A Defense of International Criminal Law*

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In this article, we critically examine the prevailing justification of international criminal law and defend an alternative approach.[1] We share the prevalent view that a system of such law is both possible and in the process of being created. However, we reject the conventional arguments offered in support of this system. Our alternative line of thinking has the consequence that a justifiable international criminal law can be much broader in scope than its conventional advocates presume. Our view is that it is permissible to prosecute and punish persons under international law when there are sufficiently widespread or systematic violations of basic human rights in a state. The rights violations need not constitute genocide, crimes against humanity, or any such "supercrime." Instead, the violations may simply be ordinary criminal acts,

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1. Our focus throughout the article is on the overlap between international criminal law and international human rights law and, specifically, on the area in which individuals are made criminally liable for the violation of basic human rights. This area is the moral core of international criminal law. The theory that we develop for this core does not hinge on any particular canonical list of basic rights (but see n. 22) or on any favored normative conception of what makes them rights. An account of the concept of human rights that fits well with our argument is spelled out succinctly by Thomas Pogge. Such rights refer to "ultimate moral concerns . . . which normally override other normative considerations"; each human individual enjoys the equal normative protection of human rights because all have "exactly the same human rights"; the rights "ought to be respected by all human agents" and "are capable of being understood and appreciated by persons from different epochs and cultures as well as by adherents of a variety of different religions, moral traditions, and philosophies." See Thomas Pogge, "The International Significance of Human Rights," *Journal of Ethics* 4 (2000): 45–69, p. 46.

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such as murder or rape, committed in a state that is failing to meet some minimum threshold for protecting the basic rights of its people.[2]

We divide the article into six main sections. In the first two, we examine some key aspects of the historical development of international criminal law in the twentieth century and the justifications provided by scholars and jurists for the law as it has emerged. Those justifications are rejected. In the third section we present the main ideas of our alternative justification for international criminal law. The central problem we seek to resolve is how international criminal prohibitions can legitimately pierce the sovereignty of a state so as to permit an international tribunal, or a court of another state, to prosecute crimes committed wholly within the state's territory. The fourth and fifth sections address a critical problem in international criminal law, that is, that the sources of international law make international prosecutions far more likely than domestic ones to violate the principles of legality. Finally, in the sixth section, we respond to several objections from proponents of a more conventional defense of international criminal law.

I. THE NUREMBERG PROBLEMS

In the wake of World War II, representatives from the victorious Allied states convened in Nuremberg to prosecute German political, economic, and military leaders. The International Military Tribunal (IMT) was unprecedented in a number of important respects. Not only did its organizers seek to conduct a fair trial rather than merely impose victor's justice; even more strikingly they did not restrict their charges to the commission of war crimes and the waging of a war of aggression. For the first time, an international tribunal prosecuted political and military leaders for violating the rights of their own citizens and subjects.

The term 'crimes against humanity' was used in the Nuremberg indictments to cover crimes the German defendants had committed against German nationals.[3] That term had initially surfaced during

2. It will be helpful to clarify at the outset that we do not assume that human rights violations are automatically violations of international criminal law. We regard the rules of international law as a human construction. The extent to which rights violations are international crimes depends on the actions of states, the rulings of international tribunals, and the other factors that constitute international law. Our disagreement with the conventional view is over the grounds and limits of a morally justifiable system of international criminal law.

3. The Charter of the IMT, in art. 6(c), defines crimes against humanity as: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on religious, racial or political grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated." The other crimes within the jurisdiction of the tribunal were war crimes, crimes against peace (most prominently, planning or waging a war of aggression), and conspiracy to

World War I to characterize the mass killings by the Ottoman authorities of their Armenian subjects. After the war, the architect of the Armenian genocide, Talaat Pasha, was convicted by a domestic Turkish court for acts "against humanity and civilization," but he escaped legal punishment and lived under the protection of the German government.[4] Moreover, the treaty which had called for the establishment of an international tribunal to prosecute crimes stemming from the war was effectively abandoned by all parties, dashing hopes of any international prosecution of Talaat.

Against this backdrop, we can understand what a controversial departure from precedent it was when the Nuremberg tribunal heard charges against the defendants for crimes violating the rights of their own subjects and citizens. One set of questions concerned the issue of forum: Germany was not a party to the London Charter establishing the IMT and so it was unclear why the tribunal was a legally proper forum in which to bring the charges. It was one thing for Turkey to prosecute its former leaders before a Turkish tribunal for planning and executing the mass murder of its own subjects. It was quite another for an international tribunal to prosecute German leaders for violating the rights of German Jews.[5]

Another set of questions concerned the issue of the substantive rules of criminal law. Again, Germany was not a party to the charter declaring that crimes against humanity were international crimes, and the rule under international law at the time was that each state was sovereign over defining the criminal status of any act within its borders.

The issues of forum and substantive criminal law are in fact connected, given this conception of sovereignty. The conception had arisen out of the Westphalian settlement nearly three centuries before Nuremberg and had been the grounds on which President Woodrow Wilson's secretary of state, Robert Lansing, opposed any international tribunal to try the planners and perpetrators of the Armenian genocide.[6] In the Westphalian order it was taken for granted that each country enjoyed a privileged position of dominion over its own self-regarding affairs. A sovereign state possessed the liberty to order its own system of criminal

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engage in the aforementioned crimes. See "Charter of the International Military Tribunal," in *Trial of the Major War Criminals before the International Military Tribunal*, 42 vols. (Nuremberg: Secretariat of the International Military Tribunal, 1948), vol. 1, pp. 10–18, p. 11.

4. Samantha Power, *A Problem from Hell* (New York: Basic, 2002), pp. 14–15. Talaat was assassinated in Berlin by the Armenian, Soghomon Tehlirian, as an act of revenge for Talaat's role in the genocide.

5. German Jews were, of course, stripped of their citizenship and later rendered stateless by German law in the campaign that culminated in genocide. The key point is that they had a moral entitlement to live within Germany and, as a consequence, the German state had a moral obligation to protect their basic rights.

6. Power, p. 12.

law however it saw fit, and thus it was the state's decision whether or not a given act should be made criminal. Similarly it was the state's decision as to the forum before which its subjects or citizens were to be prosecuted. Imagine, for instance, that citizens in some foreign states had found it objectionable that the United States had no criminal prohibition against working on the Sabbath. It would have been wholly indefensible for these states to convene a tribunal for the purpose of criminally prosecuting Americans who worked on the Sabbath. The Westphalian conception of sovereignty provided an account of why that was so.

Given the Westphalian view, serious questions arise concerning both the IMT's authority to try political and military personnel in the Axis countries and the grounds for claiming that crimes against humanity were international crimes. In order to appreciate this point, notice how such sovereignty-based doubts about the substantive rules enforced by the IMT do not apply in the case of the international crime that was declared in a series of treaties and pacts after World War I, the crime of waging a war of aggression. Aggressive war is an act that crosses state boundaries and, as such, can be readily conceived as falling under international jurisdiction. The international community as a whole has a stake when the borders of one internationally recognized state are transgressed by the military aggression of another state.[7] In contrast, it is not apparent what stake the international community has in prohibiting an individual state from treating its subjects or citizens in ways that do not necessarily have a boundary-crossing character.

Moreover, even if the Third Reich's conduct toward its own subjects was under international jurisdiction in principle, it seems clear that, prior to Nuremberg, the international community had not exercised its jurisdictional power to make any such treatment an international crime. The power had remained dormant: available, perhaps, but not yet utilized. In other words, even if the international community could legitimately prohibit states from treating their own people in certain ways, it had yet actually to adopt such a prohibition. This meant that any legal prosecution for crimes against humanity would seem to run contrary to the principle of the rule of law that proscribes ex post facto prosecution and punishment. And that principle of legality carries moral weight because it is prima facie unjust to punish anyone who is not guilty of having committed an act that was criminal at the time it was performed. Accordingly, a

7. A distinct issue concerns the conditions that must be met for there to be a valid rule of substantive international law that prohibits aggression. We examine the sources of international law in Sec. IV.

strong case could be made that charges of crimes against humanity should not have been included in the indictment.[8]

Under normal circumstances, the apparent lack of international jurisdiction and the clear absence of any international ban on a state violating the rights of its own people would have led lawyers and jurists quickly to conclude that the charges of crimes against humanity should have been thrown out of court. But circumstances were anything but normal, and many of the best legal minds sought to answer the "Nuremberg problem": how could those acts of the leaders of the Third Reich that most shocked the conscience of the world be justifiably prosecuted and punished under international law?

As we have indicated above, the Nuremberg problem can in fact be disaggregated into two distinct problems. The first implicates the scope and limits of state sovereignty: how can the international community legitimately pierce state sovereignty and prosecute officials for the mistreatment of their own people? The second involves questions about the conformity of international prosecutions to the principles of legality: in light of the substantive criminal prohibitions existing at the time of the defendants' conduct, did Nuremberg and other international prosecutions abide by the requirements of legality, and, if not, should that matter?

II. SOVEREIGNTY AND THE RECEIVED VIEW

The sovereignty dimension of the Nuremberg problem is the more fundamental one: international criminal law cannot legitimately prohibit moral wrongs committed within the borders of a state unless there is a good argument for trumping the state's normally exclusive authority over internal matters. If there is such an argument, then there is nothing wrong in principle with international trials, and one can then turn to questions of whether actual international trials have respected the principles of legality.

Among scholars and jurists working in international law, the received view is that the sovereignty problem can be overcome by showing that crimes against humanity, genocide, and similarly grave wrongs are not purely internal state matters. Rather, the view holds that such crimes reach across state boundaries, and it is only because they do so that international criminal jurisdiction can legitimately trump state sovereignty.

8. Other problems with the Nuremberg prosecutions were the tribunal's apparent lack of impartiality and the provision of the London Charter (art. 6) that made only those individuals on the Axis side subject to prosecution before the IMT. Those defects made problematic not just bringing the charges of crimes against humanity but also the charges of war crimes and crimes against peace. The conspiracy charge was also questionable insofar as its elements made it much more sweeping than the definition of conspiracy under German law. However, our initial focus here is on crimes against humanity.

Taking his cue from the standard distinction between civil and criminal law, Larry May has recently articulated a philosophical principle that lies behind the received view. As May explains, "In domestic settings, criminal prosecutions should only go forward when group-based individual harm is alleged, that is, harm that affects not only the individual victim but also the community. . . . In international criminal law, harms that are prosecuted should similarly affect a public . . . what could be called the world community or humanity." Thus, May advocates what he calls "the international harm principle," according to which the international community may make criminal only that behavior harmful to the international community itself.[9]

One way of meeting May's harm principle when it comes to crimes against humanity and similar atrocities is by connecting such crimes to acts that unquestionably do harm the international community. This was the main strategy of the lead U.S. prosecutor, Justice Robert Jackson, in his opening address to the IMT. He contended that crimes against humanity were international crimes insofar as they were inextricably connected to the planning and waging of a war of aggression: "How a government treats its own inhabitants generally is thought to be no concern of other governments or of international society." However, Nazi persecutions of its own people became international crimes "because of the purpose for which they were undertaken . . . the precipitation of aggressive war."[10]

The invasion of an internationally recognized state by another state ipso facto harms the international order of states and brings the matter, in principle, within the jurisdiction of the international community. Accordingly, on Jackson's argument, there are certain egregious moral wrongs, for which crimes against humanity stand, and international jurisdiction over these crimes can ride piggyback on the crime of waging

9. Larry May, *Crime against Humanity: A Normative Account* (Cambridge: Cambridge University Press, forthcoming), chap. 3. We should stress that May pairs his international harm principle with "the security principle," which he formulates as: "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 bodies may be justified in 'crossing the borders' of a sovereign state when genuinely acting to protect those subjects" (chap. 4). 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.

10. *Trial of the Major War Criminals*, vol. 2, p. 127. The IMT accepted Jackson's war-nexus requirement but gave it a narrow reading so that the persecution of Jews during the pre–World War II period was ruled to be beyond the scope of the tribunal's jurisdiction. See *Trial of the Major War Criminals*, vol. 22, p. 498; and Telford Taylor, *The Anatomy of the Nuremberg Trials* (Boston: Little, Brown, 1992), p. 583.

a war of aggression. State sovereignty is pierced on account of a "war nexus."

However, the war-nexus argument fails in two main respects. First, it cannot answer the question of why charges of crimes against humanity should be separate charges from those of planning and waging a war of aggression. The problem is that the argument elides the fact that an act is a crime only under a given description. If planning and waging aggression are the central acts that push a state's conduct out of its sovereign realm, then the criminal charges should be restricted to preparing and waging a war of aggression. Even if "crimes against humanity" were part of the preparation for the waging of the war, the international crime would still be that of preparing and waging a war of aggression. This is because it is only under the description 'preparation for a war of aggression' that extermination, persecution, deportation, and so forth would count as international crimes. Under the descriptions 'extermination', 'persecution', and 'deportation', we would not have international crimes. The second problem is that, as Richard Vernon has recently noted, the war-nexus strategy is "too selective and conditional. . . . For not every persecution, obviously, is a prelude to war."[11] International jurisdiction solely for those moral atrocities that are a preparation for war or an essential part of some cross-border attack seems far too limited. Even granting that sovereignty is to be accorded significant weight, it is difficult to see why—so long as a state's egregious conduct is cabined within its own borders—sovereignty is so important as to outweigh all other considerations.

The second way of trying to meet May's international harm principle involves a moral analogue to the boundary-crossing idea that is central to the war-nexus approach. Here the notion is that some crimes are so egregious as to victimize all of humanity, even if the perpetrators never literally reach out beyond their own territory. This notion seems to have been reflected in the opinion of a court in the British zone of occupation after World War II. The court held that a crime against humanity "is committed whenever the victim suffers prejudice as a result of the National Socialist rule of violence and tyranny to such an extent that mankind itself was affected thereby."[12]

Hannah Arendt expressed the view more clearly in her discussion of the Eichmann trial, held before an Israeli court: "Insofar as the victims

11. Richard Vernon, "What Is Crime against Humanity?" *Journal of Political Philosophy* 10 (2002): 231–49, p. 239.

12. "Decision of the Supreme Court of the British Zone, 26 October 1948," in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen,* vol. 1, pp. 122–26, p. 124 (unofficial translation), quoted in Prosecutor v. Tadic, case no. IT-94-1-A (July 15, 1999), p. 117, par. 260, n. 322.

were Jews, it was right and proper that a Jewish court should sit in judgment, but insofar as the crime was a crime against humanity, it needed an international tribunal to do justice to it."[13] Arendt went on to criticize the Israeli court for failing to recognize that the extermination of a particular community—Jews, Poles, or Gypsies, for example—"might be more than a crime against the Jewish or the Polish or the Gypsy people, that the international order, and mankind in its entirety, might have been grievously hurt and endangered."[14] More recently, Geoffrey Robertson has argued that a crime against humanity "diminishes every member of the human race," and so is properly subject to international criminal jurisdiction.[15] And May himself argues for a version of this approach, contending that crimes such as genocide are typically perpetrated by states, or other powerful collective actors, and are committed against persons based on their group affiliation. Such state-sponsored, group-targeted crimes, he claims, are harmful to humanity itself.[16]

This second way of trying to establish international jurisdiction over crimes against humanity also fails. First, it is wrong to think that Nazi crimes against Jews somehow victimized all of humanity. There were many humans who were left quite unaffected, one way or another, by the anti-Semitic atrocities of the Third Reich. Harm was done to the humanity of the Jewish victims, but that is not to say that harm was done to humanity itself.

More fundamentally, it is a mistake to argue for international criminal jurisdiction on the basis of May's international harm principle or anything akin to it. The principle presupposes the adequacy of a Westphalian conception of state sovereignty, and that presupposition is the critical normative failure behind both the war-nexus and the harm-to-humanity arguments. If such a conception is accepted, then international law can reach moral wrongs committed within a state only if those wrongs literally or morally cross international borders. Harm to humanity is a convenient but ultimately unpersuasive fiction. Harm to the

13. Hannah Arendt, *Eichmann in Jerusalem* (1964; reprint, New York: Penguin, 1994), p. 269.

14. Ibid., p. 276.

15. Geoffrey Robertson, *Crimes against Humanity* (New York: New Press, 2000), p. 220.

16. May, chap. 5. May seems to vacillate on whether crimes such as genocide actually harm humanity or harm only a smaller population but in a way that crosses international borders. There are passages in which May explicitly uses the "harm to humanity" account: "Thus, I will subscribe to the following principle of group-based harm: To determine if harm to humanity has occurred there will have to be one of two (and ideally both) of the following conditions met: either the individual is harmed because of that person's group membership . . . or the harm occurs due to the involvement of a group such as the state" (chap. 5).

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.[17]

Once the Westphalian conception is jettisoned, it is no longer necessary to find harms that cross borders in order for international criminal jurisdiction to extend to certain moral wrongs committed within a state. In the next section, we develop a justification for international criminal jurisdiction that breaks decisively with the Westphalian model.[18]

III. A NEW JUSTIFICATION

Since Nuremberg, a central project of the advocates of international criminal law has been to define certain categories of especially egregious crimes—genocide, crimes against humanity, apartheid, and so on—so as to provide a compelling justification for overriding state sovereignty even when the commission of the crimes does not involve any literal border crossing. In this section we argue that the project is unnecessary for grounding international criminal jurisdiction over moral wrongs that do not cross borders. In particular, a proper understanding of state sovereignty reveals that international jurisdiction over moral wrongs committed within a state does not hinge on the perpetration of especially heinous "supercrimes."

The tendency of international lawyers to focus on supercrimes is

17. It is often argued that crimes such as genocide invariably cause refugee problems and that the cross-border character of such problems is a sufficient basis for international jurisdiction over the crimes. However, there are three problems with this argument. First, even assuming that there are always refugee problems, it does not follow that they are always of sufficient magnitude to conclude that the international community has been harmed. Many internal policies of a state affect refugee flows, including economic policies, but it would be implausible to suggest that any policy causing an outflow of refugees triggers some kind of international jurisdiction. Second, it is possible, even if unlikely, for there to be cases of genocide which do not cause major refugee problems, and such cases should not be automatically excluded from the scope of international criminal law. Third, and most fundamentally, the refugee argument—and the received view of which it is a reflection—fails to reach the deepest moral grounds justifying international prosecutions in cases of crimes such as genocide. Those grounds lie in considerations of basic human rights, as we will argue in the next section.

18. Without a clear break from the Westphalian model, it is not possible to persuasively counter the views of a skeptic such as Alfred Rubin who rejects the justifiability of imposing human rights norms through international tribunals or mechanisms of universal jurisdiction. See Alfred Rubin, *Ethics and Authority in International Law* (Cambridge: Cambridge University Press, 1997). Allen Buchanan has broken from that model in arguing against Rubin and in favor of incorporating human rights norms in international law. See Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2004). Also see Charles R. Beitz, *Political Theory and International Relations* (Princeton, N.J.: Princeton University Press, 1979); and David Luban, "Just War and Human Rights," *Philosophy & Public Affairs* 9 (1980): 160–81.

reasonably understood as deriving from a desire to construct a nonpaternalistic justification for restricting state sovereignty. We, too, eschew paternalism, but the international criminal law need not invoke such categories of crime in order to nonpaternalistically justify its interference with a state's self-regarding affairs. Perhaps the best way to see this is in terms of Joel Feinberg's work on the moral limits of domestic criminal law.

Feinberg has a deep appreciation for each person's autonomy and, as such, he insists that it would be wrong for the criminal law to interfere with an agent's self-regarding affairs. There is nothing wrong with punishing those people who wrongly harm others, but the criminal law has no business interfering with an agent's voluntary actions, no matter how damaging they may be to the agent herself, as long as those actions do not harm any unwilling victim.[19]

Feinberg's analysis is relevant here because those who have sought to justify the international criminal law have the same appreciation for the self-regarding activity of sovereign states that Feinberg has for the self-determination of individual persons. In other words, if one believes that states enjoy the same rights against paternalistic interference that individual persons do, then one would explicate crimes against humanity and other supercrimes in terms of harm to persons outside of the state whose sovereignty is restricted. Thus, it is not surprising that advocates of the received view suggest that the international criminal law is legitimate only when the international community is harmed because it allows them to insist that, just like individual persons, sovereign states enjoy the right to self-determination in all matters that do not harm others.

However, even if one accepts Feinberg's assessment of paternalism with respect to individuals, it is a mistake to transpose Feinberg's analysis to international criminal law in a straightforward fashion because individuals and states are importantly disanalogous. States are composed of multiple individuals, some of whom might violate the basic rights of others, and a legitimating function of any state is to help prevent, prosecute, and punish such violations. An individual may have the right to take actions that harm her own basic interests, but a state does not have the moral liberty to undertake or allow actions that harm the basic interests of the individuals who are its citizens or subjects, unless those individuals freely consent. In the absence of such consent, these actions

19. Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), and *Harm to Self* (New York: Oxford University Press, 1986). As May (chap. 5) argues with reference to Feinberg's domestic harm principle, "Requiring a violation of the harm principle is a well-recognized way to delimit the kind of things that it is legitimate to prosecute people for."

violate the rights of the individuals. The state has the responsibility to help prevent the rights violations of its people and punish those who perpetrate such violations.

This moral responsibility makes a state's sovereignty over its people more akin, in certain significant respects, to a parent's authority over her children than to an individual's dominion over herself. Parents enjoy a set of rights and liberties with respect to their children, affording them a great deal of discretion as to how to fulfill their parental responsibilities. Thus parents may choose how the children will dress, worship, eat, be educated, and so forth. However, there are moral limits on how parents may permissibly raise their children, and those limits are set by the basic rights of the children.

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 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. That is, one need not show that if a parent mistreats his children in a sufficiently horrible manner then it becomes a "crime against society" because, say, it is more likely that the children will become socially disruptive. On the contrary, third-party intervention is justified even if the domestic abuse will have no effect upon anyone outside of the family simply because the child has a right against such mistreatment.

It is true that there are some important differences between a parent's authority and a state's sovereignty. As Locke wrote, a father's "command over his children is but temporary and reaches not their life or property."[20] The sovereignty of a state over an individual does not expire when she attains a certain age or level of maturity, and sovereign power reaches the property of a state's constituents. If capital punishment is ever permissible, it reaches their lives as well. Nonetheless, the power of the government through which a state exercises sovereignty over its members is analogous to the authority of parents over their children in the following respect: 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

20. John Locke, *Second Treatise of Government* (Indianapolis: Bobbs-Merrill, 1952), p. 37.

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.

The partial analogy we draw between political sovereignty and parental authority is not meant to justify our revised understanding of sovereignty. Rather it is meant to clarify our understanding by elucidating a structurally similar form of authority in the personal sphere. The justification for our view rests on the moral claim that it better incorporates a due recognition of the importance of human rights and the inherent moral value of the human individual than does the received understanding. Before we say more about the implications our revised understanding of political sovereignty has for international criminal law, it will be helpful to note the convergence between our understanding and that of the thinkers and activists who defend the importance and permissibility of certain instances of armed humanitarian intervention.

Traditionally, such intervention has been considered strictly impermissible simply because the invaded state has not given its consent, and, on the Westphalian conception of sovereignty, any state not aggressively attacking others has an inviolable right against such intervention. More recently, political philosophers, international lawyers, and many in the global political community have questioned this absolute prohibition against intervention on grounds similar to those raised above. Certainly there is no consensus on military intervention, but we suggest that the international community is gradually but decidedly coming around to the following view of state sovereignty: legitimate states do indeed enjoy a right to self-determination which gives them exclusive jurisdiction over matters that strictly concern individuals within their territorial borders, but this sovereignty is contingent upon the state performing its requisite political functions.[21] There will inevitably be controversy regarding what qualify as the requisite political functions, but clearly they include at least securing peace and protecting basic human rights. And because a state's claim to self-determination depends on its ability and willingness to preserve peace and protect basic human rights, only states that satisfactorily perform these functions enjoy a right to sovereignty.

However, we do not claim that international criminal prosecution could be justifiable for any basic rights violation in a state.[22] There are

21. See Beitz. Also see Kofi Annan, "The Legitimacy to Intervene," *Financial Times* (December 31, 1999), available at http://www.globalpolicy.org/secgen/interven.htm.

22. Among the basic human rights on any reasonable list would be security of the person, freedom from torture and cruel or degrading treatment, freedom of thought and expression, the right to due process (including freedom from arbitrary arrest and detention), the right to property, freedom of movement (including freedom from deportation or forced evacuation), and freedom from enslavement. A sufficiently nuanced treatment of human rights would take account of the severity of the harm needed to warrant the

both principled and pragmatic reasons to restrict the potential scope of international criminal jurisdiction, and even those thinkers who are dubious of the argument from principle can and should accept the pragmatic considerations as sufficient.

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 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.

But what counts as "adequate"? Our suggestion, to be elaborated upon below, is that a state adequately protects basic rights when it neither perpetrates nor permits widespread or systematic violations of those rights. Accordingly, on the argument of principle, a state that does not perpetrate or permit such violations has a right of self-determination, and that right places a limitation on the legitimate scope of international criminal jurisdiction. Conversely, such a limitation is absent in the cases of states that do permit or perpetrate widespread or systematic violations of basic rights. The political leaders of Somalia in the early 1990s were unable, and the leaders in Milosevic's Yugoslavia were unwilling, to protect adequately their peoples' basic rights. On the argument of principle, then, neither Somalia nor Yugoslavia had a right of self-determination that could provide a principled moral barrier against an effort of the international community to criminally prosecute those responsible for crimes that violated basic rights and occurred within their borders.[23]

The idea that states can have a right to self-determination is problematic in the eyes of some thinkers, even in the case of states that clearly possess moral legitimacy. Such thinkers often argue that only individual persons—not collectivities—can have basic rights, including the right of self-determination. Yet, even if this individualist view is ac-

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characterization of a form of mistreatment as a "human rights violation." Thus, if a burglar steals a radio, the victim's right to property has been violated, but it would be misleading to say that her human rights have been violated: the severity of harm is not sufficient to warrant such a characterization. On the other hand, if all of her property were expropriated by the state or some other agency, then the harm would normally be sufficient to warrant such a characterization.

23. This approach conforms to the idea of complementarity incorporated in the Rome statute establishing the International Criminal Court: the court will have jurisdiction only when domestic courts are unwilling or unable to prosecute criminal offenses arising under the statute. See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), articles 1 and 126(1).

cepted, there 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 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. In contrast, a system that authorized international jurisdiction whenever and wherever there were violations of basic rights would almost surely involve an inefficient use of legal and political resources, licensing international institutions to do what could be much better done by domestic ones.

It does not follow, of course, that the precise pragmatic optimum is to be drawn at the point where states are unwilling or unable to prevent systematic or widespread violations of basic rights. But once our criterion is spelled out, the "widespread or systematic" formulation will appear to be a reasonable one marking off the appropriate boundaries of international criminal jurisdiction, given either the pragmatic or principled point of view.

"Widespread" is a purely quantitative notion referring mainly to the number of violations: it takes account of the number of people victimized, weighted by the relative importance of the rights violated. In some cases, the total population size will be relevant, but above a certain threshold number of victims, it probably does not matter what proportion of the total population the victims represent. For example, the Serbian massacre of 7,000 Muslim males at Srebrenica counted as widespread, no matter what fraction it was of the total Bosnian population. "Systematic" is a partly quantitative notion, referring to acts that are part of some plan whose execution would result in many rights violations. But because of the planning element, the notion also has a qualitative aspect: there is some aim or objective that cannot be specified solely in numerical terms. The aim might involve the targeting of a certain social group, but it could also consist of spreading terror through a general population by random acts of violence. Accordingly, on our criterion, international criminal jurisdiction would be triggered whether or not the intended rights violations were group oriented. Moreover, jurisdiction could apply even before the violations reached a level that would count as widespread.

It is important to note that rights violations can be widespread without being systematic or, more generally, part of any organized effort.

For example, in a failed state, there may be many murders and rapes that are not directed or instigated by any group but are simply the accumulation of separate criminal acts committed by individuals operating solo and made possible by the breakdown of the state's law enforcement apparatus. Under our theory, such murders and rapes would be within the potential scope of international criminal jurisdiction, even though they were just ordinary domestic crimes.

However, in many cases, there will be large numbers of individuals operating in concert to violate the basic rights of others. Yet, international jurisdiction should not be automatically triggered by the mere fact that some responsible parties are not prosecuted domestically. Here, again, there is some threshold determined by the number of persons and how important their role was in the rights violations. The more perpetrators who go unprosecuted domestically and the more important their role, then the closer one comes to triggering international criminal jurisdiction.

The widespread or systematic criterion responds to principled and pragmatic concerns about the scope of international criminal jurisdiction by giving states considerable leeway to order their own affairs. From the point of view of political principle, the leeway is to be thought of as a basic right of self-determination, and it is conditional upon a state's performance of its requisite political functions. Performance is measured by the number and severity of actual or planned rights violations. Saying that the violations are widespread or systematic is saying that the state's performance, measured in such terms, falls below what can be reasonably demanded. In such a situation, the state has no principled claim against international criminal jurisdiction for the crimes committed on its territory.

From the pragmatic point of view, the state's moral leeway to order its own affairs derives strictly from the instrumental value such leeway possesses in virtue of protecting the rights of individual persons. And the state is presumptively in the best position to prosecute rights violations within its borders. However, that presumption is overridden when the state's performance is sufficiently dismal that international institutions become more efficient prosecutors. To say that rights violations are systematic or widespread is to say that the state's performance has fallen to such a low level that international institutions can be reasonably thought to do a better job of prosecution.

It is a consequence of our analysis that the widespread or systematic criterion may be applied somewhat differently depending on whether one thinks that the most basic reason for restricting international criminal jurisdiction is rooted in a political principle of state sovereignty or in a pragmatic assessment of the relative strengths of domestic and international institutions. We think that this vagueness is not an insu-

perable obstacle so long as the criterion is pointing in the right direction, and we believe that it does so by looking at the severity and number of human rights violations that occur within a state's territory.[24] On either the principled or pragmatic arguments, such factors must count as key determinants of whether the international community may legitimately intervene in a state's domestic criminal justice process. For current purposes, we suspend judgment on the question of whether the argument from principle, or the one from practice, provides the most basic reasons for limiting the scope of international criminal jurisdiction.

In connection with the phrase "widespread or systematic," it is worth noting that article 7 of the statute of the International Criminal Court (ICC) defines as crimes against humanity acts such as murder and enslavement "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." However, there is a crucial difference between the ICC statute and the account we are proposing. Our account is not offered as a definition of crimes against humanity or any other crime. Rather, it is an account of when and why international prosecutions justifiably pierce state sovereignty. In contrast, the ICC statute defines a certain crime and simply assumes that the crime, so defined, is one that justifies the piercing of sovereignty. The problem with the ICC's definition is that it simply leaves us with the standard, but unpersuasive, argument that crimes against humanity are justifiably subject to international jurisdiction because they are so morally egregious as to harm humanity itself.

A second important difference between our account and the ICC approach to crimes against humanity is that we do not require that widespread violations of basic rights within a state be part of "an attack" on a population in order for international jurisdiction to apply. As noted above, in failing states with ineffective legal enforcement, rights violations could qualify as widespread simply in virtue of the cumulative result of very many unrelated murders, rapes, and so forth.

This second difference points to a feature of our account of international criminal jurisdiction that sharply distinguishes it from the received view of human rights crimes: the account does not rely on the idea that international jurisdiction must gain its foothold based on the commission of some "supercrime" such as genocide or crimes against

24. In order to be normatively plausible, any standard dictating when international criminal jurisdiction is triggered must point to the kinds of considerations that we have discussed in cashing out "widespread or systematic," that is, those regarding the scope and severity of violations of basic rights. Perhaps there is some phrase other than 'widespread or systematic' that better captures the relevant considerations. However, it is difficult to see how any standard will be significantly more precise than the one our account uses. As with many other areas of law, standards can only be rendered more precise by a process of institutional rulings and rules.

humanity. It is not necessary to struggle—as mainstream theorists have done—to develop a reasonably persuasive account of how certain egregious crimes harm humanity or the international community: the Westphalian conception of sovereignty that demands such harm as a precondition of international criminal jurisdiction has been jettisoned. If one adopts, instead, the functional account of state sovereignty recommended here, then states that do not sufficiently protect the basic rights of their people have no legitimate objection to the imposition of international criminal law on them.[25]

IV. LEGALITY AND JUSTICE

We have argued that the international community has the right to override state sovereignty and to prohibit and prosecute widespread or systematic human rights violations on a state's territory. This argument would certainly place Nazi atrocities against their own subjects within the potential scope of international criminal jurisdiction. However, it is one thing for an international ban that covers such atrocities to be justifiable in principle. It is another for there actually to be such a ban.

The second dimension of the Nuremberg problem revolves around the claim that there was no such ban and that, as a consequence, the prosecutions for crimes against humanity violated a key principle of legality: the prohibition on ex post facto prosecution. This claim has normative importance because it is prima facie unjust to prosecute an individual and render him liable to criminal punishment unless he has violated a clear law, prospectively applied. Moreover, Nuremberg's problems with legality were not merely the product of the unprecedented character of the trial: the sources of international law make international criminal prosecutions more prone than domestic ones to reasonable claims of having violated the principles of legality. It is also important to note that the ex post facto problem is not distinctive to the defense of international criminal law developed here. Rather, our point is that any defense must come to grips with the problem and that extant theories of international law have failed to do so adequately. Let us begin, then, with the injustice of ex post facto prosecution and then turn to the problems of legality in international prosecutions.

The injustice of prosecuting someone who has not violated a clear, prospective law is reflected in certain traditional principles of legality, most prominently in the principle of *nullum crimen sine lege* and the prohibition on ex post facto prosecution. The *nullum crimen* principle declares that no conduct may be regarded as criminal without a law specifically prohibiting it. The ex post facto principle bars the appli-

25. We do not treat the issue of amnesties and when they are legitimate here, except to say that their legitimacy cannot be ruled out a priori.

cation of criminal prohibitions to conduct occurring prior to the time the prohibitions came in force. There are multiple normative grounds for such principles, including the need to restrain governments from repressing political opposition or unpopular groups, but the key point here is simply that it unjust to the individual. Consider, for instance, the injustice of deciding on Thursday that everyone who had lit a campfire in the park on Tuesday should be punished. If Nancy lit a campfire on Tuesday, then, at the time, she committed no crime. Of course, one might say that Nancy became legally guilty on Thursday for her behavior on Tuesday but, as a moral matter, this is an injustice to Nancy because applying the law retroactively made it impossible for her to avoid legal guilt.[26]

A strong case can be made that the defendants at Nuremberg were retroactively prosecuted, at least on the charge of crimes against humanity.[27] It might seem that this ex post facto problem is specific to the Nuremberg trial, given its unprecedented character. However, an understanding of the differences between domestic and international criminal law reveal that the appearance is misleading.

In well-functioning domestic legal systems, criminal prosecutions rarely run afoul of principles of legality. The rules of criminal law are clearly identifiable, and they precisely specify the elements of each criminal offense. Moreover, the rules are applied prospectively within a clearly specified jurisdiction. Meeting the requirements of legality is usually not difficult in light of the existence of generally accepted and highly determinate procedures of legislation and adjudication, together with institutions whose specific legal powers and jurisdiction are also generally accepted. The result is a clear and noncontroversial source of domestic criminal law, with a fixed jurisdiction and a determinate formulation for each of the substantive rules that belong to the law.

In contrast, the sources of international criminal law make for a set of legal rules whose validity and jurisdiction are often much more controversial and whose meaning is considerably more vague. The stat-

26. We do not claim that the principles of legality must be respected (to some threshold degree) in order for some system that regulates human conduct to be a system of law. That claim was part of Lon Fuller's procedural version of natural law theory, but it is no part of the analysis we give of international or domestic law. See Lon Fuller, *Morality of Law*, rev. ed. (New Haven, Conn.: Yale University Press, 1964). However, we do agree with Fuller that the principles of legality have moral weight.

27. The scholarly discussion and debate over the conformity of Nuremberg to the principles of legality have continued for over a half century. We cannot address the matter in a thorough manner here. Yet, even if one were to reject our analysis regarding crimes against humanity at Nuremberg, one could still agree that other legality problems afflicted the trial, e.g., the absence of a definition of aggression and crimes against peace, and that such problems are more prone to occur in international prosecutions than domestic ones.

ute of the International Court of Justice declares that there are four sources of international legal norms: (1) treaties and international conventions agreed upon among states, (2) international customary practices accepted as law, (3) the general principles of law accepted by "civilized nations," and (4) judicial decisions and "the teachings of the most highly qualified publicists of the various nations."[28] Most jurists treat sources 1 and 2 as the main sources of the substantive international criminal law, but even with that limitation, significant problems meeting the *nullum crimen* principle remain because treaties and conventions declaring crimes often lack specificity. For example, to this day there is no international convention that defines the crime of aggression, a point we will take up shortly.

Moreover, it is extremely unclear when the conditions are met for a criminal norm to become part of customary international law or what the precise formulation is of any given customary norm. Presumably, a sufficient number of states must conform to the norm and do so, in part, out of the belief that it is their legal obligation to do so. But it is unclear whether and how the behavior and attitudes of enough states can create a legal obligation under which all states stand. In addition, even when there is general acceptance of some customary criminal prohibition, there is often dispute over its correct formulation. For example, for decades after Nuremberg, jurists and scholars debated whether the war-nexus requirement was an essential element of crimes against humanity. Even today, prominent scholars of international law have said that the issue is still "not entirely free of doubt."[29]

To be sure, well-functioning domestic criminal justice systems are not entirely free of indeterminacy and other features that raise problems of legality. Moreover, there is nothing inherent to international criminal law that makes it more prone to legality-related problems than domestic systems. However, international criminal law has in fact developed in a manner that does, as a rule, make it more prone.

It is true that current trials for crimes against humanity under the international criminal tribunals for the former Yugoslavia (ICTY) and

28. Statute of the International Court of Justice, art. 38 ("Statute of the International Court of Justice," in *Documentary Textbook of the United Nations*, ed. J. E. Harley [Los Angeles: Center for International Understanding, 1950], pp. 883–89, p. 892). Customary practice is regarded as having two elements: a regular pattern of behavior plus an *opino juris*. The *opino juris* condition means that the behavior is motivated by the belief that it is legally required.

29. See Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law*, 2d ed. (Oxford: Oxford University Press, 2001), p. 58. Ratner and Abrams themselves argue that the clear weight of authority is against the war-nexus requirement, but their willingness to assert that the matter is subject to doubt reflects the relatively vague character of some important international crimes.

for Rwanda (ICTR) present a different situation from the one confronting the IMT. Today virtually all international law scholars and jurists take for it granted that crimes against humanity are a distinct and valid part of customary international law. They point to the UN General Assembly declaration of 1946 that the principles of the IMT were principles of international law and its request that the International Law Commission codify the principles. Jurists and scholars also note that a number of states have enacted their own domestic laws prohibiting crimes against humanity and conducted their own prosecutions for atrocities committed during World War II. Nonetheless, there is some reason to question the received view that crimes against humanity now hold an indisputable status as crimes under international law.

During the Cold War, the world witnessed many episodes that fit comfortably within the IMT's understanding of crimes against humanity, and no individuals were prosecuted.[30] Of course, the Cold War itself had much to do with the absence of legal action even in such an egregious case as Cambodia.[31] But by the time the ICTY and ICTR began to hand down their indictments, virtually the only charges that had ever been brought for crimes against humanity were in connection with actions committed during World War II. It is at least questionable whether one can say that a criminal norm has its source in customary international law when the actual behavior of states is tantamount to permitting violations of the norms. And because the statutes for the ICTY and ICTR presuppose that crimes against humanity were prohibited by preexisting international law, there is a colorable argument that the prosecution of such crimes before those tribunals is ex post facto.

However, we will not press here the possible ex post facto problems with the ICTY and ICTR. We simply caution that, if custom is to be taken as a source of law, then the actual practices of states need to be taken rather seriously.[32] More important to the current argument is the point that international criminal law raises problems of legality which go beyond ex post facto concerns. For example, the *nullum crimen* prin-

30. Ibid., pp. 190–91.

31. After many decades of delay, a hybrid international-domestic tribunal has been agreed to for the prosecution of international crimes committed in Cambodia.

32. In rejecting Justice Jackson's contention that customary international law prohibited crimes against humanity, Judith Shklar wrote, "To speak of international law as analogous to customary law is an abuse of the term 'custom'. Custom implies usage—continuous conformity of behavior—the total absence of which two world wars had just demonstrated" (Judith Shklar, *Legalism: Law, Morals, and Political Trials* [Cambridge, Mass.: 1964; reprint, Harvard University Press, 1986], p. 166). Her claim that Jackson was not taking custom seriously can and should be endorsed, but we do not accept her suggestion that there is some kind of inherent problem with the idea that customary practice can generate international legal rules.

ciple requires specificity in the description of conduct that is declared criminal under the law, but international law fails to provide such specificity in many important instances.[33] Perhaps the most notable case of the lack of specificity involves the crime of planning and waging a war of aggression. The pre-Nuremberg treaties outlawing such wars did not define the crime, nor did the London Charter. More recently, the ICC prohibits aggression but adds, "The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime."[34] Such a provision has yet to be adopted. It might be easy to dismiss the protestations of the Nuremberg defendants about the lack of specificity in treaties outlawing aggression. However, one need only think of the NATO bombing of Yugoslavia in 1999, the Vietnamese ouster of the Khmer Rouge regime in Cambodia in 1979, or the U.S. invasion of Iraq in 2003, among numerous other instances, in order to realize that a definition of the international crime of aggression is neither a superfluous nor simple matter.

Specificity problems also affect the prosecutions before the ICTY and ICTR. Consider the genocide charges brought against Jean-Paul Akayesu before the ICTR. Genocide is prohibited by UN convention and included in the ICTR statute as a crime for which the tribunal has jurisdiction. Reflecting the UN convention, the statute defines genocide as committing one of a series of enumerated acts "with the intent to destroy in whole or in part, a national, ethnic, racial or religious group." One of the acts enumerated is "imposing measures intended to prevent births within the group."[35] Precedents had not specified sexual attacks as potentially fitting under that category, but the judgment of the trial chamber held that sexual mutilation and rape, among other sexual attacks, could be understood as "measures intended to prevent births within the group."[36]

In an ICTY case, the appeals chamber ruled that direct force was not an element of the crime of rape and that coercive circumstances, such as being held in de facto military quarters, could negate a person's consent to sexual conduct. The perpetrator need not himself use force

33. M. C. Bassiouni writes, "An examination of all 274 international instruments reveals that the language used in ICL instruments to define crimes and other penal matters is less specific than that found in many contemporary penal codes." See "The Sources and Content of International Criminal Law: A Theoretical Framework," in *International Criminal Law*, vol. 1, *Crimes*, 2d ed., ed. M. C. Bassiouni (Ardsley, N.Y.: Transnational, 1999), p. 33.

34. ICC Statute, art. 5, par. 2.

35. Statute of the International Criminal Tribunal for Rwanda, art. 2, at http://www.ictr.org/wwwroot/ENGLISH/basicdocs/statute.html.

36. Prosecutor v. Jean Paul Akayesu, case no. ICTR-96-4-T (September 2, 1998), pars. 507 and 508.

or threaten its use for rape to take place under such conditions.[37] International criminal law had left open the question of whether, as in some domestic criminal codes, direct force was an element of the crime.

The point in discussing these rape cases is not to criticize them for (arguably) violating the *nullum crimen* principle. Rather, it is to illustrate how the sources of international criminal law make prosecutions under it more prone to such violations than prosecutions under domestic law. Moreover, given the way in which international criminal law develops, it is reasonable to think that there would be substantial problems of legality attending any realistic transition from the current regime of international law to one that is as fully protective of human rights as the system we sketched in Section III. That system involves substantially greater incursions on state sovereignty than the current regime permits. In particular, it allows international tribunals or even the domestic tribunals of other states to step in not only when supercrimes such as genocide or crimes against humanity are perpetrated in a given state but also when the state is committing or failing effectively to prosecute and punish systematic or widespread human rights violations.

It is unlikely that, at the start, there will be many states prepared to sign on to a treaty creating such a sovereignty-restricting system. Instead, a more likely scenario is that a few "vanguard" states will take it upon themselves to prosecute in their own domestic courts, or under multinational tribunals that they establish, human rights violations in other states that are failing to perform their requisite political functions. The defendants prosecuted in such tribunals could certainly claim that the principles of legality have been violated. The jurisdictional basis of such prosecution in existing international law would be slim. However, it would seem that the only way to reach the point where international tribunals routinely prosecute widespread or systematic rights violations in failing or criminal states is gradually to build up the custom so that, over time, it becomes a generally accepted practice which is understood to fulfill the legal obligations of the state parties.

The dominant view among international lawyers and legal scholars is that the principles of legality are side-constraints that must not be violated, even for a "good cause" such as punishing perpetrators of mass atrocities or establishing a system of international law more protective of human rights. However, if our analysis is right, then legality problems are endemic to international criminal prosecutions, and one is faced with the unwelcome prospect of concluding that many celebrated prosecutions from Nuremberg forward violated legality.

It might be said that any injustice in the ex post facto prosecution

37. Prosecutor v. Kunarac, Kovac, and Vukovic, case nos. IT-96-23 and IT-96-23/1 (June 12, 2002), pars. 129–32.

of perpetrators of human rights atrocities pales into insignificance in light of the moral guilt of the perpetrators. Accordingly, one might think that the prima facie injustice of international prosecutions that violate the principles of legality does not ultimately matter. In the next section, we address this view and develop an alternative line of argument for the position that international prosecutions can sometimes be justified when they transgress key principles of legality.

V. MORALITY, LAW, AND BASIC RIGHTS

If our analysis to this point has been on target, then the sources of international criminal law make prosecutions under it liable to overstep the bounds of legality. There is a strong argument, for example, that the defendants at Nuremberg were prosecuted ex post facto insofar as crimes against humanity were concerned and that defendants at subsequent international trials were prosecuted under legal rules that did not meet the *nullum crimen* principle. These defendants may have borne a staggering degree of moral guilt, but they were legally innocent of key crimes for which they were convicted, or at least the verdicts against them were tainted by the fact that they were handed down on the basis of rules that lacked the precision demanded by the principles of legality.

Yet, even from the admission of legal innocence, it does not follow that the prosecutions and punishments were unjustifiable. As we shall argue, the moral reasons in favor of punishing legally innocent defendants can sometimes outweigh the legality-based reasons against doing so. In such cases, the defendants have no right to object to their punishment.[38] Before elaborating the argument, it is worth distinguishing it from two similar positions with which it might be confused.

First, one could suggest that when a defendant is morally guilty to an extreme degree, she ipso facto becomes legally guilty as well. The idea here is that some of a defendant's excess moral guilt can fill in, as it were, for what otherwise would be an absence of legal guilt. We reject this account because legal and moral guilt are distinct categories, and it simply misdescribes things to pretend that they somehow merge in extreme cases.

A second view is closer to our own: when a defendant is sufficiently morally guilty, it no longer matters that she is legally innocent or that the guilty verdict was tainted by the imprecision of the rules on which

38. There is an important distinction between punishing people summarily and punishing them through the process of a legal trial. Some critics of the trial argued that the Nuremberg defendants should have been punished summarily rather than through a trial. In this section, we present the reasons for concluding that the trial did not violate the rights of the defendants, notwithstanding their legal innocence. In the next section, we take up the critics' argument that the defendants should have been summarily punished.

the verdict was based. This view correctly acknowledges the descriptive fact that a person can remain legally innocent no matter how morally guilty she is. Nonetheless, it makes a normative mistake by supposing that a defendant's legal innocence can lose its moral significance when she is sufficiently morally guilty. A person's legal innocence always generates moral reasons against punishing her.

However, it can be permissible to punish a legally innocent person because the moral reasons against punishing the legally innocent are not indefeasible. We suggest that the moral reasons against punishing a legally innocent person must be weighed against those moral reasons in favor of doing so, and it is possible in exceptional cases for the latter to outweigh the former. Let us consider the Nuremberg defendants insofar as they were prosecuted for crimes against humanity. Even on the view that they were legally innocent of those charges, there were still moral reasons in favor of criminally punishing the defendants for the acts which had been retroactively prohibited by the applicable rules of the London Charter.

The most obvious and popular reason to punish the defendants at Nuremberg was simply that they deserved it. This retributive conviction is not difficult to explain: justice demands that morally guilty people be punished for their wrongdoing, and given that the defendants at Nuremberg were so horribly morally guilty, it would have been a gross transgression of justice if they had been left unpunished. Put in terms of moral reasons, the defendants' legal innocence provided moral reasons against punishing them but their extreme moral guilt provided decisive moral reasons in favor of doing so. This position was taken by Hans Kelsen. He wrote that the acts proscribed as crimes against humanity by the London Charter were "morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character. . . . Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force."[39]

A second set of moral reasons in favor of punishment was generated by the restitutive effects of punishment. One need allege neither that punishing the criminal fully restores the victim nor that the principal justification of punishment is victim restoration to claim that victims regularly experience a real sense of restoration when those who have violated their rights are duly convicted and punished. If this claim is sound, then the potential restorative effects of punishing the defendants at Nuremberg provided moral reasons in favor of doing so. And because

39. Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" *International Law Quarterly* 1 (1947): 153–71, pp. 164–65.

there were so many profoundly wounded victims who stood to gain at least some psychological restoration after the atrocities of the Third Reich, it seems right to suppose that these moral reasons in favor of punishment were substantial.

A third set of moral reasons to punish the defendants at Nuremberg stemmed from the role the punishment played in enabling Germany to return to a peaceful life under the rule of law. Until people have a sense that justice has been served to some reasonable extent, they are often unwilling to move forward in a peaceful and constructive fashion. In the case of Germany after World War II, the feelings of resentment and anger were so strong that it is likely that severe and rampant vigilantism would have posed a formidable obstacle to restoring the rule of law. The punishments at Nuremberg were instrumental in neutralizing the anger and outrage that would otherwise have fueled vigilantism, and they did so through a process that embodied in at least some measure the principles of legality. Such a process was reasonably seen as helping to get Germany back on the road to the rule of law.

Judith Shklar defended the trial and punishment largely on the basis of this third set of reasons: "As far as the Trial dealt with crimes against humanity it was both necessary and wise."[40] She openly recognized the charges as ex post facto and yet argued that the trial fulfilled "the most compelling purpose of all criminal justice. It replaced private, uncontrolled vengeance with a measured process of fixing guilt in each case and taking the power to punish out of the hands of those directly injured."[41] Shklar also emphasized the contribution of the Nuremberg proceedings to the re-establishment of the rule of law in Germany: "The Trial, by forcing defense lawyers to concentrate on the legality of both the entire Trial and its specific charges, induced the German legal profession to rediscover and publicly proclaim anew the value of the principle of legality in criminal law which for so many years had been forgotten and openly disdained."[42] Writing in 1964, her assessment was that, thanks in significant measure to the trial, "Western Germany is now, in short, a *Rechtstaat*."[43]

The reasons that overrode the prima facie injustice of ex post facto prosecution at Nuremberg also apply to the current international tribunals for Yugoslavia and Rwanda. The defendants bear an extreme degree of moral guilt; additionally, restoring victims and establishing a rule of law are important considerations in favor of the prosecutions before the ICTY and ICTR, notwithstanding possible legality-related

40. Shklar, p. 155.
41. Ibid., p. 158.
42. Ibid., pp. 165–66.
43. Ibid., p. 169.

problems. But perhaps the most important reason for international tribunals in Nuremberg, the Hague, and Arusha has yet to be explained.

Such tribunals are necessary due to the absence of a global sovereign to enact an international criminal code and establish a judiciary to apply it. This absence means that international criminal law must grow predominantly by custom and practice. In this situation, ad hoc tribunals such as the IMT and ICTY are the only feasible forums to adjudicate cases under the law. Moreover, due to the vague character of custom and practice, as a practical matter, these tribunals will deviate from accepted standards of legality. Nonetheless, they are justified because they are essential to establishing an international criminal law that adequately protects basic rights. We do not deny that the operations of the ICC may eventually constitute a major step toward an international system of adjudication that meets the requisite standards of legality. If that eventuality comes to pass, however, its way will have been paved by the use of tribunals whose standards of legality are problematic.

Notwithstanding her reasoning in support of the Nuremberg trial, Shklar was quite critical of the idea that the trial might have been justified on the ground that it helped in the process of constructing a nascent international rule of criminal law that better protected human rights. She wrote: "As to the notion that the Trial was part of a 'primitive stage' in the ever progressing history of international criminal law. . . . What is astounding is that anyone should be able to discern a law of progress in operation in international criminal law right after a war . . . which had seen spectacular violations of every known legal and moral norm. At best, it is a testimony to legalistic optimism—and blindness to history."[44]

However, Shklar failed to adequately distinguish two positions. The first is that there is an "ever progressing history of international law," a kind of steady march forward of international legality, and that Nuremberg was justified as part of that march. The second position does not accept the thesis that there is a steady march of progress but nonetheless sees Nuremberg as justifiable because it had a significant potential to contribute to the admittedly contingent process of constructing an international system of criminal law that protects basic rights. The first position is not credible, as she points out. The second is not only credible; it has been confirmed by recent history and provides a perspective of critical importance for judging the justifiability of international tribunals without ignoring their legality-related shortcomings.

From Shklar's historical position in the 1960s, it was only the West German legal system that seemed to have been helped by the Nuremberg precedent. But the contingencies of history, most notably the end

44. Ibid., p. 167.

of the Cold War, paved the way for a delayed but powerful effect of Nuremberg on the development of an international criminal law more protective of human rights. The IMT judgment and subsequent trials of German human rights violators are often cited as precedent by the ICTY and ICTR. In addition, it is unrealistic to think that there would be such widespread support for (and so little international resistance to) both the ICTY and ICTR had they not been preceded by Nuremberg. And there is every reason to suppose that there will be even more support for (and less resistance to) any international criminal trials that might follow these current tribunals. Of course, international conventions, such as those banning genocide, torture, and apartheid, have also been part of the piecemeal construction of a system of international criminal law. It is a ramshackle construction, to be sure. However, it does provide some protection for basic rights, and there is a reasonable hope of it providing much more.

To appreciate this last point, consider as a domestic analogy the way in which federal law has been pivotal over the years in making the United States a country more respectful of the basic rights of its inhabitants. The country began as a relatively loose federation of states, each of which had broad discretion to order its own affairs. At least initially, the federal government was charged with little more than national defense, regulating interstate commerce, and ensuring that each state conducted itself in line with the Constitution. Over time, the federal government has grown considerably, so that it is now responsible for innumerable additional functions. It is hard to deny that the ascendance of federal law has had an enormously beneficial impact on the overall respect for basic rights. One can point to numerous severe injustices in U.S. history, but many more people would have been horribly mistreated if the local leaders were not constrained by federal law.

It is reasonable to hope that international criminal law will increasingly play a role worldwide analogous to the one which federal law has played domestically in the United States. However, the only practicable way for international law to realize such a potential involves reliance on tribunals and prosecutions which cannot meet the standards of legality which well-functioning domestic systems routinely satisfy. This analysis does not entail that international tribunals can legitimately make up any rule they like and then apply it retroactively to anyone who may have "violated" it. Such arbitrary prosecutions would subvert efforts to construct an international rule of criminal law which secures basic rights. We have recognized that there is an element of injustice in prosecuting and punishing defendants who can raise ex post facto defenses or other objections based on the standards of legality. Accordingly, tribunals have a duty to conform as closely as practicable to standards of legality and, in particular, to ensure fair and reliable fact-finding procedures. How-

ever, given defendants who are charged with violating basic rights, it is justifiable for international tribunals to overrule objections based on strict *nullem crimen* and ex post facto standards. Departures from those standards are regrettable, but there is no feasible alternative for creating a rule of international criminal law.[45]

VI. POTENTIAL OBJECTIONS

Before closing, we would like to consider several potential objections, beginning with the claim that we insufficiently appreciate the importance of state sovereignty. This criticism can take either a theoretical or a practical form. On the theoretical version, the objection states that international criminal law can only come at an undue cost to state self-determination and that this is too great a price to pay. According to the practical version, our suggestion is theoretically sound, but, in real life, it opens the door to excessive interference in state sovereignty.[46]

Our response to the theoretical version of this complaint is straightforward: other things being equal, the self-determination of states should be respected (as a matter of basic principle and/or as a pragmatic requirement for protecting the rights of persons). But, as we have sought to stress, state sovereignty and respect for human rights can be competing values, and limiting state sovereignty is justifiable where it is incompatible with respect for human rights. The Westphalian model is normatively inadequate because diminished state sovereignty is not too great a price to pay for securing basic rights, especially given that our proposal stipulates that any state that adequately protects these rights retains its privileged position of dominion over its self-regarding affairs. And, as for the practical objection, we acknowledge the tendency of governing bodies to expand their jurisdiction, but, given the relative levels of respect for sovereignty and human rights, for the foreseeable future it would seem unreasonable to expect the international community to unduly intrude on sovereignty for rights-related reasons.

Another potential objection is that our account fails to draw any "bright line" distinction between a domestic and an international crime.

45. See Allen Buchanan, "From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform," *Ethics* 111 (July 2001): 674–75. Buchanan is concerned with the issue of justifying acts which, though illegal under international law, could help produce moral improvements in the international legal system. Our concern is with the related but distinct matter of justifying departures from certain elements of the rule of law in a criminal trial on the ground that the departures are necessary to construct an international rule of criminal law that effectively protects basic rights.

46. See Rubin, pp. 166–67; and Lord Browne-Wilkinson, dissenting from the *Princeton Principles on Universal Jurisdiction*, p. 49, n. 20. The *Princeton Principles on Universal Jurisdiction* are available at http://www1.umn.edu/humanrts/instree/princeton.html.

This comment is on target, but we do not regard it as an objection. It is true that (other than the restriction that the defendant must be accused of violating a basic human right) we draw no distinction between what actions might be under domestic or international criminal jurisdiction. The tendency since Nuremberg has been to suppose that there must be some special category of crime in order to explain why the international community (or humanity) has been harmed by what would otherwise be a domestic criminal matter. As we argued above, however, this supposition derives from the Westphalian conception of state sovereignty. Once the Westphalian model is rejected, there is no need to hold that the international community must be harmed in order for international jurisdiction to be triggered.

On our functional account of sovereignty, the key question is whether the state is adequately performing the requisite political functions. And because a state is not satisfactorily performing these functions when it is either unable or unwilling to secure peace and protect its people's basic rights, the international community may permissibly intervene in order to take up those functions when basic rights violations are widespread or systematic.

The response to this last objection might give rise to distinct concerns regarding vigilantism. In particular, one might worry that, if the international community may legitimately intervene to punish ordinary crimes, then why cannot nonstate domestic parties do so as well? In other words, if a crime need not involve harm to the international community, then it appears as though there is nothing special about the international community that qualifies its tribunals to preside over such matters. And if this is correct, then our view may seem to license any person with a handgun to go out and exact justice for rights violations.

Our response to this concern is threefold. First, it is important not to lose sight of the fact that our view does not license any party, domestically or internationally, to take the criminal law into its own hands unless the state is failing to perform its requisite functions; so our position clearly does not open the door to vigilantism in any legitimate state.

Second, as a normative matter, a high priority must be set on the task of constructing a system of international criminal law that works together with domestic states reliably to protect basic human rights. Vigilantism is precisely the wrong way to go: it is neither reliable nor respectful of the rule-of-law values that can be realized by the international criminal law. The ex post facto and *nullum crimen* problems show that not all of those values can be realized *ab initio*. However, international criminal law is a work in progress and in process, and many

important legal values can be respected even as the work remains unfinished.

Finally, as a practical matter, one of the foremost virtues of instituting an effective system of international criminal law is precisely that it will undercut the motivation of miscellaneous individuals to resort to vigilante justice. Such an effect can help to stop the circle of senseless violence that typically attends widespread or systematic human rights violations and begin the restoration of peace, order, and the rule of law.

To appreciate the force of this last point, recall our analogy between parental discretion and state sovereignty. In particular, consider whether a state's decision to intervene in family affairs when the parents are judged to be derelict has given rise to any type of vigilantism with respect to parenting. That is, has the state's insistence that parents have no indefeasible monopoly on raising their children led to excessive cases of third parties (whether relatives or not) stepping in and forcibly removing children from the care of their parents? We suspect that, if anything, the opposite has been true. Specifically, while the general community might be more willing to question the dominion of bad parents, the state's emergence in this capacity has made people more inclined to defer to the judgment of the state and less apt to take these matters into their own hands. Similarly, it is reasonable to expect that the continued creation of international law will increasingly lead individuals in states failing to perform their proper functions to look to international law as the appropriate forum to determine and exact justice. In sum, while our proposal does suggest that individual states need not have a monopoly on permissible criminal prosecution and punishment, it in no way theoretically licenses or practically encourages vigilantism.

Some critics of our account might be concerned that supercrimes such as genocide and crimes against humanity do not play a central organizing role in the justification we offer for international criminal law. For many legal thinkers and jurists, it is precisely the morally abominable nature of those crimes that serves as the ultimate justification for the moral core of international criminal law. A commitment to international criminal law is seen as a commitment to take aggressive but legal steps to prevent in this century the all-too-depressing repetition of the atrocities of the past century.

Yet, it should be noted that our analysis is consistent with the idea that genocide and other supercrimes should be banned by international law. Indeed, the standard legal definitions of genocide and crimes against humanity guarantee that any such crimes will meet our criterion of being widespread or systematic. Thus, given our account, there is certainly nothing wrong with making supercrimes international criminal

violations. Our crucial point is that crimes such as murder and rape need not amount to supercrimes in order for international jurisdiction to take hold. If the crimes are sufficiently widespread due to a state's inability or unwillingness to perform the requisite political functions, then "generic" murders and rapes are legitimately subject to international prosecution. It is for this reason that a justifiable international criminal law can be substantially broader in scope than advocates of the received view acknowledge.

The final objection we consider focuses on our defense of international trials that violate the standards of legality. In that defense, we conceded that the Nuremberg defendants were convicted on ex post facto grounds when it came to crimes against humanity and that others who have stood before the bar of international justice were prosecuted in ways that violated the *nullum crimen* principle. Yet, we argued that countervailing moral reasons outweighed the prima facie injustice of convicting persons who were legally innocent or charged with violating unclear legal rules. But critics might argue that our position is a travesty of legal justice, equivalent to pronouncing defendants "not guilty" before cheerfully handing down the sentence. Most important, such an Alice-in-Wonderland verdict sets a bad precedent: it encourages subsequent judges and prosecutors increasingly to bend the rules in order to punish morally blameworthy but legally innocent defendants. It is better, this objection continues, to keep legal justice untainted. In the case of Nuremberg, this means that the Nazi leaders should have been summarily punished once they had been conclusively identified by Allied authorities. In this way, the morally guilty would have received punishment but international criminal law would have been kept clean.[47]

Before considering the consequences of having a legal trial that departs from standards of legality, notice that, even if this objection is on target, it would not show that anyone's rights are violated when an international party decides to convene a legal trial to determine the facts of the matter before imposing punishment. If the defendants at

47. Writing while the trial was still in progress, Charles Wyzanski argued that the Nuremberg defendants should be punished after an "executive determination" of who they were and what they did, rather than after a legal trial. For Wyzanski, the IMT clearly deviated from the standards of legality and the danger of the trial was that it would come to be seen as "an example of high politics masquerading as law." He believed that the trial "instead of promoting may retard the day of world law" (Charles Wyzanski, "Nuremberg: A Fair Trial? Dangerous Precedent," reprinted in *Philosophical Problems in the Law*, 3d ed., ed. David Adams [Belmont, Calif.: Wadsworth, 2000], p. 36; originally published in *Atlantic Monthly* 177 [April 1946]: 66–70). Wyzanski's concerns about the trial's danger of undermining the process of building an international rule of law are addressed later in this section. It should be noted that Wyzanski altered his assessment of the trial. See Charles Wyzanski, "Nuremberg Retrospect," *Atlantic Monthly* 178 (December 1946): 56–59.

Nuremberg had no right against summary punishment, then they certainly had no right against a thorough and public examination of the facts before the IMT as part of the process through which they were punished. Accordingly, the most that this objection could show is that the decision to hold legal trials in the absence of clear and prospective laws is ill advised or otherwise suboptimal. However, we would deny even this less ambitious conclusion. Without contesting the premise that there are potentially harmful consequences of holding legal trials in these cases, we suggest that such trials are nonetheless justified because of their more weighty potential benefits. In particular, even if retributivism is indifferent as to whether or not the morally guilty person's punishment follows a legal trial, the other three considerations that we cited to justify punishing the legally innocent—restoring victims, paving the way to peace and political stability, and creating an effective system of international law—all are better realized when a legal trial takes place. Consider each in turn.

It is not implausible to suppose the victims would derive some satisfaction from knowing that their attackers had merely been punished, but there can be little doubt that a much greater restitutive effect comes when the perpetrator is also duly convicted and publicly condemned by a tribunal using reliable and fair fact-finding procedures. For related reasons, legal trials can play a considerable role in ushering in a climate of peace and justice: much of the anger and socially disruptive thirst for vengeance is quenched by a reliable public determination that the defendants committed the acts alleged by the prosecution.

Above all, though, trials like Nuremberg were pivotal to the process of establishing an effective system of international criminal law precisely because they set a good, rather than a bad, precedent. The explanation is straightforward. If representatives of the Allied forces had summarily executed those who were brought to trial in Nuremberg, then the international community would have rightfully regarded the acts merely as another instance of victor's justice. Because the defendants were given a public trial in which factual allegations could be fairly tested, however, Nuremberg proved to be a landmark advance for the cause of international criminal law. In sum, the current objection rightly notes that not all punishment of human rights violators need be the result of a legal trial and that there are real concerns about setting a precedent of retroactive punishment when there is a trial. The objection can still be met, however, because the extremely important advantages of conducting legal trials like Nuremberg far outweigh the potential costs.

VII. CONCLUSION

The development of a system of international criminal law is one important part of the effort to promote respect for human rights worldwide.[48] If a state's failure to perform its political functions has led to widespread or systematic violations of basic rights on its territory, then its sovereignty does not bar the criminal prosecution of its officials or people before international bodies or the courts of other states. The best justification of a system of international criminal law rests on an appreciation of the scope and limits of state sovereignty, on the one hand, and the moral importance of human rights, on the other. If the arguments we advance in this article are sound, international criminal law can be defended as a desirable and permissible instrument in the global struggle for human rights.

48. Civil law can offer some help in the protection of human rights. In the United States, the Alien Tort Claims Act (1789) and the Torture Victim Protection Act (1991) provide legal remedies for the victims of war crimes and torture.