

International Criminal Law and the Challenges of Domain Restriction*

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To date, the issue of domain restriction in international criminal law has not been adequately theorized. This paper examines why it is that the objective of international law must be to prosecute specific international crimes, crimes that are not seen merely as domestic crimes prosecuted internationally, and examines two recent attempts to define international criminal law; finally, it proposes a third. Answering the domain question is desirable from both political and conceptual points of view. We need to answer whether a strict distinction between international and domestic crimes is necessary, and if it is – and this paper will argue that it is – where does the distinction lie?

We need to consider whether the limits of the international domain really need to be as strict as some theorists, such as Larry May, have argued. His theory restricts the domain so fiercely that it excludes crimes that the international community demands be included in the list. Allen Buchanan's theory, as expressed in his *Justice, Legitimacy and Self-Determination*, on the other hand, characterizes international crime so broadly as to include many acts that ought not, and would not, be prosecuted internationally. From their attempts, we can extract widely-held intuitions of what it is international criminal law must do and also where the line ought to be drawn between it and domestic law. Thus, this paper demonstrates that much can be learned about the domain and what we desire of it from the failure of these two theories.

As an alternative to either the too broad interpretation offered by Buchanan or the too strict interpretation by May, I will propose a third option. This third option demands that two thresholds be met for an action to be considered international crime: first, it must meet a particular threshold in terms of the type of human rights violation, and second, it must satisfy in the manner in which the rights are violated.

Why a Distinction?

The objective of international law must be to prosecute specific international crimes, crimes that are not seen merely as domestic crimes that happen to be prosecuted internationally. This distinction is desirable from both political and conceptual points of view: politically, state acceptance of international criminal institutions may hinge on the fact that international law has only limited capacity to interfere in the internal workings of states or to override sovereignty.¹ International law is often restricted in the name of sovereignty as many scholars see respect for the sovereignty of states as the universal

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¹ See: Ayoob, Mohammed. 2002. "Humanitarian Intervention and State Sovereignty." *International Journal of Human Rights*. Vol. 6. 1. (81- 102.)

standard of international conduct.² Sovereignty of states can also restrict the kind of law that forms international law.

Importantly, because one or more of the elements of legalization can be relaxed, softer legalization is often easier to achieve than hard legalization. This is especially true when the actors are states that are jealous of their autonomy and when the issues at hand challenge state sovereignty.³

Since state sovereignty is so significant in the current global context, a distinction between international and domestic jurisdiction is liable to be necessary for states, as the primary decision makers, to support a system of international law. This distinction is also important because international prosecution is costly, due to the need to create – often from nothing – an entire international judicial system.⁴ If there were no domain restriction, this international judicial system could easily become overloaded with a wide range of crimes. Limiting international criminal law to the domain of the most serious crimes helps to ensure financial feasibility for the international judicial system.

Philosophically, this distinction is a moral necessity. There are good reasons for the basic well-being of individuals to be left to the institutions of the lands in which they reside. Similar to utilitarian arguments for familial preference, as long as the state functions well and safeguards the basic rights of its citizens, there are practical reasons to believe that the most efficient way to protect human rights globally and allow sufficient latitude for cultural differences to be explored and nurtured is through the conditional sovereignty of distinct geographical and cultural groups.⁵

The demand that the domain of international criminal law must be unique to itself, however, needs to be examined in more depth to provide a sophisticated normative account of the need for this distinction and in order to define the domain of international criminal law. There is, in fact, a body of literature demanding that international criminal law be an overarching extension to domestic judiciaries, usually with the aim of prosecuting any human rights violation. One such position is offered by Andrew Altman and Christopher Heath Wellman in their paper, “A Defense of International Criminal Law”. They argue that there is no need to draw a “distinction between what actions might be under domestic or international criminal jurisdiction.”⁶ On the face of it, their position makes sense. When a state is not satisfactorily performing its requisite political functions “when it is either unable or unwilling to secure peace and protect its people’s basic rights,

² See: Jackson, Robert H. 2004. “Sovereignty as a Doctrine of Moderation.” Ed. Power and Responsibility in World Affairs: Reformation versus Transformation. Ed. Cathal J. Nolan. (57 – 75).

³ Abbott, Kenneth W. and Duncan Snidal. 2000. “Hard and Soft Law in International Governance.” *International Organization*. Vol. 54, 3. (421-456). 423.

⁴ The approved ICC program budget for 2007 was €88.87 million Euros. (ICC Newsletter, December 2006 #11. http://www.icc-cpi.int/library/about/newsletter/files/ICC-NL11-200612_En.pdf, 2)

⁵ See: Walzer, Michael. 1977. *Just and unjust wars: a moral argument with historical illustrations*. New York: Basic Books Inc. 53-55.

⁶ Altman, Andrew and Christopher Heath Wellman. 2004. “A Defense of International Criminal Law.” *Ethics*. 115. (35-67). 63

the international community may permissibly intervene in order to take up those functions when basic rights violations are widespread or systematic”.⁷

Similarly, the Responsibility to Protect (R2P) doctrine argues for a global responsibility to protect individuals at great risk by blurring the lines between domestic and international domains. “State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. [But] where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”⁸ This position, sovereignty as a responsibility to protect the people of a given territory, was first expressed by Francis M. Deng,⁹ and subsequently argued by Fernando Teson¹⁰ and the drafters of the R2P monograph. This responsibility leads to universal jurisdiction over crimes which violate human rights. It advocates for realizing a notion of universal justice – justice without borders, in process as well as in the substance of international human rights law. “The key to the effective observance of human rights remains, as it always has been, national law and practice: the frontline defence of the rule of law is best conducted by the judicial systems of sovereign states, which should be independent, professional and properly resourced . . . [but] when national systems of justice either cannot or will not act to judge [sufficiently atrocious violations of human rights] universal jurisdiction and other international options should come into play.”¹¹ Of course, the R2P argument is conditional in respect to proportionality and reasonable prospects. International interference must be the “minimal necessary to secure the defined human protection objective in question . . . [and] there must be a reasonable chance of success in halting or averting the suffering.”¹² Arguing for the responsibility to invoke military intervention, this position sets the bar high for harm that requires international interference. It, like May’s will be shown to do, draws the line based on the harm caused by the international response and not in terms of a distinct character exhibited by international crime.

The problem is that these positions turn simply on human rights violations, arguing that any time a state cannot protect its citizens from widespread or systematic human rights violations, international criminal law must step in. There are two flaws apparent in this thinking: the first is only that including all human rights violations within the domain of international criminal law makes the domain too expansive and inclusive. However, for now, we can put aside this issue of how inclusive the domain of international criminal law must be. It will be dealt with in more detail later in this paper when we explore the limits of international criminal law. Another flaw is that in conflating domestic and international crime, the strength of moral condemnation attached to labeling something an international crime is diminished.

⁷ Ibid.

⁸ International Commission on Intervention and State Sovereignty (ICISS). 2001. *The Responsibility to Protect*. Ottawa: International Development Research Council. XI

⁹ Deng, Francis M. 1996. *Sovereignty as Responsibility: Conflict Management in Africa*. Washington, DC: Brookings Institute

¹⁰ Teson, Fernando R. 1998. *A Philosophy of International Law*. Boulder, Colorado: Westview Press.

¹¹ ICISS, 2001. 14

¹² ICISS, 2001. 37

In some ways, we want to claim that international criminal law deals with actions that are beyond the reach of domestic law; they are not only crimes that the state is unable or unwilling to prosecute, but crimes that illustrate a specific kind of evil.¹³ The drafters of the Rome Statute capture this view when they wrote that there are “unimaginable atrocities that deeply shock the conscience of humanity”.¹⁴ International crime, therefore, needs to be defined by its unique character. The distinction between domestic law and international law then, based on the severity and manner of the criminal act, ought to rest with what actions should be censured by all states acting as a whole (or at least State Parties to the ICC when it is acting under its state-referral or prosecutor-initiated jurisdiction.) The question must be: what actions are devastating enough to require the explicit condemnation of the international community in the form of codification as an international crime? This question demands two distinctions be made: the first is the distinction between domestic and international jurisdiction. The second is between a violation and a crime.

An international violation, the equivalent of a human rights violation, encompasses actions that the international community condemns and hopes to influence positively, but not actions that demand penalty and censure as criminal. For example, the international community hopes to persuade all states to tolerate religious freedom or the right of all persons to own property. The violation of these rights, however, may encounter political criticism and invoke incentives for change, but it does not constitute international crime. International crime is action that harms the most basic human rights, those necessary to enjoy any rights: physical security human rights; and, as this paper will show, it is action that threatens, and transpires out of, the natural human inclination to organize politically.

Before introducing this characterization of international criminal law, one that rests on the satisfaction of two restricted thresholds, however, I will, in the following sections, examine two possible classifications of the domain of international criminal law. The first, offered by Allen Buchanan, proposes a foundation for international law based on human rights and recommends restructuring the current international system according to moral principles, proposing “legal norms and practices which, if implemented with reasonable care, would make the system more just.”¹⁵ It suggests that all persons possess a natural duty of justice to ensure that all others have access to institutions that protect their basic human rights. It demands the existence for what he describes as transnational justice and opens the door to justifying international criminal prosecution for human rights violations of a particular magnitude because it breaks down sovereignty and demands an alternative grounding for international law. This theory, however, stops short of expressly delineating the domain of international criminal law, and the domain, as interpreted from his theory, is very broad indeed. On the other hand,

¹³ See: Vernon, Richard. 2002. “What is Crime Against Humanity?”, *Journal of Political Philosophy*. Vol 10: 3. (231-249). 234

¹⁴ Rome Statute of the International Criminal Court, Rome, 17 July 1998, preamble

¹⁵ Buchanan, Allen. 2004. *Justice, Legitimacy, and Self-Determination: moral foundations for international law*. New York: Oxford University Press. 4.

an interpretation of the distinct characteristic of international crime offered by Larry May argues that international crimes threaten individuals without regard for their individuality, therefore threatening one of the most salient features of humanity. This theory will be shown to be too narrowly construed. This understanding of international crime would exclude criminal behaviour that ought not be omitted from the category of international crime. The failure of these two options opens the door for the human rights threshold option that this paper presents.

The Broad Interpretation: Buchanan and the Natural Duty of Justice

Allen Buchanan, like many of his liberal contemporaries, including Larry May, justifies the power of the state by its willingness and ability to protect the rights of its citizens. He argues that state sovereignty must be limited, and that recognition of a state is not a neutral act. State legitimacy is based on the ability and willingness of a state to protect the human rights of its citizens. Justice, to him, is the defense of human rights. He claims that we each have a Natural Duty of Justice (NDJ); we each have a limited obligation to help ensure that all persons have access to institutions that protect their human rights. International law should be evaluated in terms of how well it endorses the promotion and protection of human rights. Ultimately, he rejects the traditional conception of international law as a set of rules for the interaction of equal sovereign states, founded on their consent, and advances “a conception of international law grounded in the ideal of protecting the basic rights of all persons.”¹⁶

He argues that international law ought to be grounded in principles of justice that are evident without assuming they would be agreed to, and, unlike Rawls,¹⁷ he wants to claim that justice imposes obligations on individuals as well as institutions. The main problem with international law, according to Buchanan, is that scholars and interested parties cannot even agree on an account of the most important moral goals of the international legal system. Buchanan argues that it ought to be justice. He bases his theory of international law on three principle thoughts – the first two are moral premises, and the last is factual: First: all persons are worthy of equal concern and respect. Second, treating persons with equal concern and respect demands that we treat them justly. And third, treating people justly requires that just institutions, including just legal institutions, be created. One of the most important ways we show equal concern and respect for persons is by acknowledging that there are human rights. Therefore, justice imposes obligations on individuals, as well as institutions, to protect the basic human rights of all persons.¹⁸ A state is one possible rights-protecting institution. But, if the state fails to protect the rights of its citizens, individuals of the world have the duty to ensure that the citizens of the state have access to an alternative rights-protecting institution. International legal institutions are an alternative, or an additional precaution.

¹⁶ Buchanan, 2004. 290

¹⁷ See: Rawls, John. 1971. *A Theory of Justice*. Cambridge, Mass. : Belknap Press of Harvard University Press.

¹⁸ Buchanan, 2004. 87 -93.

Buchanan is careful to note that international law cannot, and should not, simply duplicate domestic legal systems. In fact, he distinguishes three potential legal frameworks: domestic, international (which is different from what is commonly understood as international law, and which I will therefore term “inter-national”) and transnational justice. Domestic legal systems we, of course, understand as internally devised and performed. Inter-national justice governs relations between states. Transnational justice deals with “those minimal standards, preeminently basic human rights norms, that the international community may justifiably require every state to meet in its internal affairs.”¹⁹ It concerns rights and duties that exist “among members of the same state or between the government of a state and its members which ought to be recognized by international law as being universal, that is, applicable to all states.”²⁰ It expresses principles of justice that the international community ought to ensure are met by all states in their internal affairs. International criminal law covers questions of both inter-national and transnational justice, but is primarily concerned with issues of transnational justice as Buchanan defines it.

He provides reasoning for why transnational law is an inevitability of his moral theory of justice by asking and answering why it would be that it could better articulate and apply the dictates of justice than domestic or inter-national law. His answer is twofold: First, he points out that many states do not promote or protect the human rights of their citizens. He claims that a human rights regime would be able to help them, or persuade them, to do so.²¹ But, he also argues that if there is a morally worthy international legal system that can govern the interactions between states, it must be able to interfere into the internal affairs of the states. “A regime of international justice, which governs relations among states, must include principles for identifying which entities are legitimate states and this requires principles of transnational justice.”²²

Probably because his original intention for this work was to continue his discussion about how the international community does, and should, recognize states as legitimate – especially in cases of state-breaking – he concentrates mainly on questions of sovereignty. He does not address important questions about international criminal prosecution of the violators of the human rights he is so concerned with. It seems that on his theory, like that of Altman and Wellman, almost any human rights violations can be seen as under the jurisdiction of international criminal law. As indicated earlier in this paper, defining the domain of international criminal law so broadly as to include any human rights violation would violate the spirit in which the concept of international jurisdiction was accepted and would deny a community the important group right to self-determination to decide for itself how to respond to particular anti-social acts committed by, and against, its own members.

Buchanan, however, is slightly more limiting than to permit any human rights violation to fall under international criminal jurisdiction and does not accept that any

¹⁹ Buchanan, 2004. 294

²⁰ Buchanan, 2004. 191

²¹ Buchanan, 2004. 296

²² Ibid.

violation of the entire range of human rights listed in the UDHR would constitute an international criminal offense. So, what are human rights to Buchanan? And why should they serve as the critical touchstone for reforming the law? For Buchanan, human rights are moral rights which exist independently of whether they are enshrined in law or not.²³ A human right must be an interest identifiable as having such moral significance as to warrant such extraordinary protection, an interest shared by all people and identifiable as a condition of human life, and it must require institutional arrangements to be protected.²⁴ He focuses on what he terms “the most basic human rights – those most important for the capacity to live a decent human life,”²⁵ which include the right to life, security of the person, and

the right not to be subject to arbitrary arrest, detention, or imprisonment; the right against enslavement and involuntary servitude; the right to resources for subsistence; the most fundamental rights of due process and equality before the law; the right to freedom from religious persecution and against at least the more damaging and systematic forms of religious discrimination; the right to freedom of expression; the right to association (including the right to marry and have children, but also to associate for political purposes, etc.); and the right against persecution and against at least the more damaging and systematic forms of discrimination on grounds of ethnicity, race, gender, or sexual preference.²⁶

It would follow from his theory, however, that any violation of these basic human rights could fall under international criminal jurisdiction. It would also follow that some non-physical security violations, such as discrimination on the basis of gender or “preventing people from practicing their religion”, would constitute violation of a basic human right,²⁷ and therefore could be considered an international crime, prosecutable internationally.

Again, it is important to re-examine his conception of the Natural Duty of Justice which claims that persons have the limited moral obligation to help ensure that all persons have access to institutions that protect their basic human rights. For this paper’s purposes, the most important part of this tenet is *access to institutions that protect their basic human rights*. According to Buchanan, institutions are the best means of ensuring that basic human rights are protected and so the NDJ claims of each person an obligation to each other that each has access to such institutions. Granted, Buchanan offers a persuasive positive argument for grounding a moral theory of international justice in human rights. But, what institutions are required to protect basic human rights? This is one area in which Buchanan’s theory is deficient. He fails to address adequately the distinction between international (or transnational) criminal law and domestic criminal law, and he fails to provide a clear distinction between different rights-protecting institutions.

²³ Buchanan, 2004. 119

²⁴ Ibid.

²⁵ Buchanan, 2004. 129

²⁶ Ibid.

²⁷ Buchanan, 2004. 135

Restricting his exploration of moral foundations of international law within the limits of questions of sovereignty and secession, then, Buchanan focuses on defining a legitimate state, claiming that international law is a normative requirement to evaluate legitimacy of states and to breach sovereignty as an institution to protect basic human rights. He provides justification for humanitarian intervention on the basis on human rights protection. He makes no distinction, though, between different rights-protecting institutions and therefore no distinction between public international law (laws that guide state action with fear of penalty to the state) and international criminal law (law that imposes behavioural restrictions on individuals for fear of prosecution and personal sanction). In this same vein, Buchanan does not give answers as to which individuals should be prosecuted or for what. And, it is not clear on what facts decisions to prosecute internationally should turn. Since he wants to maintain a strict distinction between international and domestic law, there seems to be a strong disconnect between his intentions and the proper development of his theory to answer these questions. He seems to need a stronger explanation of the domain restriction and a clearer account of how we can, and ought to, actually hold individuals accountable under international law.

The Strict Interpretation: May and the International Harm Principle

According to Larry May, international prosecution is only justified if the crime meets the two qualifications necessary for it to be considered an international crime: it must satisfy the Security Principle and the International Harm Principle. The Security Principle is based on the understanding that states must be able and willing to protect the basic interests of their citizens. If they cannot, or will not, then the international community has the right to intervene to protect the victims or to minimize harm. A violation is an assault to the physical security or subsistence of citizens by a state or acquiescence of the state in such an assault. When a state chooses not to, or fails to, satisfy the requirement of protecting its citizens, “an international body may be justified in then acting to protect those subjects”.²⁸ Violation of the Security Principle, while it may be enough to justify humanitarian intervention, is not, however, – on its own – enough to justify international prosecution. International prosecution can only be justified by satisfaction of both this principle and the International Harm Principle (IHP).

By appealing to the IHP, May argues that only serious harm to the international community can justify international prosecution as crimes against humanity.²⁹ They “are of interest to the international community because they are more likely to assault the common humanity of the victims and to risk crossing borders and damaging the broader international community.”³⁰ He argues elsewhere that his “argument rests in part on consequentialist concerns – namely, that violence directed at groups rather than at discrete individuals risks spilling over border . . . but, more importantly, on

²⁸ May, Larry. 2005. *Crimes Against Humanity: a normative account*. New York: Cambridge University Press. 68

²⁹ We can assume that genocide can be included in this category.

³⁰ May, 2005. 83

nonconsequentialist grounds, to not treat people as individuals is to fail to take their humanity seriously.”³¹

Harm to the international community ought to be seen, according to May, as harm to humanity. By this, he means that one of the most salient features of humanity – individuality – is harmed. Individuality is harmed by non-individualized harm to persons. Victims are targeted not because of their own particular individual traits, but because of their inclusion in a group. Consistent with the Rome Statute’s definition of crimes against humanity, there are two features to May’s IHP: the crime must be widespread and/or systematic. Widespread refers to the sheer number of victims, usually group-based. And, systematic refers to the characteristic of the perpetrators: a group. So, violations of the IHP are inflicted on a group, by a group, or simply, on a group or by a group. And, for May, crimes of this nature, if they also satisfy the Security Principle, can be identified as crimes against humanity.

One problem with his classification, though, is that his reason for limiting this category to only serious attacks is not sensible. If we follow his conception of the IHP to its logical conclusion, then any human rights violation, if it harms a group and is instigated by a state or is allowed by a state, should satisfy the International Harm Principle.³² Why is it then that May limits international prosecution to serious crimes? He claims that it is because of the serious risk to the liberty of the defendant; it is because international trials have only the capacity to imprison, to restrict personal liberty. Therefore, violating a right to paid vacation³³ should not be addressed by an international trial since the crime is not severe enough to demand the punishment of incarceration. According to May, the reason the category of international crime must be restricted to serious attacks is that there are no privileges in the international sphere comparable to the privileges on the domestic sphere that the trial judge can restrict.³⁴

May claims that, “philosophically, we are justified in applying universal criminal norms in the international arena only when the scope of international crime is restricted to those crimes and criminals that are truly deserving of international sanctions.”³⁵ His position is that because international trials only have the capacity to imprison, to restrict personal liberty, the serious risk to the liberty of the defendant demands a certain gravity of criminal behaviour. This is true, of course, insofar as the domestic system has more options available to it, depending on the crime: suspended sentences, house arrest, and community service are examples. On the other hand, the fact that imprisonment is the

³¹ May, Larry. 2006. “Humanity, International Crime, and the Rights of Defendants (Reply to the Critics).” *Ethics and International Affairs*. Vol. Vol. 20, 3. (373 – 382). 374.

³² He also leaves out human rights harms perpetrated in different ways, like war crimes. It would seem that he does not have a defensible reason for this exclusion either; however, this theory of international crime is expressed in a work specifically focused on crimes against humanity. May does promise that a piece on war crimes will follow, so we can overlook this oversight and will not speculate as to how much his theory of international crime must be amended to accommodate this particular breed of crime.

³³ Article 24 of the Universal Declaration of Human Rights expresses that, “Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”

³⁴ May, 2005. 71, 77.

³⁵ May, 2005. 4.

only recourse available to the international penal system means that internationally convicted criminals may escape harsher punishments, such as the death penalty, employed by domestic systems. The distinction between domestic and international crime, however, should not rest on the limits to the variety of penal options at the international level.

May's demand, then, that the category of international crime must be restricted to serious attacks because there are no privileges in the international sphere comparable to the privileges on the domestic sphere that the trial judge can restrict is not satisfactory. If the distinction between international and domestic crimes rests on the fact that international trials cannot proscribe lesser punishments, then perhaps the tenets of international punishment require reappraisal. There seems to be nothing refraining the system from devising a way to impose lesser punishments than incarceration.³⁶ In reference to the example of a mass violation of the right to paid vacation, perhaps there ought to be a way of dealing with this particular crime – as long as it is perpetrated by a state or allowed by the state and is directed at a particular group to ensure that the IHP is satisfied. Likewise, perhaps the Ontario Separate School situation, in which religious discrimination on the part of the Canadian government deems Roman Catholic religious education worthy of public funding at the exclusion of all others, ought to be addressed and acts of supporting and assisting this discriminatory system ought to be punishable through the international criminal system.³⁷

Another problem is that his conception of group-based harm seems to centre around the non-individualistic nature (or inclusion in a group) of the victim. He claims that “while the nature of the crime may be difficult to determine, the international community is likely to be harmed when the perpetrator of a crime does not react to the individual features of a person, but rather to those features that the individual shares with all, or very many others”.³⁸ This description of an international crime clearly demonstrates May's IHP; members of humanity are less secure when the international community acquiesces to attacks that target members of a group rather than individuals based on their own characteristics. He continues, though, to include crimes in which “the perpetrator of the harm is, or involves, a State or other collective entity rather than being merely perpetrated by an individual human person.”³⁹ Either the victim or the perpetrator (and ideally both) must be part of a group. However, only the first condition really makes sense in terms of the IHP. According to the IHP, one of the most salient features of humanity is individuality. It is important to recognize each person as different and

³⁶ Indeed, the Rome Statute provides for the possibility of fines – albeit in addition to imprisonment.

³⁷ The Human Rights Committee, November 5 1999, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, ruled that “the facts before it disclose a violation of article 26 of the Covenant” (International Covenant on Civil and Political Rights), that Canada (a State party) is in violation of the dictate that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

³⁸ May, 2005. 83

³⁹ Ibid.

valuable in themselves. When clear non-individualized treatment, group-based harm, occurs, it should be seen as harming the individuality, an important characteristic of humanity, in each of us. The inclusion of the systematic (and group-based) requirement of the perpetrator, though, seems only to be an attempt to comply with the Article 7 of the Rome Statute that outlines crimes against humanity as any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; [etc.]⁴⁰

Interpretations of Article 7 view the systematic requirement as covering the group-based nature of the perpetrators. “The term ‘systematic’ requires a high degree of orchestration and methodical planning.”⁴¹ Darryl Robinson quotes an ICTR (International Criminal Tribunal for Rwanda) decision that discusses this term, claiming that “the concept of ‘systematic’ may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.”⁴² May, agreeing with the common understanding of the widespread or systematic requirement claims that “justified international prosecutions require either that the harm must be widespread in that there is a violation of individuality of a certain sort epitomized by group-based harmful treatment that ignores the unique features of the individual victim, or the harm must be systematic in that it is perpetrated in pursuance of a plan by an agent of a State or with active involvement from a State of State-like entity.”⁴³ May’s harm to humanity characterized as harm to individuality, though, does not clearly defend the idea that an organized collective (ie. State) as perpetrator causes serious harm to the most salient features of humanity, individuality.

However, if the group-based requirement only refers to the victims, then May would be restricting the category of international crime too firmly.⁴⁴ If we assume that we need a group-based victim group to satisfy the widespread condition, then we will have to eliminate some international crimes that seem obviously to be likely candidates for classification as crimes against humanity. One example is the “comfort women” victimized by the Japanese during WWII. They can hardly be considered a coherent group, given their varied nationalities. However, if we choose to ignore the ‘group-based’ requirement for some less stringent requirement like ‘non-individualized’ treatment, satisfying only May’s Security Principle, then we open up the classification to many crimes that do not deserve to be identified as international crime. In fact, this classification could then admit any crime committed by a gang or individual that victimized a number of disparate people (and was not prosecuted by the domestic legal system – to satisfy the Security Principle). Since May is advocating for the defendant’s position, and trying to limit what can be considered international crime to the most

⁴⁰ Rome Statute, Article 7.1.

⁴¹ Robinson, Darryl. 1999. “Defining “Crimes Against Humanity” at the Rome Conference”. *The American Journal of International Law*. Vol 3, 1 (43 -57). 47.

⁴² Robinson (1999) quoting: ICTR decision, Prosecutor v. Akayesu, Judgement, No. ICTR-96-4-T (Sept. 2, 1998), available at: www.un.org/ictcr

⁴³ May, 2005. 89

⁴⁴ And, less of a concern for this paper than for the practice of international criminal law, there would be considerable overlap between the categories of crimes against humanity and genocide.

serious of offenses, this does not seem to be an outcome that May would want of his theory.

However, May is right that there needs to be a distinction between international and domestic crime. He is most likely correct in his assertion that the denial of certain human rights to a group may not justify international prosecution. The distinction between internationally prosecutable and other crimes, though, must not rest on the existing feature of international law that international punishment is restricted to imprisonment. And, the domain of international criminal law cannot be characterized by May's IHP which would be so restrictive as to exclude crimes committed by an armed and politically motivated group if it were not committed against an identifiable victim-group. A more sound theory should present an underlying principle of international crime that encompasses each of the recognized forms of international criminal behaviour, covering the four international crimes – genocide, crimes against humanity, war crimes and the crime of aggression – and be able to demonstrate why it deserves international condemnation.

The Human Rights Threshold Option

There is a general presumption in favour of state sovereignty. Both May and Buchanan recognize that states exist and can be appreciated as the primary protecting agent of basic interests of individuals. States should be considered legitimate insofar as they generally protect the human rights of their citizens or the people who reside within the geographical territory over which they have the monopoly of power. First, it is out the scope of this project to produce a plan for a world without states. Second, it is not the prerogative of international criminal law to eliminate states – indeed, international criminal law's procedures are premised on the existence of states. And, finally, and most importantly, there is a normative argument for the preservation of states for the protection of cultural distinctions. The existence of states defends distinct cultures, understands customs originating out of different circumstances that demands different directives, and secures the opportunity for democratic self-determination.⁴⁵

The domain of international criminal law exists just beyond the reach of domestic law; it has jurisdiction over certain actions over which domestic law cannot preside. In most cases, the state has become the criminal entity, committing or being complicit in particularly heinous human rights violations, the character of which will be explained below. In other cases, it is simply that individuals living within the state's territory have lost the protection of the state in that the state is unable to protect them against serious attack from another party.

This brings us to the two thresholds of international criminal activity. The first demands a certain severity of human rights violation. Although all human rights are

⁴⁵ For defense of this position, see: Rawls' stewardship argument (Rawls, *Law of Peoples*, 38-39.), or Nagel's political conception of global justice and states (Nagel, Thomas. "The Problem of Global Justice." *Philosophy and Public Affairs*. 2005. Vol. 33.1. 113- 147.)

important, some are more essential than others. They are the rights that are preconditions to all others. These, the most vital human rights, are those rights to physical security. Without bodily integrity and sustenance, one cannot enjoy any of the other human rights expressed in the UDHR. As Henry Shue argues,

No one can fully enjoy any right that is supposedly protected by society if someone can credibly threaten him or her with murder, rape, beating, etc., when he or she tries to enjoy the alleged right. Such threats to physical security are among the most serious and – in much of the world – the most widespread hindrances to the enjoyment of any right. If any right is to be exercised except at great risk, physical security must be protected. In the absence of physical security people are unable to use any other rights that society may be said to be protecting without being liable to encounter many of the worst dangers they would encounter if society were not protecting the rights.⁴⁶

The distinction between what is considered a human rights violation and what is an international crime is that an international crime must be a human rights violation of a certain magnitude, demanding the ultimate protection. So, the first threshold that an action must meet is that it is a violation of a physical security human right. For the purposes of this paper, this threshold will be called the severity threshold.

The second threshold is that the way in which the physical security human right is violated involves political organization, usually a state. This we will call the agency threshold. The idea is that “[w]e are creatures whose nature compels us to live socially, but who cannot do so without artificial political organization that inevitably poses threats to our well-being, and, at the limit, to our very survival.”⁴⁷ International criminal jurisdiction takes over when there are serious physical security violations associated with political organization. It is an expansion of a theory raised by David Luban in reference to crimes against humanity. His idea is that crimes against humanity violate aspects of humanness pertaining to our political nature. We are political animals in that we need to live in groups, but groups pose a perpetual threat to our individuality and individual interests. “The legal category of “crimes against humanity” recognizes the special danger that governments, which are supposed to protect the people who live in their territory, will instead murder them, enslave them, and persecute them, transforming their homeland from a haven into a killing field.”⁴⁸ He goes on to argue that,

The distinguishing feature of crimes against humanity arises from our character as political animals. Each of us is an individual who belongs to groups and who has no alternative to living in politically organized communities; we are all, in effect, hostage to politics.⁴⁹

⁴⁶ Shue, Henry. 1996. *Basic Rights: subsistence, affluence, and U.S. foreign policy / with a new afterward by the author*. Second edition (1980). Princeton: Princeton University Press. 21

⁴⁷ Luban, David. 2004. “A Theory of Crimes Against Humanity.” *Yale Journal of International Law*. Vol. 29:1. (85- 167). 90

⁴⁸ Luban, 2004. 117

⁴⁹ Luban, 2004. 138

Crimes against humanity are international crimes because they originate out of, and attack, a human need to politically organize.

International crime arises out of the perversion of political power. “The kind of evil in question . . . relates on the one hand to the necessary institutional prerequisites of an organized project, and on the other to damage suffered by individuals only by virtue of belonging to a group.”⁵⁰ This position, interestingly, is in direct opposition to the one proposed by May. May contends that international crime threatens individuality. This perversion argument, on the other hand, claims that it is our associative nature that is at risk. It is “because the state [or more generally, any organized political entity with coercive power] is the kind of institution that it is, with the features that it has, that crime against humanity is possible.”⁵¹

This explanation for why crimes against humanity fall under international jurisdiction can be expanded to lay a foundation for understanding the wider array of international crimes. International jurisdiction can be evoked for all of the categories of international crime listed by the Rome Statute based on this understanding of international harm. Political organizations allow us to live socially, coordinated and for the most part, safely. When a serious violation is committed by the political organization – the state – or the state is complicit in it, the international sphere must step in. It is also appropriate for international criminal jurisdiction to apply when the state is unable to protect against systematic attack of its citizens by another politically organized group, such as a rebel group or faction of society with particular aims.

International law takes over when the individuals under its control lose the protection of the state, when the state turns against them or it is unable to protect them. These crimes are out of the reach of domestic jurisdiction. The state cannot prosecute itself for crimes it commits or for crimes it is complicit in. Likewise, the state requires the help of the international system to establish justice in cases with which the state was unequipped to deal. For example, in cases in which a rebel or paramilitary opponent committed severe physical security human rights violation that the state could not prevent, to bring the perpetrators of this crime to justice would be beyond the reach of the state acting alone. International crime is not merely based on the size of the crime, not merely the number of victims.

The Rome Statute of the International Criminal Court got it right, even so, in its classification of international crimes. There are two authentic categories of international crime: crimes against humanity and war crimes. I will discuss the crime of genocide as a sub-section of crimes against humanity rather than its own category; and, I will only briefly point to how this theory might relate to the crime of aggression, yet undefined.

War crimes are the easy category. These crimes are ones perpetrated by a state, in the name of a state, or by a similarly highly organized and politicized group. Although international law is not generally concerned by cases of murder or assault, (or extensive

⁵⁰ Vernon, 2002. 245.

⁵¹ Ibid.

destruction of private property), when the perpetrator is a state, the best instrument by which to ensure justice is established is international criminal law. This does not mean that an international institution must always be employed in these cases, but that international criminal law provides jurisdiction and a way to ensure that impunity does not prevail. In these cases, domestic and international jurisdictions overlap.

Crimes against humanity are also more serious examples of domestic crimes: murder, torture (assault), rape. However, now numbers make more of an impact. A very large number of victims of serious physical security human rights violations also prompts international jurisdiction. In this case, the victims have lost the protection of the state and therefore the situation requires another institution to become involved to ensure justice is attained. By why must it be a large number of victims generates international jurisdiction and not simply any victim of a serious physical security human rights violation? It is because one victim does not constitute loss of protection from the state. A few murder victims (even by an organized gang) do not amount to a crime against humanity, even if the perpetrators are not prosecuted. So, numbers matter, to an extent. The Rome Statute claims that for an action to meet the terms of a crime against humanity it must be “committed as part of a widespread or systematic attack directed against any civilian population.”⁵² Sheer numbers satisfy the “widespread” requirement, but what about the systematic one? How does the “systematic” requirement fit with this proposed two threshold option?

The systematic requirement fits with the threat by political organization to individual persons. Originally it covered cases of states turning on their own citizens (Nazi Germany), then cases in which there were organized unofficial military forces in armed conflict (the Former Yugoslavia), and then the “systematic attack” wording was adopted to cover cases of actions “committed through political organization.”⁵³ In these cases, it is not involvement in political organization that is the threat, but that the political organization, a natural human necessity, creates a serious threat for others. All humans of this world have an interest in safeguarding political organization: guarding it from morphing into something threatening, from organized political groups developing into hazardous entities as perpetrators of horrendous crimes or as ready-made and identifiable victims. Political organization is so essential to natural human life that it must be stringently defended against such perversion.

Genocide, although considered a separate category of international crime, could be subsumed under the title of crimes against humanity. The case of genocide, “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group,”⁵⁴ again clearly demonstrates a threat to political relationships. This international crime targets persons for their membership within a group.

Similarly, the crime of aggression, not yet defined, meets the agency threshold. The crime of aggression is broadly conceived as an armed attack against a sovereign state

⁵² Rome Statute, Article 7.

⁵³ Luban, 2004. 97

⁵⁴ Rome Statute, Article 6.

in any manner not consistent with the Charter of the United Nations, for defensive or humanitarian purposes. It is a threat delivered by a political organization, most often attempting to enlarge its geographical territory, against other politically organized individuals.

This human rights threshold option, presented here, offers a characterization of international crime that covers the nature of each of the recognized international crimes. Both thresholds must be met for an action to be within the jurisdiction of international criminal law. International crimes are the jurisdiction of the international community because they threaten the most basic security human rights and because they emerge from the basic nature of humans as social entities.

The Domain of International Criminal Law

International law and domestic law converge. Neither is self-contained. They cannot, however, be regarded as components of one system of law in the sense that one takes over where the other leaves off. These two systems must be recognized as independent judicial systems that run in tandem, with jurisdictions that will overlap and will often complement each other. A good analogy might be loosely based on the American legal system, in which the fifty American states are separate sovereigns with their own constitutions and plenary power to create laws covering anything not preempted by the federal Constitution or federal statutes. Both court systems, the state and the federal courts, have exclusive jurisdiction in some areas and concurrent jurisdiction in others.

American federal judicial “power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.”⁵⁵ The analogy between the American and international legal system would reveal nation-states as sovereign, to an extent. International jurisdiction originates with international treaties and customary law, and oversees crimes, not that affect the international community either because they spill over borders as some theorists argue⁵⁶ or because they harm the international community by attacking a particular feature of humanity like individuality, but that are the international community’s responsibility because they are so serious a threat to organized life as to warrant such protection. Human rights violations alone do not fall under the jurisdiction of international criminal law. But, human rights violations that satisfy both the severity threshold and the agency threshold threaten a very basic characteristic of the social being that is a human individual, something that falls within the sphere of interests of which it is the responsibility of all persons to protect. And, therefore, they fall under international jurisdiction.

⁵⁵ Article III, Section 2 of the U.S. Constitution

⁵⁶ Even the Rome Statute recognizes this position by claiming that “such grave crimes threaten the peace, security, and well-being of the world” in its preamble.

What does this distinct domain for international crime mean in practical terms? International jurisdiction is still the last resort, superseding domestic control only when the national authorities are unable or unwilling to deal effectively with the crime, and only dealing with particular crimes. The distinction between international and domestic crime means that there are certain crimes for which international courts have no jurisdiction, and some for which there is overlapping jurisdiction. For the latter, the international judiciary has an obligation to assess the domestic response (assuming that in most cases the domestic response will be appropriate).

Many states have incorporated international law in their domestic legal framework, making it seem as though there is more continuity between international and domestic legal domains than this discussion of distinct domains suggests. However, the fact that incorporated international law follows the international doctrine, and aims to meet the standards set at the international level, confirms that there are two very distinct realms of law presiding over global individuals.⁵⁷

International criminal law is presently still in its infancy and there is some concern that it might evolve into a strong global legal structure that supersedes state sovereignty, and some aspiration that it will. It would be a mistake to understand the international criminal system in this way. Rather, it is an extra layer of protection. Domestic legal systems maintain control over determining, identifying, prosecuting, and punishing most crimes, including most human rights violations. And, even when the state fails to meet international standards, the international community does not have the right or the responsibility to interfere by usurping judicial authority. International criminal jurisdiction begins with particular harms that jeopardize the most basic human rights necessary to enjoy any other rights – physical security human rights – and that arise from the perversion of political organization – itself a supposed protection.

⁵⁷ An example of this is the Crime Against Humanity and War Crimes Act (CAHWCA) enacted in Canada in 2000 to clarify that the international law definition of crimes against humanity applies in Canada, as opposed to the incorrect double mens rea definition created by the Supreme Court of Canada.