding environmental restoration as a separate condition of *jus post bellum*. Military operations should proceed within the traditional target constraints. *Post bellum*, damage to the environment should be surveyed and obligations to restore assessed. We are still stuck with the paradox. Actions that satisfy the traditional criteria constitute justly begun war and justly conducted war, but if all the agent's actions are just, how can it be at fault? If it is not at fault, how can environmental damage be its fault?

The question raised here points to an ambiguity in the traditional theory of just war. One principal goal of just war theory is to state conditions under which it is permissible to undertake military operations, when military operations will surely harm innocent persons. Let us suppose, *mirabile dictu*, that a proper list of conditions has been set forth. There are two ways that military operations can be "permissible" under these conditions: They might be permissible in the sense of *justifiable* or they might be permissible in the sense of *excusable*. The difference between justification and excuse is familiar in law and ethics. When one acts with justification, there is little post-act liability. When one acts permissibly but excusably, there may be substantial post-act liability. If you harm your attacker while defending yourself, you owe him nothing; if you harm an innocent person in the course of rescuing him, you may be liable, unless there is a specific statute immunizing you from suit. Are harms to innocents caused in *war* justifiable or excusable harms? I find it more credible to consider them excusable. The killing of enemy soldiers may, in some tortured way, be construed as killing in self-defense. The killing of any enemy civilians, however, is in no way a case of self-defense. None of the other traditional justifications seem to apply; one is not executing the guilty

after a proper process. It follows then, that there can be *post bellum* liability for permissible military acts.

The concept of *post bellum* liability that I develop here must be disconnected from any notion of fault. We are considering a just war pursued within all the constraints of *jus in bello*, and military actions undertaken within these limits are not reckless, not careless, and not negligent. If fault is not brought in, we are left with liability according to strict liability – that is, the agent will be held liable, not because he wrongfully caused damage, but simply because he caused it. I maintain this full liability in the case of environmental damage, but I maintain it, only in a qualified way, with regard to harm to noncombatants.

There are advantages and disadvantages in the strict liability approach. One advantage is that a nation that undertakes to clean up damage caused by its military operations (as, e.g., the British undertook the postwar cleanup of the Falkland Islands) can begin such work without admitting fault in the initiation or conduct of hostilities. Another advantage is that a strict liability approach aligns itself with current treatment of neutral parties in international law. If a U.S. missile aimed at Baghdad went awry and destroyed lives and property in Tehran, the United States could not evade responsibility by proving that the missile had been launched with all due care. The proposal given here suggests that the environment *under* Iraq is as neutral as are nonbelligerents *alongside*. A third advantage is that strict liability recognizes the inherently destructive character of war. Causing damage to the enemy is not an accident of war, it is the essence. Something so essentially destructive cannot be regulated by principles that refer to "taking due care" or "regrets" about collateral damage. For sure, there is going to be damage. The focus must be on what is to be done about it, not whether some pains were taken to avoid it.

In contrast, the prospect of strict liability and legally unavoidable postwar cleanup obligations increases the projected cost of military operations. Some might object that this will deter nations from undertaking just wars. The Kosovo War might, in a generous interpretation, be viewed as a "rescue operation" directed toward saving Albanians; the First Gulf War might be construed as a rescue of Kuwaitis from Saddam Hussein. Much criticism has been directed toward the UN and the United States for their failure to rescue the Tutsis in Rwanda in 1994. Many American states have Good Samaritan laws that immunize rescuers from liability for damage caused in the course of rescue. Those who accept the logic of such state provisions might argue that international law needs Good Samaritan clauses that immunize nations from liability for damage caused in the course of rescuing Albanians, Tutsis,

Bosnians, Somalis, and other victims of aggression, not requirements that increase the cost of rescue.

The analogy, however, between Good Samaritan clauses in state law and the need for Good Samaritan clauses in projected international law is weak. In the normal street case, the need for rescue is patent, and the rescuer typically does not cause damage or injury in the course of conducting the rescue. In the case of warfare, identification of the victim often requires political interpretation, and damage invariably results from the rescue attempt. The introduction of Good Samaritan clauses into the international law of war would imply that whether certain acts in war are right is contingent on whether the war as a whole is right (whether, e.g., the war is essentially a "rescue"). This conclusion would be like claiming that soldiers who shoot prisoners of war are criminally liable if they are on the aggressive side of a war but not criminally liable if they are on the defensive side of the war. There is wisdom in keeping judgments of what is legitimate during war separate from questions about the legitimacy of initiating war. Likewise, there is wisdom in keeping judgments about postwar cleanup obligations separate from judgments about the legitimacy of initiating war. We should not hold only aggressors liable for environmental damage. The moral asymmetry between aggressor and defender cannot apply to the environment, which is a background constant on both sides of a conflict. A state can act negligently and wrongfully; environments cannot.

Furthermore, in terms of adjudication, it is much easier to identify the cause of damage in Serbia (NATO bombs) than it is to decide whether Serbia is aggressor or defender. In that direction lies victors' justice and the usual asymmetries of reparations. There is clarity in the thought that those who make a mess should clean it up.

What about the problem that the costs of cleanup will deter just nations from just wars? Historically, nations do not choose to begin wars by calculating costs, but by considering selective interests, or idealistic factors, which seem to transcend mundane budgets. It is difficult to imagine a scenario in which the United States would decide that a military operation, otherwise warranted, should be deferred because of postwar cleanup costs. What is more likely is that the thought of postwar cleanup costs would put some pressure on military leaders to choose less damaging military options. For example, nations that know that they will be obliged to clear their own land mines will be less inclined to use plastic mines that elude metal detectors. If Wesley Clark had been told that American troops would be required to clean up toxic debris scattered around Pančevo, he may have been less inclined to blow it up. A more nuanced cost–benefit analysis of NATO bombing would have ensued.

Postwar cleanup obligations are not likely to stop just wars from proceeding, but they will make just wars less destructive than they otherwise might be.

A second argument against a strict liability approach is that failing to distinguish negligent from non-negligent damage penalizes the conscientious agent that makes a decent effort to minimize damage. Some might feel that a nation 1) fighting a just war and 2) striving to reduce environmental damage to a military minimum should incur no liability for damage done – particularly damage done to the territory of an enemy fighting an unjust war. The suggested rule hardly rewards negligence, however. Negligent agents typically create greater damage, and under the rule greater damage incurs greater liability. I have argued elsewhere that when civilians are killed in military operations, the focus of attention should be on the number of the dead, not on whether combatants exercised due care. Even if civilian deaths are necessary for victory, they are still a moral problem. Likewise, when environmental damage occurs in the course of military operations, the focus of attention should be on the damage, not on questions of negligence. The damage may be necessary for victory, but if the damage is not repaired, the victory will not have been just. Only just victory could justify the damage in the first place.

If the proposed environmental protections, by convention, treaty, precedent, or UN resolution, became part of the law of nations, then injured parties might seek relief under the Alien Tort Claims Act. But the prospects for helpful synergy between a supplemented law of nations and the Alien Tort Claims Act would still be poor. First, there is deep and justifiable prejudice against accepting suits that require courts to make political interpretations or take sides in a political controversy. Second, there is a prevailing view that tort claims should not be entertained against governments involved in "acts of state"; acceptance of such suits under the Alien Tort Claims Act allegedly disturbs the comity of nations. Because war is the preeminent act of state, a refusal to consider torts stemming from such acts of state would block all suits pertaining to the effects of war. Similar difficulties stemming from the acts of state exclusion have been encountered by U.S. communities attempting to sue the United States under the Federal Tort Claims Act for environmental damage caused by leakage from military storage facilities and chemical warfare research centers. The fact that, strictly speaking, acts of state refer to acts of a sovereign government on its own territory does not block a more liberal application of the Act of State Doctrine; war is typically a defense of "one's own soil." It appears, then, that inclusion of environmental damage as part of the law of nations would assist individuals and groups seeking redress for environmental damage caused by multinational corporations, but would not provide effective redress for environmental damage caused by military operations.

There are other, more abstruse, reasons why much environmental damage, whether from military or nonmilitary causes, cannot always be addressed in civil suits. First, such actions require an injured party, and there can be damage to the environment without the existence of an injured party. Environmental damage can consist of harm to nonhuman organisms that lack standing, and damage can affect ecosystems that are not even organisms. Second, although it is moderately easy to show that some act has damaged the environment, it is far less easy to show that a particular health problem in a particular individual is traceable to some particular environmental change. Defendants often exhibit genius in suggesting alternate routes of causation. The government's response to the effects of Agent Orange is perhaps a case in point.

Furthermore, as Derek Parfit has eloquently argued in *Reasons and Persons*, policies that affect the environment often determine which particular individuals are conceived and born.[5] It follows that one could choose policy A over policy B, where policy A produces an environment inferior to policy B, yet there is no individual living in the policy A-generated world who is worse off than he or she would be if he or she lived in the better policy B-generated world. To take an extreme example (not from Parfit), a nuclear war that generates a nuclear winter would be a world in which in 100 years there would exist no individual who would be better off if the nuclear war had not occurred, because he or she would not have existed if the nuclear war had not occurred. Such arcane examples provide an argument that questions of environmental damage and environmental policy often cannot be decided in person-affecting terms. A damaged environment need not contain damaged individuals.

For these reasons, the model of crime fits the problem of war-caused environmental damage better than the model of torts does. A crime can be viewed as an injury to the body politic, even if there is no victim because of mutual consent, failure of attempt, and so forth. Damage to the environment can be viewed as damage to an international body politic, even absent particular victims, or real victims who fail to bring suit. The environment is a delicate web that sustains us all, and a shock at one point vibrates out to all the other points. For this reason, damage to the environment should be distinguished from other forms of damage caused by war, and a distinct portion of the law of war needs to be devoted to it.

It follows that military damage to the environment is more effectively pursued as a crime or wrong prosecutable by appropriate international organizations and heard before international judicial bodies. Already the UNEP has been called in to investigate cases of postconflict damage and has

[5] Derek Parfit, *Reasons and Persons* (New York: Oxford University Press, 1984).

prepared an extensive scientific report regarding environmental damage done in Serbia during the Kosovo War. Under the proposed rule, the UNEP could proceed from investigation of damage, to requests for appropriate action, to bringing of charges before an international judicial body that good-faith repair efforts have not been made. Other international organizations with specialized knowledge might be empowered to investigate and bring charges. For example, the International Atomic Energy Agency might be empowered to investigate and bring charges relating to the failure of military forces to clean up battlefields contaminated by the use of depleted uranium munitions.

In the traditional postwar situation, losers have had to pay reparations for damage caused. I am far from suggesting that reparations should not be assessed against parties that begin unjust wars, although the deterrent effects of this strategy are less than we might hope because no aggressor starts a war expecting to lose it. I am suggesting that one type of damage, environmental damage, be separated from the other destructive effects of war and that obligations for environmental damage be assessed against whomever caused it, regardless of who won or lost. If World War II provides the standard model for war in the age of air power, winners cause more environmental damage than losers do, and winners are typically better equipped economically to repair the damage. They can pay, and as the cause of the damage, they should pay. This proposal is radical but it has its historical roots. Even in biblical times, cultural codes forbade poisoning the enemy's wells or destroying his fruit trees.

There is an attitude, which in a nation at war grows in popularity as the conflict drags on, that damage to the enemy is something he has brought upon himself. As Henry puts it before Harfleur:

> What is it to me if impious war
> Arrayed in flames, like to the prince of fiends
> Do, with its smirched complexion, all fell feats
> Enlinked to waste and desolation?
> What is it to me when you yourselves are cause? . . .
> What say you, will you not yield, and this avoid?
> Or guilty in defence, be thus destroyed?
> (Shakespeare's *Henry V*, Act III, sc 2).

There is a double argument in Henry's plea that it is not his fault if his siege engines and his men destroy Harfleur. First, because the French are the cause of the war, they are the cause of all the effects of war. Second, because the French could avoid destruction by yielding, they are the cause of the destruction if they do not yield. The first notion of cause is so approximate as to be legally useless: One might as well blame God for having created France.

The second notion of cause absurdly attributes to the French the last clear chance to avoid catastrophe, when in fact that last chance lies rather in Henry's hands – at the latest moment, he could choose to lift the siege.

Henry of course was invading France, and his speech would have more appeal if he were responding to an invasion, destroying the homeland resources of an invading enemy. Certainly, if your cause is just, you can justly destroy the forces the enemy has deployed against you, and perhaps, by extension, other things that are "the enemy's." It is at this point, however, that the special logical features of injury to the environment emerge. To destroy the resources of the enemy that are *his* – the artifacts with which he has mixed his labor, his buildings, his bridges, his soldiers – is excusable under the established law of war. There are things that belong to no one, however: the innocent civilians, who belong only to themselves; religious buildings, which belong to the gods; works of art, which are part of the common heritage of mankind; and the environment, which belongs to everyone, or perhaps to no one in particular. To damage the environment is not to strike a blow at the enemy; it is to strike a blow at everyone. Because one cannot wage a just war against the whole world, one cannot transfer responsibility for environmental damage to an enemy who refuses to yield, even to just terms.

The proposal given is a suggested part of the law of war, which is an odd corner of the law of nations. It might be better, more rational, if protection of the environment could be entrusted to a single developing system of international environmental law, But nation-states that have gone so far as to seriously contemplate war will always convince themselves that considerations of sovereignty and state overpower the demands of environmental law. Likewise, military commanders will always put the safety of their troops first and will not give up the advantages (say) of depleted uranium munitions to avoid radioactive contamination of the battlefield. They will not save the ground before they save their own men and women. The insertion of environmental considerations into the law of war, not the more general law of nations, will put them in the one place where the effects of acts of state themselves are not always excused, and where military commanders feel the pressure of legal requirements. The proper place for these requirements in the law of war is in the *jus post bellum*. In this area, we must pay for the cure afterwards, not the prevention before.

Placing the requirements of environmental cleanup into the *jus post bellum* creates a sequence that corresponds to the flow of historical events. Nations decide, and on occasion should decide, to enter into war undeterred by environmental considerations. When war is underway, military commanders must seek to minimize casualties, not environmental damage, and must seek victory

before all else. When the dust has settled, when (let us say) right has prevailed, and soldiers are no longer at risk, at that point there is some practical reality to pressing environmental considerations. At that point, looking at the several thousand tons of ethylene dichloride, vinyl chloride, and the mercury scattered around the Pančevo area, the questions can be raised as to who put them there and who should contribute to environmental reparations.

The argument for environmental obligations in military affairs springs from environmental ethics, a new branch of moral theory. It is here combined with the law of war, a branch of moral theory that is centuries old, containing a set of principles that find concrete expression in international law, military codes, judicial precedents, training manuals, and the like. When environmental damage and liability are discussed by environmentalists, the usual examples involve damage caused by civilian activities or industrial operations. This choice of examples creates a presumption that damage caused by military operations should be treated as a subsidiary case amenable to generalized principles of environmental ethics. The purpose of this chapter is to show that damage caused by military operations is a distinct problem that requires a distinct solution. The standard emphasis on prevention must give way to a focus on repair. The standard talk of negligence must give way to a focus on causation. These modifications in standard environmental ethics are a result of the distinct nature of war, but there is influence in the other direction. Environmental ethics brings into the law of war the awareness that the environment of the enemy is not an enemy environment.

The thrust of this argument is that innocent trees deserve more protection from the *jus post bellum* than do innocent children. Some might find this paradoxical. Some might argue that *everything* that is innocent deserves protection under the *jus post bellum*. Why not demand that a nation prosecuting a just war be liable for *all* damage caused to the enemy *except for* damage to soldiers, weapons, and military support systems, that all destruction *beyond* these things requires compensation? Here are four answers.

First, the *jus post bellum* requirement discussed here is a requirement to *restore* the environment, to produce environmental conditions that approach the *status quo ante*. This task is difficult, but it can be done. If toxins have been put into the environment, they must be taken out, even if massive quantities of soil have to be removed and replaced. If the Hudson River can be filled with migrating fish after 200 years of pollution, then the Danube can be restored to the condition it was in before NATO bombed the Serbian bridges in 1999 and blocked fish migration. Human lives cannot be replaced, however, and compensation for lost lives is a kind of artificial exercise that restores nothing. The same is true for the destruction of cultural artifacts. When Coventry

Cathedral was destroyed by the Luftwaffe, there was no replacing it because the identity of the cathedral was defined by its causal relation to past labor. (The plastic prosthetic fingers put on Michelangelo's *Pieta* after Lazlo Toth's attack in 1966 gave us not "Pieta Restored" but "Pieta plus Plastic.") We do not want to set legal requirements that cannot in fact be fulfilled.

Second, nations that are considering going to war should have a proper assessment of the prospective losses. They must reckon that they can lose nearly everything – not just military assets, but political liberty, innocent children, and irreplaceable items of cultural heritage – in dealing with an enemy that may not be able to avoid producing these losses in its pursuit of victory. If political leaders believe that they will receive compensation for *all* losses beyond military assets even if they initiate an unjust war, they will be far less deterred from war than they should be.

Third, a legal requirement to restore the environment after war creates pressure on governments before war begins to develop "environmentally friendly weapons." Arms manufacturers in the United States and in the United Kingdom already have realized that there are profits to be made in so-called "green munitions." BAE Systems, one of the largest arms manufacturers in the United Kingdom, stopped using depleted uranium in its antitank munitions in 2003, and it is exploring biodegradable plastics for missiles, reduced smoke explosives to protect sensitive marine environments, the use of surplus explosives for fertilizer, lead-free bullets, and so forth.[6] Although talk of green weapons has its comic side – the British Broadcasting Corporation (BBC) reported that the British Ministry of Defense is funding research on quieter warheads to reduce "noise pollution" in war[7] – such initiatives parallel earlier developments of "smart weapons," which do reduce collateral damage in war. Pacifists might object that green weapons and smart weapons make war more likely by making it more palatable, but decisions about going to war have hardly ever been governed by fears about damage to the *other* side. On balance, whatever makes war less destructive must be rated a good thing.

Fourth, and finally, this chapter has relied throughout on a distinction between nature and culture, between background environment and foreground construction, that is a little strained. It is even more strained, however, to equate nature and culture or to argue that they cannot be distinguished. In a tribe, a community, and even a nation-state, there is a shared sense of identity among the members such that all of them participate in a collective history and feel specially related to the acts of their community. This is why

[6] Jon Ungoed-Thomas, "Watch out Sarge! It's environmentally friendly fire," *London Times Online*, September 17, 2006.

[7] BBC News, October 26, 2006.

many Americans felt ashamed about the war in Vietnam and about the war in Iraq, even after spending years of their political lives in active opposition to those wars. This is why I feel ashamed about the bombing of Hiroshima, even though I was two weeks old when the attack took place. We must, of course, avoid the idea that all citizens are collectively guilty for the actions of their nation-states. That argument leads in the direction of terror bombing and reprisals, which the whole system of *jus in bello* rightly condemns. When all the rules of *jus in bello* are obeyed and nevertheless innocent civilians on the unjust side are necessarily killed, however, the responsibility for those deaths rests with the nation-state that fought an unjust war, not with the just side fighting a just war. The leadership and the children sink or swim together. This, at least, Shakespeare's Henry V got right. No such Geist-like links connect the environmental web to the population of the unjust side.

The children of a nation-state are *involved* in the acts of their state in a way in which the environment is *not* involved. This is why liability for killing children is not strict but liability for environmental destruction must be strict. Imagine a nation fighting a just war and selectively blockading the enemy by sea. One of its naval ships, V, intercepts ship A, sailing under the enemy flag, and V, despite due care, damages the ship. Then V intercepts ship B, sailing under a neutral flag, and despite due care (those seas are rough), damages B. After the war, the argument that due care was exercised would block the claim for damage done to ship A, but the argument of due care does not block the claim for damage done to ship B. Ship A was involved in the quarrel, but ship B was not. The argument from neutrality prevails over the argument from due care. The environment is like ship B. It is always neutral.

8 On State Self-Defense and Guantánamo Bay

Steve Viner

INTRODUCTION

The United States is currently implementing a policy of indefinite imprisonment at detention facilities such as Camp Delta at Guantánamo Bay, as well as at numerous "black sites" around the world, for persons it deems enemy combatants. Since its inception in 2002, there have been approximately 800 such detainees at Guantánamo Bay. These enemy combatants are not treated as prisoners of war, and only a few have been charged with a crime.[1] After seven years, only three detainees have been convicted of a crime.[2] Many of the detainees have been, or were, held for years without any substantial review, and many have been subject to torture, or torture-like, techniques.[3] According to former United States Secretary of Defense Donald Rumsfeld, an architect of the

[1] Contrary to the commentary to Article 4 of the IV Geneva Convention, the Bush administration treated nearly all detainees as being in an "intermediate status." The commentary indicates that all detainees are either prisoners of war or they are civilians covered by the Fourth Convention, which would entitle them to be treated in accordance with domestic criminal law procedures, see *Commentary, IV Geneva Convention*, Jean S. Pictet, general ed., trans. by Major Ronald Griffen and C. W. Dumbleton, International Committee of the Red Cross, 1958, 51. Many commentators have stated that the creation of this intermediate status by the United States has put the detainees in a legal black hole.

[2] Two detainees had a trial, and the third entered a guilty plea. See William Glaberson, "Detainee Convicted on Terrorism Charges," *The New York Times* (November 3, 2008). Available at http://www.nytimes.com/2008/11/04/washington/04gitmo.html (last accessed January 14, 2009). David Hicks, an Australian citizen, pled guilty to one charge of supporting terrorism, and as part of a plea bargain, he received a seven-year sentence. However, all but nine months were suspended. He then served nine months in an Australian prison. He is now free in Australia. Before pleading guilty, Hicks was at Guantánamo as a detainee for approximately five years.

[3] For information and Department of Defense memoranda regarding the interrogation techniques approved by the U.S. Secretary of Defense Donald Rumsfeld, see http://hrw.org/english/docs/2004/08/19/usdom9248.htm (last accessed June 16, 2008). For a good article about institutionalizing of torture, see David Luban, "Liberalism, Torture, and the Ticking Bomb," 92 *Virginia Law Review* (2006), 1425.

policy, it makes sense to imprison these people indefinitely because they are "hard core, well-trained terrorists."[4] Former Vice President Dick Cheney has stated that the detainees are "the worst of a very bad lot. They are very dangerous. They are devoted to killing millions of Americans."[5] President George W. Bush justified this policy of indefinite imprisonment for reasons grounded in a right of national or state self-defense.[6] The policy, it was argued, was necessary to prevent future terrorist attacks similar to those of September 11, 2001.

The U.S. policies concerning indefinite imprisonment of non-U.S. citizens at Guantánamo Bay and at black sites have received much criticism, including criticism from the UN and other states.[7] This criticism largely stems from concerns over violations of human rights (e.g., torture and violations of due process rights), as well as from violations of international legal obligations (e.g., the Geneva Conventions, International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).[8] In addition, many people have

4 "United States: Guantánamo Two Years On," Human Rights Watch, September 1, 2004, see http://hrw.org/english/docs/2004/01/09/usdom6917.htm (last accessed June 16, 2008).

5 As stated in an interview with Fox News Corporation and as reported at http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20020127–1.html (last accessed June 16, 2008).

6 "Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 *Federal Register* 57,833 (November 13, 2001). See also, David Luban, "The War on Terrorism and the End of Human Rights," in Verna V. Gehring (ed.), *War After September 11* (Lanham, MD: Rowman & Littlefield, 2003). For an affirmative answer regarding whether it is possible for nonstate actors to engage in an "armed attack" within the meaning of Article 51 of the United Nations (UN) Charter, so that a state's response to that attack can be considered self-defense within the meaning of the Charter, see Yoram Dinstein, *War, Aggression and Self-Defense*, 4th ed. (Cambridge: Cambridge University Press, 2005), 206–8 and Niaz A. Shah, "Self-Defense, Anticipatory Self-Defense and Pre-emption: International Law's Response to Terrorism," 12 *Journal of Conflict and Security Law* (Spring 2007), 95–126, at 104–11. On the issue of whether the attack of September 11, 2001, by al Qaeda was an "armed attack" within the meaning of the Charter and what the United States did to attempt, through correspondence with international organizations, to help ensure that the attacks on September 11 were covered under the meaning of self-defense contained within the Charter, see Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2004), 64–167, and Michael Byers, *War Law* (New York: Grove Press, 2005), 65–68.

7 A UN Committee on Human Rights has called for the closure of the facilities at Guantánamo Bay. See http://www.un.org/apps/news/story.asp?NewsID=17523&Cr=Guant%C3%A1namo&Cr1=Bay (last accessed June 16, 2008). As reported by Colum Lynch, WashingtonPost.com, on May 20, 2006, a United Nations Committee against torture has also called for the closure of Guantánamo Bay. See http://www.washingtonpost.com/wp-dyn/content/article/2006/05/19/AR2006051901900.html (last accessed June 16, 2008).

8 The United States has ratified all three of these international conventions. Recently, the U.S. Supreme Court in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), found unconstitutional U.S. laws incorporated in the Detainee Treatment Act of 2005, which denied detainees the right to file a habeas corpus action.

argued that the policies pertaining to the detainees at Guantánamo are counterproductive to the United States' own interests, as well as to the shared goal of international peace and security. Former U. S. Secretary of State Colin Powell has stated that Guantánamo Bay should be shut down "not tomorrow, but this afternoon."[9] Rather than prevent or deter terrorist attacks, many people believe that this policy creates more terrorists, incites more terrorism, and impedes the creation of an international community of states committed to defending human rights.

In this chapter, I examine the policy of indefinite imprisonment at Guantánamo Bay from the perspective of whether the policy (and the policies associated with the imprisonment) should be considered justified in accordance with an international legal right of state self-defense. A right of self-defense is the justification that is commonly referred to by the proponents of the policy to support what would otherwise be considered violations of human rights, and in this chapter, I investigate whether this justification can be properly supported.

This chapter consists of four sections. First, I provide a brief overview of the three legal limitations commonly thought to pertain to the current international legal right of state self-defense: immediacy, necessity, and proportionality. Following each, I provide reasons for thinking that the policy of indefinite imprisonment at Guantánamo Bay can meet that particular limitation. However, in the second section, I introduce and argue for a fourth legal limitation, which I call the "due diligence limitation." The due diligence limitation sets forth the epistemic obligations that need to be met before a state uses force against a particular target, for such force to be justified as an act of self-defense. It mandates that all reasonable and available measures be taken by a victim state to ensure that it targets only those persons or entities that actually pose the threat that is thought to necessitate a responsive use of force. I argue that once the due diligence limitation is incorporated into international law, as it should be, the policy of indefinite imprisonment at Guantánamo Bay should not be considered justified according to a right of state self-defense. In the third section, I present and reply to objections to my analysis and proposal. In the final section, I discuss whether there are other justifications, both legal and

[9] See "Colin Powell says Guantánamo should be closed," as reported by Reuters (Thomson Reuters, 2008) on June 10, 2007. See http://www.reuters.com/article/topNews/idUSN1043646920070610?feedType=RSS (last accessed June 16, 2008). U.S. President Barack Obama has now signed an executive order that directs the closing of the detention facilities at Guantánamo Bay. The order was signed January 22, 2009. However, as of June 8, 2009, the detention facilities have yet to be closed, and closure does not appear forthcoming soon. For the order, see http://www.whitehouse.gov/the_press_office/closureofguantanamodetentionfacilities/ (last accessed June 8, 2009).

moral, on which the United States could rely for its actions at Guantánamo Bay.

Before proceeding, however, I will clarify a couple of issues concerning my main argument and its value.

In this chapter, I ask the following question: Supposing that there is such a thing as a morally justifiable international legal right of state self-defense and that the United States could, in certain instances, invoke this legal right, should the policy of indefinite imprisonment implemented by the United States at Guantánamo Bay be considered a policy that falls within the scope of that legal right? What should be clear then is that I am not here defending the claim that an international legal right of state self-defense attributed to at least some states (e.g., the United States) is morally justifiable. Rather, although not without controversy, for the purposes of the specific issues being addressed in this chapter, I grant that at least some states can have, and at times can properly invoke, a morally justified legal right of self-defense.

Although not questioning the moral foundation of this legal right, the kind of conceptual analysis of self-defense that I offer is important for a number of reasons. One reason is that it can have practical consequences. It can expose a state's mistaken or deceptive attempt to invoke an inapplicable and unpersuasive legal justification, which is also thought to carry significant moral weight and abdicate legal and moral responsibility. When a justification such as self-defense should be considered inapplicable on close scrutiny, then the entity or group that is committing those actions will often be compelled either to change their actions or look elsewhere to successfully avoid legal or moral responsibility and sometimes liability as well. In the case of the United States and its policies at Guantánamo Bay, the removal of the justification of self-defense is, as we shall see, significant. It would be no small task for the United States to find a different legal or moral justification for its policies at Guantánamo Bay. State self-defense currently plays an important role in the U.S. articulation of a valid legal and moral reason for its policies, which are widely condemned by the international community.

Also, the conceptual analysis of self-defense that I offer has the beneficial effect of providing a better understanding of this legal justification, including its contemporary use, its alleged moral underpinning, and how the international community may be able to limit or expand coherently the use of this legal justification in the future and still retain its moral foundation. This kind of analysis can reveal some theoretical limits of this justification, which in turn can also have practical ramifications. An important question regarding this contemporary legal right is its applicability to conflicts between states and non-state actors such as al Qaeda. Later in this chapter, I show how such conflicts

with nonstate actors give rise to the need for supplementing international laws regarding state self-defense with the due diligence limitation. In many conflicts, especially with nonstate actors, the due diligence limitation is as important to understanding and resolving instances of state self-defense as are the widely accepted limitations of immediacy, necessity, and proportionality.

I. IMMEDIACY, NECESSITY, PROPORTIONALITY, AND GUANTÁNAMO BAY

It could be argued that the policy of indefinite imprisonment at Guantánamo Bay is legally justified because it meets the three current international legal limitations pertaining to state self-defense: immediacy, necessity, and proportionality.[10]

A. *The Immediacy Limitation*

In short, today, the immediacy limitation refers to the lapse of time between a sufficient threat and the act alleged to be a response to that threat, or it can also mean the lapse of time between an actual armed attack and a response to that attack.[11] If too much time has elapsed, this lapse will give the impression

[10] The necessity and proportionality limitations were reaffirmed in the recent *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, ICJ Reports 1986, 14, at 94 and 103 and in the case of *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, 161, at 183, 196–9. On the application of these limitations to the use of force in self-defense in international law, see Dinstein, *War, Aggression and Self-Defense*, 4th ed. (Cambridge: Cambridge University Press, 2005), 208–11, 237–43; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004); and David Rodin, *War and Self-Defense* (Oxford: Oxford University Press, 2002), 110–15.

[11] Here, I accept a slightly controversial legal conclusion. I believe, as Michael Walzer does, that a state may legally use force in response to a sufficient threat, even if the first shot by an aggressor has not yet occurred. Following Walzer, for something to be a "sufficient threat," there must be "a manifest intent to injure, a degree of active preparation that makes that intent a positive danger, and a general situation in which waiting, or doing anything other than fighting, greatly magnifies the risk," see Michael Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977), 81. As seen in Ian Brownlie, *International Law and the Use of Force by States*, (New York: Oxford University Press, 1963), 275–8, who rejects the idea that anticipatory self-defense is covered by Article 51 of the UN Charter, this does not mean a "sufficient threat" is covered by Article 51. Rather, it is more likely covered by customary international law. I believe that Walzer's and my position agrees with the position set forth in Sir Robert Jennings and Sir Arthur Watts, eds., *Oppenheim's International Law*, 9th ed. (London: Longman, 1996), 421–2, and D. Bowett, *Self-Defense in International Law* (Manchester: Manchester University Press, 1958), 187–93. On the point that a majority of states reject "anticipatory self-defense" as being a legal recourse to force, see Gray, *International Law and the Use of Force*, 129–34.

that the alleged defensive use of force is truly aimed at something other than removing or stopping the threat or the attack. The immediacy limitation helps to ensure that the alleged defensive act seeks to stop current or future harms by alleviating existing threats.

The immediacy limitation is often defined by what falls outside of the limitation. Use of force by a state that takes place too long after the threat has materialized or after the attack occurs tends to make an allegedly defensive act appear as mostly punishment or merely a reprisal. A defensive use of force is not supposed to be punishment, or purely so. Also, it is not to be merely retaliatory.

It is widely agreed that an acceptable amount of time between an initial use of force by an aggressor and a response by a victim state will differ according to the circumstances. Two fairly recent cases illustrate this. It is thought that the immediacy limitation was met when Great Britain sent its military forces to retake the Falkland Islands in April 1982, although its military forces did not do so for approximately two to three weeks after Argentina had taken over the Falkland Islands. Similarly, it is generally accepted that the immediacy limitation was met when a coalition of international forces led by the United States responded to Iraq's annexation of Kuwait in 1990, even though many might contend that military operations against Iraq did not really begin for nearly six months after Iraqi forces had taken control of Kuwait.[12] The following two reasons have been offered to support the conclusion that the immediacy limitation was met in both cases: International negotiations concerning alternatives to war were taking place during the time between the initial aggression and the response, and it took time for those victim states (and those states that would aid the victims) to equip and prepare their military forces, which were to undertake the responsive use of force.

Although a full written policy concerning the indefinite imprisonment of detainees at Guantánamo Bay did not come for a couple of years after the terrorist attacks of September 11, 2001, the policy still could be considered an immediate response to a sufficient threat and not merely a retaliatory action or punishment. There are three reasons why this conclusion seems reasonable.

First, it is reasonable to grant the United States a sufficient amount of time to write a formal policy to deal with nonstate actors such as al Qaeda, which is a large and complex group of well-trained persons, who allegedly take numerous years to plan individual attacks and who have the ability to cause extensive destruction and loss of life such as witnessed on September 11, 2001.

[12] See Anthony Clark Arend and Robert J. Beck, *International Law and the Use of Force* (New York: Routledge, 1993), 53–5.

Writing the procedures and training and equipping the military personnel who are to implement the policy takes time. Second, although writing the policy of indefinite imprisonment took some time, the policy itself was being implemented only weeks or months after September 11; the policy thus did not begin two years after September 11. Third and most important, the threat posed by al Qaeda and other such terrorist groups is ongoing. The numerous terrorist attempts (e.g., in London and Spain) that have taken place or been prevented since September 11 are evidence of this current ongoing threat.[13] Thus, the policy of indefinite imprisonment by the United States can be viewed as a policy that seeks to prevent future terrorist attacks by dealing with substantial threats currently posed by terrorists groups such as al Qaeda.[14]

The Necessity Limitation

For the most part, the necessity limitation is a kind of "last resort" condition requiring a state to use force against a sufficient and existing threat only after all other alternative, nonmilitary means have been tried. As stated by Robert Ago:

> The reason for stressing that action taken in self-defense must be necessary is that the State attacked . . . must not, in the particular circumstance, have had any means of halting the attack other than recourse to armed force. In other words, had it been able to achieve the same result by measures not involving the use of armed force, it would have no justification for adopting conduct which contravened the general prohibition against the use of force.[15]

Although more controversial than the immediacy limitation, one could reasonably conclude that U.S. policies at Guantánamo Bay meet the necessity limitation. Despite the fact that the United States claims that it does not negotiate with terrorists, the policy of indefinite imprisonment could still be seen as a "last resort." The policy appears to target only those associated with al Qaeda, the terrorist group responsible for September 11 and those terrorists that join in al Qaeda's plan to terrorize states and innocent citizens. Also, it could

[13] For example, the Madrid train bombings that happened in March 2004, the London train bombings (and that of a bus) that happened in July 2005, and the London airport attack in June 2007.

[14] For the conclusion from a recent U.S. report that in the next three years the threat posed by al Qaeda will continue to be a sufficient threat, and al Qaeda is expected to plot more attacks like those of September 11, 2001, see the National Intelligence Estimate of July 2007, available at http://www.dni.gov/press_releases/20070717_release.pdf (last accessed June 16, 2008).

[15] Gardam, n 10, 153.

be argued that negotiations with this group would be pointless. For many, it is fairly clear that there would be no common ground between al Qaeda and the United States in which to construct a peaceful settlement. In addition, it may be, as the United States claims, that negotiating with terrorists encourages more terrorism, for the terrorists then believe that terrorism works. If this claim is true, then the United States would have an argument that there likely is no more peaceful alternative to imprisoning these people indefinitely, no other less forceful means by which to prevent future terrorist attacks.

Furthermore, the United States may be able to show persuasively that detaining all such terrorists indefinitely does successfully prevent many future terrorist attacks. The policy may be thought to be successful because it keeps the terrorists who are detained from implementing their plans, because it serves as a deterrent to "would-be" terrorists, or because it helps the United States receive information about possible terrorist targets, methods, and their actual plans, including who their fellow would-be terrorists are, who are not yet detained. For the policy to be necessary, it must, of course, to some degree be successful. Arguably, the policy is necessary if it actually is the only way of providing the United States with the time and resources to implement effective interrogation techniques aimed at getting information needed to prevent future terrorist attacks.

The Proportionality Limitation

In brief, the proportionality limitation is a requirement that incorporates a notion of reasonableness in determining whether the use of force used by a state in response to a sufficient threat is excessive. No doubt it is within the terms "reasonableness" and "excessive" where much of the dispute about whether this legal requirement has been met can be found. One way someone might judge whether a defensive use of force is reasonable and not excessive might be to compare that use of force to the initial use of force to which it is a response. Is state B's responsive use of force in defense unreasonable and excessive given state A's initial use of force? Another way someone might shed light on this requirement is to ask what interests or goals are being protected or served by the responsive use of force. Is state B's responsive use of force unreasonable or excessive because it is considered great and destructive given that the gain or loss (however described) for state B is not so great or is considered small? This second way then calls for a balancing of the harms or destruction being done against the gains being achieved. Of course, these two analyses (i.e., weighing the use of force by both parties and judging the

responsive use of force against the interests and goals being served) are not mutually exclusive. Often, they interact. For example, an initial use of force by state A, which is viewed as limited or restricted in some important way, may make state B's responsive use of force look excessive not because state B used much more force or caused much more destruction than state A's initial use of force but because the limited use of force by state A can shape or even dictate what state B could reasonably describe as the legitimate goal or interest that it is trying to protect with its responsive use of force. To illustrate, retaking the Falkland Islands in 1982 could be considered a proportionate use of defensive force by Great Britain, but colonizing Argentina in response to their taking control of the Falkland Islands would not likely be so. Colonizing Argentina would likely be seen as unreasonable and excessive in part because Argentina's initial use of force was limited to the Falkland Islands. It was not an all-out war with Great Britain. Now, I state three reasons why someone might believe that the policy of indefinite imprisonment at Guantánamo Bay meets the proportionality limitation.

First, one could compare the force that was, or would be, used by al Qaeda to the force being used by the United States. Members of al Qaeda were training and equipping themselves to use lethal force and cause mass destruction. However, except with a few detainees who are charged with war crimes, the United States is not pursuing lethal force. Rather, imprisonment is the kind of force commonly used by states against those people who would attempt to kill innocent citizens.

Second, one could weigh the interests being protected by the policy of indefinite imprisonment against the damage being done by the policy to al Qaeda and its members. There have been about 800 detainees at Guantánamo Bay. No doubt the conditions are harsh there. Abusive treatment, even death, has occurred. Yet, the current threats posed by, and the acts committed by, al Qaeda are, and were, horrible and substantial. This fact is uncontroversial. On September 11 thousands of innocent people were killed, and the lives of thousands more were physically and emotionally devastated. Simply comparing the number of detainees and their treatment to the death and suffering of the innocent victims of September 11 and the numerous attacks attributed to al Qaeda before and after September 11 against the potential victims of future similar attacks gives the appearance that such force is proportionate. If it can be shown that the policy of indefinite imprisonment has played a substantial role in preventing one terrorist attack like that of September 11, those supporting the policy might persuasively argue that the interests being protected by the policy outweigh the harms unfortunately occurring to the detainees, even if a

few detainees do not pose, or have not ever posed, any threat or participated in an act of terrorism.[16]

Finally, in accordance with the policies associated with indefinite imprisonment, the United States is formally adjusting the amount of force used on each target (i.e., each person being detained) in its attempt to ensure that the force used against each person is not excessive. More than 450 detainees already have been released or transferred out of Guantánamo Bay, and if one accepts as true the U.S. position regarding the policies, if not prosecuted and convicted of a war crime, all detainees will eventually be released when they no longer pose a threat.

II. THE DUE DILIGENCE LIMITATION

Even if the policy can meet the three limitations of immediacy, necessity, and proportionality, the policy of indefinite imprisonment at Guantánamo Bay should not be considered a legally justified act of state self-defense. Like the epistemic obligations applicable to a person who is the victim of a sufficient threat and responds to that threat with force, the United States should also have to meet similar epistemic obligations prior to using force in defense. The force – that is, the policy of indefinitely imprisoning the detainees – committed by the United States at Guantánamo Bay should not be thought justified as an act of self-defense until and unless the United States utilizes all reasonable and available measures to ensure that each target of the policy is a proper target, meaning that each detainee poses a sufficient threat. Add this limitation to the three stated above and call it the "due diligence limitation."

According to the due diligence limitation, states that use force in defense must implement the best reasonable and available measures to ensure that persons who are not threats (hereinafter referred to as "innocent") are not the direct targets of that state's defensive actions and policies. More specifically, the due diligence limitation consists of the following three requirements: First, acts of state self-defense are acts that are aimed at proper targets, meaning that they are aimed at a target that poses a threat. Second, they are acts that are taken only after the state has utilized all reasonable and available resources to determine whether the potential target is an actual threat, what kind of threat it poses, and what actions would reasonably stop that threat from becoming

[16] Would the detention of some innocent people be the detention of too many? In all legal and "just" wars (if there are any), the unfortunate killing, not the detention, of innocent people is tolerated and not thought, by itself, to outweigh the aims or good being supported by war. I take up this issue in Section III.

an attack. Third, all defensive acts or policies must fit with the degree of knowledge that the state has about each target.

The due diligence limitation is not currently recognized in international law as a legal limitation that needs to be met before an action can be considered an act of state self-defense, but it should be. Without it, acts and policies that target innocents (e.g., acts of terrorism and acts that allow for the indiscriminate killing of persons) could be considered justified acts of state self-defense because such acts by a state could meet the other three legal limitations.

The first requirement of the due diligence limitation prohibits the targeting of innocents, including innocent bystanders.[17] For example, a right of self-defense is not usually thought to justify threatening or taking hostage the serial killer's mother to stop the serial killer.[18] If the mother is innocent, she has a right of self-defense against any aggressor, even if apprehending and threatening her would in fact stop her son from committing future murders and even if it would appear to be the only way to stop those future murders. Even if killing her meets the limitations of immediacy, necessity, and proportionality, attacking the serial killer's mother would not be thought justifiable as an act of self-defense.

Similarly, in the international arena, when state A is threatened by state B, state A should not under a right of state self-defense be able to use military force against state C to stop the threat if state C is innocent, regardless of whether it is reasonably foreseeable that such force would help alleviate the threat from state B and even if the threat to state A was one of great enormity (e.g., state A's existence was threatened).[19] In such a case, state C would have a right of self-defense against state A.

Regarding self-defense, most scholars agree that innocent persons or nonthreats cannot be justifiably targeted on grounds of self-defense because such

[17] Regarding self-defense and the killing of innocent bystanders, see Jeff McMahan, *The Ethics of Killing* (Oxford: Oxford University Press, 2002), 402, 405–10; Judith Jarvis Thomson, "Self-Defense," 20(4) *Philosophy & Public Affairs* (1991), 283–311; and David Rodin, *War & Self-Defense*, 81–3.

[18] Thomas Nagel, "War and Massacre," in Charles R. Beitz, Marshall Cohen, Thomas Scanlon, and A. John Simmons (eds.), *International Ethics* (Princeton: Princeton University Press, 1985), 68; and Robert Fullinwider, "War and Innocence," in *International Ethics*, 92–3, also use the term "innocent" to mean "nonthreat." They also make similar arguments and use similar examples regarding the use of force against innocent third parties to stop a threat. Fullinwider specifically states that self-defense does not justify the use of force on a nonthreat or innocent person.

[19] An example of this can be seen in Russia's war against Finland in 1939–1940. The Russians wanted to control Finnish territory, keeping it from Nazi Germany, because it was within artillery range of Leningrad. When negotiations to obtain the land from Finland failed, Russia took it by force.

persons are not causally responsible or morally culpable, have not lost their right not to be killed, and have not forfeited their right to self-defense.[20] Rather than justified according to a right of self-defense, those who target innocent persons or who indiscriminately kill others in an attempt to save their own life or improve their own situation are more like aggressors than defenders.[21] Those who target innocent persons use others as a means to an end. Those who indiscriminately kill people in hopes to improve their position or save their own life often recklessly use persons as means. They do not seriously concern themselves with the individuals being harmed but with what it is that allegedly needs to be done. Whether using people in this way is ever permissible we need not decide here, but what is, and should be, widely agreed upon is that people who target innocent persons or who indiscriminately harm others cannot properly rely on the justification of self-defense when they do so.

The case of a person targeting an innocent person to save lives can be considered similar to the notorious case of grabbing an innocent person walking by the hospital to harvest her organs to save five patients in the hospital who would die without those organs. This kind of act is not an act of self-defense; it is not thought justified for reasons related to self-defense. Although targeting innocent persons to save one's own life or even to save the lives of others (e.g., a friend in the hospital) may have a defensive quality to it, this defensive quality is deceptive or a false lead if it prompts people to invoke self-defense as a justification. Targeting innocent persons is not the kind of act that has been thought to fall properly within past and current conceptions of a right

[20] David Rodin argues that an aggressor must be "morally at fault" to have lost her right not to be killed. See his "Symposium: War and Self-Defense," 18(1) *Ethics & International Affairs* (2004), 64. Jeff McMahan agrees with Rodin that there must be something unjust or morally liable about the aggressor. See his "War as Self-Defense (Response to David Rodin)," 18(1) *Ethics & International Affairs* (2004). Paul Woodruff thinks that self-defense justifies using force against those who are "causally responsible." See his "Justification or Excuse: Saving Soldiers at the Expense of Civilians," Supplementary Volume VIII *Canadian Journal of Philosophy* (1982), 166–9. In "Self-Defense," 20(4) *Philosophy & Public Affairs* (1991), 283–310, Judith Jarvis Thomson argues that innocent aggressors and innocent threats "lack rights that you not kill them" because they violate "your rights that they not kill you." If none of these reasons are present, then the person is perceived as an "innocent bystander," and shifting harm to, or targeting, an innocent bystander is not justified according to a right of self-defense. Rather, it is thought to be terrorism. See McMahon, "Self-Defense and the Problem of the Innocent Attacker," 104 *Ethics* (1994), 255.

[21] Using a hypothetical example situated in Vietnam, Paul Woodruff has a good discussion regarding the distinction between shooting indiscriminately into the bushes in hopes of preserving one's life, which might sometimes be morally excused, and acting justifiably in self-defense. See Woodruff, "Justification or Excuse: Saving Soldiers at the Expense of Civilians." Here, I agree with Woodruff's analysis.

of self-defense. The right of self-defense has been, and is currently, conceived of as a right that can be invoked only by a victim against an aggressor (or by someone or some entity that comes to the aid of the victim by taking actions against the aggressor). Clearly, the justification of self-defense has not yet been broadened to encompass and justify all actions that might be taken to improve one's position, and it clearly is not thought broad enough to justify all actions that are taken to preserve one's own life.

The second requirement of the due diligence limitation places epistemic burdens on the state using force in defense. Imagine a case in which a military unit captures and incarcerates all the patrons in a restaurant based on a tip from an informant that a couple of the patrons are hard-core terrorists. Prior to apprehending all of the patrons, the unit had the time, knowledge, and resources to check this information with more reliable informants, and the unit could have had these more reliable informants specifically point out each alleged terrorist. When this is the case and the unit knows it, the unit has a duty to utilize these other procedures or resources. Similarly, an individual is not engaged in a justified act of self-defense if he walks into a bar with a machine gun and shoots all the patrons because he knows that two people in the bar are planning to kill him, especially if he also knows that he has the time and resources to ascertain which patrons in the bar actually are his would-be attackers.

The third requirement restricts the force used in accordance with the degree of knowledge that the person or state has about the target. This requirement acknowledges that there are often different degrees of knowledge or different thresholds (e.g., "reasonable suspicion," "more probable than not," and "beyond a reasonable doubt"), that, depending on the circumstances (the kind of threat posed, the urgency of the threat, and the ability to respond to the threat) justify a different degree of force. This kind of analysis and result is similar to the one that a judge might make prior to setting a monetary amount for bail or allowing any bailment at all. Also, as those evidentiary burdens just articulated indicate, this requirement follows the reasoning found in many domestic criminal laws. A police officer might first have reasonable suspicion to stop a swerving vehicle. After the stop, the officer, depending on what he or she sees or smells in the car, may have probable cause to detain the person for a short period of time and to search the car. Then, after the search, if there is strong evidence (i.e., beyond a reasonable doubt) that the driver has violated a law, a prosecuting attorney on behalf of the government could seek to impose a fine or imprisonment. Many domestic legal systems then already acknowledge this notion that different levels of force are thought justified based on the different levels of knowledge ascertained.

Because any force used in defense should correspond with the degree of knowledge that one has, incremental changes in the use of force are not only justified but should be obligatory. Less force should be used when the degree of knowledge regarding a sufficient threat is less certain. This is true because a right of self-defense does not simply consider victims of threats, but it also takes into account the potential targets of the alleged defensive act, especially when the force being used in defense will be lethal or result in substantial harm. Between states, for example, depending on the threat posed, a certain degree of knowledge concerning a specific threat might at one time only justify sanctions, whereas later, a greater degree of knowledge regarding the same threat may justify a military response.

The due diligence limitation places a duty on states to target only threats, investigate as thoroughly as possible all alleged threats, and tailor any use of force to the knowledge that the state has about the threat. This responsibility and these epistemic burdens and obligations are required to ensure that innocent people, again meaning nonthreats, are not targeted. A right of state self-defense should not exonerate a state from failing to use all available means to ensure that innocent people are not the subjects of force (e.g., imprisonment). If a state does not adhere to the requirements of the due diligence limitation, as with persons in domestic legal systems such as the United States, it is likely that that state's actions can be considered reckless or malicious and that that state should be considered culpable and likely liable as well.

The current policy of indefinite imprisonment fails to be justified according to a right of state self-defense because it cannot meet the requirements of the due diligence limitation. To meet the due diligence limitation, the policy would have to contain more "truth-conducing" procedures that would aid in discovering whether a detainee actually would pose a threat upon release. These truth-conducing procedures are minimal and are synonymous with some, but not all, of the due process rights granted criminal defendants in many domestic legal systems.[22] These procedures, which are currently absent, should

[22] If one includes the possibility of being prosecuted for a war crime by a military commission, which is not necessitated by the policies associated with indefinite imprisonment, there are currently three possible levels of review for a detainee. Here, I am discussing the procedural inadequacies, which are also fact-finding inadequacies, of the first two mandatory levels of review called the Combatant Status Review Tribunal (CSRT) and the Administrative Review Board (ARB) that result in the indefinite imprisonment of a detainee. The procedures for the first two levels of review can be found on the U.S. Department of Defense Web site at http://www.defenselink.mil/news/Combatant_Tribunals.html (last accessed June 18, 2008). These first two levels make forward-looking judgments concerning whether the detainee will pose a threat to the United States in the future. A detainee first goes before the CSRT, and the detainee's status is supposed to be reviewed by an ARB annually. The third possible review

be required because they are reasonably available. The United States has the resources to implement them for the approximately 270 detainees remaining at Guantánamo Bay and could have implemented them for all detainees that have been incarcerated there. Also, importantly, these procedures often enough significantly impact whether the truth will be ascertained and, in doing so, often enough affect whether the force being used really is a defensive use of force in the sense that it can properly be said that it is a use of force that falls within the justification of self-defense. Below, I briefly state six such minimal procedures that would need to be implemented for the U.S. policy of indefinite imprisonment to account fully and responsibly for the persons who are being, and will continue to be, detained at Guantánamo Bay.

First, a time limit for a hearing for each detainee should be set, as well as a time limit for the discovery of all evidence. Also, the detainees should have a right to be present at that hearing. Although allegedly all detainees have now had an initial administrative hearing called a CSRT, some detainees were imprisoned for years without any such hearing. Others had this hearing but were not allowed to be present at it. In addition, time limits for such hearings have now been set, but in the past they have not been adhered to, and there were not any (and currently are no) adverse ramifications for the U.S. government for not adhering to those time limits. Having time limits backed by penalties for failing to adhere to those time limits helps to ensure that the evidence is not tampered with, lost, or forgotten and that any innocent people are not detained longer than necessary.

Second, there should be a presumption of innocence at all such hearings. Currently, the CSRT starts with the presumption that the detainee is an enemy combatant and thus the detainee is a threat who should be detained indefinitely. This current presumption is just one of many procedures that appear

is that of a military commission, which prosecutes detainees for crimes. Importantly, again, note that currently the United States claims that it can imprison foreign citizens indefinitely after the first two reviews; the United States need not ever prosecute a detainee for a crime to hold the detainee for years, decades, and possibly for life. Many have already been held for six years. The procedures required by a right of self-defense for people in custody are different than those demanded by a criminal trial for at least two reasons. First, any determination to continue to hold a detainee for reasons of self-defense is mostly a forward-looking judgment; it must be a judgment regarding whether the detainee will pose a threat in the future. Thus, it is not in any way supposed to be a retributive judgment. Second, criminal trials seek evidence beyond a reasonable doubt, whereas the forward-looking judgment required of self-defense likely necessitates something less (e.g., "more probable than not" or "sufficient evidence" that the person would pose a sufficient threat upon release). Currently, the CSRT uses a preponderance of the evidence. The ARB makes recommendations to release the detainee (with or without conditions) or to continue detention on what they reasonably believe about the detainee.

to stack the deck against the detainee from merely being able to reveal his side of the story or his perspective on all of the facts that led to his apprehension. This presumption impedes the detainee from being able to examine closely all of the evidence and resources being used to continue his incarceration.

It might be thought that this suggested change (i.e., the shifting of this presumption and burden to the United States) is more concerned with being cautious than with ascertaining the truth to ensure that the process errs in favor of those who may be incarcerated. Yet, this procedural change would have truth-conducing affects. This procedural change would make the United States, which has substantially more resources (people, money, information, and technology) than the detainee, do more and reveal more. If this change were incorporated, the United States would have to utilize and expose these resources and information for closer scrutiny. This closer scrutiny would likely occur by the United States before revealing the information and by the detainee or his representative after it is presented. Of course, although the utilization of these additional resources and the exposing of more information is not always beneficial to arriving at the truth, when there is a great disparity in the resources between two contentious parties involved in a heated and important dispute (where losing for either side can sometimes be seen as far worse than lying or hiding facts), there is, often enough, a great potential for the side with the most resources to prevail, regardless of whether it presents, or adheres to, the truth. Shifting this presumption then is a procedural change that would to some degree lessen the disparity between the parties and compel the party with the most resources (i.e., the United States) to use and expose them to closer scrutiny.

Third, at all hearings regarding detention, an attorney should represent each detainee, and any presiding authority should be a judge or a panel of judges.[23] When a substantial restriction of liberty (i.e., indefinite imprisonment) is on the line and truth is the goal of the investigation, experts who are trained in reviewing and presenting the evidence are required on both sides. One is not likely going to ascertain the truth when, as is often currently the case, the representative for the government is an attorney and the representative for the detainee cannot be an attorney and thus does not have any substantial legal training in the analysis and presentation of evidence.

[23] The judges should be attorneys and have sufficient judicial experience. Currently, one of the panel members for the CSRT is to be a judge advocate (i.e., a military attorney). None of the panel members of the annual ARB can be a judge advocate, and none of the personal representatives for the detainee at the CSRT or the assisting military officer at the ARB (the person representing the detainee) can be a judge advocate. Specifically, the personal representative (who is not an attorney) for the detainee at the ARB is also not to be an advocate for the detainee.

Fourth, the detainee (or at the very least, the detainee's attorney) should be given access to all of the evidence, even classified evidence, that will be used against the detainee and could lead to indefinite detention, and the detainee (or his attorney) should be given the opportunity to rebut that evidence. For the detainee, this nondisclosure of classified evidence, which currently goes on, can be substantially the same as letting the prosecution present its case, or the most important part, without letting the defense say a word in response and not even letting the defense hear the most important part of what the prosecutor said.

Fifth, testimony obtained from torture, or torture-like techniques, should not be admissible.

Finally, house arrest, probation, or other alternative forms of monitoring in lieu of imprisonment should be possible.[24] This last condition is not a truth-conducing procedure, but it is required by the third requirement of the due diligence limitation, which states that the force used must fit with the degree of knowledge that a state has about a target.

III. OBJECTIONS AND REPLIES

Someone unconvinced by my analysis might offer the following four objections. The first objection recalls the doctrine of double effect. It maintains that the policy of indefinite imprisonment is a justified act of state self-defense because it directly targets only terrorists, and any innocent persons being detained, if there are any, should be considered "collateral damage." In other words, regarding the detainees at Guantánamo, there are two types: those who pose a threat and those who have been accidentally detained as a result of a permissible action in a war. Those who have been accidentally detained are unfortunate and unintended victims of a war.

The second objection claims that, even if the policy harms a few innocent people, the policy is a legitimate defensive action because it aids in alleviating a major threat, whether this is because the policy is a deterrent to terrorists or because it actually stops some detainees from engaging in terrorism.

The third objection is that certainly innocent people can be directly harmed in self-defense to alleviate a threat if doing so ultimately results in more good than harm. This is what happens in war, and it is unfortunate but no different if it happens at Guantánamo Bay.

[24] This is not currently possible under the procedures of the CSRT, but it is arguably possible under the procedures of the ARB (note that it takes a detainee at least a year to have an ARB, and again, at best, these are done annually).

The fourth objection does not disagree with my result but with my introduction of a fourth legal limitation regarding the international right of state self-defense. This objection claims that what the due diligence limitation requires is already contained in at least one of the other three limitations of immediacy, necessity, and proportionality and, if it is not found there, it is contained in what is called the Principle of Distinction in international law. Now, I briefly reply to all four of these objections.

First, the statement that terrorists rather than the actual detainees are the direct targets of the policy is implausible. Prior to custody, according to the doctrine of double effect, justified defensive actions against terrorists might result in innocent people being harmed and thus referred to as collateral damage. After detainees are in custody, however, the landscape and the perspective change, and they should change. When in custody, each detainee is the direct target of any further use of force (i.e., further detention), which means the term "collateral damage" no longer applies. After a state has incarcerated a person, that person no longer poses a threat. The state then has the time and possibility to implement those measures that can best determine the truth about whether each person is, or will pose, a sufficient threat upon release.

Regarding the second objection, the fact that the policy effectively alleviates a threat cannot by itself justify the policy according to a right of self-defense. Recall the example of apprehending the serial killer's mother to stop the serial killer or state A taking action against state C to aid in stopping a threat from state B. Not all actions that are perceived as necessary to stop a threat are justified according to a right of state self-defense. What makes an act defensive, in the sense that it is justified according to self-defense, is that it is an act taken against a person or state that poses a threat. Actions that are taken by states that do not target the person or entity posing the threat are actions that must be justified for reasons other than self-defense.

Third, arguably, sometimes, innocent people can be harmed to prevent some greater harm from occurring. Yet, even if true, this claim only offers an argument for the conclusion that it is morally permissible to harm innocent people to bring about a certain state of affairs (e.g., preserve a greater number of lives). It is not an argument that an act is justified because it is defensive. Acts of self-defense can be distinguished from these other acts that are thought likely to bring about good consequences or the greatest good by the fact that acts of self-defense are aimed at stopping a threat by using force directly against the threat or the agent of the threat. Innocent people do not pose any threat. As a result, even if harming them would result in the best consequences, acts that directly target them should not be thought of as acts that are justified for reasons stemming from a right of self-defense.

Finally, is the due diligence limitation covered by any current international laws regarding armed conflicts? There are two possibilities for which I think someone could make a good case. The first is that one could argue that the necessity limitation mentioned earlier in this chapter is also supposed to cover the requirements of the due diligence limitation. The second is that, although it is not closely seen as related to self-defense, it could be argued that there already is an international law that covers what the due diligence limitation requires: the Principle of Distinction. In general, the Principle of Distinction is an international law often invoked to prohibit a state's military from targeting civilians and buildings (e.g., religious temples and museums) because they are not considered legitimate military objectives. I discuss each of these possibilities now.

One reason for thinking that the requirements of the due diligence limitation are not covered by the current necessity limitation is that it would appear that targeting innocent persons, as well as the indiscriminate killing of persons, could be seen as necessary in the sense that it might be a last resort. Certainly, terrorists groups would argue this. Also, some smaller states may agree. When states are up against a much larger foe that poses a sufficient threat to their families, communities, or religious or political way of life, from their perspective, killing some innocent citizens could be considered necessary. For them, this choice is necessary because living under the oppressive, stronger adversary is not an option.

Another reason is that even large and powerful states might deem such indiscriminate killings necessary. The leaders of larger states, such as the United States, may believe that indiscriminate killings and hasty detentions are necessary to provide the required urgent response to stop would-be terrorists from committing future terrorist acts like those of September 11. At the domestic level, this is no different than quickly finding an alleged criminal in an attempt to appease the victims of the crime and, more importantly, stabilize the community. Quick actions by government leaders are often thought to show its citizens that any worries that their government cannot adequately protect them are baseless. As a result, leaders of larger states, including the United States, could conclude that indiscriminately targeting criminals or terrorists, especially foreign citizens, is not only permissible but sometimes necessary. Currently, the necessity limitation is best understood as being a last resort condition, and not all force that is deemed a last resort by a state needs to account for its targets as threats. U.S. President Harry Truman thought that using the atomic bombs were necessary, and these bombs targeted innocent persons.

Still, if the necessity limitation can be broadened to incorporate the requirements of the due diligence limitation, then of course there would be no

difference. This move, it should be noted, would give a new and double meaning to the term "necessity" in the necessity limitation. The necessity limitation would then not only signify a last resort condition, it would also limit the kind of person or resource that can be targeted, because this is "necessary" for the act to be justified as an act of state self-defense. If the necessity limitation can be broadened in this way and take on this double meaning, then I agree. The due diligence limitation would be covered by the necessity limitation.

Regarding the Principle of Distinction, as stated by Yoram Dinstein, it does bind states to the following precautions:

1. doing everything feasible to verify that the objectives to be attacked are military objectives;
2. choosing means and methods of attack with a view to avoiding – or, at least, minimizing – incidental injury to civilians and civilian objects; and
3. refraining from launching an attack expected to be in breach of the principle of proportionality.[25]

These requirements indeed do look similar to those of the due diligence limitation. However, there is a question of whether the objectives or targets covered by the Principle of Distinction are the same as those covered by the due diligence limitation. If they are not, then it appears that the due diligence limitation is different.

I believe that the Principle of Distinction does not restrict the targets to the exact same targets captured by the due diligence limitation. The Principle of Distinction restricts the target to military objectives, whereas the due diligence limitation restricts the target to an actual, or reasonably believable, threat.[26] Compared to the due diligence limitation, the Principle of Distinction can be seen as being both too narrow and too wide. It is too narrow in the sense that civilians (e.g., political leaders and the wealthy), through coercion and financial support, can be the source of actual threats yet, arguably, cannot be targeted according to the Principle of Distinction.[27] It is too wide in that

[25] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 125.

[26] Here, I am pointing out the tension that exists between the current Principle of Distinction and justifiable acts of self-defense. It is outside the scope of this chapter to discuss whether the Principle of Distinction would somehow be "improved" by incorporating the requirements of the due diligence limitation. Would it be better if military objectives were, and only could be, reasonable and believable threats? Given that civilians and government leaders can be the cause of substantial threats, I imagine it would be highly controversial to modify the Principle of Distinction in this way. For example, modifying the Principle of Distinction would arguably make the assassination of some civilians permissible under the Principle of Distinction.

[27] Yet, arguably, these noncombatant political leaders and wealthy (or influential) citizens could be targeted on grounds of self-defense if they are the cause of a real threat. See Lawrence

some military personnel, equipment, buildings, or infrastructure (i.e., military objectives) may not pose any threat at all yet can be targeted (e.g., a supply unit or any military unit retreating from the battlefield in the final days of the war). Arguably, the destruction of the Iraqi soldiers fleeing Kuwait on what has become known as the Highway of Death at the end of the First Gulf War could be considered a military objective but could not be justifiably targeted according to a right of self-defense. They were clearly fleeing to Iraq, and it was clear enough to the U.S. leaders who were in charge of setting the proper aims of the war and negotiating its ending that the war was coming to an end. The wearing of a uniform or having some interactions with the military does not necessarily make one a threat, and self-defense as I have explained justifies force against only those who can be reasonably described as a threat.

An interesting point follows from realizing that the Principle of Distinction is different than the due diligence limitation. States and persons might adhere to the Principle of Distinction, yet their actions may not be justified according to self-defense when they do so. This would be true in cases in which the target was considered a legitimate military objective but could not accurately be described as a sufficient threat. In such cases, then, to be justified in eliminating or harming that target (or adhering to the rules espoused by the Principle of Distinction), one would have to appeal to a justification other than self-defense. George Mavrodes has argued that the Principle of Distinction can be justified because adherence to it results in a better or more moral war. For him, the Principle of Distinction is a morally justified convention of war. It does not get its justification from its adherence, or relation, to self-defense.[28]

So far, I have argued that international law relevant to state self-defense needs to be supplemented with the due diligence limitation and that the current policy of indefinite imprisonment fails to be justified according to a right of state self-defense because it does not meet that limitation. In the final part of this chapter, I turn to whether there are any other legal or moral justifications available to the United States.

IV. ARE THERE OTHER POSSIBLE JUSTIFICATIONS?

The analysis thus far grants that the legal right of state self-defense is a right that in certain instances functions as a justification for a state to use force against an aggressor (i.e., a state, group, or person), and one of my conclusions is that until important modifications to the policies are made that help meet

Alexander, "Self-Defense and the Killing of Noncombatants: A Reply to Fullinwider," in Charles R. Beitz, Marshall Cohen, Thomas Scanlon, and A. John Simmons (eds.), *International Ethics* (1985), 102, 105.

[28] See George I. Mavrodes, "Conventions and the Morality of War," *International Ethics*, 75–89.

the requirements of the due diligence limitation, the policies at Guantánamo Bay fail to be justified according to this right of self-defense.

I imagine, however, that some people might question whether it is even reasonable to describe the policies associated with indefinite detention at Guantánamo Bay as an act of, or as contributing to an act of, self-defense. One might argue that the length of time the policies have been in place (almost eight years from what some consider the initial attacks of September 11, 2001), as well as the number and diversity of the persons being detained suggest that the policies are not amenable to a self-defense analysis.

I doubt that a self-defense analysis is inapplicable due to either the length of implementation of the policies or the makeup of the persons being targeted. Although it might be thought now that because the initial attack was so long ago, the alleged use of force in response can no longer be properly connected to, or described as, a response to that initial aggression, it can also reasonably be the case that the initial attack was a "wake-up" call that exposed a real and sufficient threat that is still ongoing, even nearly eight years later. As stated earlier in discussing the immediacy limitation, there appears to be good evidence that a real and sufficient threat of harm similar to that which occurred in the attacks of September 11, 2001, still exists. When such threats are ongoing, state policies designed to thwart those threats can be reasonably subject to a self-defense analysis. Even if in the end those policies fail to be justified in accordance with self-defense, the analysis is applicable.

Also, although the diversity of the persons being targeted and detained may cause some confusion, this diversity does not indicate that a self-defense analysis is irrelevant or not helpful in discovering whether there are any justifications that can be properly invoked. Even if the diversity of persons being targeted by the policies makes the actions of the United States look more like a police action than a war, many police actions and policies are certainly analyzable according to whether they are justified on grounds of self-defense. If the action or policy of the police (here the United States) does not look like one that is attempting to thwart directly a real and immediate threat of aggression, then the action or policy will have to be justified for reasons other than self-defense. To be sure, some police actions are preventative rather than defensive. Nonetheless, the analysis of self-defense can be used to discover whether the action or actions stemming from a policy is more preventative than defensive. At Guantánamo Bay, as well as with police actions or policies in general, if it turns out after analysis that it would be mistaken to invoke the justification self-defense (e.g., because the policy looks more preventative than defensive), then the United States would need to look elsewhere for justifications that support its policies related to indefinite detention. In

addition to determining whether the United States could properly invoke a moral right rather than a legal right of self-defense, I briefly analyze some of these other justifications that the United States might offer.

It does not look like there are any other legal justifications that the United States could properly invoke as a justification. In international law, it is generally accepted that a state may use force for two reasons. It can use force in self-defense, or it can use force in accordance with Chapter VII of the UN Charter, which essentially means that a state may use force if authorized by the UN Security Council.[29] I have rejected the former reason, and it is doubtful that Chapter VII is of any use to the United States. Possibly, someday, the UN could adopt a resolution affirming the policy of indefinitely detaining members of al Qaeda, because al Qaeda is considered a world threat that requires special treatment outside of a criminal court. This resolution certainly has not happened yet, and it is highly doubtful that it ever will. It is not at all likely that the UN Security Council would ever vote for a resolution that allowed one state to detain only foreign citizens indefinitely and without a trial.

Although more complicated, there may be another legally permissible way in which a state may use force in accordance with international law. This other way, which might be put forth by a creative lawyer, is to attempt to fit the policy under an exception to the prohibition on the use of force that may have been created when Israel was allowed to try Adolf Eichmann after a covert operation in which they grabbed him from Argentina in 1960. One might argue that this at least partial acquiescence by many states and the UN Security Council (i.e., allowing Israel without any penalties to grab Eichmann from Argentina and put him on trial) set a legal precedent for an exception to the use of force to capture and detain a person who has engaged in, or who has contributed to, international crimes.

I highly doubt that this "Eichmann exception" will work. One important difference between the Eichmann case and Guantánamo Bay is that Eichmann was given a trial. Most detainees are not given a trial. Another important difference is that the search for suspected terrorists is worldwide and importantly includes imprisonment without a trial for acts that they have not yet committed. Unlike the Eichmann apprehension, the policy of indefinite imprisonment is

[29] There may be a third way related to humanitarian intervention without UN approval. But, I leave this legal "way" out for two reasons. First, it is very controversial whether humanitarian intervention is legally permissible without UN authorization under Chapter VII of the UN Charter, and second, apprehending individuals who may commit terrorist attacks simply does not look like the kind of circumstance that has given way in the past to the label of a humanitarian action nor does it seem a plausible description.

not about one person who is living in one state and who quite clearly violated international laws in the past. It is not likely that any acquiescence by states in the Eichmann apprehension and trial could provide sufficient international legal support to justify the U.S. policies at Guantánamo Bay.

As there are no legal justifications, are there any moral justifications? Somewhat ironically, if there would be, then what the United States would be doing with its policy of indefinite imprisonment could be viewed as something akin to civil disobedience in a domestic legal system.[30] At Guantánamo Bay, the United States would be breaking international laws for the "right" or moral reasons, possibly to include getting the law changed. I briefly provide reasons for dismissing three different attempts to justify morally the policy of indefinite imprisonment at Guantánamo Bay.

First, it could be argued that, regardless of any legal right of self-defense, the United States has a moral right of self-defense, and the United States is acting in accordance with this moral right at Guantánamo. No doubt there are difficulties with claiming that a state rather than a person has a moral right of self-defense.[31] Yet, if a state can have a moral right, for instance, because it maintains high moral standards with regard to its own citizens and as a result it has a moral right to defend its citizens and that political and legal way of life against unjust aggression, then the United States might possess such a right.

However, even if the United States could meet the criteria necessary to possess a moral right of self-defense, it is not likely that this moral right would justify the kinds of actions that I argued should not be considered justified under an international legal right of self-defense. I argued earlier that the legal right of self-defense should contain the due diligence limitation because it, or something like it, is required by any right of self-defense, including a personal right which is a moral right, and more importantly, it is the moral right after which the state right is modeled. In other words, in Section II, it was the moral right of self-defense that was used to include the due diligence limitation into the legal right. It would be difficult, and more likely misguided, to think that a moral right of state self-defense would not also contain the due diligence limitation or something very similar to it.

Second, someone might argue that the policies at Guantánamo Bay are morally justified for reasons relating to punishment. Members of al Qaeda have committed terrible acts. They are likely to commit more such acts. As a result, they ought to be punished. Certainly, Rumsfeld's and Cheney's

[30] That is, if the due diligence limitation is accepted as being a part of international law relating to self-defense.

[31] On the absence of any moral foundation for a right of state self-defense, see David Rodin (2002).

comments stated at the outset give this impression. They openly claim that all detainees are bad people planning to do bad things and that it is right to imprison these terrible people.

Of course, any moral reason for indefinite imprisonment that is related to punishment would be misguided. Any sufficient theory of punishment would include the conditions or requirements of the due diligence limitation, if not something greater (i.e., more restrictive) than the due diligence limitation. The conditions or standards of care articulated by the due diligence limitation and applicable to self-defense are normally considered to be easier or lower standards of care to meet than would be imposed on a government that undertakes the job of punishment. From an epistemic standpoint or burden, it is often considered much easier to justify acts of self-defense than punishment. To be justified under self-defense, it is likely that a state should have to meet an evidentiary standard like "a preponderance of the evidence" or standard such as, "it is more likely than not" that the person being targeted is an aggressor. For the state to take on punishing a person, in contrast, the state would have an increased evidentiary burden, something more like "beyond a reasonable doubt." If the policy of indefinite imprisonment cannot meet the epistemic obligations necessary for self-defense, it should not be thought to meet the tougher epistemic obligations normally applicable to punishment.

Finally, there is the consequentialist moral justification that the policy is likely, overall and in the long run, to produce more good than harm. One of the objectives I had in my reply to the third objection in Section III was to separate this kind of claim from a claim that an act is justified as an act of self-defense. It would be a confusion to put this kind of consequentialist reasoning within or under the justification of self-defense. Now, I will respond more directly to this consequentialist claim. Although I concede that it would be difficult to figure out whether the policy does or will result in more good than harm or will likely promote the best consequences overall and in the long run, I provide two reasons why this kind of moral justification appears misplaced.

The first reason is that this kind of reasoning is quite clearly rejected in similar circumstances in domestic legal systems, including in the United States. At the domestic level, this kind of consequentialist moral reasoning is either thought inappropriate when dealing with putting a person in prison for years, decades, or possibly for life or it is thought to justify the view that alleged murders and suspected criminals are to be given a trial. The fact that exceptions to criminal procedures are rare in most domestic legal systems and that detainees that are U.S. citizens are not now put in prison at Guantánamo Bay but are given a trial suggests that many, if not most, people think persons

have basic rights (legal and moral) that are not to be violated in any process leading to incarceration and that these rights either form a moral barrier to this kind of consequentialist justification in these cases or, at the very least, coincide with the best consequentialist view of how to go about imprisoning people who are suspected of harming people or who may attempt to harm people.

The second reason is that, although it may be difficult to determine what the overall good and harm is, or will be, it is not too difficult to determine that the current U.S. policy of indefinite imprisonment is harming rather than promoting an international community that enforces and fosters respect for basic human rights. The overwhelming international opinion is that Guantánamo Bay ought to be closed and the U.S. policy of indefinite imprisonment stopped. It is likely that this negative opinion will have adverse affects on any overall good that the policy could have. The obvious international rejection of the policy is an important limiting factor on how much good the policy can be said to generate. Although the opinion of other states and citizens may not always be a significant factor in determining whether a policy is morally justified, it should be considered a significant factor when the moral justification being appealed to is a consequentialist one and thus one that must calculate what the effects of the policy are and will be. A consequentialist account of the policy cannot ignore the strength of current international opinion and the continued international pressure to close Guantánamo Bay. This opposition is at odds with creating a secure and effective international community, which lacks an international sovereign and thus is largely based on the trust and cooperation of its members.

CONCLUSION

The United States has relied on the international legal right of self-defense to justify its policies at Guantánamo Bay associated with indefinite detention. Like other states, one reason that the United States relies heavily on this legal right is because this right carries weight with other states. A right of state self-defense is thought to be an important attribute of statehood. Also, most states attach a strong moral value to this international legal right. For most people, this state right, which legitimizes the use of force for the defense of one's neighbors, communities, or political or cultural "way of life," is thought to be a fundamental right necessary for living a moral or good life, or at least it is thought to be inextricably tied toward striving for such a life. Because of the strength of the value placed on this legal right (whatever its source), as well as its nearly universal acceptance, a proper invocation of this right often results in the abdication of substantial legal and moral responsibility. A proper

invocation legitimizes violence against states, groups, or persons, including the detention of persons. Yet, U.S. reliance on a right of state self-defense in this instance is mistaken. The policies at Guantánamo are inadequate. The policies implemented at Guantánamo Bay reveal that self-defense is not a concept and justification that can be invoked every time that a state seeks to use violence to improve its position, power, or stature or merely every time it attempts to safeguard its citizens. Rather, self-defense only functions as a justification when the actions of the defender adhere to certain limitations. In addition to the immediacy, necessity, and proportionality limitations, the U.S. actions at Guantánamo Bay should meet the due diligence limitation. This fourth limitation should be properly incorporated into international laws pertaining to self-defense because it is crucial in many cases for distinguishing between force used by a state that is merely an attempt to make future conditions better for that state from force that is a response to aggression and attempts to target the aggressor or a reasonably believable threat. The due diligence limitation thus ensures that any responsive use of force is a "defensive" use of force in the proper sense of the word given the current concept of self-defense and how this concept functions as a justification for the abdication of substantial moral and legal responsibility.

Guantánamo Bay is, as the former Prime Minister of Great Britain Tony Blair called it, an "anomaly."[32] It is an anomaly for many reasons. One reason is the U.S. failure to adhere simply to the basic requirements of the due diligence limitation. Not only is it difficult to find the policy of indefinite imprisonment justified for legal reasons, it is difficult to see how the policy can be morally justified. Rather, to most, it looks as though the United States is attempting to implement a policy that may or may not be good for its own citizens and is clearly not regarded as good for (and by) the rest of the world. If this perception is true, then the policy's legal and moral worth is lacking.

[32] See "Powell urges Guantánamo closure," as reported by BBC news on June 11, 2007 and as seen at http://news.bbc.co.uk/2/hi/americas/6739745.stm (accessed June 16, 2008).

9 Politicizing Human Rights (Using International Law)

Anat Biletzki

Human rights – in theory, discourse, and praxis – may be questioned as to their political nature; one instinctive answer claims that politics is the natural home of the human rights endeavor, whereas a more standard and institutional reply insists that human rights are, almost by definition, apolitical. This latter option usually turns to international law as the underpinning of human rights, presupposing thereby that law itself is, indeed, apolitical.[1] The former, seemingly more natural, stance may also recognize the essential nonpartisan aura of human rights but still maintain their usefulness for political agendas. The following exercise is an attempt to meld together these opposing positions on human rights by, on the one hand, acquiescing to their politicality but, on the other hand, locating it precisely – even if not only – in the use of international law. In a sense, we are putting our foot down in the human-rights-are-political camp; the surprising element here is the justified exploitation of international human rights, humanitarian, and criminal law for such political purposes. Because, however, the tension between the political and the universal (i.e., the apolitical) cannot be shrugged off, especially not by human rights workers and organizations themselves, we suggest a philosophical angle to mitigate it: Using the constructs of "identity" and "victim" to identify both the political and the universal, and their simultaneous presence in human rights, can lead to a different understanding of the political workings of human rights based on international law.

[1] The sense in which the law is "political" has been the object of discussion in legal scholarship, which is relevant to this article but only, sadly, when carried out in the ivory tower. Our purpose here is to bring that politicality, which is recognized analytically, to bear on human rights discourse and praxis, rather than just theory.

I. A THEORETICAL–PRACTICAL PROBLEM

In the past two decades, we have been witness to the astounding expansion of the field of human rights, whether it be institutional (see the number of human rights organizations in 2005 compared with that in 1985 or even 1995), educational (see the number of programs and departments dedicated to "Human Rights Studies"), or in public awareness, consciousness, and even involvement. So pervasive is this infusion of human rights issues and discourse into the public arena that some – I would say, somewhat optimistic – thinkers have announced a victory of sorts, telling us that those persons dealing in human rights are now in power.[2] One wonders – if that were true, if human rights have really been victorious – why it is that, concurrently, there is a no-less-shocking roster of human rights violations by political bodies at large. Perhaps one should wonder about the meaning of such "power," or such "victory." Both terms appear to bespeak a political context, putting human rights not simply into the public stadium, but more particularly onto the truly political stage.

Indeed, within the halls and canons of academia both theoretical and applicative discussions of human rights are usually carried on under either the auspices of "political thought" or "political science"; otherwise, they are studied in law schools and programs of legal studies. That is to say, there is an intuitive association (if academia can be deemed intuitive) of human rights with either the political or the legal. These are the two perspectives – the political and the legal – that will engage us here, but we begin with the preliminary proposal that the legal is just that which is *not* political. Furthermore, dealing with human rights in those academic departments labeled "political science" should be immediately problematized by a looming question – what is "the political"? – to which an answer is owed that must travel beyond the academy and its "political" disciplines. That answer, in fact, can run the gamut from conceptual to concrete extremes. If one means by "political" anything having to do with the individual's relationship to state authority, and if one also accepts something akin to a conventional definition of human rights as those rights that, even if natural, an individual holds vis-à-vis his or her government (rather than relating to other individuals),[3] then human rights are

[2] David Kennedy famously tells us "we have seen the empire and it is us." His point is that the power held by "humanitarians" is unacknowledged by them, leading to a measure of irresponsibility in the management of human rights in public, political affairs. "Reassessing International Humanitarianism: The Dark Sides," in Anne Orford (ed.), *International Law and Its Others* (Cambridge: Cambridge University Press, 2006), 131–55.

[3] This positioning of the state or government as responsible for human rights might seem to ignore the supposed difference between civil rights and human rights. "Civil rights" can be

political, almost tautologically. This positioning of human rights as political is deeply essentialistic, providing the type of foundational analysis (sometimes termed "traditional"), which answers the question "What are human rights?" without shying away from the political. That kind of "political" is still theoretical; any competing analysis of human rights as prior to any state mechanism, transcending any state authority, or competing with sovereignty, is still in the realm of a conceptual exercise on the politics of human rights.

Very different, of course, is the on-the-ground sense of the "political," involving persons in the corridors of real politics, power, and diplomacy. Here, saying that human rights are political means merely pinpointing, on the one hand, the availability and use of the language of human rights and, on the other hand, the dealings in issues of human rights for and by professional and semiprofessional politicians. These actors are not unaware of human rights, although they surely are often disturbingly unmindful of them. In saying that human rights might be political in this sense, one is only alluding to the reality of the political context within which they may dwell. Presumably, this is the context that is conscripted for the proclamations of triumphant human rights; it is the game of politics as played in real life, with or without a human rights triumph. In fact, and quite unsurprisingly, the feeling that human rights are all the rage is often expressed by mentioning human rights *discourse*; human rights talk has certainly been on the ascent, in language games of all sorts including the political language game. It is questionable, however, whether that is sufficient for the cries of joy concerning the human rights coup in real politics.

Given the essentialistic, theoretical *politic* of the concept of human rights and the unavoidable *politics* of our contemporary life, our abiding question in this chapter is how human rights can be, or be understood as being, political in any sense that is more nuanced than these very abstract or very actual extremes. Can we get beyond the purely academic analysis of human rights as a political construct, on the one hand, and the solely descriptive recognition of human rights as political activism, on the other, and ask about a certain politics that is significant for the human rights agenda? Our answer, born of both philosophical analysis and political activism (buttressed by evidence from Israel–Palestine), is that human rights *are* political and that they cannot

understood in two, albeit inconsistent, ways: either as those rights formally bestowed by the state on its citizenry – and then some civil rights might be human rights, others might not; or, more parochially, as that subset of human rights recognized by the Universal Declaration of Human Rights as "Political and Civil Rights," distinct from "Economic, Social and Cultural Rights." The second nomenclature signals toward our quest for the "political," but this then belies the first, because economic, social, and cultural rights are also expected to be provided and protected by the state.

be anything *but* political. This claim is both descriptive and normative: I see the actions and operations of human rights organizations as distinctly political, as belonging in the sphere of political discourse, and as influencing and being impacted by it. It is perhaps surprising, then, that in the field of human rights itself, in both organizational praxis and (some) concordant theoretical discussions, one is constantly admonished to "never mix up politics with human rights." In fact, it seems that the one seemingly unchanging presupposition that guides human rights activity and has accompanied its phenomenal growth, the one consensual mantra (outside of academia, that is) is "human rights are not political." I suggest that they are and should be and that this is and can be achieved through the supposed apolitical turn to international law.

There are several ways of understanding the ongoing belief in the apolitical nature of human rights on the part of human rights practitioners and their intellectual supporters. A positive way of looking at it – the most straightforward, even if naïve way – is to say that the whole point of the turn to human rights was to escape the dependence that rights have had, traditionally, on political contexts (i.e., to ensure the rights that human beings have "before" any political circumstance). This is also easily buttressed by the scholarly perspective investigating the meaning of *human* rights.[4] A more down-to-earth reading emphasizes the practical status of the maxim, focusing on the need to defend the rights human beings have vis-à-vis political authorities, and believing that a counterweight to these authorities can be provided by apolitical (usually legalistic) auspices. Notice how this position houses an internal, conceptual tension. It acknowledges that the objects and subjects of human rights have to do with political powers – that, recall, was the theoretical end point of saying that human rights *are* political – but insists that this demands the denial of the (practical) political if we are to truly safeguard human rights. More pragmatic, still, is the view that human rights organizations can be more efficacious, indeed might even make substantial progress, by not being beholden to or associated with any political entity – by being, as it were, universal in their moral foundations and in accompanying legal applications.

Indeed, in the practical field of human rights organizations there are several options regarding the positioning demanded by universalism, which exhibit the complexities of these understandings. A few human rights organizations recognize that they *are* political and are not loathe to engage in a corresponding activism in political agendas. Other organizations hold on adamantly, perhaps

[4] Suffice to comment that the usual "father" of contemporary human rights discourse is John Locke, who claimed that humans possess natural rights before any political institution.

naïvely, to their apolitical universalism; we then see an attendant "tying up in knots" in several instances in which these organizations must traverse the thin line between advocating for (universal?) human rights and voicing political positions. Sometimes we might encounter pragmatic acknowledgment by human rights organizations of the added value in being perceived as neutral. This last choice is pragmatic in that it makes use of the status of "universalism" (and usually, thereby, "justice") for reasons of efficacy (in persuasiveness, in public relations, in education, etc.), while surreptitiously recognizing the political character of human rights work. I would even say that some do not blush at moving from pragmatism to cynicism, knowing full well that they are using universalism in the service of politics.

Now, there is prima facie honesty in the constant proclamations of *international* human rights organizations that they guard human rights universally – in other words, that they monitor human rights violations perpetrated by any state (or other liable organ) and that they defend any person whose human rights have been violated. Also, there is prima facie straightforwardness in the perception of universalism, contrary to any political particularism, as a be-all and end-all of these organizations' agendas, upholding them as trustworthy and impartial, and leading to their standing as similar to that of a global, judicial authority. Even more parochial organizations – representing specific groups (e.g., nations, ethnic groups, racial groups, women, disabled persons, children) and looking out for particular interests – espouse that same universalism in claiming their affinity to *human* rights. In fact, such organizations promote those very particular rights by grounding the claims to such rights in universal human rights. The move between parochialism and universalism is not immediately or necessarily paradoxical; it becomes so in cases of conflicts between groups, where human rights organizations must, while defending human rights, place themselves on one side of the conflict. The neutrality and impartiality that were to accompany universalism then become naturally suspect.

One way – the most common way in human rights practice and the way I will be lauding for several reasons – out of the quandary that this suspicion raises is the path drawn by international (human rights, humanitarian, and criminal) law. Human rights discourse is couched in, and human rights work is based on, legal formulations and precepts. Viewed simply, this is the one sound, generally accepted, and consensually respected framework that serves as both a theoretical foundation and a practical methodology for concrete human rights work. Not only is this the sturdy construction upon and within which human rights functions; in fact, the turn to legal grounding is the safety net adopted by the human rights community precisely in its defense *against* the accusation

of political association, in other words, in its claims of neutrality, objectivism, and, of course, universalism – for the law is conventionally thought to be beyond and above politics. Furthermore, the theoretical grounding provided by the legal basis does not belie its concrete fruitfulness. Indeed, international courts that have now become a moving part of the human rights community, accompanying the traditional United Nations (UN) tribunals, are continuously running at full force to address dire violations of human rights.

This positioning of international law for human rights is no more than the conventional wisdom. We nevertheless proffer the law's newer role – while admitting its accepted function as a nonpolitical instrument and therefore as being in the service of universalism (at the very least in its international mechanisms) – as one of the principal tools of human rights work (along with education, monitoring, public relations, and activism) in its political manifestation. In other words, we posit the possibility of the counterpoint "human rights are political" and ask what is entailed by this proposition regarding, among others, the predominant use of legal means in the pursuit of human rights. Fleshing out this suggestion on the level of both human rights practitioners and theoreticians means, further, accepting that local or parochial human rights organizations are no less "pure" than their international counterparts. Still, the profundity of the political element inherent in human rights demands that we provide explanation, reason, and justification for this kind of "politics." How do we move consistently from this politicization of human rights to their erstwhile philosophical analysis, which stipulates universalism? More challenging, perhaps, is the opposite direction: What gets us, safely, from the philosophical grounding of human rights, which can never eschew universalism, to their political essence? Our suggestion, in answer to both, will hinge on two constructs, identity and victimhood, that are not only explanatory but that do, indeed, derive from a certain specific understanding of universalism. Before formulating this relatively abstract postulate, however, let us begin with a localized, political illustration.

II. ISRAEL–PALESTINE AS AN ILLUSTRATION

The activities of human rights organizations in Israel–Palestine, their dilemmas, their tensions, their individual operations, and their joint cooperative projects aptly demonstrate the problems exposed by the suggestions above. More so, saying "human rights organizations in Israel–Palestine" facilely hides from view the distinctive identities of different kinds of organizations. One might almost automatically think of this nomenclature as identifying Israeli organizations looking out for human rights of Israelis and Palestinian

organizations protecting the rights of Palestinians. What about Israeli organizations involved exclusively in the human rights of Palestinians in Israel or organizations in Israel advocating for rights of Palestinians (and Israelis) in Palestine? The intricacies of these identities, their implications for the self-perception of human rights workers, and their impact on human rights work on the ground, so to speak, have created human rights conundrums that are common – political, perhaps – knowledge. We postpone the theoretical analysis of this identity conundrum for the moment; let us first tell the story of its ultimate exemplar.

Such vexed identity issues come to an apex of fascinating incongruity in the case of B'Tselem – the Israeli Information Center for Human Rights in the Occupied Territories.[5] Established at the beginning of the first *intifada* (popular uprising) in Palestine in 1989, the organization is a registered, legal, and legitimate *Israeli* human rights organization, addressing the violations of and infringements on human rights in the Occupied Palestinian Territories. That is to say, the public whose rights are protected and spoken for by the organization is, almost always,[6] the Palestinian public. It is not unheard of for a human rights organization to involve itself with the rights of others; but when that other is the consensually perceived enemy, the identity of the protector (of the enemy's rights) is put to question, even thrown into turmoil.

A number of campaigns mounted by B'Tselem during the past several years of political strife in Israel–Palestine – campaigns that undoubtedly deal with human rights while, nevertheless undoubtedly again (to my mind), occurring on the political stage – can serve as paradigmatic illustrations of such conflicted behavior. In fact, these attempts by a human rights organization to come to grips with a situation that is so transparently political and so politically significant exhibit the intricacies of using international law. The treaty-bound specifications of human rights (with prominent attention to rights of movement, property, and legal process, rights to education, subsistence, etc.) and humanitarian law (relevant to a situation of occupation) provide the axes on

[5] Proper disclosure: I have been on the board of the organization for the past twelve years and was its chairperson during 2001–2006.

[6] B'Tselem's mandate is human rights in "the Occupied Territories" – in other words, a geographical mandate. Theoretically speaking, the persons whose rights are violated can be either Palestinians or Jews who live in those territories. Practically speaking, the Jews who live in the territories are settlers; subsequently, the question of their rights (and who it is that might infringe upon them) is awkward. Putting theory and practice together, B'Tselem must address any authority who violates any rights of Palestinians and/or Jews. Experience shows, however, that the massive violation of Palestinian rights (mostly by Israeli authorities) is the rule of the day, with only sporadic and rare trespasses on Jewish rights (by either Palestinian or Israeli authorities) taking place. In those cases B'Tselem has spoken up – for all.

which to focus work that is deemed apolitical. Also, in extreme cases, a move to the construct of war crimes is requested – but not always satisfied. Let us see how and why.

The Israeli settlements on the West Bank, routinely recognized as a political issue to be worked out and negotiated between the parties to the conflict, were investigated by B'Tselem using criteria, standards, and terminology of human rights. With hardly a mention of the political situation or of the fact that this was a bone of contention between two political entities,[7] the settlement project was analyzed under the rubrics of both international human rights law and international humanitarian law. The resulting conclusions – that the establishment of the settlements runs against the prohibition of transferring citizens from occupying power to occupied territory and that of making permanent changes in the area, and that the settlements infringe on the right of self-determination, equality, property, adequate standard of living, and freedom of movement – were formulated in precise, legalistic terms. The ensuing report, entitled "Land Grab,"[8] was published in 2002 and has become the definitive text for data and understanding of this gargantuan settlement undertaking for the human rights community, for scholars, for the courts, but also for politicians and policy makers. Is this, then, a document of universal human rights or of politics? Clearly, it is international law that is the conduit between them. Only by employing the formal, binding, and mostly unequivocal formulations and strictures residing in its legal framework could B'Tselem ground the demands of human rights – often perceived as no more than idealistic hand waving – in concrete judgments of and practical recommendations to government.

Another, more nuanced, instance of the wrestle between human rights and politics – this time in the well-trodden field of security versus human rights – is supplied by the Israeli "security barrier" (variably called the "separation wall" or the "fence"). Here, one might be enticed to view the matter as the standard tension, now so much with us in these days of "the war against terrorism," between the right (of certain people) to security and the corresponding obligation of a state to its citizens, and the rights (of other people) that are violated by pursuance of that first right. Indeed, the common presentation of the conundrum instigated by the wall has been adapted to a conventional tug-of-war between rights (of some) and rights (of others) as an internal discussion within human rights discourse or, more pertinently, even as internal to the legal working of international law. In fact, in December 2003 the International Court

[7] I use "entities" intentionally because these are not two states but rather a state (Israel) and an occupied territory (sometimes seen as represented or controlled by the Palestinian Authority).
[8] *Land Grab: Israel's Settlement Policy in the West Bank* (Jerusalem: B'Tselem, May 2002).

of Justice was requested to tender an advisory opinion precisely on the "legal consequences arising from the construction of the wall." Famously, in July 2004, the court found that the wall was, indeed, "contrary to international law" and elaborated on the legal consequences of its illegality. Basing its opinion on international humanitarian law – customary international law, the Hague Regulations, the Fourth Geneva Convention, the UN charter – regarding "threat or use of force and the illegality of any territorial acquisition by such means" and the principle of self-determination, and using also international "human rights instruments" (International Covenant on Civil and Political Rights [ICCPR] and International Covenant on Economic, Social and Cultural Rights [ICESCR]) regarding liberty of movement, right to work, health, education, and an adequate standard of living, the court did not ignore the balancing act required of it in considering Israel's "needs of national security or public order." It just was "not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives." This deliberation resulted in a clear, although not unanimous, formulation, branding the wall contrary to international law, and, in consequence, requiring Israel to cease construction and make reparations for the damage it had caused, and demanding that the rest of the world recognize this illegality as such. Such are the workings on the stage of international law; their status, ostensibly, has nothing to do with politics.

It is in the local, Israeli context, that this same game, with similar rules and tools, appears to take on more nuanced qualities. In B'Tselem's report, "Under the Guise of Security" (2005),[9] the wall was scrutinized, with human rights constructs providing the initial tools for an interim conclusion – that the barrier is indeed the main cause of human rights violations of Palestinians living near it. An examination of the Israeli contention that "the Barrier's route is based solely on security considerations" could have taken the legal path of balancing different sets of rights, those having to do with security and the others, and showing, for example, that the element of proportionality, well founded in international humanitarian law, has been exceeded by Israel's positioning of the wall (which impacts more than a quarter of a million Palestinians). Interestingly though, that was not the strategy undertaken in the report. Instead, the organization embarked on a more challenging – and, I submit, more political – enterprise: that of explaining how, although security is conscripted by Israeli authorities to explain and justify the wall's construction, its de facto route belies that alleged motivation. "The report shows that not only were security-related reasons of secondary importance in certain locations, in

[9] *Under the Guise of Security: Routing the Separation Barrier to Enable the Expansion of Israeli Settlements in the West Bank* (Jerusalem: B'Tselem, December 2005).

cases when they conflicted with settlement expansion, the planners opted for expansion, even at the expense of compromised security. This desire for settlement expansion led to an increase in the violation of Palestinians' human rights." This is not, in effect, the in-house human rights security-versus-human-rights dispute, but a far more pernicious intrusion of other politics and other political interests into the human rights conversation. Yet even this is not the final step: B'Tselem goes on to recruit international humanitarian law to deal its final blow. Because the settlements are illegal (according to international humanitarian law), the wall itself, being a result of the intent to protect and expand them, is illegal as well. Rare are the times that the political agenda in Israel has been so explicitly exposed as *illegal*.

Separate from the settlement project, but not unrelated to it, is the discriminatory road system operated by Israel in the Occupied Territories – certain roads for Jews, other roads for Palestinians, some for both, some that change daily – as exposed by B'Tselem in 2004, in a report titled "Forbidden Roads."[10] Seemingly less complex than the entire settlement project, the "roads regime" is shown in the report to infringe on the Palestinians' right to freedom of movement and right to equality, in violation mostly of international human rights treaties that Israel is party to and, perhaps, less flauntingly, of the Fourth Geneva Convention. Most striking, however, is the careful allusion that the organization makes in the report to "apartheid," likening the "separation through discrimination" of the road system in the West Bank to the South African racist practice. Although the road system calls for this comparison with the original apartheid, the report makes an essential distinction: The South African system was "formulated in legislation," whereas its Israeli counterpart is an informal and unofficial modus operandi of Israeli military occupation. The organization's need to differentiate thus between the two systems is interesting. Considering that apartheid is now recognized as a crime against humanity, it would have been natural to move toward international criminal law to ground the similarity – or contrast – between the two systems, the South African and the Israeli. More so, the UN treaties and documents making apartheid a crime (against humanity) explicitly deny the necessity of legislative measures proscribing the apartheid to identify "policies and practices of racial segregation and discrimination" as apartheid.[11] International criminal law could have served the organization well in tying its analysis to

[10] *Forbidden Roads: The Discriminatory West Bank Road Regime* (Jerusalem: B'Tselem, August 2004).

[11] It is the wording of definitions of apartheid in the relevant documents, which marks *racial* segregation as an essential characteristic of apartheid, that is usually called upon to excuse Israel from the charge of apartheid, because the discrimination that is manifested there is not considered, by some, to be racially motivated.

apartheid. Instead, the report on exclusionary roads was immersed in human rights and humanitarian law, rather than criminal law. The heavy weight of the apartheid suggestion, different from the routine – is it less heavy? – violations of human rights, was not tethered to any legal basis. It is, strangely, more of a rhetorical (political?) ploy, even in the hands of a human rights organization.

What one can generally surmise, given these exemplary cases of international law in the service of human rights on the political field, is that, not surprisingly, human rights law and humanitarian law are usually enlisted for the call to justice, rather than a move to the courts functioning in international criminal law. In situations and events where talk of war crimes seems more befitting than the vocabulary of human rights, most organizations tread more gingerly. Of course, under the Fourth Geneva Convention there is the evaluative opening for "grave breaches" that amount to war crimes and, accordingly, B'Tselem and other Israeli organizations have written, sparingly, about various actions of Israel – mostly in Gaza – that can constitute war crimes. International organizations such as Amnesty International and Human Rights Watch have been, at times, more forthcoming. To be sure, in the Israel–Palestine case, it is not the bona fide human rights organizations but rather the politically oriented peace and "refusenik" movements, along with more vocal human rightists, that have adopted the auspices of criminal law to further their (political?) agenda. Thus, for instance, the Israeli Committee Against Home Demolitions (ICAHD) has approached foreign litigators in an attempt to file a suit against specific army commanders for their involvement in home demolitions.[12] The story of Major General Doron Almog, head of the Israel Defense Forces' southern command in 2000–2003, made headlines when he cowered in an El Al plane at Heathrow after being alerted to the British warrant for his arrest for war crimes. Perhaps most significant in this context is the ongoing battle, mounted by Yesh Gvul and Gush Shalom (two of Israel's most prominent peace movements) and signed on to by several celebrities, to indict Dan Halutz, Israeli Air Force's Commander in Chief, for criminal responsibility in the dropping of a one-ton bomb on a Gaza residential building. That the house was the home of Salah Shahade, a senior Hamas commander, and that the Air Force considered the operation a success in the war on terror, did not, say the complainants, exonerate the pilots of the operation, their commanders, and, most importantly, Halutz himself from blame for killing fourteen civilians, most of them children. The avenues of prosecution were,

[12] B'Tselem published a report in November 2004, *Through No Fault of Their Own: Punitive House Demolitions during the al-Aqsa Intifada*, referring only once to such demolitions being "grave breaches" of the Geneva Convention and "war crimes" in the Rome Statute of the International Criminal Court.

first, the Israeli criminal courts (where the case was rejected) and then, when those avenues failed, a continuous effort to engage foreign and international criminal courts. As in the cases of "pure" human rights organizations, the turn to international law (this time international criminal law) is the most effective device for promoting goals that cannot be deemed apolitical, which are, undoubtedly, at the forefront of political action.

III. WHO IS THE VICTIM?

The cases described populate the charged political context of Israel–Palestine. One could say that it is only natural that in such an environment (even) human rights must turn political. On a realistic reading, moreover, there is no denying that human rights work, human rights agendas, human rights campaigns, and even human rights discourse have become deeply political – not only in the Middle East. In particular, it is in the utilization of that purportedly most apolitical of contexts, the law, international law, that we have identified the means for the politicization of human rights. Is this not an insidious convolution?

Think of it this way: Governments and societies can be placed on a scale of democratic-to-undemocratic regimes according to their recognition and implementation of the rule of law. Furthermore, that rule of law can be categorized as deriving from general legislation and specific laws that are more or less attentive to human rights. Therefore, engagement with government, which is, admittedly, in several dimensions a political engagement, may entail dealing with legal issues having to do with human rights; there is nothing untoward about that. However, because international human rights law, international humanitarian law, and international criminal law all spring from a profound, explicit acknowledgment of the centrality of human rights, they can, and do, function as the standard by which government is assessed, judged, and called to account. It is also a slippery slope that then dislodges human rights from their apolitical, legal moorings, immersing them instead in the political discussion – a discussion carried on in exclusively political terms, by politically motivated actors, often in political institutions, touched by truly political interests. Is that where and how one should perceive politicized human rights? Should we not try to go back up from such down-to-earth dealings, perhaps by returning to conceptual analysis?

Our object is, consequently, to conceptualize the politicization of human rights in general. The localized, highly problematized stories must now return us to the supposedly intractable duo of universalism and politics and to their conciliation. Theoretically, we must make peace between the adulation

of universalism, which runs the human rights motor, and the inevitable, but perhaps not lamentable, engagement of human rights with the political. This peacemaking is to be done by addressing the identity of the "human rightist" and granting him or her a clear mandate always to recognize a victim.[13]

Start with identity, and let us return to that convoluted group of organizations that we named "human rights organizations in Israel–Palestine." The first thing to notice is that such organizations hold distinctive formal identities that, by definition, point to various complex allegiances. Most straightforward are Palestinian organizations, in Palestine,[14] which represent Palestinians living in Palestine whose rights have been infringed upon by Israeli authorities in control of the West Bank.[15] Then, there is the somewhat more tricky function of Palestinian organizations in Palestine that represent Palestinian individuals' rights against Palestinian authorities.[16] This group,[17] complex in the best of times, is now almost incoherently perceived, for it is no longer clear what is meant by the term "Palestinian authorities." Next come Israeli Palestinian organizations[18] that represent Israeli Palestinians (i.e., Arab citizens of Israel) against Israeli authorities – seemingly a well-defined minority interest group within a well-ordered, institutionalized state, were it not for the political vagaries of the situation. Then, there are Israeli organizations that represent Palestinians in Palestine against Israeli authorities,[19] one of which

[13] Although I use the singular, "a victim," nothing in the following analysis hinges on the victim being an individual; groups, as we shall see, can be victimized as well.

[14] "Palestine" is not an internationally recognized political or state entity. I use "Palestine" as shorthand for the Occupied Palestinian Territories (called by some, by many, OPT) – meaning the West Bank and Gaza.

[15] The question of Israel's effective control of the Gaza strip has been on the table since the "disengagement" of August 2005, when Israel vacated the settlements in Gaza and pulled its army out of the strip.

[16] When I talk of "Palestinian authorities," I refer to the Palestinian Authority established by the Oslo Accords of 1993. As of June 2007, even this nomenclature is problematic, because Gaza is ruled by Hamas, which is, de facto, a Palestinian authority, but not that agreed upon by the signers of the Oslo Accords.

[17] The intersection of these two groups is understandably large. Paradigmatic organizations are al-Haq, Palestinian Center for Human Rights (PCHR), Al Dameer Association for Human Rights, Jerusalem Legal Aid and Human Rights Center, and the Resource Center for Palestinian Residency and Refugees' Rights (BADIL).

[18] Most outstanding are Adalah – the Legal Center for Arab Minority Rights in Israel, Mossawa – the Advocacy Center for Arab Citizens of Israel, and the Arab Association for Human Rights.

[19] Most emblematic, of course, is B'Tselem, with others being, for example, HaMoked – Center for the Defence of the Individual, Machsom (Checkpoint) Watch, Rabbis for Human Rights, ICAHD, Gisha – Center for the Legal Protection of Freedom of Movement, and Yesh Din – Volunteers for Human Rights. Some organizations – such as the Association for Civil Rights in Israel, Defence for Children International, and the Public Committee Against Torture in Israel – make no distinction between Israel and the territories under its control, or, for that matter, between Israelis and Palestinians.

has served us well in this tale.[20] These all sport the anticipated complications and complexities that derive from convolutions of identity in complications of politics and geography. We know from the staples of identity politics that, although identity, in its one-dimensional form, supports a definite particularity rather than an encompassing universalism, the more sophisticated discussion of identity recognizes the multiple elements that can constitute a complex identity and is challenged by the place of blatantly contradictory elements. When that place is populated inconsistently there arises, in the individual, a tension addressed by psychology; in a society, a tension addressed by sociology; in a state, a tension that cannot be called anything but political.

Were human rights simplistically "universal" (i.e., apolitical in the straightforward, yet in a naïve sense adumbrated), the intricacies (of these identity-prone labels) should not have mattered to the organizations, Israeli or Palestinian, or to the public and even the authorities that they address. It is somewhat disconcerting, then, when observation of the workings of these organizations discloses a number of phenomena that have arisen in the wake of the political situation, not to mention political violence, and that have hindered cooperation between the organizations despite their supposed common ends and purported universalism. These occasional incidents have to do with tensions among the different organizations, with matters of offense given and taken in correspondence with international bodies, and with outright misunderstandings of local (i.e., particular) interests and motivations. More unnerving, adding to the conflicted self-identity of the workers of organizations like B'Tselem, are the accusations of betrayal, even treason, that are bandied about publicly. It would seem that universalism is cowed by the power of political angst that propels the organizations; it would seem that politics is getting in the way of human rights.

This is where the universalism of human rights is called upon to do more than just excuse the actions of the organizations; it must ground their very identity. This is not, however, a case of flying the flag of universalism and thereby ascending beyond or even vacating the troubled waters of political conflict. On the contrary, our proposition is that it is precisely by flying that flag that human rights organizations can and should take part in politics without stooping to the banality of taking political sides. This manner of flag flying must also be more than a rhetorical gesture and certainly different from partisan support. The infrastructure, status, and procedures of international law provide it with the requisite mechanisms for such a nuanced project. Such a

[20] I include here only those human rights organizations that are relevant to the duo "Israel–Palestine." Other groups, dealing with the rights of children, women, workers, and so forth, are plentiful but are essentially dissimilar in not being explicitly burdened by the political context.

nonsimplistic construct of universalism, a universalism that does not pretend to reside above or beyond a particular identity, a universalism buttressed by law, can instead, and usually does, infuse human rights groups and organizations with an exceptional identity that has to do precisely with their human rights identity. By being a replacement for traditional identities, however, this kind of universalism can wear political garb, and can do so unself-consciously.

Indeed, the universalism of human rights invigorates the question of identity: Being a human rightist endows one (an individual, an organization) with a particular universal (cosmopolitan, global) identity. How is this to be manifested concretely, how is it to carry real weight, if we are to escape from the ephemeral, metalevel of a universality disconnected from real life? Differently put, how is it to become political without betraying the universal?

Making "universalism" political in a deeper sense than the supposedly localized political, necessitates a turn to the *victim* as focusing human rights talk and action. In a sense, this is the final defense for those persons who insist on global justice, those persons who advocate the pursuit of absolutist, universal, or consensual values with which to ground human rights without deteriorating into a political taking of sides. These protagonists can seize upon the ultimate concept of "victim" as both a particular and a universal. When one can recognize, in contexts of conflict and strife, a clear victim and a clear victimizer, one can then insist on protection of the victim as a universal value. Although this may appear to be taking sides (politically or otherwise), taking the side of the victim is a universal stance, a clear expression of justice, global or otherwise. Also, spotlighting the victim is an aid – both practically and theoretically – for the issue of identity: Who are we, and for whom do we stand up? The victim – even if he belongs to the enemy.

Identity and victimhood have traditionally traveled a different route together; it is victimhood itself, essentially being the victim and functionally playing the victim's part, that has become a staple of identity studies, with past victimhood giving meaning to the current identity of groups. The "politics of victimhood,"[21] moreover, has the fulcrum on group victimhood rather than individual victims. This, indeed, might appear more conducive to a political attitude toward and utilization of victimhood: groups vying for attention, historical compensation, partisan recognition, and finally rights. Looking at the dialectic of victimhood discourse, however, especially in the predominant transitional justice models (as popularized by "truth and reconciliation commissions" and such), arouses doubts as to whether it holds any political water. "The past suffering of victims could be honored as a claim to moral

[21] Robert Meister, "Human Rights and the Politics of Victimhood," 16(2) *Ethics & International Affairs* (2002), 91–108.

victory precisely insofar as they were willing to accept moral victory as victory enough, and to forgo the demands of revolutionary justice."[22] To be sure, in assessing the benefits or detriment of the recent upper hand of human rights for victims of past atrocities, it is not unreasonable to view human rights in their current triumph, their "proximity to power," as reneging on precisely that recognition of victimhood that could have contributed to the political – rather than moral, social, or economic – advancement of a victim group. "In contrast to revolutionary justice, 'transitional justice' seeks to lay the ghosts of dead victims to rest, and to empty the present of backward-looking political significance."[23]

In other words, human rights discourse can be perceived as responsible for the depoliticization of victimhood itself when one acquiesces to the joyful consensus surrounding the success of human rights and its supposed situation in the corridors of power. If, instead, we opt to continue viewing human rights as a nascent discipline and a troubled endeavor, if we evaluate it as successful in discourse but wanting in concrete achievement, and if we follow its workings as aspiring rather than proximate to power, then recognition of victimhood is recognition of a victim – usually, although not always or necessarily, an individual victim. The politics of victimhood associated with the self-identity of groups then gives way to human rights as the politics of acknowledging (another's, rather than one's own) victimhood.

Where there is a victim, there is a perpetrator. It is here that international human rights law, international humanitarian law, and international criminal law come in. Interestingly, and in concert with our preference in this chapter to center on the individual victim (although never ignoring the possible victimhood of groups), it is the individual victim and the individual perpetrator of crimes that are addressed by criminal law.[24] More interesting, however, is our understanding of the victim in international criminal law – where the victim must be presupposed as the victim of a crime, playing a "not . . . very substantive role,"[25] with only the specification of the crime(s) receiving

[22] Ibid., 95.

[23] Ibid., 99. Meister's grievance toward "victimhood" revolves around a different issue from ours, namely, the bifurcation between (revolutionary) unreconciled victims and (counter-revolutionary) fears of victorious victims. His additional distinction between individual perpetrators of evil and injustice, and systemic beneficiaries of the same, is what then leads to his profound (and different from ours) criticism of contemporary human rights discourse – that it has been depoliticized precisely because of its insistence on dealing with perpetrators alone.

[24] Ibid., 107. Meister identifies this "individuating project of criminal prosecutions" as either apolitical or "a serious limitation of liberal political analysis."

[25] Stephen Riley, "'Not Being Victims Ever Again': Victimhood and Ideology," in George Kassimeris (ed.), *Warrior's Dishonour: Barbarity, Morality and Torture in Modern Warfare* (Aldershot, UK: Ashgate, 2006), 193.

necessary detailing for criminal procedure. Indeed, victimhood in international criminal law, although individualistically oriented, rarely obtains the particular description or portrayal that one might expect. The very idea of a victim in international criminal law meanders between particularism and universalism, remaining forever ambiguous.[26] Isn't this as it should be? Instead of decrying the "leveling and stultifying effect of the 'universal victim,'"[27] it behooves us to finesse that meandering: Recognition of the particular victim is a universal demand of/from the human rightist, using international human rights law, international humanitarian law, but mostly international criminal law. In a sense, this is a meta-position, procuring an identity for the human rightist, unifying ideology and law in the context of politics.

The work done by human rights organizations is ultimately political work and is naturally enlisted for political agendas. It is "defended" through the construct of universalism, but not just for practical or efficacious reasons. Rather, the defense arises from the understanding that universalism enjoins us to protect the victim and that such protection is essentially political in character. Political in character, but legal in procedure. The philosophically endowed concept of universalism must be buttressed by a legal scaffolding, which can make the victim more than just a subjective, psychological, or even metaphorical object. True, narratives of victimhood are rampant in conflicted or warring societies, but turning to the law for identification of the victim and then for just desert is, contrary to the apolitical presuppositions and presumptions of legal thought, precisely a way of politicizing human rights.

Another formulation would have it that politicizing human rights involves adjoining the parochial with the universal via international law. Such a position can then also lay to rest the interesting but bothersome accusation that human rights and humanitarian organizations may sometimes actually subvert the course of justice by providing fig leaves, facades, or tolerable standards for the powers of evil to exploit. This accusation may be hypothetically true and intellectually challenging, but defense of the victim by using the law is the only practicable option of responding to the challenge – and the evil.

Conceptual paradoxes inevitably infect practical engagement. Not for naught do human rights organizations, purporting or pretending to be engaged solely in universal issues, find themselves in convoluted apologetic situations, situations that are palpably political. We submit that there was, originally, no reason to desert the political aspect of rights talk when graduating to human rights; there is now reason to return to political awareness precisely in the area of human rights. Because politics is the engine of current affairs, it should be addressed on every possible level, including that of human rights.

[26] Ibid., 198.

[27] Ibid., 202.

This is, in a sense, a political conclusion – that perhaps *via* human rights we can attain feasible political solutions. This means, however, that the act of politicization is achieved precisely by anchoring human rights in international law. Also, more so, given the current political world order, international human rights organizations, no less than local ones, can be welcomed politically. That is to say, there is authentic strength, rather than pragmatism or even cynicism, in the inescapable and conscious turn to politics by human rights organizations because advocacy and legal empowerment (of human rights) have a natural home in political contexts. Finally and explicitly, then, our claim is that human rights praxis *is* political, that *it should be* political, and that only by being so on the stage of legality can it make a difference.

PART FOUR

PUNISHMENT AND RECONCILIATION

10 The Justification of Punishment in the International Context

Deirdre Golash

I. INTRODUCTION

Since the Nuremberg trials, the United Nations (UN) has taken steps to bring criminal violators of international law to trial in various forums. Special tribunals were established for the conflicts in former Yugoslavia and Rwanda, and the UN has also exerted pressure on national governments to try these violators, as in East Timor. In 1998, a permanent court, the International Criminal Court (ICC), was established by a treaty signed by 105 nations. The crimes that fall under the ICC's jurisdiction are genocide, crimes against humanity (specific acts such as torture performed in the context of systematic or widespread attacks on a civilian group), war crimes, and the crime of aggression.[1] The ICC's jurisdiction is complementary; that is, it steps in only where the domestic government is unable or unwilling to prosecute. The court has so far opened investigations in Uganda, Congo, Darfur, and Central African Republic.

There are reasons for thinking that the justification for punishing offenders convicted by the ICC is especially strong. The crimes of which these offenders are convicted are in general qualitatively more serious than their domestic counterparts. Such crimes are vastly more serious than ordinary crimes; they

[1] UN, *Rome Statute of the International Criminal Court*, July 17, 1998. Available at http://untreaty.un.org/cod/icc/statute/romefra.html (accessed April 22, 2008).

Earlier versions of this chapter were presented at the Workshop on International Criminal Law, Internazionale Vereinigung für Rechts- und Sozialphilosophie, Krakow, Poland, August 2007, and at the Midwest Political Science Association, Chicago, Illinois, March 2008. Some portions of the argument are condensed from my book, *The Case Against Punishment: Retribution, Crime Prevention, and the Law* (New York: NYU Press, 2005). I am indebted to Sharon Melzer for her yeoman service as a research assistant, and to Larry May and Zach Hoskins for their helpful comments.

directly affect many more individuals, and their effects on the communities in which they occur are far deeper and more lasting.

Just as we might think that the justification for punishing first-degree homicide is stronger than that for punishing shoplifting, we are likely to think that the justification for punishing mass homicide for purposes of ethnic cleansing is stronger than that for punishing garden variety homicide. Society (domestic or international) has a stronger justification for prohibiting these crimes, as well as more of a stake in seeking to prevent them, and in responding to those that do occur with an appropriate expression of condemnation. Roland Amoussouga, spokesman for the UN International Criminal Tribunal for Rwanda (ICTR), suggests that criminal prosecution can serve these goals:

> We believe . . . the existence of ICTR may have made a major difference in political developments in places like the Democratic Republic of Congo (DRC), Burundi and lately Kenya . . . The Tribunal will leave a legacy of international jurisprudence that can guide future courts and deter future commission of these grave crimes. . . . This is the first time high ranking individuals have been called to account before an international court of law for massive violations of human rights in Africa. The Tribunal's work sends a strong message to Africa's leaders and warlords.[2]

I argue that, although it is important to prevent these crimes, the difficulties faced by those who attempt to justify punishment in terms of crime prevention are more serious in the case of international crime. Equally, the importance of prohibiting international crimes and condemning those that do occur does not significantly strengthen the argument for punishment for that purpose. My argument is that this question is not primarily one of sovereignty but rather is premised on the unusual circumstances under which these crimes are committed and on the relationship of offenders to the punishing body. Some features of these crimes and the social context in which they occur suggest that punishment may be less effective in achieving the goal of prevention in the international forum than in the domestic. The link between condemnation and punishment is also weaker in the international context, because the absence of punishment by an international body is not as likely to be interpreted by the public as condonation, and because offenders are less likely to accept a message of condemnation from the punishing body. Where punishment for these crimes is imposed by a domestic government, its condemnatory force for both offenders and the public is similarly weakened insofar as that government is dominated by an opposing political faction.

[2] ICTR, *ICTR Newsletter*, March 2008, available at http://69.94.11.53/ENGLISH/newsletter/mar08/mar08.pdf (accessed April 20, 2008).

Where the offending faction has emerged victorious, however, it is unlikely that its members will punish their own for the tactics that made victory possible.

II. NATURE OF INTERNATIONAL CRIMES

I use the examples of Yugoslavia, Rwanda, and Uganda to illustrate the nature of the crimes prosecuted in international criminal tribunals and the circumstances in which they occur.

Yugoslavia

With the exception of the years from 1945 through 1990, the history of the region of the former Yugoslavia is one of almost constant conflict, both among the various religious (Eastern Orthodox, Roman Catholic, Muslim) and ethnic groups in the region and between indigenous residents and external invaders. Yugoslavia, first established under that name in 1920, was reconstituted in 1945 at the end of World War II. Following the death of Marshal Tito in 1980 and the fall of the Soviet Union in 1989, Yugoslavia was redivided into several independent nations, including Serbia, Macedonia, Croatia, and Bosnia. Serbs fought for control of Croatia, and Bosnian Serbs sought to set up the Republika Srpska covering about half of Bosnia. These actions met with resistance from the Bosnian Muslims.

Perhaps most egregious of the crimes prosecuted by the International Criminal Tribunal for the former Yugoslavia (ICTY) was the Srebrenica massacre, in which thousands of Muslim Bosnian men in an isolated "safe area" within Republika Srpska guarded by a UN peacekeeping force were killed after being forced to relinquish their arms. In July 1995, Bosnian Serbs began shelling the UN safe area and took thirty of the Dutch peacekeepers hostage. The Dutch asked for NATO airstrikes, but the strikes never came because of a paperwork issue. Thousands of Muslims fled to the UN Dutch station. They allowed 5,000 people in but turned away 20,000.[3] Some 15,000 people tried to escape on foot through the mountains to Muslim-controlled territories in Tuzla, with many dying en route from heat, hunger, and injuries, as well as from Serb attacks. Women and children were bused to Muslim areas, and then the Serbs began killing the men left behind.[4] On July 13, the Dutch, apparently believing that they could neither provide means of survival to the Muslims in the safe area nor protect them from being seized by the Serbs,

[3] Suzanne Bardgett, "Remembering Srebrenica," 57(11) *History Today* (2007), 52.

[4] Ibid., Netherlands Institute for War Documentation, "The Journey from Srebrenica to Tuzla," Part IV, Chapter 1 in *Srebrenica, a "Safe" Area* (April 2002). Available at http://193.173.80.81/srebrenica/ (accessed May 1, 2008).

handed them over to the Serbs in exchange for fourteen Dutch hostages. The Serbs separated the men from the women and children.[5] Then, according to the ICTY's judgment on Radislav Krstić's appeal, "They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity."[6]

Many have questioned why the Serbs perpetrated this massacre, which seems to have given them no military advantage. The position of Srebrenica – an isolated enclave surrounded by Serb territory – was clearly untenable on any long-term basis, and the massacre of Muslim fighters was less advantageous than holding them as prisoners of war, who could then be exchanged for concessions. The Serbs seem instead to have been motivated by factors beyond the reach of rational calculation. Even the aim of securing Bosnia for Serbs alone through "ethnic cleansing" required only that Muslims be expelled, not that they be executed. *The New York Times* had reported two years earlier, in 1993, that Serbian forces were poised to attack Srebrenica despite their expectation that such an attack would precipitate Western military intervention.[7] In a video recording made the day before the massacre, Ratko Mladić, Chief of Staff of the Army of the Republika Srpska, indicated that the time had come to "take revenge against the Turks."[8] Bosnian Muslims were commonly referred to as "Turks," a reference to the period when Bosnia was part of the Ottoman Empire. Mladić may have been referring to recent attacks by Bosnian Muslims on the Serbs or to much older grievances. Bosnia had remained under the control of the Ottomans after Serbian independence in 1829, intensifying the resentment of Bosnian Serbs against Muslims in the area. Two weeks earlier, Mladić had invoked the martyred Serbian hero, Tsar Lazar, who led his army to defeat against the Ottomans in 1389:

> Prince Lazar gave his army the Communion, and bowed for the Heavenly Empire, defending fatherland, faith, freedom and the honour of the Serbian people. We have understood the essence of his sacrifice and have drawn the

[5] Netherlands Institute, "Summary for the Press" in *Srebrenica, a "Safe" Area.*

[6] UN News Centre, "Srebrenica Massacre Was Genocide, UN Tribunal for Former Yugoslavia Confirms" (April 19, 2004). Available at http://www.un.org/apps/news/story.asp?NewsID=10441&Cr=Srebenica&Cr1 (accessed November 12, 2007).

[7] John F. Burns, "Standoff for Muslim Enclave in Bosnia," *The New York Times*, April 23, 1993. Available at http://query.nytimes.com/gst/fullpage.html?res=9F0CEED6163DF930A15757C0A965958260 (accessed May 3, 2008).

[8] Radio Free Europe/Radio Liberty, "Bosnia-Herzegovina: The Voice of Ratko Mladić," December 29, 2005. Available at http://www.rferl.org/featuresarticle/2005/12/9AE60B00-A506–4C47–9454-CDFD05AE9C69.html (accessed April 22, 2008).

> historical message from it. Today we make a winning army, we do not want to convert Lazar's offering into a blinding myth of sacrifice.[9]

Lazar is depicted in legend as having chosen defeat in response to an oracular message telling him that this choice would secure for him "the kingdom of heaven."[10] The 600th anniversary of this battle was prominently celebrated by Serbs in 1989.[11]

The ICTY has issued 161 indictments, resulting in fifty-six convictions and nine acquittals as of April 2008, with twenty-six trials still ongoing and eight at pretrial stage. Three suspects remain at large. Five, including former President Slobodan Milošević, died before judgment.[12]

Serbia refused to turn over indicted leaders until forced to do so by the threat of economic sanctions. Republika Srpska President Radovan Karadžić was not arrested until 2008, thirteen years after his indictment. Mladić has not yet been apprehended, although he lived openly in Belgrade until Milošević's arrest.[13]

Rwanda

The Rwandan Tutsis and Hutus were originally almost indistinguishable, although Tutsis tended to be lighter-skinned. The word "Tutsi" originally meant "cultivator" and "Hutu" meant "herdsman."[14] Belgian colonists saw them as two distinct ethnic groups and developed a preference for the Tutsis. A key part of this process was the "Hamitic myth" to which the colonists subscribed, according to which lighter-skinned, sharper-featured groups found in Africa were supposed to have arrived from the north and assumed control over darker-skinned indigenes.[15] During Belgian rule, there was episodic violence against the Tutsis, including riots in which 20,000 Tutsis died, and many went

[9] Netherlands Institute, "Serbs and 'Turks': The Ottoman Heritage," Appendix IV, Chapter 1, in *Srebrenica, a "Safe" Area*.

[10] See, for example, Dusko Doder and Louise Branson, *Milošević: Portrait of a Tyrant* (New York: Free Press, 1999), 7–9.

[11] Netherlands Institute, "Under Communist Rule," Appendix IV, Chapter 4, in *Srebrenica, a "Safe" Area*.

[12] ICTY, *ICTY at a Glance*. Available at http://www.un.org/icty/glance-e/index.htm (accessed April 21, 2008).

[13] BBC News, "Profile: Ratko Mladić," June 6, 2005. Available at http://news.bbc.co.uk/2/hi/europe/1423551.stm (accessed November 22, 2007).

[14] David Moshman, "Theories of Self and Theories as Selves," in Cynthia Lightfoot, Christopher A. LaLonde, and Michael J. Chandler (eds.), *Changing Conceptions of Psychological Life* (New York: Routledge, 2004), 183–206.

[15] Ibid.

into exile in Uganda, where most were confined to camps. Subsequently, the Hutus took power on Rwandan independence in 1962. In 1973, Juvénal Habyarimana, leader of the militant National Republican Movement for Democracy and Development (MRND), seized power in a military coup. Tutsi exiles in Uganda formed the Rwandan Patriotic Front (RPF), which launched attacks on Rwanda in 1990 in an effort to end Rwandan oppression of the Tutsi minority. Habyarimana declared Tutsis and Hutu sympathizers enemies of the state. The Arusha Peace Accords of 1993 called for democratization and power sharing between Hutus and Tutsis, but Hutu extremists sought to undermine the process and began to form militias.[16]

When Habyarimana's plane was mysteriously shot down in 1994, the extremists seized power and apparently made a considered decision to exterminate the Tutsis.[17] Broadcasts over the MNRD-controlled radio station claimed that the Tutsis were planning to massacre Hutus and urged Hutus to participate in eliminating the "inyenzi" (cockroaches) and their Hutu accomplices. Over the radio, killing was often referred to as "umuganda" (collective work); agricultural terms such as tree felling and bush clearing were also used.[18] The outbreak of violence against Tutsis initially appeared to be spontaneous, but later research has shown that, in the three years leading up to the massacre, the government of this tiny and impoverished country had purchased $112 million worth of small weapons, becoming the third largest importer of arms in Africa. Weapons were freely available and could be purchased cheaply.[19]

Hundreds of thousands of Tutsis and tens of thousands of moderate Hutus were killed over a three-month period. Many were also raped or mutilated. Some Hutus participated willingly in the killings, but those who resisted were threatened with immediate and drastic punishments such as rape or death.[20] Officials who refused to participate were killed, and Hutus who helped Tutsis

[16] United States Holocaust Memorial Museum, "Rwanda Current Situation: 2007." Available at http://www.ushmm.org/conscience/alert/rwanda/contents/02-current/ (accessed November 23, 2007). Alan J. Kuperman, "Rwanda in Retrospect," 79 *Foreign Affairs* (January, 2000), 94–118.

[17] ICTR, *Sentencing of Jean Kamamba* (September 4, 1998). Available at http://69.94.11.53/default.htm (accessed May 2, 2008). United States Holocaust Memorial Museum, "Rwanda: Overview: 2007." Available at http://www.ushmm.org/conscience/alert/rwanda/contents/01-overview/ (accessed May 2, 2008).

[18] Helen M. Hintjens, "Explaining the 1994 Genocide in Rwanda," 37(2) *Journal of Modern African Studies* (1999), 268.

[19] Nelson Alusala, "The Arming of Rwanda and the Genocide," 13(2) *African Security Review* (2004); Paul J. Magnarella, "The Hutu-Tutsi Conflict in Rwanda," Chapter 4, in Santosh C. Saha (ed.), *Perspectives on Contemporary Ethnic Conflict* (Lanham, MD: Lexington Books, 2006).

[20] Ravi Bhavnani, "Ethnic Norms and Interethnic Violence: Accounting for Mass Participation in the Rwandan Genocide," 43(6) *Journal of Peace Research* (2006), 651–69.

were severely punished. Ultimately, the RPF was able to defeat the Hutus, in the process also killing thousands in massacres and summary executions. The RPF seized power and reestablished control by the Tutsis.

The UN was sharply criticized for its failure to take action to prevent the genocide, despite information conveyed to participant governments about what was happening, where the Tutsis were hiding, and what was needed to help.[21] When a decision to intervene was finally made, it took seven weeks for the Pentagon to negotiate a contract for the delivery of armored personnel carriers because of a dispute over "maintenance and spare parts" for the equipment. No help arrived until after the RPF had already won a military victory.[22]

The ICTR, established in Arusha, Tanzania, in 1997, indicted ninety leaders of the Rwandan genocide, including the former Prime Minister, Jean Kambanda, and fourteen other government officials. Seventy-five of those indicted have been arrested. As of 2007, the ICTR had convicted twenty-nine of these persons and acquitted five, at a total monetary cost of about $1.5 billion. Sentences imposed have ranged from five years to life in prison.[23]

The former head of the ICTR, Carla del Ponte, raised the possibility of prosecuting members of the RPF for atrocities committed by their side. It was made clear by the Kagame government, however, that they would stop cooperating (by sending witnesses, etc.) if RPF members were prosecuted.[24]

Another 130,000 persons arrested by the Rwandan government are being tried in local *Gacaca* courts. Approximately 47,000 persons have been convicted and sentenced to community service, sometimes in the form of caring for the orphans of victims or building houses for them.[25] Others have received prison sentences. The use of *Gacaca* courts for genocide trials has been criticized on the basis that these courts, conducted by laypersons, are unsuitable for these serious crimes, and that they do not provide the due process guaranteed

[21] International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events (African Union), *Rwanda: The Preventable Genocide* (1999). Available at http://www.africa-union.org/Official_documents/reports/Report_rowanda_genocide.pdf (accessed May 31, 2009).

[22] Ibid., § 10.16.

[23] ICTR, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, November 20, 2007. Available at http://69.94.11.53/default.htm (accessed April 20, 2008).

[24] Information, Documentation and Training Agency, Arusha (Tanzania), "Carla Del Ponte Tells of Her Attempts to Investigate RPF in Her New Book" (quoting from Del Ponte, *La Caccia: Io e i criminali di Guerra* (Milan: Fetrinelli, 2008)), (April 2, 2008). Available at http://www.hirondelle.org/arusha.nsf/LookupUrlEnglish/6C3CE27C31D9B0FA43257420001CC540?OpenDocument (accessed May 3, 2008).

[25] Human Rights Watch, "Rwanda: Events of 2007." Available at http://hrw.org/englishwr2k8/docs/2008/01/31/rwanda17828.htm (accessed July 21, 2008).

by the African Charter.[26] The courts were traditionally used only for minor local disputes. Another source of dissatisfaction is that war crimes by the RPF do not fall under the jurisdiction of the *Gacaca* courts.[27]

Uganda

The ancestors of Uganda's Acholi peasants moved south from Sudan in the fifteenth century to escape the effects of drought. In the nineteenth century Egyptian traders moved in, seeking slaves and ivory and leaving conflict and destitution in their wake. In the early 1900s, the British took over, disarming peasants in the area and forcibly resettling them. Acholi resistance to laboring on British cotton farms earned them a reputation for militancy, and the British recruited them into the armed forces. People from the region subsequently became part of President Milton Obote's army after independence. Obote turned over control of the army to Idi Amin, who then took power in a coup. Amin hunted down Obote supporters, and many Acholi were massacred.[28] When Obote came back to power after the death of Amin, the Acholi-dominated government in turn carried out the massacre of more than 300,000 National Resistance Army (NRA) supporters in the Luwero Triangle massacre under his direction.[29] When Yoweri Museveni of the NRA came to power in 1986, the Acholi were chased back north, and several rebel groups formed. The government responded repressively, and approximately a million Acholi peasants – almost all of the region's rural population – were forced into internment camps under threat of death. Starvation and disease are rampant in the camps. The original rebel groups were wiped out, but a successor group, the Lord's Resistance Army (LRA), was formed by Joseph Kony, the nephew of former rebel leader Alice Auma Lakwena.[30] In keeping with the mission of Lakwena's group, the Holy Spirit Movement, Kony claims to be a messianic prophet seeking to establish government according to the

[26] Dadimos Haile, *Rwanda's Experiment in People's Courts (Gacaca) and the Tragedy of Unexamined Humanitarianism* (Institute of Development Policy and Management, University of Antwerp: January 2008). Available at http://www.ua.ac.be/objs/00167439.pdf (accessed July 21, 2008).

[27] Alana E. Tiemessen, "After Arusha: Gacaca Justice in Post-Genocide Rwanda," 8(1) *African Studies Quarterly* (Fall 2004), 70. Available at http://www.africa.ufl.edu/asq/v8/v8i1a4.html (accessed May 3, 2008).

[28] Hugo Slim, "War and Peace in North Uganda," in *Katine: It Starts with a Village*, available at http://www.guardian.co.uk/katine/2008/feb/19/background (accessed May 3, 2008).

[29] Phares Mutibwa, *Uganda Since Independence: A Story of Unfulfilled Hopes* (Trenton, NJ: Africa World Press, 1992), 159.

[30] Philip Apuuli Kasaija, "Taking Stock of the First Arrest Warrants of the International Criminal Court," 7(1) *African Journal of Conflict Resolution* (2007), 43–61, 45–6.

Ten Commandments. The LRA routinely kidnaps children, who make up a significant portion of its forces,[31] and is accused of murdering, raping, maiming, and torturing civilians, as well as brutally disciplining its own members. Although Acholi formerly supported the LRA, brutal attacks by the Uganda Peoples Defence Force (UPDF; NRA successor) reduced popular support for the LRA, giving rise to LRA suspicions that they were collaborating with the government. Acholis in the internment camps are now in danger both from LRA attacks and from the government. At least 500,000 have died.[32]

In 2003, Museveni referred crimes against humanity by the LRA to the ICC. Five LRA figures including Kony were indicted by the ICC for crimes against humanity and war crimes, although two of them have since been killed (one at the order of Kony himself).[33] The ICC decided not to act on allegations of atrocities by the UPDF, claiming that LRA atrocities have been much worse.[34] Museveni's government has also made it clear that it will not cooperate with prosecution of the UPDF and has several times threatened to withdraw its cooperation with the ICC.[35] Unfortunately, these indictments may have made it more difficult to end the violence. A peace agreement (the latest of several) has been negotiated, but Kony failed to come forward to sign the final agreement as planned in April 2008, apparently because he is afraid that he will be arrested and sent to the ICC.[36] The rebels earlier demanded withdrawal of the ICC indictments as a precondition to peace talks. Museveni is obligated under the terms of the Rome Statute to cooperate with ICC prosecution, but he appears to be keeping his options open by suggesting that he would set up special courts in Uganda to deal with human rights violations

[31] A recent study used data from returning abductees to estimate that the LRA had abducted 54,000 to 75,000 persons, including 25,000 to 38,000 children, from 1986–2006. Phuong N. Pham, Patrick Vinck and Eric Stover, "The Lord's Resistance Army and Forced Conscription in Northern Uganda," 20(2) *Human Rights Quarterly*, (May 2008), 404–11.

[32] Katherine Southwick, "North Ugandan Conflict, Forgotten But Still Deadly: Unless the World Helps in the Peace Effort, Civil Unrest Could Destabilize the Region and Hamper Progress," *Yale Global On Line*, available at http://yaleglobal.yale.edu/display.article?id=53 (accessed November 23, 2007).

[33] Kony reportedly ordered the killing of Vincent Otti, his second in command, in a power struggle. Henry Mukasa and Els De Temmerman, "How Vincent Otti Was Killed," Diocese of Northern Uganda Web site (December 9, 2007), available at http://dioceseofnorthernuganda.blogspot.com/2007/12/how-vincent-otti-was-killed.html (accessed July 21, 2008).

[34] Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," 21(2) *Ethics & International Affairs* (2007), 188.

[35] Ibid.

[36] Joel Ogwang, "Uganda: Kony Fears That Museveni Will Arrest Him," *New Vision (Kampala)* (April 17, 2008), available at http://allafrica.com/stories/200804180013.html (accessed June 16, 2008).

during the war.[37] There is considerable sentiment in favor of resolving the stalemate by reverting to a traditional form of justice, *mato oput*. This ritual, traditionally used by the Acholi in cases such as homicide, involves the public acknowledgment of wrongdoing by the offender and an offer of compensation to the family. Both sides share a bitter drink to recognize the bitterness of the past and put it behind them.[38] Many Acholis feel that ICC punishment is inappropriate, as reflected in the words of one cultural leader:

> Kony being convicted and taking him to the Hague, that is taking him to heaven. His cell will have air conditioning, a TV, he will be eating chicken, beef. He will be given a chance to work in the jail and earn something. I'd rather he be here and see what he has done. Let him talk to the person he has ordered the lips to be cut off. Let him talk and hear. The Acholi mechanisms must be allowed to run their course first, so that peace can be brought about. Only if at that stage there is a complainant who wants to take Kony to court should legal action be taken.[39]

Although the leader quoted may be wrong about the conditions Kony would enjoy if imprisoned by the ICC (Africans are typically imprisoned in Africa), many Acholis (and others) share the sentiment that acknowledgment of wrongdoing and reconciliation should have priority over retribution.

Summary

Crimes prosecuted by the ICC and predecessor bodies to date are extreme acts of violence committed by large groups of persons, typically under the leadership of dictatorial governments or equally ruthless opposition groups, as a result of ongoing political conflict. These acts resemble acts of war in that they are part and parcel of attempts by their leaders to gain or consolidate political power. They are distinguished from ordinary warfare by their brutality as well as by the nature of the victims, who are usually unarmed persons posing no immediate threat. Atrocities are often perpetrated by both sides, and the memory of past victimization is used to motivate participants. In many of these situations, there is a legacy of colonialism and/or a history of inaction or delay by the UN and Western powers in providing assistance. Because the

[37] Chris McGreal, "Museveni Refuses to Hand Over Rebel Leaders to War Crimes Court," guardian.co.uk (March 13, 2008), available at http://www.guardian.co.uk/world/2008/mar/13/uganda.internationalcrime (accessed July 16, 2008).

[38] Kaisaja, "Taking Stock," 57.

[39] Refugee Law Project, "Peace First, Justice Later: Traditional Justice in Northern Uganda," Working Paper No. 17 (July 2005), available online at http://www.refugeelawproject.org/working_papers/RLP.WP17.pdf (accessed May 31, 2009).

ICC needs the cooperation of the domestic government to mount an effective prosecution, it is normally possible for the group currently holding power to block efforts to prosecute its adherents.

III. PREVENTION

The prevention of crimes is one of the most important goals of punishment, and the importance of preventing these extremely serious crimes is beyond dispute. But this does not immediately compel the conclusion that it is important to punish past perpetrators. First, there is the issue of whether punishment of these offenders will in fact prevent similar crimes in the future, and, if so, how many such crimes it can be expected to prevent, and at what human cost. Second, we must ask whether there is any other way to obtain the same benefits. Finally, there is a question as to whether we are justified in sacrificing the liberty of present offenders to prevent future offenses by others. I leave aside this last question as the theoretical considerations do not vary from the domestic to the international context.

The threat of deterrent punishment seeks to operate on the will of the individual offender at the moment of temptation to commit the crime. It will thus be most effective on persons who are motivated by narrow self-interest rather than see themselves as sacrificing self-interest for broader goals. For the deterrent mechanism to operate, the potential offender must be able to see that there are acceptable alternative courses of action and be able to choose to pursue those alternatives. The punishment threatened must be sufficient to outweigh gains from the crime, including the gains of taking the path of least resistance. In the typical domestic context, criminal laws are reinforced by social sanctions such as disapproval and by widely held moral norms. Most people will refrain from criminal behavior in pursuit of self-interest, regardless of the criminal penalty, because such behavior is deviant and leads to social rejection as well as loss of self-esteem. Those who do commit crimes have often rejected the standards of the larger culture and instead seek recognition from a criminal subgroup. Deterrent punishment seeks to counter the social pressure of the subgroup as well as the motivation of self-interest.

Mass atrocities often occur under a reign of terror by a despotic government or ruthless factions such as the LRA. Where individuals are induced to participate through direct coercion – as many were in Rwanda – it is obvious that the remote threat of humane punishment for participation is unlikely to deter. The child soldiers of the LRA are in no position to choose to risk the immediate danger of brutal discipline in order to avoid the long-term threat of punishment for crimes against humanity. Those who voluntarily participate in these

crimes find themselves in situations in which the social pressure not to harm (some) others has suddenly been removed or, indeed, has been turned into its opposite as pressure from either peers or authorities to target despised others. As Mark Drumbl aptly points out, these participants are better characterized as conformists rather than deviants.[40]

Readers familiar with the obedience research of Stanley Milgram or the Stanford prison experiment conducted by Philip Zimbardo will not be surprised to learn that it is relatively easy for political leaders to manipulate large numbers of people into doing unspeakable things. In Milgram's original experiment, only a handful of subjects refused to obey the commands of the experimenter to apply increasing levels of voltage to another subject, even when the victim appeared to lose consciousness. These individuals were not following their own inclinations; when left to choose the shock levels themselves, all subjects confined themselves to much lower levels. When ordered by a person lacking credible authority status to increase shock levels, few complied; but when the experimenter ordered them to stop and the victim demanded that they continue, none continued.[41] Perceived injustice (where the victim had agreed to the experiment only on condition that he could stop when he wanted) did not significantly affect the willingness of subjects to administer the shocks after the victim protested.[42] Many subjects recognized that they were violating moral norms and asked the experimenter whether they should not stop; but although this perception created evident anxiety for the subjects, it was not enough to cause them to disobey.[43]

Milgram analyzes the situation as follows:

> The most far-reaching consequence of the agentic shift [in which an individual sees himself as carrying out the commands of a legitimate authority] is that a man feels responsible *to* the authority directing him but feels no responsibility *for* the content of the actions that the authority prescribes. Morality does not disappear, but acquires a radically different focus: the subordinate person feels shame or pride depending on how adequately he has performed the actions called for by authority.[44]

Milgram goes on to suggest that subjects continued with the experiment despite verbalizing their perception that it was wrong to do so because of the

[40] Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), 32.

[41] Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Perennial Classics, 2004), 104–5.

[42] Ibid., 66.

[43] Ibid.

[44] Ibid., 151.

social impropriety involved in challenging the experimenter's definition of the social situation:

> The teacher [subject] cannot break off and at the same time protect the authority's definition of his own competence. Thus, the subject fears that if he breaks off, he will appear arrogant, untoward, and rude . . . The entire prospect of turning against the experimental authority, with its attendant disruption of a well-defined social situation, is an embarrassment that many people are unable to face up to.[45]

Thus, it is easy for recognized leaders to secure obedience to morally outrageous orders because their followers attribute responsibility for the wrongdoing to those leaders and limit their own sense of responsibility to doing what is expected of them by the authority.

Not every individual will surrender his better moral judgment under these conditions. Persons most likely to do so are those with an external locus of control, high authority orientation (more often found among those harshly treated as children),[46] lack of education, and narcissistic or fatalistic outlook.[47] Some are motivated by ordinary self-interest – career advancement or immediate material rewards – but this too must be seen against the background of a moral outlook deliberately warped by others. It is not as if these are individuals leading ordinary lives who decide to join the Mafia or take up assassination as a sideline; it is more that they find themselves in a situation in which they will be rewarded for facilitating some disagreeable but necessary task, the nature of which has been determined by others who appear to have the right to make such decisions.

A propensity for obedience alone does not explain either the brutal behavior of many participants in atrocities or their often evident satisfaction in carrying out their tasks. Research has also shown that there is a widespread human tendency to abuse persons under one's control in certain situations. Zimbardo's prison experiment, in which college students selected for their normal psychological profiles were randomly assigned to be "guards" or "prisoners" (in a setting that they knew to be artificial), shows the extraordinary power of situational cues. Within days of the beginning of the experiment, the "guards" began to abuse the "prisoners," forcing them to exercise for hours and to clean

[45] Ibid.

[46] James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (New York: Oxford University Press, 2002), 181–2, citing Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (New York: Cambridge University Press, 1989).

[47] Waller, *Becoming Evil*, 179–81.

toilets with their bare hands. Even more disturbingly, the researcher conducting the experiment became sufficiently enmeshed in the fictional setting to elevate his concerns as the "prison warden" over his experimental goals. The planned two-week experiment was aborted after only six days when an outsider pointed out to Zimbardo how badly both he and the "prison guards" were behaving. It seems that our perception of others as respected equals is more fragile than it ordinarily appears: All too easily, it is displaced by cues signifying threat and otherness, or inferiority and weakness.

Later research has identified specific cultural, situational, and individual factors that precipitate the commission of mass atrocities. On the cultural level, a fatalistic outlook, harsh child-rearing practices, and a culture of compliance with authority induce a greater disposition to comply with orders.[48] All of these cultural factors are found in Rwanda, which is noted for its hierarchical society (both pre- and postgenocide).[49] As Milgram notes, individuals easily displace responsibility onto authority figures. Such figures can enhance this effect by structuring interactions so that there is no opportunity to question the decision (routinization),[50] by euphemistically relabeling wrongful behavior ("ethnic cleansing," "umuganda"), or by demonizing or dehumanizing the targets of violence[51] ("Turks," "cockroaches"). They may also provide rationalizations, such as self-defense or the greater social good. Psychologist Robert Zajonc argues that the development of a "moral imperative" by leaders was a key factor in Rwanda, where vicious rumors about the intentions of the Tutsis and specious arguments about the necessity of killing them were spread over the radio.[52] Similarly, despite Joseph Kony's apparent depravity, the roots of his organization are in a spiritual movement dedicated to the plausibly virtuous aim of overthrowing the repressive Museveni government,[53] and at least the voluntary members of his group no doubt believe this. Indeed, if human psychology did not include such mechanisms, warfare would hardly be possible.

48 Ibid.

59 Waller, *Becoming Evil*, 179, 182.

50 Herbert Kelman and V. Lee Hamilton, *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (New Haven, CT: Yale University Press, 1989).

51 Philip Zimbardo, "A Situationist Perspective on the Psychology of Evil," in Arthur G. Miller, *The Social Psychology of Good and Evil* (New York: Guilford Press, 2004), 32; Kelman and Hamilton, *Crimes of Obedience*, 19, 20, 188–9; Waller, *Becoming Evil*, 184 (citing unpublished work by Robert Sternberg of Yale University).

52 Robert Zajonc argues that the killing was seen as a necessity, Waller, *Becoming Evil*, 187–8. Albert Bandura similarly shows that it was seen as preventing more suffering than it caused. Ibid., 190.

53 Philip Apuuli Kasaija, "Taking Stock of the First Arrest Warrants of the International Criminal Court," 7(1) *African Journal of Conflict Resolution* (2007), 43–61, 45–6.

Even in the absence of authority figures, groups can spontaneously decide to do things that individuals would not. Actual orders may not even be necessary; there are several documented instances in which individuals have voluntarily participated in killing of noncombatants given official encouragement to do so. The members of Hitler's Reserve Police Battalion 101, recruited from retired police officers too old for military service, were given the assignment of killing Jews in Poland, but were told that they were not required to participate. At first only about half of the men participated, but those who initially refused were ridiculed as "unmanly" by others. By the end of the operation, participation had increased over time until 90 percent were doing so.[54] Processes of group potentiation and group polarization mean that people acting in groups do not act on the "average" views of their members; instead, their behavior tends to reflect extremes.[55] Something of this kind may have occurred among Hutus who voluntarily participated in the killing of Tutsis. Group participation can lead to a "fragmentation of conscience," in which no one feels responsible for the group's behavior.[56] A comparable diffusion of responsibility permits inaction where many others are perceived to be in the same position to help.[57] We are familiar with this phenomenon in daily life: Our sense of responsibility is focused on actions that will not get done if we do not personally do them, particularly those actions for which we will be held accountable, and to a lesser degree on collective responsibilities in which we must do our part. Actions that could be taken by any number of other persons do not excite our attention.

It is not realistic to think that the threat of punishment by an international body can counter the psychological, situational, and social pressures that induce individuals to engage in atrocities, even those individuals who do so without being coerced. I do not suggest that human susceptibility to psychological pressure to violate the rights of others makes that behavior excusable any more than one is excused from more ordinary misbehavior by the strong

[54] Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (1992), cited in Zimbardo, "Psychology of Evil," 21, 35.

[55] Waller, *Becoming Evil*, 35–6.

[56] M. Scott Peck, *People of the Lie: The Hope for Healing Human Evil* (New York: Touchstone, 1983), cited in Waller, *Becoming Evil*, 32. See also Zimbardo, "Psychology of Evil," 32. Deindividuation, in the absence of authority figures, "suspends conscience, self-awareness, sense of personal responsibility, obligation, commitment, liability, morality and analyses in terms of cost-benefits of given actions" by 1) reducing cues of social accountability of the actor (anonymity of actor, diffusion of responsibility – shared with others); 2) reducing concerns for self-evaluation of the actor (altering state of consciousness through drugs or intense emotions, projecting responsibility onto others).

[57] Darley and Latané, "Bystander Intervention in Emergencies: Diffusion of Responsibility," 8(4) *Journal of Personality and Social Psychology* (1968), 379.

and often effective temptations of greed and lust, but rather that the threat of punishment is not likely to deter it.

On the other side of the ledger, the advantage of preventing even a small number of international crimes is much greater than the advantage of preventing a similarly small number of domestic crimes. Unfortunately, deterring a small proportion of a population from participating voluntarily will not prevent mass atrocities or even reliably reduce casualties. Leaders may resort to greater use of direct duress or simply broaden their recruiting efforts to make up the difference. If deterrence is to have significant effects, it must operate on the leaders.

The top leadership does, at least, operate relatively autonomously; it does not have to resist social pressure to use these tactics. Again, though, deterrence is plausible only for persons who act out of narrow self-interest. Some of them – Charles Taylor comes to mind – may act simply out of greed and a desire for self-aggrandizement.[58] Unlike the bank robber who acts on similar motives, however, such leaders act publicly and have often already knowingly incurred the murderous wrath of their immediate political enemies. Instigators of genocide are already in the business of taking huge risks to achieve their political goals. The possibility of punishment by an international body increases the risk, but for this increase to tip the balance, it would have to make it impossible, or at least very unlikely, for this type of offender to be able to enjoy the fruits of success. Aspiring dictators would hesitate to achieve their goals through crimes against humanity if they knew they would immediately be deposed if the strategy succeeded. If the international community had the ability to impose such a result, criminal punishment would not be necessary for deterrence. Unfortunately, ensuring that punishment is imposed on such a leader is no less difficult than deposing him. The ICC has no police or other enforcement mechanism and so must rely on nation–states to apprehend suspects. Thus, although the leaders of genocidal enterprises can seldom hope to maintain anonymity, those who gain or keep the positions of power they seek are often able to evade prosecution.

Some leaders responsible for atrocities act for what they see as important political motives – either to carry out an ideological agenda or to preserve the power of a regime. Augusto Pinochet, for example, defended his regime's extensive use of torture as necessary to the stability of his government.[59]

[58] Mark Duffield, "Globalization, Transborder Trade, and War Economies," in Mats R. Berdal and David M. Malone (eds.), *Greed and Grievance: Economic Agendas in Civil Wars* (Boulder, CO: Lynne Rienner Publishers, 2000).

[59] Hugh O'Shaughnessy, *Pinochet: The Politics of Torture* (New York: New York University Press, 2000).

Serbian leaders of the Srebrenica massacre have been variously described as fanatically pursuing "ethnic cleansing" of the area or as seeking vengeance against the Muslims, who had killed several hundred Serbs in the years before the massacre.[60] Such ideologues may be willing to accept personal sacrifice for their political ends. Persons who act for what they see as a cause higher than narrow self-interest, or simply out of blind rage or hatred, are likely to be difficult to deter.

For punishment to be justified on the grounds of deterrence, we need to know not simply whether punishment has some tendency to prevent crime (as presumably it does) but also how much crime it prevents, and at what cost. We are unlikely ever to get any hard evidence for deterrence of international crimes, which are still mercifully rare. If the deterrent effects of domestic punishment were undisputed, we might extrapolate to the international context, but there is surprisingly little empirical evidence for such effects even in the domestic context.[61] If we begin from a relatively weak deterrent effect for punishment generally, it seems that the deterrent effect of international punishment cannot reasonably be expected to outweigh its costs in the face of the strong countervailing pressures on both leaders and minor participants. The social resources used to finance tremendously costly international prosecutions (more than $20 million per trial in Rwanda) might, from a utilitarian point of view, be better spent on efforts to prevent these crimes by other means, or at least to mitigate their effects. Some have argued that early military intervention could have greatly reduced the casualties in Rwanda. At an earlier stage, helping Tutsis and Hutus to mediate their grievances before they exploded into the original violence that drove Tutsis into exile, or even ameliorating the situation of the exiled Tutsis after they were in Uganda, might have prevented the escalation of conflict that led to the genocide. Similarly, it has been argued that efforts to avert the war between Serbs and Bosnians, of which the Srebrenica massacre was a part, could have succeeded if the United States had not consistently urged the Bosnians to reject peace proposals.[62]

IV. EXPRESSIVISM

Much attention has been given to the "expressive" function of international punishment. Certainly, it is important to express condemnation of these

[60] Diana Johnstone, "Swans Commentary: Peter Handke and the Watch Dogs of War," available at http://www.swans.com/library/art12/dianaj03.html (accessed May 3, 2008).

[61] See Golash, *Case Against Punishment,* Chapter 2, "Does Punishment Do More Good than Harm?"

[62] Johnstone, "Watch Dogs of War."

crimes, because they are so serious and because they affect so many people. Surviving victims, devastated by their own injuries and the deaths of many friends and relatives, must be vindicated; we must recognize and acknowledge how seriously they were wronged and show an appropriate level of concern for them. Condemnation by the international community has the potential to be especially powerful, insofar as it can show offenders that the whole world (not just their local enemies) condemns their behavior. Formal acknowledgment of the moral status of the crime is thus seen to be important for victims, offenders, and others.

Beyond simple acknowledgment of the moral status of the overall wrongful behavior, it is important that the story of the atrocities be told, at a level of detail that recognizes every serious harm, and that each part of the story be given its proper place in a shared understanding of how the events unfolded and who was responsible for them. As Mark Osiel argues, individuals who are not prosecuted for their role in these events will often refuse to participate in attempts to construct a shared narrative, thus leaving key issues unresolved and allowing the ill-defined competing narrative (e.g., "they attacked us first") to escape scrutiny.[63] It is not enough to condemn a massacre; we must also characterize its component parts. We must specifically identify the individual participants and show that they are unable either to refute the evidence of their behavior or to give an exculpatory account of it. The higher up the participant, the more important it is to do this. The securing of a detailed and accurate factual record is a precondition for discussion of the significance of the events for the society in which they occurred. Without this record, it will be difficult for the society to move forward in a constructive way. The importance of a properly constructed narrative is directly proportional to the significance of the events in question. Ordinary domestic crimes are significant only for the individuals directly involved. Mass atrocities directly affect far more people and also have far-reaching effects on the society as a whole. In addition, although some events (e.g., the September 11 attacks or the dropping of a nuclear bomb) that kill large numbers of civilians are discrete events that are relatively easy to grasp, many mass atrocities are committed piecemeal over periods of time and require substantial reconstruction to be understood.

To the extent that trials are essential to narrative and understanding, it is thus more important to conduct trials and to condemn the guilty parties for international crimes than for ordinary domestic crimes. It may be possible for these needs to be satisfied through other solemn processes that compel the

[63] Mark Osiel, "Why Prosecute? Critics of Criminal Punishment for Mass Atrocity," 118(22) *Human Rights Quarterly* (2000), 118–47.

presence of the offender and allow both sides to be heard, such as *mato oput*. Even when trials are necessary, though, it is less clear that condemnation must be expressed through punishment.

Punishment may be taken to be an appropriate vehicle both for conveying to offenders that their conduct was wrong and for reinforcing that idea to a wider (in this case worldwide) audience. Where punishment is the conventional vehicle for conveying deep social condemnation, not to punish can be taken as condonation of wrongful behavior. This may not be the case in at least some of the societies where older traditions of compensation and reconciliation (although suppressed by intervening European colonization) still have resonance. It is even less clearly true in the international context, because the convention of punishing international crimes is not yet so deeply ingrained as to imply condonation by its absence. The international community has both used other kinds of formal condemnation and ignored a great deal of seriously wrongful behavior. The ICC specifically has failed to indict victors (such as the RPF in Rwanda and the UPDF in Uganda) for atrocities in many of these cases. It is to be expected that such failures will continue. The resources available to the ICC are too limited to indict massive numbers. Having no police force of its own, it must get the cooperation of sitting governments, which (as we saw in the cases of Serbia and Uganda) are disinclined to provide it when their own side is threatened. Beyond these immediately practical factors, the ICC is highly unlikely ever to act against the nations on which it primarily relies for funding. If punishment is the only or the best way to express condemnation, and the ICC is the only or the best body to express it, then the ICC should impose punishment more widely and uniformly for international crimes. The fact that the ICC is not now, and will not be in the foreseeable future, in a position to punish most violations has detrimental effects on the ability of the punishments it does impose to convey the appropriate message of condemnation. The other side of this coin is that, to the extent that the condemnatory power of punishment is conventional, it is open to the international community, in a way that it is not open to most national governments, to express condemnation in other ways.

A merely verbal expression of condemnation – even if it comes in the form of a UN resolution – may seem insincere and even hypocritical if it is not backed up by action. There is a widespread assumption that this action must be punishment, but preventive intervention, assistance to victims, and orders to make compensation can also show sincerity. To justify the choice of punishment as the action to be taken, it must be shown that punishment carries some meaning that these other actions do not. But, as I argue, the communication made by punishing the offenders who commit these crimes

is more seriously problematic than that made by punishing ordinary domestic offenders.

The nature of the communication that can (arguably) be made by punishment is affected by the source from which it originates, by its intended audience, and by the relationship between the two.

Consider first the idea of conveying the moral condemnation of the international community to the offender. Punishment cannot by itself carry any cognitive message. If offenders understand why they are being punished, it is only because of separate messages (such as conviction) verbally delivered. With the addition of hard treatment, we seek to affect the offender on a visceral level – to get him to change his emotional attachments to values in a positive way. In short, beginning from the assumption that the commission of the crime results from a defect in the offender's moral character, we seek through punishment to change his character by getting him to come to share our evaluation of his conduct and hence to repudiate it. R. A. Duff compares this process to that which occurs when a religious group imposes an involuntary penance on a member who has strayed from the group's values.[64] This can and does happen in the case of children and offenders punished by communities to which they are genuinely attached. The experience of being harshly treated, in virtue of our own behavior, by those whose approval we are anxious to deserve can illuminate the necessity of choosing between our attachment to these persons and our attachment to values antithetical to theirs.

There are two difficulties in applying this model to international punishment. First, the participation of low-level offenders does not necessarily arise from defects of character in the required sense. Second, for both minor and major participants, the required relationship of attachment to the punishing body is seldom present in the case of international crimes.

As argued, persons who participate in mass atrocities act as most people would in their situation. It is true that those with the best moral characters (those least disposed to do wrong) will not participate in massive wrongdoing even when urged to do so by authorities or peers. It does not follow, however, that those who do participate have character defects – rather, it only follows that they do not have ideal moral characters. It is easier to justify punishment for the moral improvement of those who do not live up to the standard that most

[64] R. A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986). Herbert Morris makes a similar argument that does not appeal to a religious analogy in "A Paternalistic Theory of Punishment," 18 *American Philosophical Quarterly* (1981), 263–71.

people can maintain. When unusual stresses have predictably caused people of average moral character to do wrongs that are out of character for them, it is fruitless to seek to improve their moral characters. Low-level participants in atrocities are much more likely than ordinary domestic criminal offenders to fall into this category.

The leaders who set these crimes in motion are much more easily characterized as having character defects that need to be remedied. It may seem absurd to be concerned for the moral characters of the worst abusers, but, as Duff explains, if we are committed to the idea that the rules prohibiting such acts are fair and rational, we have no right to assume that any individual is incapable of ultimately coming to appreciate this. For both Duff and Morris, the importance of the individual's (autonomous) attachment to the good is central. Indeed, the worse the crime, the more compelling the case that we must do our best to convey its wrongness to the resistant perpetrator, who is so far separated from the good that he cannot see this for himself.

It remains true, however, that the perceived enemies of offenders are not in a position to make this kind of communication effectively. For offenders to take the unwelcome message of the wrongfulness of their conduct to heart, they must see it as coming from a person or group to which they are emotionally attached.

Large and loosely knit societies, such as the United States, are not likely to find much attachment to the larger society among typical marginalized offenders. This is true to an even greater degree of the offender punished by a loosely defined international community, particularly where those imposing judgment do so in foreign forms. To the extent that offenders are faced with a choice between their own value attachments and attachments to those they see as punishing them, they will readily choose the former.

Because international crimes typically take place in the context of fierce political struggle, it is easier for the perpetrators of these crimes and their allies to interpret their punishment as political victimization than it is for ordinary domestic offenders to do so. And whereas it is often possible for domestic offenders to interpret their punishment as victimization by more powerful social groups ("The Man"), it is even easier for offenders against international law in postcolonial nations to see their punishment as the continuation of a history of Western colonialism and oppression.

For punishment to have any possibility of carrying the desired message, offenders must first see the punishing body as both legitimate and morally authoritative. As Hegel perceptively notes, the principal difference between revenge and punishment that "annuls the crime" is the position of the state

as moral arbiter.[65] Before the state is established, individuals who impose even just retribution on their enemies will be taken by those enemies simply to have engaged in the same kind of transgression as they did originally – which reaffirms the acceptability of such behavior rather than undermining it. As among children, getting smacked back by a peer may indicate that it is imprudent to strike him, but not that it is wrong.

A domestic government may be in a better position to send the desired message to the offender in that such a government will have a history of responding to crimes with punishment, so that its punishments are more likely to be understood as condemnation rather than revenge. As well, it is the group with which the offender most closely identifies that is in the best position to send a message of condemnation that will be understood and potentially accepted as such. This is the strength of traditional procedures specific to the group with which the offender identifies: LRA leaders, if they can be reached at all, will more likely be reached by a message perceived as coming from their Acholi allies than from their UPDF enemies.

Where members of the group are widely implicated in violations of human rights, it is unlikely that the group will engage in what is essentially self-condemnation. The Serbian government and population, for example, remain protective of Serbians indicted by the ICTY. Where the national government is dominated by an opposing faction, as in Rwanda and Uganda, however, it may be in an even weaker position than an international body to convey the desired message. It is all too likely that the message received in such cases, both by those punished and by their allies, will be one of vengeance rather than of justice.

Perhaps, though, we should be more concerned with the message sent to the rest of the world than with that sent to the offender. (I leave aside here the question of whether it is appropriate to use offenders to convey messages to others, as the issue is the same in both domestic and international contexts.) Certainly, it is important to condemn the behavior of these offenders and to do so in the strongest possible terms. To the extent that punishment draws for its expressive function upon an established convention, however, the justification for international punishment as a way of sending a message of condemnation is weaker than in contexts in which punishment is widely viewed as the only way in which strong condemnation can be expressed. Although this is true for most domestic offenses, it is not (yet) true of international crimes. To the extent that the message of condemnation can be sent in other ways, the

[65] G. W. F. Hegel, *Philosophy of Right*, T.M. Knox, trans. (New York: Oxford University Press, 1967), 66.

justification for using punishment to do so (and for establishing punishment as the conventional way to do so) is weakened.

The failure of a national government to impose punishment for international crimes will more likely invite the interpretation that the government condones those crimes. But the imposition of punishment on the political enemies of the government will invite the interpretation, by both allies and enemies, that it is a continuation of warfare. The message of condemnation will come through most clearly where the government punishes adherents of its own political party for their participation in atrocities. But this message is mixed as well: A political group that gains power through atrocities and then punishes those who committed them is likely to appear hypocritical. For such a government to show that it truly disavowed the atrocities, it would have to renounce the power gained through them.

I have argued that, despite the greater seriousness of international crimes and the consequent greater importance of preventing and condemning them, the imposition of punishment on perpetrators of these crimes is harder to justify either in terms of preventing similar crimes or in terms of expressing condemnation of these crimes than is the punishment of ordinary criminal offenders. These difficulties flow from the historical and political contexts in which these crimes occur, as well as from the morally ambiguous status of those imposing punishment.

11 Political Reconciliation and International Criminal Trials

Colleen Murphy

I. INTRODUCTION

My focus in this chapter is on the role of the international community, and of international criminal trials specifically,[1] in the promotion of political reconciliation within transitional societies. The concept of reconciliation refers to the process of repairing damaged relationships.[2] Political reconciliation focuses on the characteristically impersonal relations among members of a political society. Transitional societies are those aspiring to democratize or, more minimally, establish peace after a recent period of repressive rule or civil conflict, characterized by systematic human rights abuses. Examples of recent transitional societies include Iraq, Afghanistan, and Rwanda.

An inquiry into the role of international criminal trials in promoting political reconciliation may seem unpromising. The operations of some hybrid

[1] In this chapter, international criminal trials are understood broadly to include ad hoc international tribunals, the permanent International Criminal Court (ICC), as well as hybrid tribunals operating in domestic contexts.

[2] This understanding of the concept can be found in the work of John Roth, "Useless Experience: Its Significance for Reconciliation after Auschwitz," in David Patterson and John K. Roth (eds.), *After-Words: Post Holocaust Struggles with Forgiveness, Reconciliation, Justice* (Seattle: University of Washington Press, 2004), 86; Daniel Philpott, "Introduction," in Daniel Philpott (ed.), *The Politics of Past Evil: Religion, Reconciliation, and the Dilemmas of Transitional Justice* (Notre Dame: University of Notre Dame Press, 2006), 14; and Trudy Govier and Wilhelm Verwoerd, "Trust and the Problem of National Reconciliation," 32(2) *Philosophy of the Social Sciences* (2002), 178–205. This is the second sense of reconciliation that Paul M. Hughes identifies in his "Moral Atrocity and Political Reconciliation: A Preliminary Analysis," 15(1) *International Journal of Applied Philosophy* (2001), 123–35.

An earlier version of this chapter was presented at the International Association for Philosophy of Law and Social Philosophy (IVR) World Congress in Krakow, Poland, as part of a panel on "International Criminal Trials." I am very grateful to Larry May for inviting me to participate in that panel and for the helpful feedback I received. I would also like to thank Kathleen Murphy, Susanne Sreedhar, Nancy Lawrence, Cyndy Brown, and Paolo Gardoni for their valuable comments on previous drafts.

and international criminal tribunals are hampered by insufficient financial resources, lack of international personnel familiar with local cultures and languages, hostility to international personnel in certain transitional contexts, and rejection of the legitimacy of such tribunals. Such limitations call into question the ability of international trials to prosecute and successfully convict perpetrators and counter impunity. They also seemingly strengthen skepticism about the ability of such trials to promote reconciliation.

One objective of this chapter is to temper such skepticism. My thesis is that international criminal trials can contribute to political reconciliation by fostering the social conditions required for law's efficacy. This chapter builds on previous work in which I argue that the cultivation of mutual respect for the rule of law is a constitutive part of the process of political reconciliation.[3] The (re-)establishment of mutual respect for the rule of law is an important part of the process of repair because relationships structured by law realize three important moral values: agency, reciprocity, and justice. The absence or erosion of the rule of law damages relationships by undermining these values and by cultivating distrust, resentment, and a sense of betrayal among citizens.[4]

This chapter departs from prominent themes in contemporary discussions of international criminal trials and political reconciliation in two respects. First, I focus on the character of the international criminal trials process, rather than defending or challenging the contributions of international criminal trials to justice, deterrence, or ending the historic impunity enjoyed by perpetrators of human rights abuses.[5] Second, because my interest is in the

[3] See my "Reconciliation, the Rule of Law, and Genocide," *The European Legacy* (forthcoming); "Reconciliation, the Rule of Law, and Post-traumatic Stress Disorder," in Nancy Nyquist Potter (ed.), *Trauma, Truth, and Reconciliation: Healing Damaged Relationships* (Oxford: Oxford University Press, 2006), 83–110; and "Lon Fuller and the Moral Value of the Rule of Law," 24 *Law and Philosophy* (2005), 239–62.

[4] My claim is not that establishment of mutual respect for the rule of law is sufficient for reconciliation, nor that undermining or the absence of a legal system is the only source of damage to political relationships during civil conflict or repressive rule.

[5] For a discussion of general justifications of international criminal trials, see Naomi Roht-Arriaza, *Impunity and Human Rights: International Law Practice* (New York: Oxford University Press, 1995); Jaime Malamud-Goti, "Transitional Governments in the Breach: Why Punish State Criminals?" 12(1) *Human Rights Quarterly* (1990), 1–16; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998); Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, DC: United States Institute of Peace Press, 1995); M. Cherif Bassiouni, "Searching for Peace and Achieving Justice," 59(4) *Law and Contemporary Problems* (1996), 9–28; and Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Crown Publishing Group, 1998). Nancy Combs questions whether international criminal trials, as currently structured, are effective in ending the legacy of impunity in her *Guilty Pleas in International Criminal Law* (Stanford, CA: Stanford University Press, 2007).

conduct of criminal trials rather than their outcome, I do not address the question of the compatibility between criminal trials, retributive justice, and reconciliation.[6] Instead, I emphasize what I take to be subtler, more easily overlooked contributions of international criminal tribunals to political reconciliation.[7]

The first of the four sections in this chapter explains the social conditions on which law's efficacy depends, drawing on the insights of legal philosopher Lon Fuller. The second highlights the absence of these conditions in societies in conflict or under repressive rule. The third shows how international criminal trials can promote reconciliation by cultivating the social conditions on which law depends. I also discuss the circumstances that must be in place for these contributions to be realized in practice. The fourth considers three objections to my analysis.

II. SOCIAL CONDITIONS OF LAW

My focus in this section is the social and moral conditions required for a system of legal rules to regulate the behavior of citizens and officials in practice. My aim is expository and constructive, namely, to articulate Fuller's argument for the necessity of four conditions.[8] These conditions are ongoing cooperative interaction between citizens and officials, systematic congruence

[6] For a discussion of this relationship, see Ruti Teitel, "Bringing the Messiah through Law," in Carla Hesse and Robert Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999), 177–93.

[7] Analyses that focus on other potential contributions of trials to reconciliation include Larry May, "Reconciliation, Criminal Trials, and Genocide," Chapter 13 in his *Genocide: A Normative Account* (Cambridge University Press, forthcoming); Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Piscataway, NJ: Transaction Publishers, 1999); Michel Feher, "Terms of Reconciliation," in Carla Hesse and Robert Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999), 325–339; and Julie Mertus, "Only a War Crimes Tribunal: Triumph of the International Community, Pain of the Survivors," in Belinda Cooper (ed.), *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999). Challenges to these accounts of the contributions of trials to political reconciliation include Teitel, "Bringing the Messiah through Law," and Laurel Fletcher and Harvey Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation," 24 *Human Rights Quarterly* (2002), 573–639.

[8] Fuller never systematically argued for these general conditions, although references to them occur throughout his writings. My reconstruction of Fuller's argument draws on his work and on Gerald Postema's discussion of Fuller on implicit law. See Gerald Postema, "Implicit Law," 13 *Law and Philosophy* (1994), 361–87; Lon Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969); Lon Fuller, *Anatomy of the Law* (Westport, CT: Greenwood Press Publishers, 1968); and Lon Fuller, "Human Interaction and the Law," in Kenneth Winston (ed.), *The Principles of Social Order: Selected Essays of Lon F. Fuller*, rev. ed. (Portland, OR: Hart Publishing, 2001), 231–66.

between law and informal social practices, legal decency and good judgment, and faith in law. The first condition, ongoing cooperative interaction, is the most fundamental. The second, third, and fourth conditions facilitate ongoing cooperative interaction and ensure that it is of the kind necessary for law to function as it should.

Typically, in stable social contexts the presence of each of these four social conditions is assumed or taken for granted. However, as I discuss in greater detail in the next section, these conditions are characteristically undermined or absent during periods of repressive rule or civil conflict. Appreciating the role of these social conditions in cultivating or maintaining a system of legal rules that regulate the behavior of citizens and officials in practice is thus critical for understanding what processes of reconciliation must address if political relationships in transitional societies are to be repaired.

Law refers to "the enterprise of subjecting human conduct to the governance of rules."[9] To understand the social conditions required for law to be effective, it is important first to discuss law's central task. Law's primary function is, in the words of Fuller, to maintain "a sound and stable framework (or baselines) for self-directed action and interaction."[10] There are three senses in which the action and interaction structured by law are self-directed.[11] First, law influences behavior by providing reasons for choosing specific courses of action, rather than psychologically manipulating or altering the social conditions for action. Agents choose whether to act on these reasons. Second, legal rules specify general norms, which agents follow by interpreting and applying to their situation. Action governed by law is self-directed because citizens discover in a general rule a reason for acting in a specific way. Finally, the framework of law enables citizens to pursue their goals and plans. Individuals pursue their goals in a social context where they interact with others. To pursue their goals successfully, individuals must be able to formulate reliable and stable mutual expectations of how others will behave. Such expectations enable individuals to anticipate how others will respond to different actions.

The ability of law to provide general and shared baselines for interaction depends on ongoing cooperative interaction among citizens and officials.[12] The norms of law must be common, public norms if they are to provide shared baselines. Cultivating shared, public understandings requires officials and citizens to consider how others are likely to interpret and determine the practical import of general norms. Citizens must consider how officials are likely to

[9] On this point, see Fuller, *The Morality of Law*, 130.

[10] Fuller, *The Morality of Law*, 210.

[11] See Postema, "Implicit Law," for a complete discussion of these first two conditions.

[12] See Fuller, "Human Interaction and the Law," 234–5, and *The Morality of Law*, 206–20.

understand this practical import to be confident that their interpretation of which actions are prohibited or permitted coincides with the interpretation of officials and other citizens. Similarly, officials must consider how citizens are likely to understand legal rules when determining the practical import of general legal norms. The substantive aims of law are undermined if officials' interpretation of the law does not roughly coincide with the understanding of citizens. When citizens and officials can be confident that they share the same understanding, the ability of citizens to successfully pursue their goals and lead self-directed lives is enhanced; they are in a very real sense able to determine what kind of treatment their actions are likely to receive. When there is no congruence, officials dictate the meaning of law instead of facilitating self-directed interaction.

The required ongoing cooperative effort also entails willingness on the part of officials and citizens to comply with such rules and, as such, be governed by law. Citizens generally must fulfill the expectation of officials and fellow citizens that the law will influence their deliberations and determine which actions they choose. Officials must judge and respond to the conduct of citizens in accordance with declared rules.[13] Implicit in governance by law is the commitment of the government to the citizen that law in fact specifies the standard of conduct that citizens are expected to obey and to which they will be held.

If and when there is an absence of the willingness to comply with law, then the efforts of citizens and officials become futile. As Fuller writes, "A gross failure in the realization of either of these anticipations – of government toward citizen and of citizen toward government – can have the result that the most carefully drafted code will fail to become a functioning system of law."[14] Equally significant, the incentive or willingness of citizens and officials to comply with the law is responsive to the actions of others. To the extent that others refuse to restrict their actions, the corresponding willingness of others will decline. As Fuller writes, "If the citizen knew in advance that in dealing with him government would pay no attention to its own declared rules, he would have little incentive to abide by them. The publication of rules carries with it the 'social meaning' that the rulemaker will himself abide by his own rules."[15]

The second social condition is systematic congruence between informal practices and the law, which facilitates the ability of citizens and officials to understand how others will interpret and apply general rules. Individuals determine the practical import of a general legal norm, what it requires in

[13] Fuller, *Anatomy of the Law*, 9.
[14] Fuller, "Human Interaction and the Law," 255.
[15] Fuller, *The Morality of Law*, 217.

specific situations, by imagining acting on it. This imaginative exercise draws on knowledge of one's social context and practices.[16] To illustrate, consider Fuller's example of a statute that makes it a "misdemeanor to bring any 'vehicle' within the park area."[17] Determining which objects are permitted or prohibited by this statute, and thus the statute's practical import, depends on knowing the social function played by parks as an institution. This social function may differ in various social contexts, leading to corresponding different understandings of what constitutes a vehicle for purposes of the statute. What is permissible to bring to a park will differ if a park functions as a place of quiet versus as a place for social gathering and "enjoyment."

When a norm has no connection with social practices, it can become more difficult to determine its practical import and to be confident that one's interpretation will be congruent with the interpretation of other citizens and lawmaking and law-enforcing officials. A likely result is that individuals will become "dependent on what officials and formal institutions do," rather than on their own understanding.[18] In addition, laws disconnected from a given social context are more likely to seem unreasonable or arbitrary, which may lead to outright evasion of the law.[19]

Third, law's efficacy depends on legal decency and good judgment among lawmaking and law-enforcing officials. Maintaining law is a practical art[20] that "depends upon repeated acts of human judgment at every level of the system."[21] The required legal decency consists of an understanding of and appreciation for the distinctive way that officials govern when they govern by law.[22] When officials govern by law, they are responsible for providing and maintaining shared baselines for interaction. This is fundamentally different than using political power to eliminate enemies or rivals or viewing legal power as a tool to control citizens and other officials. Legal decency also includes a respect for the implicit limitations on official action that law entails. For law to successfully provide baselines for interaction that citizens have a genuine opportunity to follow, legal rules must take a specific form. The requirements of the rule of law specify the form that rules should take and must be systematically respected for legal rules to be able to govern the conduct of citizens

[16] It becomes clear from social context, Fuller writes, that, for example, a ten-ton truck is excluded but a baby carriage is not, although both fall under the dictionary definition of "that in or on which a person or thing is or may be carried." *Anatomy of the Law*, 58.

[17] Fuller, *Anatomy of the Law*, 58.

[18] Postema, "Implicit Law," 265.

[19] Kenneth Winston makes this point when introducing Fuller's essay "Human Interaction and the Law." See p. 231 of his *The Principles of Social Order: Selected Essays of Lon F. Fuller*, rev. ed. (Portland: Hart Publishing, 2001).

[20] See Fuller, *The Morality of Law*, 91.

[21] Fuller, *Anatomy of the Law*, 39.

[22] Ibid., 65.

and officials in practice. The lawmaking and law-enforcing process should be constrained by these requirements.

In *The Morality of Law*, Fuller discusses at length the eight requirements of the rule of law, which include clarity, promulgation, prospectivity, and congruence between official action and the law. Each of these captures implicit expectations made within contexts where officials govern by law. Fuller writes, for example: "Every exercise of lawmaking function is accompanied by certain tacit assumptions, or implicit expectations, about the kind of product that will emerge from the legislator's efforts and the form he will give to the product . . . [T]here is implicit in the very notion of a law the assumption that its contents will, in some manner or other, be made accessible to the citizen so that he will have some chance to know what it says and be able to obey it."[23] Law cannot provide shared baselines for interaction if the baselines themselves are kept secret and remain unknown to citizens.[24] The eighth desideratum requires that there be congruence between official action and the law. Fuller discusses various procedural mechanisms, such as the right to representation by counsel, the right to cross-examine witnesses, the right to appeal a decision, and the right to habeas corpus, that are designed to maintain such congruence. He also lists factors such as "bribery, prejudice, indifference, stupidity, and the drive toward personal power," which can destroy or impair congruence by undermining legal decency.[25]

Good judgment, as well as decency, by officials is required because there is no simple formula that lawmakers can follow to maintain a system of rules that respect the requirements of the rule of law and that effectively govern the behavior of citizens and officials in practice.[26] For example, adherence to the requirements may at times undermine legality, and violations of requirements of the rule of law may promote the purpose of law. To illustrate the former point, Fuller writes: "Suppose the absurd situation of a government that has only one law in the books: 'Do right and avoid evil.' In this case a rule is general, but general in a way that thoroughly undermines legality."[27] In contrast, in certain situations retrospective legislation may be appropriate and not inimical to the rule of law. Fuller illustrates this point by drawing on an example of a statute in New Hampshire that required the performer of a

[23] Ibid., 61.

[24] Similarly, declared rules that are systematically unclear or vague will not be able to provide the relevant guidance for citizens and officials. This problem with vagueness is why it makes sense, Fuller writes, to consider due process guarantees violated when a law is so vague that it is not clear what law it prohibits or permits. Fuller, *The Morality of Law*, 102.

[25] Ibid., 81.

[26] Fuller's most extended discussion of this condition occurs in *Anatomy of the Law*, 13–39.

[27] Fuller, "Human Interaction and the Law," 256.

marriage to fill out a form within five days of the marriage ceremony. The state printing press burned down after the legislature adjourned, leaving no legal way to repeal or postpone the date that the statute became effective. A retroactive statute provided a way of validating performed marriages until the legislature resumed session, which would otherwise have been invalid.

Recognition of the fact that certain instances may permit violation of the requirements of the rule of law opens the door to potential corruption and abuse. Decency and good judgment are required to understand when and why it is appropriate to violate the requirements of the rule of law. The use of retroactive legislation can be deeply problematic and inimical to the rule of law, as Hitler's use of retroactive legislation following the Roehm purge vividly demonstrates. In 1934, after deciding that certain "dissident" members of the Nazi Party posed a threat and needed to be eliminated, Hitler went to Munich where he and his followers shot and killed seventy individuals deemed threatening. Afterward, Hitler demanded that legislation be passed stating that "he had acted as 'the supreme judicial power of the German people.' The fact that he had not lawfully been appointed to any such office, and that no trial had ever been held of the condemned men – these 'irregularities of form' were promptly rectified by a statute retrospectively converting the shootings into lawful executions."[28]

The fourth social condition is faith in the law among citizens. Fuller writes, "Normally, and by and large, the citizen must of necessity accept on faith that his government is playing the game of law fairly," by, for example, formulating clear, general rules that are actually respected and enforced in practice.[29] Fuller never explicitly explains why such faith is necessary. Presumably, faith is required in part because a chronic suspicion of government officials and continual checking up on government actions would lead to paralysis, instead of self-directed action and interaction, at the individual or at the societal level. Similarly, the willingness of citizens to follow the requirements, and thus the ability of law to provide an effective framework for interaction, depends on citizens having a certain degree of faith in legal procedures. Such faith is not inviolable, nor does Fuller claim that citizens should maintain their faith in the law regardless of revelations of how government officials are acting in practice. As Fuller notes, "Precisely because this faith plays so important a role in the functioning of a legal system, a single dramatic disappointment of it, or a less conspicuous but persistent disregard for legality over a whole branch of law, can undermine the moral foundations of a legal order, both for

[28] Fuller's most extended discussion of this condition occurs in *Anatomy of the Law*, 64.
[29] Fuller, "Human Interaction and the Law," 255.

those subject to it and for those who administer it."[30] Indeed, the clear abuse of or indifference to the requirements can undermine the faith of citizens and lead to a subsequent erosion of the willingness among citizens or officials to maintain this kind of social order. The faith required is not identical to blind obedience or no oversight on the part of citizens. Thus, Fuller's recognition of the importance of faith does not imply that citizens are expected or required to disregard or be indifferent to what government officials are doing.

III. ABSENCE OF SOCIAL AND MORAL CONDITIONS IN TRANSITIONAL CONTEXTS

In societies in conflict or under repressive rule, declared legal rules frequently do not govern the behavior of officials and citizens in practice, and the social conditions required for law to be effective are absent or undermined.[31] In this section, I illustrate the absence of the four social conditions described in the previous section, using concrete, historical examples.[32] The absence of such conditions is significant because it negatively impacts the prospects for reconciliation, understood as the (re-)building of a mutual commitment among citizens and officials to respect the rule of law. It is in fostering the social conditions for law's efficacy, I suggest in the next section, that international criminal trials can contribute to reconciliation.

Let us first consider Argentina. Legal scholar and politician Carlos Nino, who was actively involved in the transition to democracy and the efforts to deal with the legacy of human rights abuses, eloquently captures the absence of the cooperative interaction at the heart of law in his native Argentina in his discussion of anomie, "a disregard for social norms, including the law."[33] In Nino's view, anomie contributed to the conduct of the military junta from 1976

[30] Fuller, "Human Interaction and the Law," 255.

[31] For a detailed description of the absence of these conditions prior to a transition away from conflict and repressive rule, see Paul van Zyl, "Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies," in Charles Villa-Vicencio and Wilhelm Verwoerd (eds.), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (Cape Town: University of Cape Town Press, 2000), 42–57; Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," 52(2) *Journal of Interational Affairs* (Spring 1999), 647–7; Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," 78 *California Law Review* (1990), 451–13; and Truth and Reconciliation Commission of South Africa, *Volume 4: Truth and Reconciliation Commission of South Africa Report* (London: MacMillan Reference Limited, 1999).

[32] These examples serve illustrative purposes. I recognize that the extent of the impairment of the functioning of the law, as well as the depth and pervasiveness of the erosion or absence of four social conditions, varies in different transitional contexts.

[33] Carlos Nino, *Radical Evil on Trial* (New Haven, CT: Yale University Press, 1996), 47–8.

through 1983. Nino traces anomie to the colonial period "when local officials frequently proclaimed: 'Here the law is respected, but not obeyed.'"[34] Other examples of official anomie include the recurrent use of the coup d'état and "unconstitutional mechanisms" to first acquire and then increase political power. Courts facilitated anomie by recognizing the legitimacy of coups d'état rather than checking the illegal and extralegal exercise of political power. In Nino's words, "Argentine judges have developed the doctrine of de facto laws to legitimate laws enacted by the military governments."[35] A robust black market, extensive tax evasion, smuggling, and bribery illustrate the systematic disregard for law by citizens. Consequently, "everyone would be better off if the laws were obeyed, but no single individual is motivated to do so."[36]

This absence of ongoing cooperative effort was coupled with an erosion of legal decency and judgment, vividly displayed in the systematic, unofficial disappearing of citizens.[37] Disappearing citizens are first abducted by agents of the state or those acting at the request of the state, and then often tortured and killed. They "disappear" in the sense that the state refuses to acknowledge that the abduction occurred or provide information on the abductees' whereabouts. In response to allegations of disappearances, governments typically deny that a crime has occurred at all, let alone a crime for which they are responsible. Sadly, the practice of disappearing, as well as the use of death squads, is not unique to Argentina. Uruguay, El Salvador, Guatemala, Sri Lanka, South Africa, Ethiopia, and Cambodia are just some of the countries that have disappeared citizens or operated death squads during periods of civil conflict or repressive rule.[38] Death squads kill individuals at the request of the state, which in turn denies responsibility. However, the location of the body does not remain unknown but is normally "deliberately left where it can be found."[39] Responsibility for such deaths is frequently laid at the door of individuals not associated with, or in conflict with, a regime.

In both substance and impact, the occurrence of disappearing citizens is incompatible with the overall purpose of law. First, it constitutes a rejection of the implicit commitment of a government that rules by law to hold citizens to the standards expressed by declared rules. Governments "render meaningless legal discourse" when they deny that any crime occurred or deny responsibility for crimes that are discovered. Cases of "disappearing individuals" enable a government to avoid responsibility for its actions and frustrate the ability

[34] Nino, *Radical Evil on Trial*, 47–8.
[35] Ibid.
[36] Ibid.
[37] Disappearing also displays a lack of more general decency.
[38] Roht-Arriaza, "State Responsibility to Investigate," 451–5.
[39] These definitions draw on those provided in Roht-Arriaza, "State Responsibility to Investigate."

of citizens to determine the justifiability of government actions. Second, as Roht-Arriaza discusses, the function of such activities is to frighten citizens into impotence by terrorizing "broad sections of the population, who live with the uncertainty of not knowing whether their relatives, neighbors, or co-workers are dead or alive . . . The terror and uncertainty create a chilling effect on political activity in general."[40] The use of terror provides evidence of the lack of respect for what the requirements of the rule of law mandate. A government that resorts to terror creates a climate of instability and fear, where citizens cannot turn to declared rules or rely on their interpretation of them to develop stable expectations about what official treatment or response to their actions is likely to be. The absence of due process, indeed *any* legal process, undermines conditions crucial for realizing congruence and constitutes a refusal by government officials to be constrained in their actions by what the law permits or prohibits. Disappearing is "clearly illegal under international law, as well as under the domestic law of every country prohibiting murder and kidnapping."[41] The lengths to which officials go to deny responsibility for such disappearances are evidence of their illegality.

Government officials in transitional societies also often lack the judgment and competence required to maintain a system of law. Legal scholar Paul van Zyl writes that newly established governments "inherit . . . criminal justice systems that are practically inoperative."[42] Even when committed to the rule of law, officials may lack the knowledge of what respect for due process entails or may construct a legal system in which appropriate due process guarantees are not included. As van Zyl writes: "In certain countries, criminal justice systems were created in a climate of oppression and human rights abuses. Law enforcement personnel were trained and authorized to employ methods of evidence-gathering, prosecuting and adjudicating that would be impermissible in a constitutional democracy."[43] In South Africa during apartheid, the police regularly used torture to extract confessions, which consequently rendered them unprepared to deal with crime using more difficult but legitimate methods of gathering evidence.[44] This lack of preparation is confirmed by the "collapse in the capacity of the police to investigate and arrest, attorneys general to prosecute, judges to convict and correctional facilities to imprison . . . The South African police have an extremely small number of poorly trained detectives. In certain jurisdictions more than a third of prosecutorial posts are empty

[40] Roht-Arriaza, "State Responsibility to Investigate," 451–5.
[41] Ibid., 456.
[42] Paul van Zyl, "Justice Without Punishment," 44.
[43] Ibid.
[44] Ibid.

and cannot be filled."[45] The retraining of the police may thus be necessary in transitional contexts.

Given the absence of the cooperative effort required to maintain law, incongruence between informal practices and declared rules, and erosion of decency and judgment among officials, it is not surprising that citizens living in societies emerging from a period of repressive rule or civil conflict often have little faith in law. Even in contexts where the erosion of the social conditions required for law is not as dramatic or pervasive as in the contexts described, the faith in law of citizens can be undermined nonetheless. Consider Northern Ireland. Historically, there has been deep distrust among the predominantly Catholic nationalists of the Royal Ulster Constabulary (RUC), the police force in Northern Ireland from 1922 through 2001.[46] Reforming the police force was one of the primary commitments of the United Kingdom in the most recent peace agreement, and remains an important condition for the long-term success of that agreement. Evidence of the distrust includes the historically low level of participation by Catholics in the police force. At the time of the Northern Ireland Agreement, cultural Catholics composed 43 percent of the population, but only 7.5 percent of the RUC personnel.[47] Other indications include fear of the RUC, hostility toward their presence, and a refusal to cooperate in police investigations.[48]

Sources of the distrust of and lack of faith in the police among the largely Catholic, nationalist population include unlawful state-sanctioned killing by police and collusion between the police and paramilitary organizations.[49] Such events, but equally importantly the nonrepresentative composition of the police, contributed to the perception of partiality. In the words of political scientists John McGarry and Brendan O'Leary, experts on Northern Ireland: "A police service composed primarily of recruits from the dominant ethnic or national group will not be seen as impartial by members of excluded groups, irrespective of the behaviour of police officers. Such a service is also unlikely to be impartial in practice, as its officers are more likely to reflect the

45 Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," 52(2) *Journal of International Affairs* (Spring 1999), 647–67.

46 The RUC was assimilated in 2001 into the newly constituted Police Service of Northern Ireland.

47 John McGarry and Brendan O'Leary, *Policing Northern Ireland: Proposals for a New Start* (Belfast: Blackstaff Press, 1999). Available at http://cain.ulst.ac.uk/issues/police/docs/mcgarry99.htm (accessed on September 11, 2007).

48 McGarry and O'Leary, *Policing Northern Ireland*.

49 John McGarry and Brendan O'Leary, "Stabilising Northern Ireland's Agreement," *The Political Quarterly* (2004), 213–25, on 217. See also Fionnuala Ni Aolain, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Belfast: Blackstaff Press, 2000).

values of their own community of origin, and not those of others."[50] Increasing a representative police force will "increase nationalist confidence that the police service(s) represent(s) everybody. It will erode the partisan unionist culture."

IV. THE CONTRIBUTION OF INTERNATIONAL CRIMINAL TRIALS

Transitional societies aspire to foster political reconciliation or to repair damaged political relationships. An important component of this process is (re-)building a system of shared legal rules to regulate the behavior of citizens and officials in practice. The general lesson from the Fullerian analysis in Section II is that the cultivation of law depends not simply on drafting and ratifying a constitution that specifies protected rights. In addition, the social conditions of law need to be cultivated. The characteristic absence of these conditions in transitional contexts constitutes an obstacle to the (re-)building and repairing of social relationships predicated on mutual respect for and shaped by the law in practice. Thus, processes of reconciliation should address, at least in part, and attempt to promote the cooperative interaction, decency, good judgment, and faith in the law that enable self-directed interaction to flourish.[51]

Understanding how to cultivate each of these social conditions of law requires both theoretical and empirical knowledge.[52] Theoretical analysis of the function and defining characteristics of social processes (e.g., criminal trials, truth commissions, reparations) can shed light on connections between such processes and the goals of and preconditions for reconciliation. Empirical studies can then provide important information about the circumstances that are conducive to or inimical for the achievement of the function of social processes like law. Such information can provide guidance in terms of whether, for example, international criminal trials are likely to realize their potential contribution to reconciliation in specific transitional contexts.

In this section, I first offer a theoretical argument to support the claim that international criminal trials contribute to reconciliation by cultivating legal decency and good judgment among officials and encouraging faith in law

[50] McGarry and O'Leary, *Policing Northern Ireland*. Other important studies of the police in Northern Ireland include John Brewer, Adrian Guelke, Ian Hume, et al., *The Police, Public Order, and the State: Policing in Great Britain, Northern Ireland, the Irish Republic, the United States, Israel, South Africa, China* (New York: St. Martin's Press, 1988), 12, and John Brewer, *Inside the RUC; Routine Policing in a Divided Society* (Oxford: Oxford University Press, 1991), 250.

[51] These conditions capture only part of the obstacles because the repair that reconciliation entails is broader than the restoration of mutual respect for the rule of law.

[52] I am grateful to Leslie Francis for helping to clarify this point for me.

among citizens. I then explore some of the empirical conditions that can influence whether these contributions are, in fact, realized. My empirical discussion is largely speculative. Further empirical research is required to confirm or disconfirm the considerations that I advance or point to overlooked considerations that might be relevant. After considering and responding to a series of objections, I end this section by highlighting the limits of the contributions to reconciliation that international criminal trials can make.

The starting premise of my theoretical argument is an empirical observation: The international community is extensively involved in the legal processes of transitional societies, especially during their transitional period from conflict or repressive rule to peace and democracy. Ad hoc international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as the permanent International Criminal Court (ICC) represent one dimension of this involvement. These tribunals cover serious violations of international humanitarian law, including violations of the Geneva Conventions, laws of war, genocide, and crimes against humanity in a specific area during a specific period of time.[53] Such tribunals are the product of international cooperation and interaction. Separate United Nations Security Council resolutions created the ICTY and ICTR, and the ICC is based on a treaty signed by 104 countries. Trial proceedings draw on both civil and common law systems, and the staff of such tribunals is drawn from around the globe.[54] The collection of evidence, detention of accused persons, and funding of such tribunals depends on cooperation and contributions from the international community.[55]

Hybrid tribunals also have been established in contexts including Sierra Leone, Timor–Leste, Kosovo, Bosnia, and Cambodia.[56] Such courts are hybrid in the sense that judges and prosecutors include both national and international representatives, and the rules regulating such courts include national and international regulations. They operate in the location where the crimes

[53] United Nations, "International Criminal Tribunal for Rwanda." Available at http://69.94.11.53/default.htm (accessed on September 9, 2007).

[54] As of February 2007, the staff of the ICTY had members representing eighty-one countries. The ICTR has eighty-five nationalities represented in its staff.

[55] United Nations, "ICTY at a Glance." Available at http://www.un.org/icty/glance-e/index.htm (accessed on September 9, 2007). The relationship between these international tribunals and national courts is defined differently. Although national courts and the ICTY have concurrent jurisdiction over such violations, the ICTY can "claim primacy" if in the interest of international justice. The ICC, in contrast, represents a "court of last resort" – that is, it only pursues cases if not investigated or prosecuted in a genuine way by a national court.

[56] International Center for Transitional Justice (ICTJ) Web site. Available at http://www.ictj.org/en/tj/781.html.

occurred.[57] The operating budget for such hybrid tribunals is influenced by the scale of voluntary contributions from international donors.[58]

Complementing such formal involvement is the work of nongovernmental organizations (NGOs). William Schabas has documented the influential role of the United States Institute of Peace, Priscilla Hayner, and Paul van Zyl in determining the relationship between the court and the Truth and Reconciliation Commission in Sierra Leone.[59] The International Center for Transitional Justice (ICTJ) advises countries on whether to confront the legacy of human rights abuses through criminal trials and/or truth commissions and the appropriate relationship to establish between different programs (i.e., the Truth and Reconciliation Commission and Special Court in Sierra Leone); trains and assists prosecution efforts in both domestic and hybrid tribunals; files *amicus curiae* briefs in domestic tribunals; monitors domestic criminal justice proceedings; publishes studies on the study of hybrid tribunals; and holds conferences on domestic prosecutions with international representatives involved in such efforts to create a network of advisors and offer a forum for exchanging investigation strategies.[60] It currently works in such capacities in more than twenty-five countries around the world, including Burundi, the Democratic Republic of the Congo, Ghana, Kenya, Liberia, Sierra Leone, South Africa, Uganda, Argentina, Colombia, Guatemala, Mexico, Nicaragua, Panama, Peru, Afghanistan, Cambodia, Sri Lanka, Algeria, and Iraq.

This intense level of involvement in the legal processes of transitional societies by the international community differs significantly from the role that the international community plays in the legal processes of nontransitional societies. This deep level of involvement suggests that the international community is positioned to affect the norms, practices, and patterns of interaction within transitional societies in a much more profound manner than nontransitional contexts. That is, the operations of the ICTY and newly formed ICC, for example, have more immediate and direct ramifications on the social and legal processes of the former Yugoslavia and Uganda than they do on those of France.

International criminal trials can influence prospects for reconciliation in transitional contexts, I want to suggest, by playing an educative role. International proceedings can thus offer a stark contrast to the practices and procedures

[57] Ibid.

[58] William Schabas, “A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone,” 15 *Criminal Law Forum* (2004), 3–54.

[59] Schabas, “A Synergistic Relationship,” 25. Hayner and van Zyl both work at the ICTJ.

[60] ICTJ Web site. Available at http://www.ictj.org/en/tj/781.html (accessed on September 7, 2007).

of the past in transitional contexts. International criminal trials are structured to respect the constraints of due process and adhere to internationally recognized standards. In the words of the ICTY: "The Rules of Procedure and Evidence guarantee that ICTY proceedings adhere to internationally recognised principles of fair trial ... important elements include the presumption of innocence, the right to be tried without undue delay, the right to examine adverse witnesses and the right of appeal. Procedural provisions for the protection of witnesses' identities and the actual assistance provided before, during and after the proceedings by the Victims and Witnesses Section within the Registry ensure that witnesses can testify freely and safely."[61] To the extent that such procedures are followed, international criminal trials provide a model for how criminal proceedings should be conducted. The procedures and safeguards characteristic of the structure of international criminal trials prioritize and take seriously the view of all persons, including criminals, as self-directed agents whose actions determine the official response to them. As discussed in the previous section, the lawmaking and law-enforcement officials within societies under repressive rule or emerging from civil conflict are characteristically corrupt, incompetent, and ineffective.

To illustrate some of the ways in which properly conducted international criminal trials can provide a sharply contrasting model for how the criminal justice process proceeds, consider first the presumption of innocence until proven guilty. Taking seriously this presumption implies the requirement that it be demonstrated, to a sufficiently justifiable degree, that the alleged perpetrator was indeed responsible for specific crimes. It implies the refusal to suspect or assume guilt simply because the perpetrator belongs to a suspect group or category. This is in contrast to practices in areas of conflict, where being Catholic in Northern Ireland or African in South Africa sometimes eroded the seriousness with which the presumption of innocence was maintained. The presumption of innocence is especially important to respect in transitional contexts. A shift in power often occurs in conjunction with a transition.[62] To the extent that previously powerful groups, which may have assumed the guilt of individuals who were members of a suspect group, are not themselves subject to the same practice by the international community or newly empowered groups working with the international community, this demonstrates in practice that the holding or losing of power should not and need not be responsible for or determine the outcomes of criminal trials.

[61] ICTY Web site. Available at http://www.un.org/icty/cases-e/factsheets/organs-e.htm.

[62] This is not to suggest that persons who previously held power no longer hold power after a transition. How dramatically the power dynamic shifts differs among societies.

Another important component of international criminal trials is the treatment of alleged perpetrators during the period leading up to a trial and during the course of pretrial interrogation and evidence-gathering phases. In international criminal trials, suspects are not to be held in inhumane conditions, tortured into confessions, or made to suffer cruel and unusual punishment. Taking seriously these basic protections, even with respect to persons suspected or convicted of failing to show the same respect toward others in the past, sets an important precedent that contrasts sharply with practices of the past. Respecting constraints against torturing suspects into confession or holding suspects in inhuman conditions signals an acknowledgment of the dignity that stems in part from the agency of all individuals. The conduct of prosecutors and law enforcement officials throughout the legal process, specifically with respect to the gathering and sharing of evidence, is critical. In contrast to the practices described by van Zyl, official conduct should be performed in a forthright manner, not manipulated.

Finally, a legal system depends on the cooperation of citizens, who are often important sources of information and can serve as witnesses who play a critical role in the successful conviction of perpetrators of crimes. In situations of conflict, cooperating with law enforcement officials may be dangerous, leading to serious bodily harm and rarely resulting in the elimination of the original threat. Thus, it is critical that the witnesses who do cooperate in such trials be provided with adequate and serious protection, and this commitment is reflected in the provisions established by tribunals such as the ICTY.

There are two primary respects in which the model provided by the process of international criminal trials can be educative in a way that is conducive toward reconciliation. First, such trials can cultivate decency and better judgment among lawmaking and law-enforcement officials in transitional contexts. They do so by highlighting the absence of legal decency and good judgment among government officials during conflict or repressive rule, when diminished significance is attached to proving the guilt of criminals and recognizing their humanity throughout the criminal process. In addition, by working with local officials, representatives of the international community can communicate training, knowledge, and understanding regarding how and in what way their practices must change for law to function as it should and for law to regulate conduct in practice.

The second way in which the educative role of international criminal tribunals can facilitate political reconciliation is by restoring confidence and faith in law among ordinary citizens. Seeing respect given to the constraints of due process and prohibitions against certain types of treatment can promote conditions conducive to faith in the legal system by reducing the risks involved

in participation. Knowing that arrest does not entail torture, that conviction does not entail death, and that cooperation does not risk death reduces the incentive of individuals to opt out of cooperating with (or do everything to avoid contact with) the law enforcement system. Seeing norms of international law enforced, and seeing officials held accountable for failing to respect the constraints that law imposed, can restore confidence in the fact that law will be enforced and declared rules will provide an accurate picture of what the actual practice of law enforcement will be.

V. OBJECTIONS CONSIDERED

Persons acquainted with the actual operations of hybrid and international criminal tribunals such as the ICTY may be skeptical about whether such trials can contribute to reconciliation in the way I suggest. They may point to the failure of such tribunals to respect the due process guarantees in practice, stemming, for example, from resource constraints both financially and in terms of personnel trained in the language of witnesses and alleged perpetrators.[63] In response, I would note that this objection does not call into question the validity of my analysis. The proposed contributions of criminal trials are based on the assumption that criminal proceedings with an international dimension operate as they should, where the specific normative understanding of how criminal trials should function is framed by the fundamental commitment of law to pursue justice and to respect the agency of perpetrators and victims alike. Highlighting the degree to which international criminal tribunals fail to operate the way they should draws attention to the importance of reforming international criminal trials and the necessity of the international community providing sufficient funding so that the contributions that I have discussed can be realized in practice.

This response may not alleviate the concerns about whether international criminal trials will contribute to reconciliation, even if trials are reformed to respect due process guarantees in practice. There are two potential sources of lingering doubt. International personnel are not always welcome in transitional contexts, nor are international or hybrid trials necessarily viewed as legitimate. One source of uncertainty about whether such trials will provide an educative moment stems from recognition of these conditions.

In response, I want to recognize the validity of this underlying concern. That the international community is deeply involved in transitional contexts does

[63] For a detailed examination of such failures, see Nancy Combs, *Factfinding in International Criminal Law: The Appearance, The Reality and The Future* (Cambridge: Cambridge University Press, forthcoming 2009).

not guarantee that its involvement always will be beneficial. In practice, the international community may change norms or patterns of interaction within transitional societies for the worse rather than for the better.[64] Interaction with members of the international community may entrench rather than alleviate the perception of law's partiality.

Important empirical work needs to be done to refine our understanding of the conditions that are likely to facilitate the realization of the potential educative role of international criminal tribunals in practice. The objection draws attention to the critical importance of international criminal courts being viewed as legitimate. Viewing representatives of the international community as legitimate is more likely to encourage acknowledgment and understanding of the failures of past law-enforcement and lawmaking practices among domestic officials.

Whether trials are viewed as legitimate is likely to depend on whether specific conditions are in place. I want to suggest some circumstances that, in my view, are influential in this regard. How and which cases are selected for prosecution will affect the image of the impartiality of the international community. First, especially in deeply divided societies where atrocities were committed by members of both sides of a conflict, solely singling out representatives of one community for prosecution is likely to erode the perception of impartiality among the targeted community. Second, local law enforcement officials are more likely to view international representatives as legitimate if the practice of the international community is consistent with its rhetoric (and thus, e.g., impartial).[65] Partiality and corruption by international officials will only serve to entrench, and potentially legitimate, the practices too often found within transitional contexts.

A different source of skepticism about whether criminal trials will facilitate reconciliation stems from concern about the consequences of enhancing due process guarantees. Of particular concern may be the consequence that more guilty individuals go free. According to this objection, it is most important to see that criminals responsible for egregious wrongdoing are punished. Without punishment, victims will not have the opportunity to express their resentment and hatred and have the benefit of seeing justice done. Absent this opportunity, the willingness of victims to engage with the new society, or with the members

[64] I am grateful to Laurel Fletcher for drawing my attention to this point.

[65] For a discussion of the significance of perceptions of legitimacy, see Laurel E. Fletcher and Harvey M. Weinstein, "A World Unto Itself? The Application of International Justice in the Former Yugoslavia," in Eric Stover and Harvey Weinstein (eds.), *The Former Yugoslavia, My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocities* (Cambridge: Cambridge University Press, 2004), 29–48.

of the community from which perpetrators came in cases of divided conflict, will diminish. In addition, allowing guilty individuals to go free may represent a pattern disturbingly similar to the past. If the standards are too high, then it appears that the legacy of impunity, far from being successfully countered, will in fact be continued through international criminal trials.

In response, a note of caution is in order. Commitment to the rule of law entails that responsibility for specific wrongdoing be proven, and not merely assumed. If one eases the presumption of innocence that respect for the rule of law requires in cases where respecting this presumption might lead to acquittal, one risks replicating behavior characteristically displayed during civil conflict and by repressive regimes. Nor will appeal to the importance of countering the legacy of impunity be sufficient to justify a cavalier attitude toward this presumption. Repressive regimes normally disregard due process considerations not merely to instill terror, but also to counter an alleged or real threat to an important value or to the continued existence of their society.

At the same time, the objection raises an important point. If no alleged perpetrators are ever successfully prosecuted, then perpetrators have little reason to fear or anticipate punishment. Nor do members of transitional societies have reason to think that human rights will be respected, regardless of whether they are respected by law. Thus, if it turns out that few, if any, convictions can be achieved by adhering to stringent standards of due process, given, for example, current financial and personnel resource constraints, careful consideration may need to be given to whether it is possible to ease specific standards so as to make convictions possible but in a way that avoids the appearance or reality of replicating problematic patterns displayed during conflict or by repressive regimes.

There is one final objection to consider. Transitional societies often have extremely limited resources to devote to the pursuit of reconciliation, as well as more general societal reconstruction. Similarly, the international community has limited resources to devote to the various needs faced by societies emerging from a period of repressive rule or civil conflict. Societies and the international community may face the choice of investing in education and health care or investing to ensure that due process guarantees are more robustly protected. Given these tough choices, the objection goes, it is unjustifiable to demand that further resources be placed to protect due process more strongly when other ways of promoting reconciliation are more cost effective and needs other than reconciliation are equally pressing.

In response, I first want to recognize that this objection points to the limits of the contributions that international criminal tribunals can make to political reconciliation. It is critical to recognize the contributions, as well as the limits.

First, respect for the rule of law constitutes one important, but not the only, dimension of repair that relationships in transitional contexts require. Second, international criminal trials address some but not all of the social conditions required for law to be effective and thus for the dimension of reconciliation on which I have focused in this chapter to be achieved. For example, international criminal trials do not address the broader reform of social practices required for congruence between laws protecting rights and social practices to be realized and the law to thus be effective. For example, in contexts such as South Africa, racism is deep and pervades all social institutions. Such racism needs to be addressed if the laws specifying the equality of all citizens are to be viewed as reasonable and the concrete implications of such laws knowable by both citizens and officials. International criminal trials are ill suited to effect the change in information that social practices require to successfully combat racism.[66]

Given these limits, and the other pressing demands in transitional contexts that the objection rightly highlights, it may sometimes be unjustifiable to devote resources to strengthening due process guarantees. However, this needs to be demonstrated and cannot simply be assumed. In my view, much more careful analysis is required before we can conclude that this contribution is too costly. Such analysis requires, at a minimum, weighing the relative importance of the competing interests or values that might be pursued and assessing the likelihood that each competing value could be realized, should resources be devoted to its pursuit. How to determine and balance relative weights and likelihoods are complicated tasks, beyond the scope of this chapter to resolve,[67] but I hope that this chapter has succeeded in showing that this erosion or incomplete realization of due process guarantees will involve a significant cost, not only in terms of justice but also in terms of reconciliation. It is a cost that we should be extremely cautious about accepting.

[66] Although such trials may have some limited impact through expressing condemnation of specific crimes.

[67] For a discussion on these questions, see Colleen Murphy and Paolo Gardoni, "The Acceptability and the Tolerability of Societal Risks: A Capabilities-based Approach," 14(1) *Science and Engineering Ethics* (2008), 77–92, and "Determining Public Policy and Resource Allocation Priorities for Mitigating Natural Hazards: A Capabilities-based Approach," 13(4) *Science and Engineering Ethics* (2007), 489–504.

Index

Acholi people, 208–9
Active national jurisdiction, 16–17
Act of state doctrine, 146
African Charter, 207–8
Agent Orange, 142–3, 146–7
Agents of justice, 49
Aggression, crime of, 61
Ago, Robert, 159
Alien Tort Claims Act (US)
  environmental damage from war, claims for, 141–2, 146
Allende, Salvador, 61–2
Almog, Doron, 190–1
al Qaeda, 158–62, 175
Altman, Andrew
  May compared, 42–3, 53
  sovereignty, on
    generally, 4, 41–2
    pragmatic argument, 54–6
    principled argument, 52–4
Amin, Idi, 208–9
Amnesty International, 190–1
Amoussouga, Roland, 202
Anvil Mining, 108–9
Aquinas, 141
Arendt, Hannah, 48–9
Argentina
  Falklands War and, 158, 160–1
  forced disappearances in, 232–3
Arusha Peace Accords, 205–6
Augustine, 141
Australia
  corporate liability for international crimes in
    arguments regarding, 116–17
    Criminal Code, under, 116
    foreign relations, objections based on, 132
    generally, 108–9
    jurisdiction, 116
    organizational approach, 121–2
    Rome Statute, incorporation into domestic law, 113–14
  crimes against humanity, laws regarding, 115–16
  genocide, laws regarding, 115–16
  war crimes, laws regarding, 115–16

BAE Systems, 151
Bass, Gary J., 60
Bassiouni, Cherif, 22
Belgium
  corporate liability for international crimes in, 113–14
  universal jurisdiction in, 61–2, 78–80
Bemba, Jean-Pierre, 69
Bickerton, Christopher, 69–70
Biletzki, Anat, 9
Blair, Tony, 179
Bosnia and Herzegovina
  humanitarian law in, 78–9
  international crimes in, 203–5, 216–17
  international tribunals for, 237–8
Branch, Adam, 69
B'Tselem, 186–91, 193
Buchanan, Allen, 45
Burkina Faso
  female genital cutting in, 81–2, 86–7
Bush, George W., 153–4

Cambodia
  forced disappearances in, 233
  genocide in, 98–9
  humanitarian law in, 78–9
  international tribunals for, 78, 237–8
Camp Delta, 153–4
Canada
  corporate liability for international crimes in, 108–9, 113–14
Capital punishment, 51–2
Cassese, Antonio
  complementarity principle, on, 114–15
  crimes against states *versus* crimes against international community, 25–6
  international crimes, criteria for, 23–4, 27–9, 36–7
  piracy, on, 15–16, 23, 25, 27
Central African Republic
  ICC, involvement of, 63, 67, 201
Cheney, Dick, 153–4, 176–7
Children Act of 1989 (UK), 82–3
Child soldiers, 211–12
China
  foot binding in, 77–8
Cicero, 141
Civil disobedience, 176
Clark, Wesley, 145–6
Collateral damage, 169–70
Collective guilt, liability for environmental damage from war and, 151–2
Combatant Status Review Tribunal (CSRT), 167–8
Community values involved in international crimes, 25
Complementarity principle, 55, 67, 114–15, 135
Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (US), 141–2
Congo
  corporate liability for international crimes in, 108–9
  ICC, involvement of, 63, 67, 201
Convention on the Elimination of Discrimination Against Women (CEDAW), 75–6, 81–2, 88–9
Convention on the Rights of the Child (CRC), 75–6
Corporate liability for international crimes
  Australia, in
    arguments regarding, 116–17
    Criminal Code, under, 116
    foreign relations, objections based on, 132
    generally, 108–9
    jurisdiction, 116
    organizational approach, 121–2
    Rome Statute, incorporation into domestic law, 113–14
  Belgium, in, 113–14
  Canada, in, 108–9, 113–14
  collective responsibility and, 118
  complementarity principle and, 114–15, 135
  Congo, in, 108–9
  corporate culture and, 121–3
  ECCP and, 126–30
  Ecuador, in, 131–2
  extraterritorial jurisdiction, objections based on, 125–6
  feminist legal theory and, 119–20
  foreign relations, objections based on, 131–5
  France, in, 113–14
  fundamental purpose of criminal law and, 123–5
  generally, 108–11
  Germany, in, 117
  "harm to humanity" standard, 136–7
  ICC jurisdiction over, proposal for, 136–7
  India, in, 113–14
  individual liability, objections based on, 117–25
  Indonesia, in, 108–9
  international agreements, 112
  Japan, in, 113–14
  "legal imperialism" and, 135
  legal personhood *versus* moral personhood, 119
  May on, 120–1, 124–5, 128–30
  methodological individualism and, 119
  middle position on group responsibility, 120–1
  militarized commerce, 109
  moral responsibility and, 120
  Myanmar, in, 108–9
  Netherlands, in, 113–14
  nonintervention principle, objections based on, 126–30
  norm projection and, 124
  Norway, in, 113–14
  organizational approach, 121–3
  Papua New Guinea, in, 131–2
  positive general prevention and, 124
  predictability, objections based on, 130–1

regional agreements, 112
regulatory offences, 117–18
Rome Statute, under
complementarity principle, 114–15, 135
ICC jurisdiction over, proposal for, 136–7
incorporation into domestic law, 110–11, 113–15, 127–8, 130–1
Sudan, in, 108–9
Sweden, in, 108–9
United Kingdom, in, 113–14
United States, in, 108–9, 113–14, 131–2
Corporations as secondary agents of justice, 49–50
Crimes against humanity
Australia, laws in, 115–16
failed states and, 33
international crimes, as, 26–7
international criminal law regime, compatibility with, 61
international tribunals, role of, 237
universal jurisdiction over, 33
Crimes of aggression, 27
cross-border, 34
and the ICC, 201
response to, 158, 179
victims of, 145
Croatia
war in, 203
"Crystalization" of groups, 94–5, 103
Cultural genocide, 92
Culture, criminalization of
generally, 89–90
historical background, 77–8
humanitarian law and, 78–81
human rights compared, 85–8
individual responsibility in, 80–1
individual *versus* state responsibility, 88
international tribunals, 78
truth and reconciliation commissions, 78–9
universal jurisdiction and, 78–80
human rights and, 81–4
female genital cutting, 81–4, 86–7
generally, 75–7
habit, role of, 81
honor killings, 87–8
hostility toward forcing social change, 86–8
humanitarian law compared, 85–8
individual *versus* state responsibility, 88
individual responsibility and, 76
limits on use of criminal law, 88–9
diversion of resources from structural goals, 88–9
generally, 76
hostility toward forcing social change, 86–8
individual *versus* state responsibility, 88
pragmatic concerns, 76
rationale for, 84–5
Cunliffe, Philip, 69–70

Darfur
"crystalization" of tribes, 94–5
Fur tribe, 94–5
ICC, involvement of, 63, 67, 201
International Commission of Inquiry on Darfur, 93–6, 103–5
Massalit tribe, 94–5
tribes in, 94–6
Zaghawa tribe, 94–5
"Death squads"
Defining international crimes, 15
del Ponte, Carla, 207
Democratic Republic of the Congo. *See* Congo
Deterrence
coercion of perpetrators, effect of, 211–12
empirical evidence, lack of, 217
ICC and, 70–1
indefinite detention and, 169–70
justification of punishment, problems with, 202–3, 211, 223
just war, problem of liability for environmental damage from war deterring, 145–6
leaders, of, 216
moral authority of perpetrators, effect of, 212–16
political motivation of perpetrators, effect of, 216–17
preventive function of ICC (*See* International Criminal Court (ICC))
self-interest, necessity of, 211, 216
social pressures on perpetrators, effect of, 212–16
universal jurisdiction and, 29–30
Dinstein, Yoram, 172
Disappearances, forced, 233–4
Distinction principle, 169–73
Djibouti
female genital cutting in, 81–2

Domestic stability and sovereignty, 51, 53
Double effect doctrine, 169–70
Drumbl, Mark, 211–12
Due diligence limitation in state self-defense. *See* State self-defense
Dueling, 77
Due process concerns, 242–3
Due process protections, 8 n4, 154, 166, 230, 242
  absence of, 234
  and international standards on, 239
Duff, R. A., 220–1
Dworkin, Ronald, 93

East Timor
  humanitarian law in, 78–9
  international tribunals for, 78, 237–8
Ecuador
  corporate liability for international crimes in, 131–2
Eichmann, Adolf, 126–7, 175–6
Elias, Juanita, 118
El Salvador
  forced disappearances in, 233
Environmental damage from war, liability for
  act of state doctrine and, 146
  aggressor *versus* defender, 145
  assessment of costs of war, effect on, 151
  collective guilt, relieving, 151–2
  criminal law model, 147–8
  deterrence of just war, problem of, 145–6
  environmental ethics and, 150
  fault, disconnecting liability from, 143–4
  "Good Samaritan" law analogy, 144–5
  "green munitions" and, 151
  jus in bello and, 142–3
  jus post bellum, proposal for, 141–3, 149–50
  justification *versus* excuse, 143–4
  Kosovo War, 141–2, 147–50
  lack of injured parties, problem of, 146–7
  negligence and, 146
  restorability of environment, 150–1
  separation from other postwar issued, 148
  strict liability, 143–5, 152
  transferring responsibility to enemy, problems with, 148–9
  Vietnam War, 142–3
Environmental ethics, 150
Ethiopia
  female genital cutting in, 83–4
  forced disappearances in, 233
"Ethnic cleansing," 216–17
European Committee on Crime Problems (ECCP), 126–30
European Court of Human Rights (ECHR), 53, 55
Evidence, proposals regarding access to during indefinite detention, 168–9
Expressivism
  attachment of perpetrators with punisher, necessity of, 221–2
  choice of punishment, relevance of, 219–20
  condonation, lack of condemnation as, 219, 223
  detail of, 218
  domestic *versus* international bodies, punishment by, 222
  importance of, 217–18
  international community as audience, 222–3
  justification of punishment, problems with, 223
  legitimacy of punisher, necessity of, 221–2
  moral shortcomings of perpetrators and, 220–1
  political victimization, danger of, 221
  punishment by perpetrators' own group, preference for, 222–3
  self-condemnation, lack of, 222
  source of punishment *versus* audience for punishment, 220
  trial, necessity of, 218–19
  victors, failure to indict, 219
Extraterritorial jurisdiction, objections to corporate liability for international crimes based on, 125–6

Failed states
  crimes against humanity and, 33
  genocide and, 33
  international criminal law regime, as justification for, 62–3
  terrorism and, 33–4
  universal jurisdiction over, 33
Falklands War, 158, 160–1
Federal Tort Claims Act (US)
  environmental damage from war, claims for, 141–2, 146
Female Circumcision Act (UK), 82–3
Female genital cutting, 75–7, 81–4, 86–7
Feminist legal theory, 119–20
Field, Stewart, 122

Foot binding, 77–8
Forced disappearances, 233–4
Foreign relations, objections to corporate liability for international crimes based on, 131–5
Fourth World Conference on Women, 83–4
France
  corporate liability for international crimes in, 113–14
  dueling in, 77
Francis, John, 4
Francis, Leslie, 4
Freeport-McMoRan, 108–9
French, Peter, 120, 122, 124–5
Fuller, Lon
  internal morality of law, on, 65–6
  rule of law, on, 230
  social conditions of law, on, 11, 226–32, 236
Fund for Peace, 62–3
Fur tribe, 94–5

Gacaca courts, 207–8
Geneva Conventions
  Guantánamo Bay and, 154–5
  international tribunals, role of, 237
  Israel/Palestine situation and, 190–1
  road system in West Bank and, 189–90
  security barrier in West Bank and, 187–8
  universal jurisdiction and, 79
Genital mutilation, 75–7, 81–4, 86–7
Genocide
  Australia, laws in, 115–16
  Cambodia, in, 98–9
  cultural genocide, 92
  defined, 91–4, 105–7
  failed states and, 33
  group identification (*See* Group identification in genocide)
  gypsies and, 105
  intention, relevance of, 98
  international crimes, as, 26–8
  international criminal law regime, compatibility with, 61
  international tribunals, role of, 237
  Jews and, 100–1
  legal positivism and, 93
  nominalist perspective, 92–3
  physical destruction *versus* cultural destruction, 92
  race and, 95
  Roma and, 105
  Rwanda, in, 91–2, 144–5, 205–7
  tribes and, 94–6
  Tutsis, against, 205–7
  universal jurisdiction over, 33
Genocide Convention
  genocide defined under, 105–6
  group identification and, 6, 100–1, 104–6
  origin of, 59
  race and, 95
Germany
  corporate liability for international crimes in, 117
  dueling in, 77
  honor killings in, 87–8
Ghana
  female genital cutting in, 81–2
Golash, Deirdre, 10
"Good Samaritan" laws, 144–5
Gourevitch, Alexander, 69–70
Grear, Anna, 119–20
"Green munitions," 151
Grotius, Hugo, 2, 141
Group identification in genocide
  authoritative act of, 97
  common elements, 106
  consensus, 97–8, 102
  "crystalization" of groups, 97–8, 102
  devaluation of genocide concept, danger of, 102
  exclusions, 106–7
  generally, 107
  Genocide Convention and, 100–1, 104–6
  May on, 6
  multiplicity of, 95
  objective approach to, 100–1
  other factors in, 96
  "out-group" and "in-group" identification, 96, 99
  perceptible characteristics, 101–2
  proposed reforms, 105–7
  publicity condition, 98–100
  race and, 95
  Schabas on, 6, 92–3, 96–7, 100–2
  self-identification alone, problems with, 98
  social facts and, 103–4
  sole identification by perpetrators, problems with, 97
  stipulation, by, 104

Group identification in genocide (*cont.*)
subjective approach to, 92–4
tribes and, 94–6
Tutsis as, 91–2
Guantánamo Bay, indefinite detention at
Combatant Status Review Tribunals (CSRT), 167–8
criticism of, 154–5
generally, 153–7
state self-defense, as (*See also* State self-defense)
framing of issue, 156
importance of analysis, 156–7
Guatemala
forced disappearances in, 233
Gulf War, 144–5, 158, 172–3
Gush Shalom, 190–1
Gypsies and genocide, 105

Haass, Richard, 45–6
Habre, Hissene, 79–80
Habyarimana, Juvenal, 205–6
Hague Regulations, 187–8
Halutz, Dan, 190–1
Harm principle, 84–5
"Harm to humanity" standard, 133–4
Hart, H. L. A., 19, 65–6, 93
Hate crimes, 26–7
Hayner, Priscilla, 238
Hearings during indefinite detention, proposals regarding, 167
Hegel, G. W. F., 221–2
Henkin, Louis, 47, 56
Henry IV (France), 77
Henry V, 148–9
Henry VIII (England), 95
Hessler, Kristen, 3
Hitler, Adolf, 104–5, 214–15, 231
Hobbes, Thomas, 2
Holocaust, 59, 100–1
Holy Spirit Movement (Uganda), 208–9
Honor killings, 87–8
House arrest during indefinite detention, proposals regarding, 169
Humanitarian law
criminalization of culture and (*See* Culture, criminalization of),
individual responsibility in, 80–1
universal jurisdiction and, 78–80
war, roots in, 85

Human rights
belief in apolitical nature of, 183–4
centrality of law in, 196
criminalization of culture and (*See* Culture, criminalization of),
expansion of field, 181
legal *versus* political nature of, 181–2, 184–5
politicization of (*See* Politicization of human rights)
sovereignty and, 46
Human Rights Watch, 190–1
Hutus, 205–7, 214–15, 217
Hybrid tribunals, 237–8

ICC. *See* International Criminal Court (ICC)
ICTR. *See* International Criminal Tribunal for Rwanda (ICTR)
ICTY. *See* International Criminal Tribunal for the Former Yugoslavia (ICTY)
Immediacy limitation in state self-defense, 155–9
Indefinite detention
access to evidence, proposals regarding, 168–9
civil disobedience analogy, 176
deterrence and, 169–70
"Eichmann exception," 175
Guantánamo Bay, at
Combatant Status Review Tribunals (CSRT), 167–8
criticism of, 154–5
framing of issue regarding state self-defense, 156
generally, 153–7
importance of analysis regarding state self-defense, 156–7
hearing procedures, proposals regarding, 167
house arrest or probation, proposals regarding, 169
justifications of, 173–8
presumption of innocence, proposals regarding, 167–8
punishment purpose as justifying, 176–7
right to counsel, proposals regarding, 168
Security Council authorization of use of force justifying, 175
state self-defense, as (*See* State self-defense)
torture, proposals regarding inadmissibility of evidence obtained through, 169

India
  corporate liability for international crimes in, 113–14
  sati in, 77–8
Indictments
  ICTR, 207
  ICTY, 205
Individual liability
  corporate liability for international crimes, objections to based on, 117–25
  criminalization of culture and, 76
  humanitarian law, in, 80–1
Indonesia
  corporate liability for international crimes in, 108–9
"Internal morality of law," 65–6
International Atomic Energy Agency (IAEA), 147–8
International Center for Transitional Justice, 238
International Chamber of Commerce, 130
International Commission of Inquiry on Darfur, 93–6, 103–5
International Court of Justice (ICJ), 187–8
International Covenant on Civil and Political Rights (ICCPR), 154–5, 187–8
International Covenant on Economic, Social and Cultural Rights (ICESCR), 187–8
International crimes. *See also specific crime*
  ad hoc approach to, 22
  agents of state, 27–8
  alternative political framework, necessity for, 21, 29–30
  Cassese on, 23–4, 27–9, 36–7
  community values involved, 25
  corporate liability for (*See* Corporate liability for international crimes)
  crimes against humanity as, 26–7
  criteria for, 23–4
  defining, 15
  deterrence (*See* Deterrence)
  genocide as, 26–8
  inaction by states, 19, 27–8, 32–3
  incompleteness of approach to, 22
  individuals as ultimate victims, 34–5
  international community, crimes against, 29
  joint interest in suppressing, 28–9, 36–7
  jurisdiction, classifying based on, 16, 36–7
  legitimacy of, 18
  natural law analysis, insufficiency of, 20–1
  piracy as
    community values involved, 25
    overview, 15–16, 23
    traditional view, 23
  secondary rules of recognition, 19
  state action
    other states, against, 18–19
    own citizens, against, 18, 28
    requirement, 27
  trials, 50
  victims, problems with classifying based on, 34–5
"International crimes proper," 19, 38, 71
International Criminal Court (ICC)
  Central African Republic, involvement in, 63, 67, 201
  complementarity principle, 55, 67, 114–15, 135
  Congo, involvement in, 63, 67, 201
  corporate liability for international crimes, proposal for jurisdiction over, 136–7
  Darfur, involvement in, 63, 67, 201
  deterrence and, 70–1
  dilution of state authority, potential for involvement to cause, 69
  domestic legal systems, as model for, 71
  further violence, potential for involvement to incite, 69
  jurisdiction, 65–7
  justifications for
    failed states, problems with, 62–3
    international scope of crimes, 61
    universal jurisdiction, arbitrariness of, 61–2
  legalism and, 65–6
  nonretroactivity in, 65–7
  partial compliance theory and, 63–7, 70
  preventive function
    generally, 59–60
    optimism regarding, 60
    overview, 71
    political resolution, necessity of, 70–1
    retributive function, tension with, 60
    structural limits on, 58–9, 68
  punishment in, 201–2
  reconciliation, role in, 237–8
  referrals to, 67–8
  retributive function, 59–60
  rule of law and, 66–7

International Criminal Court (ICC) (*cont.*)
sovereignty and, 56, 67–8
types of crimes prosecuted by, 210–11
Uganda, involvement in, 63, 67, 69, 201, 209–10
universal jurisdiction and, 17–18
victors, failure to indict, 219
weaknesses of, 69
International Criminal Tribunal for Rwanda (ICTR)
generally, 201
indictments by, 207
jurisdiction, 78
reconciliation, role in, 237
International Criminal Tribunal for the Former Yugoslavia (ICTY)
generally, 201
indictments by, 205
jurisdiction, 78
reconciliation, role in, 237–40
Srebrenica massacre and, 203–4
Internationale Vereinigung für Rechts- und Sozialphilosophie (IVR), 1
International harm principle, 41, 43, 50–1
International tribunals. *See also specific tribunal*
crimes against humanity, role regarding, 237
genocide, role regarding, 237
hybrid tribunals, 237–8
jurisdiction, 78
legitimacy, problems with lack of, 241–2
reconciliation, role in (*See* Reconciliation, role of international tribunals)
war crimes, role regarding, 237
Intervention
military intervention, 68–9
non-intervention principle, objections to corporate liability for international crimes based on, 126–30
sovereignty and, 46–7
Iraq
Gulf War and, 158, 172–3
Israel
politicization of human rights in, 185–91
road system in occupied territories, 189–90
security barrier, 187–9
settlements in occupied territories, 187
Israeli Committee Against Home Demolitions (ICAHD), 190–1
Israeli Information Center for Human Rights in the Occupied Territories. *See* B'Tselem

Jackson, John, 44, 48
Japan
corporate liability for international crimes in, 113–14
Jews and genocide, 100–1
Jorg, Nico, 122
Jurisdiction
active national jurisdiction, 16–17
ICC, 65–7
ICTR, 78
ICTY, 78
international crimes, classifying based on, 16, 36–7
international tribunals, 78
national jurisdiction
defined, 16–17
exclusivity, forfeiture of, 30–1
universal jurisdiction compared, 17–18
passive national jurisdiction, 16–17
pooling of jurisdiction, universal jurisdiction compared, 28–9
universal jurisdiction (*See* Universal jurisdiction)
Jus ad bellum, 141–2
Jus in bello, 141–3
Jus post bellum, 141–3, 149–50
Just war
environmental damage from war, problem of liability for deterring just war, 145–6

Kagame, Paul, 207
Kambanda, Jean, 207
Karadžić, Radovan, 205
Kenya
female genital cutting in, 86–7
Kirsch, Philippe, 60
Kony, Joseph, 208–10, 214
Kosovo
international tribunals for, 237–8
Kosovo War
environmental damage from, 141–2, 147–50
rescue operation, as, 144–5
Krasner, Stephen, 46–7
Krstić, Radislav, 203–4

Kuwait
  Gulf War and, 158, 172–3
Kyriakakis, Joanna, 6–7

Lacey, Nicola, 117–18
Lackey, Douglas, 7–8
Lakwena, Alice, 208–9
Lazar (Serbia), 204–5
Lee, Win-chiat, 3
"Legal imperialism," 135
Legalism and ICC, 65–6
Legal personhood *versus* moral personhood, 119
Legal positivism and genocide, 93
Legitimate state authority, universal jurisdiction over violations of, 29–31, 38
Lena, Jeffrey, 135
Lord's Resistance Army, 69, 208–12
Luban, David, 42, 51, 124–5, 133–4
Lundin Oil AB, 108–9
Lynch, Gerald E., 123–5

Margin of appreciation doctrine, 55
Masalit tribe, 94–5
Mato oput, 209–10, 218–19
Mattei, Ugo, 135
Mavrodes, George, 173
May, Larry
  Altman and Wellman compared, 42–3, 53
  corporate liability for international crimes, on, 120–1, 124–5, 128–30
  criticism of, 41–2
  group identification in genocide, on, 6
  sovereignty, on, 4, 40, 50
McGarry, John, 235–6
Methodological individualism, 119
Milgram, Stanley, 212–14
Militarized commerce, 109
Military intervention, 68–9
Mill, John Stuart, 84–5, 104
Milošević, Slobodan, 205
Mladić, Ratko, 204–5
Moral conditions of law. *See* Social conditions of law
Moreno-Ocampo, Luis, 69
Morris, Herbert, 221
Murphy, Colleen, 11
Museveni, Yuwero, 208–10, 214
Myanmar
  corporate liability for international crimes in, 108–9

National jurisdiction
  defined, 16–17
  exclusivity, forfeiture of, 30–1
  universal jurisdiction compared, 17–18
National Republican Movement for Democracy and Development (Rwanda), 205–6
National Resistance Army (Uganda), 208–9
Natural law, insufficiency for defining international crimes, 20–1
Necessity limitation in state self-defense, 155–6, 159–60, 170–2
Negligence, environmental damage from war and, 146
Netherlands
  corporate liability for international crimes in, 113–14
Nino, Carlos, 232–3
Nongovernmental organizations (NGOs)
  politicization of human rights, role in, 191–4, 196
  reconciliation, role in, 238
  secondary agents of justice, as, 49–50
Non-intervention principle, objections to corporate liability for international crimes based on, 126–30
Nonretroactivity and ICC, 65–7
North Atlantic Treaty Organization (NATO)
  environmental damage from war and, 141–2
Northern Ireland
  faith in law, lack of, 235–6
  Royal Ulster Constabulary (RUC), 235
Norway
  corporate liability for international crimes in, 113–14
Nuremberg Tribunal, 59–61, 65–6, 75, 118

Obote, Milton, 208–9
O'Leary, Brendan, 235–6
O'Neill, Onora, 49
Organisation for Economic Co-operation and Development (OECD), 134–5
Organization of the Supreme Courts of the Americas, 51–2
Osiel, Mark, 218

Palestine
politicization of human rights in, 185–91
road system in occupied territories, 189–90
security barrier, 187–9
settlements in occupied territories, 187
Pančevo bombing, 141–2, 149–50
Papua New Guinea
corporate liability for international crimes in, 131–2
environmental damage in, 141–2
Parental authority analogy, 53–4
Parfit, Derek, 147
Partial compliance theory
ICC and, 66–7, 70
international criminal law regime and, 63–5
Rawls on, 63–5
rule of law and, 66–7
Passive national jurisdiction, 16–17
Peace of Westphalia, 44–5
Pinochet, Augusto, 61–2, 216–17
Piracy
Cassese on, 15–16, 23, 25, 27
international crime, as
community values involved, 25
overview, 15–16, 23
traditional view, 23
privateering compared, 27
universal jurisdiction and, 27
Political reconciliation, role of international tribunals. *See* Reconciliation, role of international tribunals
Politicization of human rights
belief in apolitical nature of, 183–4
centrality of law in human rights, 196
descriptive approach, 182–3
expansion of human rights field, 181
generally, 180
human rights organizations, role of, 191–4, 196
importance of political awareness, 196
Israel/Palestine situation, in, 185–91
road system in occupied territories, 189–90
security barrier, 187–9
settlements in occupied territories, 187
law as source of politicization, 191, 196–7
legal *versus* political nature of, 181–2, 184–5
normative approach, 182–3
political actors and, 182
universalism and, 183–4, 193–4, 196
victims, identification of, 191–2, 194–6
Pol Pot, 98–9
Postwar environmental damage. *See* Environmental damage from war, liability for
Powell, Colin, 154–5
Presumption of innocence
indefinite detention, proposals regarding, 167–8
reconciliation, role in, 239, 243
Prevention. *See* Deterrence
Primary agents of justice, 49
Privateering, 27
Probation during indefinite detention, proposals regarding, 169
Proportionality limitation in state self-defense, 155–6, 160–2
Punishment
deterrence (*See* Deterrence)
expressivism (*See* Expressivism)
indefinite detention, punishment purpose as justifying, 176–7
preventive function of ICC (*See* International Criminal Court (ICC))
reconciliation, necessity for, 242–3

Quick, Oliver, 117–18

Race and genocide, 95
Racism, 243–4
Rawls, John, 63–5
Reconciliation, role of international tribunals
cooperation of citizens and, 240
due process concerns, 242–3
educative role, 238–41
empirical approach, 236–7, 242
generally, 224–6
hybrid tribunals, 237–8
ICC and, 237–8
ICTR and, 237
ICTY and, 237–40
legitimacy, problems with lack of, 241–2
limited resources, problem of, 244
NGOs, 238
presumption of innocence and, 239, 243
problems with, 224–5
punishment, necessity of, 242–3
rule of law, importance of, 225
Schabas on, 238
selective prosecution, problem of, 242
skepticism regarding, 241
social conditions of law, promoting, 236

theoretical approach, 236–7
torture, inadmissibility of evidence obtained through, 239–40
transitional states, in, 238
Referrals to ICC, 67–8
Reisman, Michael, 46
Republika Srpska, 203–5
Retributive function of ICC, 59–60
Retroactive laws, 230–1
Right to counsel during indefinite detention, proposals for, 168
Rio Tinto, 131–2
Roht-Arriaza, Naomi, 62, 233–4
Roma and genocide, 105
Rome Statute. *See also* International Criminal Court (ICC)
aggression under, 61
corporate liability for international crimes under
complementarity principle, 114–15, 135
ICC jurisdiction over, proposal for, 136–7
incorporation into domestic law, 110–11, 113–15, 127–8, 130–1
genocide defined, 105–6
preamble, 59–60
rule of law and, 65–6
Royal Ulster Constabulary, 235
Rule of law
Fuller on, 230
ICC and, 66–7
partial compliance theory and, 66–7
politicization of human rights and, 191
reconciliation, importance to role of international criminal tribunals in, 225
restrictions, 4–5
Rome Statute and, 65–6
Rumsfeld, Donald, 153–4, 176–7
Rwanda
Arusha Peace Accords, 205–6
coercion of perpetrators in, 211–12
gacaca courts, 207–8
genocide in, 91–2, 144–5, 205–7
Hutus, 205–7, 214–15, 217
ICTR (*See* International Criminal Tribunal for Rwanda (ICTR))
international crimes in, 205–8
international tribunals for, 63
moral authority and genocide, 214
National Republican Movement for Democracy and Development (MRND), 205–6
Rwandan Patriotic Front (RPF), 205–8
Tutsis, 91–2, 205–7, 214–15, 217
universal jurisdiction and, 78–80
Rwandan Patriotic Front (RPF), 205–6

Sanctions, 68
Sati, 77–8
Schabas, William
group identification in genocide, on, 6, 92–3, 96–7, 100–2
reconciliation, on role of NGOs in, 238
Searle, John, 103–4
Secondary agents of justice, 49–50
Secondary rules of recognition, 19
Security Council
ICC, referrals to, 67–8
use of force, authorization, 175
Security principle, 40–1
Selective prosecution, 242
Self-defense, state. *See* State self-defense
Serbia
environmental damage from war in, 141–2, 147–50
international crimes in, 203–5, 216–17
Shahade, Salah, 190–1
Sierra Leone
humanitarian law in, 78–9
international tribunals for, 63, 78, 237–8
Truth and Reconciliation Commission, 238
Slaughter, Anne-Marie, 51
Social change and criminal law. *See* Culture, criminalization of
Social conditions of law
compliance with law, willingness for, 228
congruence between informal practices and law, 228–9
cooperation between citizens and officials, 227–8, 232–3
decency and judgment on part of officials, 229–31, 233–5
elements of, 226–7
faith in law on part of citizens, 231–2, 235–6
Fuller on, 11, 226–32, 236
reconciliation, promoting in pursuit of, 236
retroactive laws, 230–1
self-directed action and interaction, law as framework for, 227
transitional states, lack in, 227, 232–6

South Africa
- apartheid in, 189–90, 234–5
- capital punishment in, 51–2
- forced disappearances in, 233
- racism in, 243–4
- sovereignty and, 46–7

Sovereignty
- Altman and Wellman on, 41–2
  - generally, 4
  - pragmatic argument, 54–6
  - principled argument, 52–4
- attributes of, 45–6
- conditional nature of, 19
- decomposing of, 47
- domestic stability and, 51, 53
- efficiency and, 54–6
- forfeiture of, 40, 43–4, 56–7
- Hobbesian perspective on, 41, 51
- human rights and, 46
- ICC and, 56, 67–8
- international harm principle and, 41, 43, 50–1
- intervention and, 46–7
- May on, 4, 40, 50
- minimalist approach to, 41, 54
- moral presumption in favor of, 40–1, 50–1
- overview, 39, 57
- parental authority analogy, 53–4
- reform of
  - agents of justice, 49
  - institutional problems with, 48
  - justification for intervention, 48
  - lack of international institutions, 48–9
  - moral problems with, 48
- security principle and, 40–1
- South Africa, of, 46–7
- "sovereignty-modern"
- "transgovernmental order" and, 51–2
- United States and, 56
- universal jurisdiction and, 19

Spain
- universal jurisdiction in, 61–2

Srebrenica massacre, 203–4, 216–17

Sri Lanka
- forced disappearances in, 233

Stacy, Helen, 5

State self-defense
- due diligence limitation
  - degree of knowledge and degree of force, 165–6
  - elements of, 162–3
  - generally, 155–6, 162, 166, 178–9
  - Guantánamo Bay and, 166–9
  - necessity limitation compared, 170–2
  - need for, 163
  - objections to, 169–73
  - targeting of innocents prohibited, 163–5
  - verification of knowledge, 165
- Guantánamo Bay, and indefinite detention at
  - framing of issue, 156
  - generally, 153–7
  - importance of analysis, 156–7
- immediacy limitation, 155–9
- indefinite detention as
  - access to evidence, proposals regarding, 168–9
  - applicability of self-defense analysis, 174–5
  - collateral damage and, 169–70
  - consequentialist reasoning, 177–8
  - deterrence and, 169–70
  - distinction principle and, 169–73
  - double effect doctrine and, 169–70
  - due diligence limitation, 166–9
  - hearing procedures, proposals regarding, 167
  - house arrest or probation, proposals regarding, 169
  - moral right to self-defense and, 176
  - "more good than harm" standard, 169, 170, 176–8
  - presumption of innocence, proposals regarding, 167–8
  - right to counsel, proposals regarding, 168
  - torture, proposals regarding
    - inadmissibility of evidence obtained through, 169
- moral right to, 176
- necessity limitation, 155–6, 159–60, 170–2
- proportionality limitation, 155–6, 160–2
- requirements, 157

Stephens, Beth, 123

Strict liability for environmental damage from war, 143–5, 152

Sudan
- corporate liability for international crimes in, 108–9
- Darfur (*See* Darfur)
- female genital cutting in, 81–2

Sweden
- corporate liability for international crimes in, 108–9

Talisman Energy, 108–9
Tanzania
  female genital cutting in, 86–7
Taylor, Charles, 216
Territorial jurisdiction, 16–17
Terrorism
  detainment of suspects, 160, 169
  and failed states, 33–4
  and international crime, 27, 112
  and U.S. policies toward non-citizens, 153–4, 154n6
  war against, 187
Texaco, 131–2
Timor-Leste. *See* East Timor
Tito, Josip Broz, 203
Tokyo Tribunal, 75
Torture, inadmissibility of evidence obtained through indefinite detention, proposals regarding, 169
  reconciliation and, 239–40
Torture Convention, 61–2, 154–5
"Transgovernmental order," 51–2
Tribes and genocide, 94–6
Truman, Harry, 171
Truth and reconciliation commissions, 78–9
Tuomela, Raimo, 103–4
Tutsis, 91–2, 205–7, 214–15, 217

Uganda
  Acholi people, 208–9
  child soldiers in, 211–12
  coercion of perpetrators in, 211–12
  Holy Spirit Movement, 208–9
  ICC, involvement of, 63, 67, 69, 201, 209–10
  international crimes in, 208–10
  Lord's Resistance Army, 69, 208–12
  mato oput, 209–10, 218–19
  National Resistance Army (NRA), 208–9
Uganda People's Defence Force (UPDF), 208–10
United Kingdom
  Children Act of 1989, 82–3
  corporate liability for international crimes in, 113–14
  Falklands War and, 158, 160–1
  Female Circumcision Act, 82–3
  female genital cutting in, 81–2
  "green munitions" in, 151
  honor killings in, 87–8
  Northern Ireland
    faith in law, lack of, 235–6
    Royal Ulster Constabulary, 235
  Pinochet case and, 61–2
United Nations
  Charter, 175
  Environmental Program, 141–2, 147–8
  Security Council
    ICC, referrals to, 67–8
    use of force, authorization, 175
  universal jurisdiction and, 17–18
United States
  Alien Tort Claims Act, claims for environmental damage from war under, 141–2, 146
  Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 141–2
  corporate liability for international crimes in, 108–9, 113–14, 131–2
  dueling in, 77
  Federal Tort Claims Act, claims for environmental damage from war under, 141–2, 146
  female genital cutting in, 81–2
  Gulf War and, 158, 172–3
  sovereignty and, 56
United States Institute of Peace, 238
Universalism and politicization of human rights, 183–4, 193–4, 196
Universal jurisdiction
  alternative political framework, necessity for, 21, 29–30
  arbitrariness of, 61–2
  Belgium, in, 61–2, 78–80
  controversial nature of, 17–18
  crimes against humanity, over, 33
  defined, 16–17
  deterrence and, 29–30
  genocide, over, 33
  humanitarian law and, 78–80
  ICC and, 17–18
  inaction by states, 19
  international community, crimes against, 29
  justifiability of, 18
  legitimacy of, 38
  legitimate state authority, violation of conditions of, 29–31, 38
  piracy and, 27
  pooling of jurisdiction compared, 28–9

Universal jurisdiction (*cont.*)
  prior claims, insufficiency of grounding in, 37–8, 244
  Rwanda and, 78–80
  sovereignty and, 19
  Spain, in, 61–2
  state action against other states, 18–19
  state action against own citizens, 18
  war crimes, over, 34
Unocal Corporation, 108–9
Uruguay
  forced disappearances in, 233
Use of force, Security Council authorization, 175

van Zyl, Paul, 234–5, 238–40
Vietnam War, 142–3
Viner, Steve, 8–9

War crimes
  Australia, laws in, 115–16
  international tribunals, role of, 237
  universal jurisdiction over, 34
Wellman, Christopher
  May compared, 42–3, 53
  sovereignty, on
    generally, 4, 41–2
    pragmatic argument, 54–6
    principled argument, 52–4
  Westphalian doctrine and, 41–2, 53
Wells, Celia, 117–21
West Bank
  road system in, 189–90
  security barrier, 187–9
  settlements in, 187
Westphalian doctrine
  Altman and, 41–2, 53
  evolution of, 45
  historical background, 44–5
  overview, 44
  Wellman and, 41–2, 53

Yesh Gvul, 190–1
Yugoslavia. *See also specific republic*
  dissolution of, 203
  ICTY (*See* International Criminal Tribunal for the Former Yugoslavia (ICTY))
  international crimes in, 203–5, 216–17
  international tribunals for, 63

Zaghawa tribe, 94–5
Zajonc, Robert, 214
Zenawi, Meles, 85–6, 88
Zimbardo, Philip, 212–14