GROUNDED THE STANDING TO PROSECUTE ATROCITIES

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ABSTRACT
CLAIR MORRISSEY: Grounding the Standing to Prosecute Atrocities
(Under the direction of Gerald J. Postema)

Crimes against humanity are widespread and systematic attacks on civilian populations, sometimes committed by officials of a state against citizens of that state. These atrocities are inhumane acts that intentionally make the lives of the victims impossible, intolerable or indecent. In the words of the International Criminal Court these crimes “shock the conscience of mankind.” In the aftermath of these atrocities victims and those who stand in solidarity with them call for justice. But who has the authority to answer this call for justice? More pointedly, if we are to respect the political autonomy of states, how could any international institution have the standing to prosecute perpetrators of a crime that has occurred solely within the borders of that state?

In response to this question, I develop an Alternative Cosmopolitan Account (ACA), wherein I argue that an international tribunal could have the standing to redress these crimes in virtue of being part of a global institutional structure necessary for fulfilling the demands of justice, in particular, by making determinate the content of what we owe to one another as members of a global moral community. I begin my account with a commitment to minimal cosmopolitanism: that each person stands in a morally salient relationship with each other person, and that this requires that we view one another as objects of moral concern. I argue that the obligations we have to one another in virtue of this relationship are not determinate without a mediating political institution that can provide a coherent, univocal, enforceable
system of law. This problem of indeterminacy requires a *global* mediating institution that articulates both law between states (international law) and between individuals (cosmopolitan law), of which the prohibition on crimes against humanity is a part.
For my family
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**INTRODUCTION**

**THE IMPORTANCE OF JURISDICTION**

“Beth Hamishpath” - “the House of Justice” - are the first words of Hannah Arendt’s *Eichmann in Jerusalem*. Perhaps the most well-known and influential account of a post-World War II Nazi prosecution does *not* begin with a description of the accused or of the atrocities he committed. Arendt’s account of the trial of Adolf Eichmann by the State of Israel begins with a physical description of the judges entering the chamber of the newly built courthouse, “Beth Ha’am” - “the House of the People.” It is a description of the *location* of the proceedings. She draws attention to the meaning imparted to the trial by where it took place – first the court itself, then the community represented by this particular court. Thus, the first character in Arendt’s report on Eichmann’s trial is the state of Israel, manifested in the Israeli institutions of justice. This way of beginning her account implies that to understand what follows one must first understand where it happened. This consciousness of jurisdiction, of the community or people doing the prosecuting (and whether this community has the legitimate standing to do so) permeates her account so completely it is even present in the title of the book – *Eichmann in Jerusalem*.

Why does Arendt draw our attention so directly to the forum of Eichmann’s prosecution? An answer is present in her inclusion of part of Attorney General Gideon Hausner’s opening speech to the court, wherein he argued that given Eichmann’s particular
station in the Third Reich, the failure of the Nuremberg Tribunals to prosecute him had the effect of leaving “the Jewish tragedy out of the account.” Arendt asks of this argument,

Did Mr. Hausner really believe the International Military Tribunal at Nuremberg would have paid greater attention to the fate of the Jews if Eichmann had been in the dock? Hardly. Like almost everyone else in Israel, he believed that only a Jewish court could render justice to Jews, and that it was the business of Jews to sit in judgment on their enemies.¹

Arendt reports that this belief on the part of Hausner is situated in a context of almost universal hostility in Israel to the mere mention of an international court which would have indicted Eichmann, not for crimes ‘against the Jewish people,’ but for crimes against mankind committed on the body of the Jewish people.²

Arendt presents us with what she observes as a widely held belief: it matters who prosecutes Eichmann. Arendt raises this question about the importance of jurisdiction for the prosecution of crimes against humanity from the perspective of the victims of the atrocities. Hers is a question born out of reflection on the importance and meaning of criminal trials for the victims of the crimes.

The question of the standing to prosecute atrocities can also be forcefully raised from the perspective of those prosecuted. As an example of the same challenge posed from this other point of view: the International Criminal Court issued an arrest warrant for President Omar al-Bashir of Sudan in March of 2009 for crimes against humanity and war crimes. Sudan’s Ambassador to the United Nations Abdalmahmood Abdalhaleem Mohamad responded by saying:

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² Ibid.
For us the ICC doesn't exist. We are not bound by its decisions and we are in no way going to cooperate with it. Indeed, the verdict that was announced today in the Hague does not deserve the ink used to print it.³

Notice that rather than deny the charges leveled against al-Bashir, Mohamad tries to undermine the standing of this particular court to level the charges at all.

It may be tempting to read Mohamad’s statement on behalf of al-Bashir as the last ditch efforts of a tyrant to remain free, or perhaps the knowing exploitation of a mere legal loophole. Knowing the nature and extent of the evils to which al-Bashir subjected the Sudanese people it is difficult to take seriously Mohamad’s assertion of al-Bashir’s rights. After all, this is what Mohamad is doing. He is challenging the prosecuting body to explain by what right it is indicting al-Bashir.

Understood this way, as an assertion that the ICC must prove that its law is binding on al-Bashir, the charge raised by Mohamad on al-Bashir’s behalf requires a response. Part of what is horrific about the genocide in Sudan (although far from all of what is horrific about it) is the intentional use of violence by the powerful against the powerless. It is an extreme example of the misuse and abuse of power of the governing bodies by the officials of them. It represents the worst behavior of a thug, a tyrant. Recognizing this, we also recognize that prosecution of those who commit these atrocities must not abuse or misuse the political power of those prosecuting bodies, lest the prosecution be just another use of force by the powerful against the (relatively) powerless. There are many requirements on the full justice of the prosecuting body, the first of which is that it exercises its power by right. That is, the prosecuting body has the standing to do so in the first place.

In different ways both Arendt and Mohamad raise the same question: Could an international tribunal have the standing to prosecute perpetrators of crime against humanity, and if so, in virtue of what does it have this standing? I call this the jurisdiction question and it is the leading question of this thesis. The aim of this dissertation is to answer the jurisdiction question, by arguing that the international community (as such) does have the standing to prosecute perpetrators of crimes against humanity when the states in which the crimes occur are either unwilling or unable to do so.

THE JURISDICTION QUESTION IN FOCUS

I have given this question the proper name “The Jurisdiction Question.” However, it is important to notice that it is a question of a more general kind. Jurisdictional questions arise in contexts other than that of crime against humanity and international criminal law. Examples familiar to those within the United States are the frequent constitutional challenges regarding whether some domain of action falls within the purview of the federal government or the individual states. For instance, whether specification of the second amendment’s right to bear arms is rightly determined and articulated for individuals by the particular states in which they reside, or by the federal government. More generally, the jurisdictional questions arise whenever an institution presents itself as rightfully holding a perpetrator of a crime accountable.

Moreover, this judgment of ‘legitimate interest’ or standing is a normative judgment that cannot be answered by merely looking to the world and its institutions and asking whether the body has the kind of sheer power to do so. Recall that this question is motivated by the need to show that one is not acting as a mere thug. A justification for jurisdiction requires a normative explanation that does not reduce to ‘it is more powerful’ (or offers, at
least, an explanation for why ‘more powerful’ counts as an answer to this normative question).

There are two elements of jurisdictional questions in general that one must answer when engaging with problems of jurisdiction. The first is the question of who: what community, society, group or institution (perhaps, through a representative) has the standing to prosecute or otherwise redress the transgression? Notice that the ‘who’ aspect of the question is phrased such that only a community or group counts as an adequate answer to it. I have framed the question this way to emphasize the political/legal nature of jurisdiction. We are asking which body stands in the proper relation to the individual such that the body can hold that individual accountable or otherwise enforce particular norms.

The second jurisdictional question is the question of why: in virtue of what does this (or any) community, society, or group, have this standing? This is straightforward as a question, but it is important to say a word about the kinds of things that can count as answers to it. What kinds of reasons, values, principles, can be appealed to in answering this ‘why’ element of the jurisdiction question? Rather than give a substantive list in response to this question, I suggest we think of it functionally. Arguments that answer the why element of the jurisdiction question explain the normative importance of, or moral or political reasons relevant to the existence or scope of the power of a particular institution. This is in contrast to arguments that give a moral argument for punishment or harsh treatment of the perpetrators of these crimes that does not view the question as political.

I used the language of ‘proper relation’ and ‘standing’ above to indicate that this normative judgment is about a kind of authority to hold accountable. However, invoking ‘authority’ in this context can be misleading. By authority I do not mean to indicate that
questions of jurisdiction reduce to questions of legitimacy. We can judge that some community has the standing to hold accountable, but that the institutions that represent that community fail to be fully legitimate. Perhaps they are corrupt, or undemocratic. Returning to our domestic example of specification of the second amendment, we would not say that settling this issue of jurisdiction relies on establishing whether (or to what extent) the US government and the state of North Carolina are legitimate. Jurisdiction is a matter of the relevant communities and their institutions having a legitimate interest (or exclusive interest, or overriding interest) in the norm violated or specified.

This issue of jurisdiction is distinct from questions of standing familiar from the philosophical literature on moral responsibility. The standing at issue in this discussion is not merely a question of who can appropriately blame perpetrators of crime against humanity for what they have done through interpersonal interactions, or even actions in the public sphere that are aimed at holding people accountable (for instance in the press). Jurisdiction questions ask whether some community, represented in some way through formal political and legal institutions, stands in the proper relationship to the perpetrator, such that it can utilize these institutions to hold that perpetrator accountable.

Answering the jurisdiction question establishes only a necessary condition on what we may call the legitimate prosecution of crime against humanity (as opposed to a sufficient condition for such a prosecution). What I discuss in this thesis is the question of which communities have the standing to prosecute crime against humanity. There are important further questions about what prosecuting bodies would have to be like in order to exercise the power to prosecute legitimately. One may think that they must be created democratically, or at least, be created by the consent of the governed. The resources I develop to answer the
jurisdiction question will give us a place to begin answering these further questions, but
discussion of them will not fall within the scope of this project. Although distinct from these
further questions, the jurisdiction question is importantly related to important questions about
whether and why an institution has the political authority to legislate and define law, full
stop. As we will see, arguments for the need for and standing of institutions of law (and not
merely the prosecuting court) are important in answering the jurisdiction question.

I have made a point of clarifying the nature and scope of the jurisdiction question
because the moral severity of crimes against humanity creates the danger of ignoring the
importance of the question. For example, prosecuting someone for his central role in the
systematic amputation and mutilation of hundreds of thousands of people in Sierra Leone
seems so clearly to be an appropriate exercise of the power of law, that we risk submerging
the question of whether the group doing the prosecuting has the *standing* to do so in the first
place. The extreme nature of the evils in question can give rise to a desire to punish
perpetrators that ignores the question of the right to do so.

**A Note on Approach**

My project falls within the tradition of philosophical exploration of the moral
foundations of justice. This locates my project at the intersection of ethics, political
philosophy and the philosophy of law. I aim to provide arguments and analyses concerning
the normative justification of different legal or political institutions that have, as Rawls may
describe them, justice as their first virtue.⁴ In this project those legal and political institutions
are criminal prosecutions of those who violate public international law, particularly the
prohibition on crime against humanity.

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My approach to answering the jurisdiction question is heavily influenced by Allen Buchanan’s work on international justice. Laying out his methodological commitments in building a moral theory of international law in *Justice, Legitimacy and Self-Determination*, Buchanan begins with the contention that “a moral theory of international law is needed, both for responsible criticism of the status quo and for guiding progress toward a better state of affairs.”\(^5\) By this, he means that

> there is a need for self-conscious, systematic moral reasoning, the attempt to produce an interrelated, mutually supporting set of prescriptive principles that will provide substantial guidance for at least most of the more important issues with which international law must deal or which it could profitably address.\(^6\)

Buchanan claims that developing a moral theory of the international law is instrumentally valuable. It is necessary (though clearly not sufficient) to work out a moral theory of the international law if we are to improve the international law itself.

Seeing the value of a moral theory of the law as essentially instrumental generates other methodological commitments for Buchanan. He argues that to give a moral theory of the international law one must engage in a great deal of institutional thinking. That is, the theory must respect the fact that the law is instantiated, enforced, and produced by *institutions*, and that it is these institutions that need to come to reflect the principles that the moral theory proscribes. The theorist must take seriously the fact that reform of international law is reform of international institutions. I follow him in adopting an institutional outlook.

With that said, I disagree with Buchanan that the sole or primary value of building a moral theory of international law is the instrumental value this practice has for the reform of

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\(^6\) Buchanan, 15.
international legal institutions. I follow Iris Marion Young in her observation that “politics is partly a struggle over the language people use to describe social and political experience.” Insofar as politics serves this role in the lives of individuals and communities, we should recognize that part of the use people put the moral-political concepts to centrally concerns understanding the experiences of others, and coming to appreciate our own experiences as of a certain kind. The value of building and developing a moral theory of institutions of justice is, at least in part, engaging in this public discussion that incorporates, builds, and challenges concepts that are important for making sense of who we are, how we are related to one another, and what we have experienced (individually and collectively).

**Outline of the Project**

The project unfolds in five stages: (A) an analysis of ‘crime against humanity’ taking into account both the legal definition and the moral conception of atrocity, (B) an exploration of and argument against traditional ways of framing and answering the jurisdiction question, concluding with the need for a cosmopolitan strategy for answering the question, (C) study of models of the relationship between the status of sovereignty and the nature of international justice or international law, (D) reflection on the motivation for and content/commitments of cosmopolitanism as understood in this argument, (E) an argument built upon this understanding of the basic moral relationship of cosmopolitanism for the international community’s standing to prosecute crimes against humanity.

In Chapter One I develop an account of ‘crime against humanity’ that takes into account both the legal tradition in which the concept emerged and is currently embedded, as well as moral consideration of the nature of atrocities. I argue that crimes against humanity

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are widespread and systematic attacks on civilian populations, often carried out by the
governments under which the civilians live that exploit the vulnerability of the civilians and
cause them harm that deprives (or seriously risks depriving) them of the basics that make life
possible, tolerable or decent. This account of crime against humanity puts into clear focus the
difficulty of the jurisdiction question. Crimes against humanity can be, and often are,
perpetrated by officials of the governing bodies under which the victims live. This poses a
unique jurisdictional puzzle that is difficult for traditional theories of international justice to
address, because the attacks can occur wholly within the boundaries of a presumed to be
sovereign state (and thus, off limits for any external interference).

Chapter Two addresses this jurisdictional puzzle directly. I formulate the puzzle as a
three-step argument against the standing of external bodies to prosecute crimes against
humanity, called the Nuremberg Problem. I then present and evaluate three different
strategies for solving the Nuremberg Problem: the War-Nexus Approach (as utilized by the
framers of the London Charter for the Nuremberg Tribunals), the Harm to Humanity
Approach (as formulated by Larry May) and the Conditional Sovereignty Approach (as
formulated by Andrew Altman and Christopher Heath Wellman. In evaluating these
approaches I develop four criteria for an adequate account. Namely, that the account be
appropriately consistent with the general principles of public international law, that it explain
the standing of the international community as such, that it explain the importance of states
and domestic political communities and that it respect the victims of crimes against
humanity, and in doing so, make adequate room for the moral standing of individuals in its
account of standing.
In response to the shortcomings of the approaches I evaluate in Chapter Two, Chapter Three begins building a new answer to the Nuremberg Problem with a critical discussion of different models of the status of state sovereignty and the nature and content of international justice. I discuss models and arguments concerning the status of sovereignty from Thomas Hobbes, Immanuel Kant, Michael Walzer and John Rawls – arguing that the best way to understand the status of sovereignty is as articulated and shaped, at least in part, by international law and procedures of international justice. I end with the suggestion that in light of this discussion an Alternative Cosmopolitan Account (ACA) is a promising direction for responding to the Nuremberg Problem.

Chapter Four takes up this suggestion and fills out the content of the ACA’s cosmopolitan commitment. I argue that cosmopolitanism, properly understood, need not be a political claim, but rather points to a kind of basic moral relationship that exists between all human beings. This relationship can be characterized as co-membership in the moral community, and further described as exhibiting three important features. The important features being: co-members take one another as participants rather than objects, value being able to justify actions, rules and institutions to one another, and engage in social practices that manifest or realize this co-member relation.

Chapter Five uses the analysis of the cosmopolitan commitment developed in Chapter Four to build the full ACA through an argument for the standing of the international community as such to hold perpetrators of crime against humanity accountable. I conclude by returning to the Nuremberg Problem and evaluating the ACA as a response in light of the four features of a good account developed in Chapter Two.
CHAPTER ONE

CRIMES AGAINST HUMANITY: MORAL AND LEGAL CONCEPTIONS

MORAL AND LEGAL USES OF “CRIME AGAINST HUMANITY”

The term “crime against humanity” has an important and complicated place in our constellation of normative concepts. It is often used as a way to identify atrocious evils and in an expression of condemnation for those who perpetrate them. When we call the genocide in Darfur a crime against humanity, we mean to express that it is an extreme evil. Additionally, within the context of the constantly expanding and evolving international criminal law “crime against humanity” has another role in our set of normative resources. It is a violation of international law.

Illustrations of the complexity of this and related concepts are found with relative frequency in the public sphere. Former Secretary of State Colin Powell recognized the genocide in Darfur as genocide in 2004. Prior to Powell’s formal recognition, citizens of the United States clearly knew of the moral evils taking place in Darfur, and used the term ‘genocide’ to refer to them. In fact, knowledge of the evils explains why Powell visited Sudan charged with the task of determining whether to recognize the events as genocide. Yet, his formal declaration that the atrocities were genocide changed the political discourse as well as the political relationship between the state of United States of America and the state of Sudan.
This complicated relationship between the moral and political or legal uses of certain concepts exists for the term “crime against humanity” as well. The Rome Statute of 1998, which established the International Criminal Court, begins by recognizing “that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of mankind.” The term “crime against humanity” is used later in this document to capture, in part, what is meant by unimaginable, unspeakable, unthinkable evil. However, the instrument does so through a formal legal articulation of particular actions that count as violation of public international law (as will be discussed in more depth below).

Despite the attempt to codify the unimaginable atrocities in this statute, these evils are importantly unlike what most of us think of as crime. Richard Vernon points to Hannah Arendt’s claim that “[the Nazi’s guilt for the Holocaust], in contrast to criminal guilt, oversteps and shatters any and all legal systems,” as a way to capture the seeming discontinuity between the reality of the unimaginable evils and the language of law and crime. Recognition of this complexity poses an initial challenge to those working with the concept ‘crime against humanity.’ One must resolve the apparent tension created when legal and political bodies codify prohibitions of certain kinds of actions using tools available from these perspectives that can seem insufficient for the task of capturing the nature of the evils.

Vernon notes that in response to this worry about the sufficiency of political-legal frameworks for capturing the nature of crime against humanity we could go in another theoretical direction and recast the use of ‘crime against humanity’ as merely a technical term

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in international law. This would allow us to give a definition of crime against humanity in the following way: crimes against humanity are whatever violates a rule held to be authoritative by international bodies or by general consent. However, as Vernon goes on to argue, the question “what is crime against humanity?” resists being answered in this way for reasons related to the pre-theoretical, extra-legal aspect (what I refer to as the moral use of the concept) of the term “crime against humanity.”

To begin, “if the offence lay in the fact that it is prohibited, then every violation of international law would become ‘crime against humanity’ and nothing would remain to distinguish this category (except its name).”\textsuperscript{10} That is, if we use the term crime against humanity to mean (merely) international crime or violation of international law, we lose focus on the particular kind of evil to which the term is meant to refer: the unspeakable evils that shock the conscience of mankind. After all, certain kinds of technical treaty violations will be violations of international law, but fall short of shocking any consciences at all, let alone that of all mankind.

Vernon’s initial objection, as formulated, may appear superficial or easily answered. We could simply respond by stipulating that “crime against humanity” does not refer to all transgressions of international law, but only a particular, narrow range of violations. Although this response avoids this particular formulation of the worry, there is something more behind the objection that remains unaddressed. The worry is that if we define crimes against humanity in the first instance as a violation of international law, we have missed something important about crime against humanity. We have gotten the order of explanation wrong. These evils, like many other crimes, are not wrong because they are prohibited by law. Rather, they are prohibited because they are wrong. Moreover, they are wrong whether

\textsuperscript{10} Vernon, 231.
or not they are prohibited, and even if they were prohibited for reasons other than that they are wrong.

This leads Vernon to a second way of explaining the tension between the moral and legal uses of the term: “no uncritical history of the evolution of the idea can square it with the ordinary history of law.”\footnote{Vernon, 231} The idea that crime against humanity is a technical notion within international law ignores the history of our concept of crime against humanity. It was originally introduced in the Nuremberg Charter, when there was yet no law or legal mechanism to condemn it. It was introduced in the law to capture a unique kind of evil, it is not thought of as a unique evil because it is named as one in the law. As Vernon writes, crime against humanity “expressed a sense of moral outrage before it became an international offense.”\footnote{Vernon, 232} Again, we see the importance of recognizing the moral judgment that these evils are evils as independent from the political attempt to hold perpetrators of these evils accountable through legal prosecution. With these related considerations Vernon has refined the challenge posed to those interested in ‘crimes against humanity’. The challenge is to explain what crimes against humanity are, in a way that respects these two different perspectives – the legal and the moral.

The aim of this chapter is to explore these two seemingly distinct if not wholly different uses of “crime against humanity” and the relationship between them. In identifying the legal definition and the moral conception as distinct but not wholly different, I mean to be drawing attention to how thinking about ‘crime against humanity’ through the moral lens and through the legal lens are different ways of looking at roughly the same events or states of affairs. Under the description of the concept as a moral notion we pay attention to the nature

\footnote{Vernon, 231.}
\footnote{Vernon, 232.}
of atrocity, of extreme evils intentionally carried out against fellow human beings. Under the
description of the concept as a legal notion we pay attention to the particular formulation of
what counts as a crime against humanity under the law, and how the international legal
bodies have drawn the necessary and sufficient conditions for application of the term.\textsuperscript{13}

This conceptual investigation into crime against humanity is in service of the overall
aim of this thesis. Recall, our guiding question asks: does the international community have
the standing to prosecute crime against humanity? In order to answer this question we need
to be clear on what crimes against humanity are in the first place. To do this, we need a good
understanding of the international law with respect to crimes against humanity, but we do not
want our answer to the jurisdiction question to be hostage to the particular legal definition of
crime against humanity as it is at this moment. Moreover, we need resources for evaluating
and bringing to bear considerations that support or undermine the existence of such laws
(with their attendant definitions).

As I indicated in the Introduction, this thesis is not a piece of legal scholarship. It
answers a philosophical question about standing, and I aim to work with a conception of
crime against humanity that is appropriate to this task. To that end, this chapter carves out a
distinct category of actions or events at issue in the jurisdiction question by identifying
morally important aspects from both the public international law as it has developed and
moral reflection on the kinds of atrocities the law is designed to pick out. Carving out this
category not only provides us with a starting point for answering the jurisdiction question,
but answers Vernon’s challenge by supplying an account of the nature of crime against
humanity that respects the potentially divergent moral and legal perspectives.

\textsuperscript{13} The necessary and sufficient conditions given by the public international law are made all the more difficult
to identify and work with by the development of the law, itself, and debates about the \textit{ex post facto} nature of the
prosecutions for crimes against humanity.
This chapter has three primary sections. The first presents the legal definition of crime against humanity, identifying what I take to be the three central features of it for our investigation. The second presents Claudia Card’s atrocity paradigm as a way into the moral conception of atrocity and a lens through which to view the morally salient elements of the legal definition. Finally, I present an analysis of crimes against humanity that meets Vernon’s challenge by respecting these two distinct perspectives and uses of the concept.

**The Legal Definition of Crime Against Humanity**

Understanding the legal definition of crime against humanity is more difficult than merely turning to the requisite page in our international legal code and reading off a definition. In part, as we shall see, the complexity comes from the fact that the definition has been modified over time and has been employed somewhat differently by different courts and tribunals. In part, this complexity comes from the nature and evolution of international criminal law. Like many areas of public international law, international criminal law has developed in a haphazard and sporadic way.

This dynamism is reflected by the difficulty scholars have had not only articulating and isolating those acts that are international crimes, but also identifying the criteria for international criminalization. As an example of this confusion and complexity: the International Law Commission (ILC) produced a Draft Code of Crimes Against the Peace and Security of Mankind in 1991. It contained 26 distinct types of criminal acts, and was seen by the international community as “overreaching and ambiguous.”

After a great deal of debate, a new text, reduced to 5 types of criminal acts from the original 26, was produced

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in 1996. The recognized international crimes being: aggression, genocide, crimes against humanity, crimes against the United Nations and associated personnel, and war crimes.

Although now generally accepted as an international crime, the prohibition on crimes against humanity is relatively new in public international law. The term “crime against humanity” was introduced into the law, and thus popular parlance, in 1945 by the International Military Tribunal (IMT) through the London Charter.  

Although the term was introduced by the IMT, similar language to that of “crime against humanity” can be found in international criminal law prior to 1948. In particular, the Martens Clause, found in the preamble to the 1899 Hague Convention on the Laws and Customs of War on Land, invokes the laws of humanity; which itself is relied heavily on in the Treaty of Versailles to condemn the Armenian Genocide and characterize its perpetrators as enemies of humanity. Before the 20th century, hostes humani generis, “the enemies of humanity” was a term used as early as the 1600’s to apply to pirates, and again in the 1800’s to apply to slave-traders. This in turn was derived from the Roman Law concept of jus gentium - the law of nations/peoples - used to pick out those laws common to all peoples of the Roman Empire.

The first explicit legal definition of crime against humanity is found in Article 6 of the International Military Tribunal’s London Charter:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in

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16 International prosecutions were never conducted in response to the Armenian Genocide for political reasons. However, the international response to the genocide helped to establish the legal claim that the international community has an interest in actions that occur within the territory of a presumed to be sovereign state.

17 Bassiouni, Chapter 3.
connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.\textsuperscript{18}

There are three central features of this definition relevant to the aims of our current investigation. The first is (1) crimes against humanity are defined in relation to war. The London Charter recognizes crimes against humanity when they are committed against the backdrop of or as essential elements in a state’s build up to or execution of aggressive war. The second is (2) crimes against humanity are committed against civilian \textit{populations}. The emphasis on populations indicates that crimes against humanity are something more than or other than a series of one-off acts. Rather, they are large-scale, and carried out against a definable group of people. Finally, (3) the definition is notably silent on who can be charged with this crime. It leaves open the possibility that it is the officials of a citizen’s own state that are the perpetrators.

This final element of the definition is particularly important for the jurisdiction question. We are accustomed to thinking of international crimes as (things like) war crimes – acts that cross borders, committed by the representatives of one state against representatives of other states, or against civilians of other states. The prohibition on crime against humanity, to the contrary, is a prohibition on what a state (or representatives of it) can do both to its \textit{own} civilians and to civilians of other nations.

Rather than work through each appearance of “crime against humanity” in public international law, I will move to the most recent. The International Criminal Court’s Rome Statute contains the now standard definition of crime against humanity, which is derived from the way the crime was defined by the IMT as well as for the International Military

The Rome Statute defines crime 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; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.\(^{19}\)

Returning to the three important features of the London Charter’s definition – we can see how the legal concept has changed over time. (1) Crimes against humanity are no longer tied, essentially and by definition, to war. It is possible for something to count under the law as a crime against humanity without it having taken place as part of a state’s building toward or engaging in aggressive (that is, territorial border-crossing) war.\(^{20}\) (2) The International Criminal Court’s definition maintains and amplifies the importance of the large-scale nature of the crime. Whereas the London Charter merely mentioned that crimes against humanity occur against populations (rather than particular individuals) the current definition explicitly states that the actions against the population must be widespread and systematic. What

\(^{19}\) Rome Statute, Article 7.

\(^{20}\) This feature of crimes against humanity has significant consequences for arguments concerning jurisdiction that I will take up in Chapter Two.
“widespread and systematic” means remains a matter of debate, but for present purposes it is enough to note that the definition builds in an emphasis on the scope as well as the severity of the suffering. (3) The International Criminal Court’s definition remains silent on who can be charged with this crime. So, it too leaves open the possibility that it is the officials of a citizen’s own state that are the perpetrators.

A Moral Conception of Atrocity: Card’s Atrocity Paradigm

Rather than attempt to present, arbitrate and evaluate a survey of the concept of evil from the history of moral theory, in this section I will present (in order to work closely with) Claudia Card’s articulation of the nature of evil in The Atrocity Paradigm: A Theory of Evil. Instead of giving the moral conception of atrocity, I will be working with a (particularly illuminating) conception of atrocity. Card’s theory is particularly helpful for our purposes because her explicit aim is to “articulate a conception of evil that captures the ethically most significant, most serious publicly known evils of [Card’s] lifetime.”21 She aims to give a moral account of evil that covers the central cases of crime against humanity, and so, we are guaranteed to be referring to at least some of the same events.22

Card’s atrocity paradigm is also especially helpful for our purposes because she self-consciously incorporates insights from different moral theories. The definition of evil Card develops is not from within a particular normative theory, but is meant to stand on its own. For Card, “evils are foreseeable, intolerable harms produced by culpable wrong doing.”23 This definition reflects both the importance of harm that is privileged in the Utilitarian

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22 As will be discussed below, crimes against humanity can be thought of as a subset of the Card’s atrocities. Not all atrocities will be crimes against humanity, but all crimes against humanity will be atrocities.

23 Card, 3.
tradition, and also to the importance of the psychological state of the wrongdoer, as is the focus of the Stoic tradition (Kant included). With this definition, like many that appear *prima facie* plausible to the point of being uncontroversial, the devil is in the details. To understand what actually counts as an evil in Card’s theory we need to more fully understand the two major components of it: intolerable harm, and culpable wrongdoing. Before turning to these important components, I will introduce Card’s project a bit more thoroughly, including her use of atrocities as paradigm cases of evil.

As just mentioned, Card takes “atrocities” as paradigm cases for the purpose of constructing her theory of evil. Rather than define atrocities themselves (as the theory of evil is meant to provide this) Card begins with a list of well-known atrocities:

- the Holocaust;
- the bombings of Hiroshima, Nagasaki, Tokyo, Hamburg and Dresden;
- the internment of Japanese Americans and Japanese Canadians during World War II;
- the My Lai massacre;
- the Tuskegee syphilis experiments;
- genocides in Rwanda, Burundi, and East Timor;
- the killing fields of Cambodia;
- the rape/death camps of the former Yugoslavia;
- and the threat to life on our planet posed by environmental poisoning, global warming, and the destruction of rain forests and other natural habitats.

These are particular instances of more general kinds of evils:

- genocide, slavery, torture, rape as a weapon of war, the saturation bombing of cities, biological and chemical warfare unleashing lethal viruses and gases, and the domestic terrorism of prolonged battery, stalking and child abuse.²⁴

One of Card’s reasons for starting with atrocities as paradigms of evil is a commitment to understanding evils as evils and a commitment to valuing the victims’ point of view.

In the first case, Card claims that it is important to begin with a conception of atrocities as evils rather than evil. That is, as a set of terrible events (or terrible series of

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²⁴ Card, 8.
events, actions, etc), rather than “a metaphysical force….or a demonic psychology.”

This leads to the second commitment made by the atrocity paradigm: the primacy of the experience of the victims and the focus on their point of view in the creation of the theory. By beginning with harm, we focus on the fact that atrocities are not merely committed they are suffered. This emphasis directs us to the victims’ experiences and testimonies as primary sources for understanding the nature of atrocity and evils.

With that background on Card’s project, recall from above that “intolerable harm” is the first component of her theory of evil. Although pointing to the list of atrocities gives us a first pass intuitive understanding of what she could mean by “intolerable harm,” we need to be clearer on what, exactly, is meant by this term.

To begin, intolerable harm is severe harm. Where severity of harm:

is a function of such factors as (1) intensity of suffering, (2) effects on one’s ability to function (to work, for example) and (3) on the quality of one’s relationship with others, (4) how containable the harm is (what Bentham quaintly called its ‘fecundity’), (5) how reversible, (6) possibilities of compensation, and also (7) durability and (8) the number of victims.

In saying that the severity of harm is a function of different factors Card does not mean to assert a straightforward harm calculus. In the first place, it is not clear that many of the dimensions on this list can be quantified (for example, the impact of the event on the quality of one’s relationships with others). Rather, what she means to suggest is that “harm” is multifaceted, and the most severe evils will be extreme instances of harm along its various dimensions.

Beyond merely articulating the dimensions of harm, we can give a more general explanation of what makes harm severe. Severe harm:

25 Card, 9.
26 Card, 14.
deprives, or seriously risks depriving, others of the basics that are necessary to make a life possible and tolerable or decent (or to make a death decent). Such basics includes uncontaminated food, water and air; sleep; freedom from severe and prolonged pain and from debilitating fear; affective ties with other human beings; the ability to make choices and act on them; and a sense of one’s own worth as a person.  

That is, severe harms are intolerable harms, where intolerable is a normative concept. Card defines a tolerable life as “at least minimally worth living for its own sake and from the standpoint of the being whose life it is, not just as a means to the ends of others.” Again, what exactly this amounts to and the justification for taking it as a conception of a “tolerable” life is much more than we need to get into here. What is important for our purposes is the attempt to isolate and focus on that kind of harm that makes one’s life possible, harms that make it impossible to live a minimally decent human life. This standard is clearly tied to the point of view of the subject of the harms. But, given the extreme nature of the harms, the subjectivity does not threaten to explode the list or undermine its integrity. Rather, the point is to emphasize the experience of the victim, and recognize some (reasonable) room for variation across particular persons.

With this brief overview of Card’s understanding of intolerable harm, we can see that intolerable harm alone is not sufficient for capturing the unique nature of atrocities. To see this, take the example of contaminated water. The second cholera pandemic (caused by drinking contaminated water) reached Paris in 1832, killing 20,000 people in that city alone. Although this involves widespread severe harm, it is not the same as the other atrocities on Card’s list. As she writes:

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27 Card, 16.
28 Ibid.
severe and unremitting pain or humiliation, debilitating and disfiguring diseases, starvation, extreme impotence, and severe enforced isolation are evils when they are brought about or supported by culpable wrongdoing.  

Intolerable harm can be brought about by a natural disaster, or by a series of terrible coincidental events outside the control of human agency. People whose lives are characterized by these non-intentionally inflicted harms live what Card refers to as “wretched lives,” and deserve our support in the alleviation of these conditions, but they are not victims of atrocities. Atrocities involve not just severe harm, but intentionally inflicted severe harm. Card names this second element of atrocities “culpable wrongdoing,” the further discussion of which I now turn.

Harms are evils when they are both severe/intolerable (as discussed above) and when they are: (1) reasonably foreseeable (or appreciable) and (2) culpably inflicted (or tolerated, aggravated or maintained). Thus, the element of ‘culpable wrongdoing’ amounts to a king of intentional infliction of intolerable harm. Rather than fully explore the distinctions and definitions that provide Card with the tools to build a more robust theory of culpable wrongdoing, I will present only those relevant to understanding what Card means by “intentional infliction.” To understand this aspect of the definition we need to make at least two distinctions: evil intentions from evil motives and evildoers from evil persons.

According to Card, an evil intention is “a culpable intention to do someone intolerable harm, or to do something with that foreseeable result, even if the intention does not succeed.” Where, “evil deed” refers to cases where the intention is successful, and where culpability can involve:

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29 Card, 16.
30 Card, 20.
(1) the aim to bring about intolerable harm, (2) the willingness to do so in the course of pursuing an otherwise acceptable aim or in adhering to some other value or principle, or (3) the failure to attend to risks or take them seriously.\(^{31}\)

The creation of a statewide plan to exterminate an ethnic minority, the knowing implementation of an economic policy that will result in the death of thousands of citizens and failing to address an infrastructural feature of a city that puts the lives of thousands at risk will all count as culpable intentions.

Keeping in mind the goal of explaining the nature of atrocities, we ought to note that it is often insufficient to work solely with concepts appropriate for evaluating whether an individual is evil. Often, the intolerable harms are carried out through formal institutions, or are otherwise the result of the functioning of such institutions. So, a definition of evil institution is needed:

An institution, law or practice is evil not only when its purpose is inhumane (as with bullfighting) but also when it is reasonably foreseeable by those with power to change it that intolerably harmful injustices will result from its normal or correct operation (as many believe true of capital punishment).\(^{32}\)

We can imagine a non-evil institution whose offices are filled with evil persons, or we can imagine an evil institution where the offices are filled with non-evil persons. For our purposes, we need not settle these issues either, but follow Card in the suggestion that we should allow for the existence of evil institutions and be sure to clarify whether we are attributing the evil-status to particular individuals or to institutions themselves.

Card’s analysis of atrocity demonstrates the potential for diversity among the members of the class of atrocities. Her aim is to identify the features shared by all atrocities. Our investigation, on the other hand, has a narrower scope. We are interested in just those atrocities that are crimes against humanity. This analysis of culpability in the conception of

\(^{31}\) Ibid.
\(^{32}\) Card, 20.
atrocities, and the distinctions needed to understand the full breadth of atrocities, suggests a means by which to further differentiate kinds of atrocities. In particular, not all atrocities are crimes against humanity, and the distinctions within ‘culpable wrongdoing’ provide resources to draw on in carving out this subset. The web of distinctions can better help us distinguish this narrower classification, while locating it within a larger set of atrocities. The next section is devoted to distinguishing crime against humanity as a subset of the moral category of atrocity, using the features of crime against humanity as identified in the legal definition.

**AN ANALYSIS OF CRIME AGAINST HUMANITY**

Now that we have both the legal definition and the *Atrocity Paradigm* on the table, we can move to directly addressing the aim of this chapter - giving an analysis of ‘crime against humanity’ that can meet the challenge posed by Vernon. To begin the analysis, let’s start with the first clause of the legal definition: crimes against humanity are widespread and systematic attacks on civilian populations. I take this brief clause as our starting point and the heart of the definition of crime against humanity.

Crimes against humanity differ, initially, from other evils insofar as they are widespread and systematic. They are attacks on a large number of people, executed according to some kind of plan, or by a body capable of systemic attacks. These two aspects of the scope of the crime – that it is widespread and systematic – pick out for attention two different features of these evils. ‘Widespread’ indicates that there are a large number of victims, or that the attack was an attack on a large number of people. ‘Systematic’ on the other hand, points to scope of the perpetrator and the execution of the attack. Only certain kinds of entities or agents will be capable of executing a systematic attack on a
population – namely, one with multiple individuals engaged in executing the attack and organized in such a way that coordinated action is possible.\textsuperscript{33}

This initial aspect of the analysis invites gray area with respect to which atrocities count as crime against humanity. For example, paying attention to whether harm is widespread and brought about by an entity capable of coordinated execution of the attack, and according to some kind of plan or intention to cause this harm – we may wonder if something like Mao’s Great Leap Forward, or the social and economic policies enacted by the Khmer Rouge in Cambodia that resulted in mass starvation count as crime against humanity. These economic and social policies seem clearly to meet the criteria of affecting a large number of people, in a systematic way. However, we may think that they are not the same as the killing fields in Cambodia, or the 1994 genocide in Rwanda. I think this kind of fuzzy border or gray case is appropriate. With the Holocaust, apartheid in South Africa, and the rape camps in Yugoslavia we have paradigm cases of crimes against humanity to guide our analysis. That all of the horrific harms that governments have caused their own people fail to fall within one natural class, but rather have similarities and differences along a number of dimensions, should be expected.

With this expectation of a family resemblance rather than a natural kind – we can still do more work to try to differentiate crimes against humanity from other large-scale atrocities. The emphasis on ‘civilian populations’ in the analysis of crimes against humanity points to a morally important relationship between the perpetrators and the victims. Crimes against humanity are a unique moral category, in part because the victims of the attacks are in

\textsuperscript{33} Crimes against humanity are widespread \textit{and} systematic in my analysis. The International Criminal Court tends to treat these features of atrocities disjunctively, such that crimes against humanity are widespread, or systematic or both. I suspect this is because the court is subject to a standard of proof, which can be met more clearly for the ‘widespread’ criterion than the ‘systematic’ criterion.
positions of extreme vulnerability (often, to the perpetrators). To explain this element more clearly, consider the nature of the relationship between a government and those who live under it. We often think of governments as entities whose purpose includes the protection of those subject to them. They consist of institutions whose functions include not only the coordination of citizens (rules for driving on the same side of the road, zoning regulations, and the like) but also the protection of the citizens from both one another and from external threats. Thus, when a group of citizens is attacked by their own government or governmental officials (or the government is powerless or negligent enough to sit idle while the citizens are attacked by another internal group), we cannot help but see the victims as particularly and woefully vulnerable. The entity charged with the security of the citizens against this kind of attack, is now directly attacking them (or standing idly by).

People are dependent on and vulnerable to the governments under which they live. Human beings have needs in virtue of the kinds of lives they live: human beings have bodies that can become sick and suffer pain from assault, many live in communities that require not only day to day coordination, but are themselves required for many of our pursuits (cultivation of relationships, including family and friends, careers, hobbies). What I have called pursuits are valued by those whose pursuits they are, and engaging in them, cultivating them, and enjoying them require a great deal of time, energy and focus. In order for us to pursue these goods, human beings need to entrust a great deal of day to day security and coordination to the governments in which they live. Thus, governments are entrusted with material goods, and powers. People are not merely dependent on their governments for these things, but can be said to entrust (by participation in the institution, including obeying the laws, payment of taxes and the like) the government with these goods.
Trust is an important feature of a person’s relationship to her government. One cannot help, for the most part, but depend on a government. This dependence and trust is reflected in many features of governments. We often create rules for our institutions that attempt to render the dependence reasonable, or otherwise, rescindable. Many governments build in systems of representation and election that can remove officials, or build in mechanisms for sanctioning officials. The entrusting of the officials is often indicated by public oaths, and swearing-in ceremonies. In many ways, we view positions of power in governments as “at the will” of the community, as positions of privilege.

Not only do people depend on their governments, by entrusting them with certain powers and resources, governments often enjoy a monopoly on force in order to carry out the purposes of the institutions. In order for a government to carry out its aims, it needs access to resources, including militaries and police forces. It needs mechanisms of coercing compliance with certain rules in order to achieve the ends for which we need a government in the first place, and it often requires some mechanism for ensuring the safety of the citizens from those outside.

Moreover, governments often exercise their coercive power with the presumption of legitimacy. In order for a government to effectively accomplish its ends, citizens must trust it to do so. That is, part of the entrusting of the government with the resources to use coercive force often involves the presumption that day-to-day this power is being used justly. If each individual were to engage in constant and perpetual oversight of the actions of the government, the purpose of having the government would be undermined. Again, we often build in more and less formal mechanisms of oversight, but the point of doing so is that
individuals can assume (and often do) that the government is acting by rights in any particular case.

This dependence on those in power is a description of people in general; however, it is exaggerated in contexts that unfortunately describe many areas of the world: radical poverty, deeply rooted racial or tribal animosities, and systematic power inequalities. Poverty, conflict and inequality make lives difficult to live well and precarious. Moreover, those who are radically poor, or engaged in internal violent conflicts, have limited resources to appeal to or draw on for aid. It is these features of some communities that governments are able to address through the centralization of resources and powers. Governments can try to mitigate or change systematic features of a community, and those in power are trusted to address.

Returning to the aim of this discussion, giving an analysis of crimes against humanity, we have moved to understanding crimes against humanity as attacks on groups of people who have entrusted their resources for protection to some government. The people attacked remain dependent (as above) on the government for its protection. Thus, when the government or those in power attack civilians using the resources meant to protect them (or do nothing to stop an attack) the vulnerability of the civilians is being exploited. Those attacked have (perhaps necessarily) given over certain goods and powers that are now being used against them. The entity one would turn to for protection or aid is the attacker, or complicit in the attack.\textsuperscript{34}

Keeping in mind Card’s analysis of atrocities in general, we can see that crimes against humanity, understood as exploitations by the government of the extreme vulnerability

\textsuperscript{34} I have used the language of civilian rather than citizen in this description to indicate the practical and conceptual distance between a government or ruling power and a state.
of the civilians, are only a subset of the evils she describes. In particular, these kinds of evils
are those in which intolerable harm is caused, or is otherwise the result of, evil institutions.
The institutions at issue are governments, and the ‘evil’ nature of them is a kind of perversity.
It is not only that the institution has an evil aim or purpose, but that the institution’s purpose
is abandoned and inverted.

What remains from our initial characterization of crimes against humanity is an
analysis of ‘attack.’ Attacks are characterized by causing severe harm. As in Card’s theory of
evil, the legal definition of crime against humanity places a central importance on the
severity of harm caused to the victims. Recall that part of the legal definition includes a list
of actions that when done systematically to a great number of people constitute crime against
humanity:

(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible
transfer of population; (e) Imprisonment or other severe deprivation of
physical liberty in violation of fundamental rules of international law; (f)
Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy,
enforced sterilization, or any other form of sexual violence of comparable
gravity; (h) Persecution against any identifiable group or collectivity on
political, racial, national, ethnic, cultural, religious, gender as defined in
paragraph 3, or other grounds that are universally recognized as impermissible
under international law, in connection with any act referred to in this
paragraph or any crime within the jurisdiction of the Court; (i) Enforced
disappearance of persons; (j) The crime of apartheid…

These actions are among the most horrific things that can be carried out by human beings
against other human beings. However, presented merely with the list, we can ask: why these
actions and not others? Card’s atrocity paradigm can help us explain in virtue of what
something would or could appear on the list of terrible actions that constitute crime against
humanity: they cause severe harm.
Take, for example, the use of rape, from (g) of the legal definition. Victims of rape in war often report extremely intense suffering both at the time of the rape and in the aftermath of it. It often severely impairs the ability of the victims to move forward and function not only day to day, but to pursue projects and plans in the future, and it compromises the victim’s ability to trust others, and thus adversely affects not only her current relationships, but potential future relationships. The harm of rape in war is not containable, that is, it seems to bleed out into all other aspects of the life of the victim, it is not reversible, it stays with the victim for a lifetime, and it is unclear what could even count as “compensation” for it. Finally, rape as a weapon of war is just that, a strategic and systematic use of rape against a population of victims as a means of conducting war.\textsuperscript{35}

The terrible actions that constitute crime against humanity are those that cause severe harm, understood as severe along these various dimensions of harm. Card’s further analysis of what makes harm severe, that it “deprives someone of the basics that are necessary to make a life possible and tolerable or decent” can serve as a more general characterization of the terrible actions that constitute the legal definition. That is, crimes against humanity are attacks on civilian populations that exploit the vulnerability of the civilians and cause them harm that deprives (or seriously risks depriving) them of the basics that make life possible, tolerable or decent.

One might worry about this emphasis on severe harm as a way to explain why the terrible actions in the legal definition are what they are. One may think that something else explains why those terrible actions make the list and not others. In particular, one may find it attractive to explain the principle for sorting the relevant ways of harming a large number of

\textsuperscript{35} For example, in the Bosnian War the estimated number of victims of rape as a weapon of war is between 20,000-50,000 people.
civilians in a systematic way in terms of basic human rights rather than harm. I prefer the latter for two reasons. The first, following Card, Young and Arendt, is the importance of keeping central to our theorizing the victims of the crimes. By focusing on the harm to the victims, we keep central the orientation to evil as evils that are suffered. The rights framework runs the risk that Vernon poses above, of over ‘legalizing’ the moral core of the conception of crime against humanity by describing it in a way that victims do not relate to or feel alienated by. Vernon’s challenge is to give an account that makes sense of the evils experienced by the victims, and the language of rights can be (if not parochial in the derogatory sense) alien to and alienating for the victims. Although one can experience an action as having one’s rights violated, it may be that only in certain kinds of societies do people conceptualize their experiences this way. It is not that I object to there being a legal definition of crime against humanity at all (as clearly I am relying on just that in this project). Rather, I prefer to give a characterization of the events the legal definition picks out that is located as much as possible in the experience of the victims, rather than in a political framework.

Moreover, one need not hold that appeals to human rights are nothing more than “non-sense on stilts” to recognize that there are theoretical problems with positing basic human rights that are better to avoid if one can. The first is that it is difficult to identify what ‘basic human rights’ are, both in terms of their normative grounding and a specified form. The aim of my appeal to severe harm is to explain why the terrible actions on the list are the terrible actions on the list (makes life impossible, intolerable or indecent). In order for a basic human rights approach to do so, we would have to know what the basic human rights are. That is, we would need to see some kind of list or specification of the rights. However, once
we generate such a list of basic human rights, we can raise the same question of it that we did for the list of terrible actions in the definition of crime against humanity: why these and not something else? Answering this requires giving the normative foundations for the basic human rights. Not only would this risk taking us too far a field of our project, it may well lead us right back to an account similar to that of severe harm developed by Card.

In my view, rather than get stuck in the mire of basic human rights it is better to refer to something that we will all agree exists, even if its boundaries are somewhat blurry. There are identifiable ways in which peoples’ lives can be made impossible or intolerable, and suffering can be worse along a number of dimensions. Crimes against humanity are, in part, characterized by being very bad along a number of the dimensions of suffering, such that they make people’s lives if not impossible, than indecent or intolerable.

With this brief digression, we can end this analysis with a positive account of what crimes against humanity are, that respects both the legal and the moral uses of the term. Crimes against humanity are widespread and systematic attacks on civilian populations, where widespread refers to the number of the victims, and systematic refers to both the nature of the perpetrators (organized in such a way and powerful enough that they are capable of executing a plan of attack) and the manner of the execution. Finally, ‘attack’ picks out those things that governments do to their citizens that exploit the vulnerability of the civilians to the government itself that cause severe harm that deprives or risks depriving people of the basics that make life possible, tolerable or decent.

That crimes against humanity can be and often are committed by governments against their own people makes them a particularly interesting and important category for international justice. Often, international justice and international law is primarily concerned
with the behavior and rights of states with respect to one another. This leaves things like crimes against humanity under-explored or out of the picture entirely. In particular, crimes against humanity raise a unique challenge to accounts of international jurisdiction, because the normative resources often available to answer this question consist of those appropriate for governing the relationships between states, rather than the behavior of states or governments with respect to their own people. The complexity of the jurisdiction question for crime against humanity, and the problems with the traditional resources for addressing it, are the subject of the next chapter.
CHAPTER TWO

THE NUREMBERG PROBLEM AND ITS PROBLEMS

THE NUREMBERG PROBLEM

In Chapter One I developed an analysis of “crime against humanity” as widespread and systematic attacks on civilian populations that exploit the vulnerability of the civilians and cause them harm that deprives (or seriously risks depriving) them of what makes life possible, tolerable or decent. These attacks can occur wholly within the territory of a state and be perpetrated by the officials of that government. This feature of crimes against humanity creates a unique jurisdictional puzzle. Crimes against humanity are unlike war crimes or crimes of aggression that clearly cross borders and potentially endanger the safety and security of members of other states. We could cite the fact that war crimes or crimes of aggression involve harm to, or at least the interests of, other states as reason for them falling under the jurisdiction of the international (as opposed to some domestic) criminal law. However, prima facie, this kind of reason is unavailable for crime against humanity. This puzzle about crimes against humanity is at the heart of this project, and is captured by the question guiding this thesis: Could an international tribunal have the standing to prosecute perpetrators of crime against humanity, and if so, in virtue of what does it have this standing?

This jurisdiction question can be, and often is, formulated as an argument against the standing of external bodies to prosecute crimes against humanity. I call this argument the
Nuremberg Problem. The aim of this chapter is to evaluate three strategies for ‘solving’ the Nuremberg Problem. I begin by presenting the Nuremberg Problem, and the three standard responses to it. For each strategy I present a particular account that represents the general approach, as well as challenges to and worries about both the particular accounts and the general approach. I conclude with the suggestion that to respond to the Nuremberg Problem we first need a better understanding of the status of sovereign states.

The Nuremberg Problem is the following a short argument against the prosecution of crimes against humanity by bodies external to the state in which the crimes have been committed:

(1) A sovereign state has the right against external bodies to non-interference with respect to the governing prerogatives of that state. (Premise)

(2) A political or legal response to self-regarding events is a governing prerogative of a sovereign state. (Premise) By definition, a self-regarding event is an event that occurs wholly within the territorial boundaries of a single sovereign state, is carried out only by members of that state, and is carried out only against members of that state.

(3) So: A sovereign state has the right against external bodies to non-interference with respect to a legal response to self-regarding events. (1, 2)

This first part of the argument establishes a plausible right of states to political autonomy. Sovereign states have a right against other individuals, groups, communities, and the like actively becoming involved, against the will of the officials of the state, with the governing prerogatives (including the appropriate responses to wrong doing or violations of law) that concern only citizens of the state in question.

(4) Crimes against humanity (i.e., systematic and widespread attacks on civilians by the civilians’ sovereign state) can occur wholly within the territorial boundaries of a sovereign state, are carried out only by members of that state, and are carried out only against members of that state. (Premise)
(5) So: Crimes against humanity can be self-regarding events. (4, definition of self-regarding)

Steps 4 and 5 restate the jurisdictionally salient aspects of crimes against humanity, and locate the crimes as self-regarding events. They are evils conducted by perpetrators capable of widespread and systematic attacks on a civilian population. This includes officials of the state in which the civilian population in question resides, and thus, it can be the case that some atrocities concern only citizens of the state in question. Moreover, they can take place exclusively within the physical territory of a state (they can fail to physically cross borders into the domain of other states), further reinforcing that the crimes against humanity in question can be matters that concern only members of the state in which they occur.

(6) So: sovereign states can have a right to non-interference against external bodies with respect to the legal response to crimes against humanity in some cases (viz., those cases where the crime against humanity is a self-regarding event). (3,5)

No community or group other than the one involved in the atrocities, or operating legitimately according to that state, can be justified in violating the state’s right against external interference to perpetrators of crime against humanity who are officials of a sovereign state and the crimes in question took place within the physical territory of that state.

**Strategies for Responding to The Problem**

There are two broad strategies for solving the Nuremberg Problem: statist and cosmopolitan. Statists hold that international institutions or other external bodies can have standing to prosecute crimes against humanity in virtue of the fact that the atrocities in question cross the territorial borders (either physically or morally) of the states in which they occur. Statists accept the first part (steps 1-3) of the Nuremberg Problem argument, but deny
the premise in (4). They deny that crimes against humanity are rightly seen as falling exclusively within the political boundaries of the states in question. If the atrocities cross borders, the state in which they occur cannot reasonably claim that they are solely a matter of the self-governance of that state, as other states or the international community would have a legitimate interest in the events.

Cosmopolitans, on the other hand, accept the second part of the Nuremberg Problem argument (steps 4 and 5), but deny the premise in (1). They deny that political and legal responses to crimes against humanity fall within the governing prerogatives of the state. That is, cosmopolitans hold that there are some events that concern only members of the state, and take place within the state, but do not fall within the governing prerogatives of the state. They argue that international institutions or other external bodies can have standing to prosecute perpetrators of crimes against humanity in virtue of protecting or ensuring the basic human rights (or well-being) of individual persons. When a state fails to do so (by perpetrating or allowing crimes against humanity) it no longer has a claim to the right to political autonomy and external bodies can have the standing to prosecute those responsible for the atrocities.

**Statist Strategy: War Nexus**

As mentioned above, the general statist strategy is to deny (4) in the Nuremberg Problem. The first way of doing so is to tie crimes against humanity to the physical transgression of borders. This position holds that an external body has jurisdiction when crimes against humanity either spill over the borders of a state, or they are part of the build up to or execution of aggressive war. Thus, these other states or the international society of which they are a part have the standing to hold the perpetrators accountable.
The drafters of the London Charter for the International Military Tribunal were clearly aware of the jurisdictional puzzle created by introducing crime against humanity as an international crime. The drafters resolved this puzzle quite straightforwardly for the situation they were charged with addressing. Recall from above the definition of crime against humanity found in the London Charter, that the drafters defined crime against humanity as:

murder, extermination, enslavements, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.36 [emphasis added]

Most important for our purposes is the definitional relationship between crime against humanity and aggressive war. The drafters defined crimes against humanity in such a way that to count as crime against humanity, the acts committed against the civilian population must be connected to war or aggression on the part of the state perpetrating or permitting the atrocities. As it involves tying crimes against humanity explicitly and intentionally to war crimes and crimes of aggression this strategy is often referred to as the war nexus approach.

The chief virtue of this approach is what I will refer to as its accessibility. By accessibility I mean that what is recommended by this statist argument is something that those subject to the international law can understand and see as at least possible or plausible revisions or extensions of the law as it is. At the time the argument was employed by the creators of the International Military Tribunal it comported well with a dominant view of the moral status of political borders. It was recognizable as a legitimate argument by those who were in a position to conduct the trials. Moreover, it was an insightful legal maneuver that allowed the allied powers to prosecute in the case at hand something that had never been

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36 London Charter (1945).
prosecuted before. This accessibility manifests an important methodological commitment for approaches looking to ground the standing to prosecute atrocities: progressive conservatism.

Progressive conservatism is the methodological requirement that “theory should build upon, or at least not squarely contradict, the more morally acceptable principles of the existing international legal system.”37 When giving a moral theory of international law it is important to work from the normative foundations that have been developed and (more or less) agreed to by the international community itself. The political and legal articulations of the normative foundations for institutions and foundational conventions have been developed over a great number of years by people from all over the world, and are the result of an intergenerational international political process. Respect for this process is important in order to fulfill the commitment articulated in the Introduction to this dissertation to building a moral theory of international law that is appropriately institutional.38

Although the war nexus strategy for solving the Nuremberg Problem is straightforward and has proved to be successful in introducing crimes against humanity into international criminal law, the strategy loses its force when viewed as a general approach to grounding jurisdiction outside the state in which the crimes occurred. In the first case the war nexus definition of crime against humanity does not apply to all cases in which the officials of a state permit or perpetrate a widespread and systematic attack of their fellow citizens. The war nexus approach does not exhaust the salient category of crimes against humanity that was developed in Chapter One of this thesis. Insofar as we have identified an important


38 Respect for this process and the outcomes of the intergenerational, international efforts does not imply complete subservience to the actual laws – but rather, engagement with them and recognition of them as important manifestations of a political process we should take seriously and learn from.
group of actions that ought to be criminalized, this strategy will not treat the category as a discrete class.

One might think that it is not an objection to the war-nexus approach that it holds that an external body does not have standing with respect to all cases of crime against humanity. Even if crime against humanity does form a class of the kind I identified in Chapter One, it may be the case that external bodies’ standing to prosecute does not apply to each member of the class. The strength of this response to my objection relies on the nature and strength of the principle by which one splits the category of crime against humanity into those external bodies can prosecute and those they cannot. If the reason for holding that only some crimes against humanity are within the jurisdiction of external bodies is a morally important reason, the war nexus approach is not as problematic as I have presented it as.

The reason appealed to by the war nexus approach is the integrity of territorial boundaries of states. This approach holds that external bodies only have standing when the crimes against humanity cross or spill over the borders of the state in which they occur. The approach itself relies on the moral status of territorial borders implying that no external bodies have standing on the behavior of states with respect to their own people in the absence of the consent of the state whose borders are at issue (and only concerning those matters that the state has explicitly consented to being bound by). This reliance on a strong right to territorial integrity is a position that I challenge in more detail in Chapter Three, and so I will reserve the major discussion of the problems with this assumption there. Here I want to draw attention to the importance of the right of territorial integrity implicit in this approach, and how the viability of the approach relies on this assumption.
STATIST STRATEGY: HARM TO HUMANITY

Turning now to the second statist approach - arguing that crimes against humanity harm humanity. The harm to humanity position holds that crimes against humanity harm not only the victims, but humanity or the international community itself. In this way, crimes against humanity are not confined within the states in which they occur. So, crimes against humanity fall outside the governing prerogatives of the state. Statists of this second kind argue that insofar as humanity is harmed, some body or institution representing humanity has the standing to prosecute the perpetrators of these crimes.

The most thorough version of this approach is presented in Larry May’s *Crime Against Humanity: A Normative Account*. May’s argument begins with a defense of two foundational principles: the Security Principle (SP) and the International Harm Principle (IHP). The SP states:

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 remember 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.39

This first principle ties the sovereignty of a state to its willingness and ability to protect its subjects. SP is a way of rebutting the strong moral presumption against crossing the borders of a state. It does not claim that the international community *should* prosecute any time the security principle is breached. Rather, SP establishes in what set of circumstances it *may* be justified – those in which the sovereignty of the state in question does not have a moral presumption against interference (or a right to non-interference) because it fails to meet the requirements for sovereignty.

In defense of SP, May argues that when a state attacks or refuses to defend a group of its citizens, the citizens are no longer under an obligation to obey the laws of that state. This indicates, for May, that the state is no longer sovereign or can enjoy the rights of sovereignty. If the state is no longer sovereign, then there is no reason to grant it the moral presumption in favor of not crossing its borders or respecting its right to non-interference. Thus, international bodies could be justified in crossing its borders. Notice, the SP merely establishes that someone or other could legitimately cross the borders of the state to prosecute the perpetrators of the atrocities. This does not establish that it is the international community that uniquely has the jurisdiction to do so.

To understand how May establishes that it is the international community as such that has the standing to prosecute, let us turn to his second principle: the International Harm Principle. The IHP states:

Only when there is serious harm to the international community, should international prosecutions against individual perpetrators be conducted, where normally this will require a showing of harm to the victims that is based on non-individualized characteristics of the individual, such as the individual’s group membership or is perpetrated by, or involves, a State or other collective entity.\(^{40}\)

May presents this principle as explaining only the justification to prosecute particular evils and not a further specification of who has the jurisdiction to prosecute crime against humanity. I present IHP as doing the latter because without it playing this role, SP alone does not establish the standing of an international body that represents ‘humanity.’

With IHP we see that for May, “what sets paradigmatic international crimes apart from domestic crimes is that, in some sense, humanity is harmed when these crimes are

\(^{40}\) May, 83.
perpetrated.”41 This reflects the distinction between the criminal law and the public law more generally in the domestic setting. As May writes,

> criminal law is a subset of public law – the harms that are the subject of prosecution are not private but public in the sense that the public is harmed when the individual is harmed by certain crime.42 [emphasis added]

In international law those harms that are subject to international criminal prosecution are those that affect the relevant community, i.e. the world community or all of humanity, in the same way that crimes in the domestic setting are said to harm the (more) local community. Given this analogy it seems that at the foundation of May’s account is a commitment to thinking that being harmed (perhaps in a very particular way) grounds the jurisdiction to prosecute.

This leads to the next question for May’s analysis: how can humanity be harmed? He identifies three general ways of answering this question. (A) An individual human being is harmed, and thereby, the whole of humanity is also harmed. (B) Some significant characteristic of humanity is harmed, perhaps by harming it within each member of humanity. (C) All of mankind is harmed.

May goes on to argue that (A) is not promising unless it can be made more intelligible. It is not clear what kind of part-whole relationship individual persons stand in with mankind as such. We could say that each individual person instantiates (or exemplifies, or participates in) the property “mankind.” However, this makes the claim that humanity has been harmed trivial, because it seems to imply that each time an individual is harmed, humanity is harmed. (C) is also unhelpful, because short of the most extreme cases imaginable (perhaps a nuclear war that results in the destruction of life on nearly all

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41 May, 82.
42 Ibid.
an action will not directly harm each member of mankind. That leaves May with option (B): crimes against humanity are those acts that harm a significant characteristic of humanity.

May glosses ‘acts that harm a significant characteristic of humanity’ as those things that harm or otherwise assault the humanity of particular persons. Although he does not fully articulate what constitutes a person’s “humanity,” he argues that a person’s humanity is assaulted when she is picked out for bad treatment on the basis of having certain characteristics associated with membership in a particular social group and membership in that group is out of her control. He writes:

If an individual is treated according to group-characteristics that are out of that person’s control, there is a straightforward assault on that person’s humanity. It is as if the individuality of the person were being ignored, and the person were being treated as a mere representative of a group that the person has not chosen to join.\(^{43}\)

When this happens the person’s individuality is ignored, because she is treated as a mere representative of some group and the membership is not her choice. This group-based harm is a kind of callous disregard for the individuality of the person, and in May’s terminology, an assault on her humanity.

May claims that humanity has an interest in this kind of group-based harm to individuals, writing “in my view humanity has interests. One interest of humanity is that its members, as members not be harmed.”\(^{44}\) That ‘humanity’ can have interests is a difficult claim to understand. Recognizing this, May supports the claim by analogy to other kinds of groups that we can think of as having interests. For May, the claim that humanity has interests is

\(^{43}\) May, 85.

\(^{44}\) May, 82.
similar to the claim that a club has an interest that its members, as members, not be harmed. For when the club’s members are harmed in this way, the harms adversely affect the reputation or the club, and even the ability of the club to remain in existence.  

This analogy is only meant to point us to the sense in which humanity can have an interest. I will return to this analogy and problems with it below.

In understanding the claim that humanity has an interest, we also need to understand why humanity would have *this* interest in group-based harms to individuals. May’s argument is that:

while the nature of the crime may be difficult to determine, the international community is likely to be harmed when the perpetrators of a crime do not react to the individual features of a person, but rather to those features that the individual shares with all, or very many others, or if the perpetrator of the harm is, or involves, a State or other collective entity rather than being merely perpetrated by an individual human person.  

This explanation of humanity’s interest in group-based harms to individuals ties this harm directly to the risk of harm to others. The group ‘humanity’ has an interest in group-based harms to individuals, because the group-based harms to individuals represent a risk to the international community itself. More pointedly, May writes:

*Humanity is a victim when the intentions of individual perpetrators or the harms of individual victims are based on group characteristics rather than on individual characteristics. Humanity is implicated, and in a sense, victimized, when the sufferer merely stands in for larger segments of the population who are not treated according to individual differences among fellow humans, but only according to group characteristics.*

This extended discussion of humanity’s interest in the group-based harms to individuals reveals two distinct ways in which humanity could come to have this interest. The first is that

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45 May, 83.
46 May, 84.
47 May, 85-86.
the characteristic ‘one’s humanity’ is violated by group-based harms to individuals, and therefore, the group that shares this characteristic ‘humanity’ is implicated in the harm to the individual. The second is that group-based harms to individuals are important to the group ‘humanity’ because they are the kinds of harms likely to cross-borders or affect a large number of people.

With May’s position in view, we can now raise questions about it. I will focus on three interrelated worries. The first is whether ‘humanity’ is a sufficiently defined group such that it can have interests in the way May describes. The second is whether May has provided a sufficient explanation for why humanity has an interest in group-based harms to individuals. The third is whether the relationship between harm or interest and standing is sufficiently established.

For the first, May acknowledges that humanity is not like a club, or a domestic political community, but maintains that analogies to clubs and domestic communities can shed light on the sense in which humanity can have interests and, be harmed in virtue of having these interests set back. For harm to be to the group qua group, rather than to the individual members of the group, we need a clear account of setting back the interests of the group as a group. For groups that take the form of voluntary associations, for example a school sports team, things that make the actions of the group impossible are clear cases of group harm.

For example, damage to the gym that makes practicing impossible is harm to the basketball team, as a team. For cases like the ones at issue in this discussion, it is not clear how the actions cause this kind of set back to the group as a group. In saying this, I do not want to dismiss ‘humanity’ as a morally salient category, or claim that there is no sense to
saying that there are morally salient features of humans as such (something that I will return to in Chapter Four). Rather, I want to challenge whether we can think of humanity as a group that can be harmed as such.

May claims that the analogy to voluntary associations is not meant to do the work in explaining how humanity can have an interest but merely to shed light on the truth of this claim. However, the plausibility of a group being harmed as a group seems to depend on the ability to isolate the group and attribute to it some goals, intentions or at least common purposes. We may be able to think of a domestic political community as this kind of entity, and yet not hold that members of this community are voluntary members in the way clubs are, to think that there are discrete aims of that community as a community. Perhaps, to protect its members from one another and outside threats or to provide its members with education, access to health care or other basic needs. We can sometimes identify the common purposes of a community in people’s behavior with respect to one another, or their participation in common practices that manifest discrete values, purposes or intentions.

“Humanity” does not seem to be such a group. To what would we turn to understand the common purposes of humanity, such that we could attribute to it particular interests? It is not clear how to determine what the interests of humanity itself are. We may think that all of humanity has an interest in the continued life of humanity itself and those things that make this life possible (although, again, it is hard to know what would support this claim). It is this worry that seems to push May, initially, toward the view that harm to humanity is harm to a significant characteristic of humanity. Which moves to our second worry with May’s strategy. Even if humanity is a group that has interests, why would humanity as a group have an interest in group-based harms to individuals?
May appears to go back and forth between thinking that humanity has an interest in its members as members (that is, humanity harmed when ‘one’s humanity’ is harmed), and that humanity has an interest in group-based harm to individuals because these harms are potentially more dangerous to more people. It is important to keep these two different bases for attributing an interest to humanity distinct. The first runs into the worries and questions I raised above about the status of ‘humanity’ as a group, and how we could attribute to that group interests.

The latter runs into the worries that May himself raised for option (A) above. In distinguishing different ways to give an analysis of harm to humanity, May argued against those who claim that humanity is harmed when human beings are harmed. He argued that this strategy posits a mysterious part-whole relationship between individual persons and humanity itself that is unintelligible. May’s second way of explaining why humanity has an interest in individual group-based harms seems to be a variant on this response. Rather than say that any time humanity is harmed when any individual human being is harmed, he claims that group-based individual harms harm humanity because they risk harm to a large number of people (either within a state or across borders). But, why should we think that the part-whole relationship is any less mysterious when it is a large number of people instead of one person?

One could avoid this collapse back into the metaphysical morass, by claiming that humanity has an interest in group-based individual harms because they risk crossing physical borders and destabilizing the international society. If this is the case, then May’s account of harm to humanity is not a distinct kind of approach to the Nuremberg Problem, but a
sophisticated version of the cross-physical borders approach, and subject to the same worries and objections.

In presenting May’s argument to this point I have been using ‘standing’ and ‘interest’ nearly interchangeably. For May, a group’s having a legitimate interest in something is for that community to have the standing to hold one accountable for setting back that interest. Although May acknowledges a move between harm to humanity and the standing of the international community to prosecute crimes against humanity, he does not argue for the move. May merely points to the domestic case - to the difference between the public law broadly and the criminal law. This is not enough, I contend, for his project of establishing an external body’s jurisdiction. There remains a further question about why harm to humanity establishes the international community’s standing to prosecute perpetrators of crime against humanity. We need an account that moves us from ‘harm’ or ‘interest’ to ‘jurisdiction.’

One might want to stop me at this point and object that this third worry about May’s analysis is unfair – he should not have the burden of justifying criminal law in order to show how there is international jurisdiction for crime against humanity. To this kind of worry I want to say: fair enough. May is not required to justify the criminal law. However, he does need a general story about how to establish jurisdiction that is plausible for the international case. Pointing to the domestic criminal law may be sufficient if everyone could agree that the international prosecution of crime against humanity is relevantly similar to the domestic criminal prosecution. However, that is the issue in question. The question of the standing to prosecute these atrocities is, in part, a question about whether there is an analog of domestic criminal law in the international sphere.
Given that what we need is an account taking us from harm to jurisdiction, we can turn our attention to likely candidates. Luckily enough, there is an available account within the broadly Millian liberal tradition. The Millian explanation in question begins with grievance evils, and so I will refer to it as the grievance morality account. Grievance evils are a special class of wrongs done to specific persons. As Postema describes them, “grievance evils are of immediate personal concern to [the specific persons wronged]; the evils directly affect their own good and interest, goods in which they have a direct and personal stake.” Joel Feinberg connects these kinds of wrongs to the criminal law, writing:

When a person has been harmed in one of his vital interests, or even when he has been seriously inconvenienced to his great annoyance, a wrong has been done to him; he is entitled to complain; he has a grievance to voice; he is the victim of injustice; he can demand protection against recurrences; he may deserve compensation for his loses.

So, grievance wrongs are the kinds of things that give us the standing to do something about them: to complain, to protect, or to demand compensation. However, it is not enough to merely claim that this is the case. An explanation is needed for why it is the case.

Postema provides such an explanation in “Politics is About the Grievance.” The key move from having a grievance to having the moral standing to hold others accountable is to focus on the nature of the goods that one has a grievance about. The personal goods at issue are those that ground rights. Rights, in turn, imply duties on the part of others and accord particular powers to the bearers of them. Three important powers or competencies, in particular: 1) the right to make claims and the right to voice grievances; 2) that others are answerable to the rights-bearers to respect the rights in question; 3) rights-bearers can call

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upon others to act on their behalf and hold people to duties owed to them, as well as make such people answerable for violations of those duties.\(^{50}\)

This third power or competency is key to getting the moral entitlement to punish off the ground. We recognize that, in part, having a right is dependent on having a mechanism for enforcing that right. This recognition is manifested in this third power of the rights-bearer. Combining the power to call upon one another to hold people accountable for respecting this right with the assumed presence of an at least minimally legitimate public authority in our community, we come to what Postema labels the fourth power of a rights-bearer: the ability to demand protection of her rights from public authorities. If this power is to be meaningful, it must be the case “that public authorities, acting in the name of the political community as a whole, have standing to respond to rights-bearers’ calls for protection.”\(^{51}\) In this way, we transition from grievance evils being wrongs to particular persons, to wrongdoers being answerable to public authorities.

I do not think we can borrow this story. There are two important points of tension between May’s harm to humanity analysis and the grievance morality account that I want to touch on. To begin, notice that in the grievance morality account of the moral standing to prosecute it is not the fact that the community is harmed that generates the jurisdiction of the political community. Rather, it is the relationship between the rights-bearer and the political community, as well as the nature of rights (what it means to have a right to something) that provides the normative foundation for jurisdiction. This suggests that discussion of harm to humanity as such would be unnecessary, as the normative heavy lifting for the grievance

\(^{50}\) Postema, 307-8.

\(^{51}\) Postema, 309.
morality comes in the way in which communities ensure the rights of individuals, not in harm to the community itself.

A further tension between May’s harm to humanity and grievance morality is in what he identifies as harm to humanity. Recall from above that the evil in question is setting back humanity’s interest in the group-based harm to the individual. Although May’s analysis of harm to humanity is meant to preserve a kind of focus on the individual human beings who are victims of atrocities, it does not focus on what we might take to be the most obvious (and important) ways that these atrocities harm individuals. For example one might think that the harms of crimes against humanity are: subjecting the victims to incredible pain, anguish, terror, torture, and the like. These are severe harms, and serve as the moral core of our analysis of crime against humanity in Chapter One. These severe harms are absolutely grievance evils – they set back the most vital interests of the victims. This is not to deny that failing to treat persons as individuals is morally wrong, or that it is an important feature of crime against humanity. What I mean to suggest is that May’s harm to humanity is not the kind of thing that gets us the grievance morality account up and running. The issue is what entities May has playing the particular roles. In attributing an interest that can be set back to humanity, he seems to be saying that the body with the grievance is humanity itself, rather than the individual who have suffered severe harm.

Having explored three worries with May’s harm to humanity strategy for solving the Nuremberg Problem, it is important to take stock of its virtues. This strategy has two primary virtues. First, in locating the normative force of the argument for standing in some kind of global group harm, it easily explains why the international community is the relevant community with the standing to prosecute the atrocities at issue. The strategy has a clear
explanation for why crime against humanity is something the international community (as a whole) has the standing to redress: the crime harmed that community.

Second, this approach demarcates distinct realms of domestic and international jurisdiction. States have jurisdiction over those things that concern the people as members of domestic communities, or the domestic communities themselves. The international community has jurisdiction for those things that concern humanity itself. Having seen that the first statist approach has the virtue of accessibility because it respects the value of states’ territorial integrity – we can see the same value being respected in the harm to humanity approach. This second statist approach makes clear that there are different domains of jurisdiction. It clearly demarcates a realm in which the state is sovereign, by arguing that the international community’s standing is derived from the community itself being directly harmed or otherwise implicated by the crime.

Despite these virtues, and beyond the particular issues with May’s account, there are some general worries for anyone embracing the second statist strategy. The first is that in claiming that crimes against humanity harm humanity itself, one must provide an account of not only group harm, but harm to humanity as a group. The concept of group harm is notoriously difficult to make out, and moreover, intuitive cases of harming a group qua group are not clearly of the kind at issue in this discussion of crime against humanity if ‘humanity’ rather than the particular targeted group is the relevant harmed group. There is also a danger in arguing that crimes against humanity harm humanity, as it involves redefining crime against humanity away from the importance of the harm to the victims. In Chapter One I developed an account of crime against humanity that places central importance on the intolerable harm done to the victims. Arguing that we have the standing to prosecute crime
against humanity, because it harms all of us, runs the risk of trivializing the harm done to the victims.

**COSMOPOLITAN STRATEGY: CONDITIONAL SOVEREIGNTY**

I turn now to the second general strategy: cosmopolitanism. Cosmopolitans differ from statists in arguing that the standing of international institutions is ultimately grounded in the moral status or rights of individuals. The cosmopolitan strategy is to argue that a state’s legitimate claim to political autonomy does not entail the right to violate human rights (or natural law), and thus, when officials of a state do so by attacking their own citizens contrary to human rights (or natural law), the state no longer enjoys the right to self-governance – the status of sovereignty. As discussed briefly above, this position challenges the first premise of the Nuremberg Problem.\(^{52}\) It claims that (1) does not hold for, is not true of, the states in which crimes against humanity occur, as the violation of human rights (or natural law) because states that do so are not sovereign. Cosmopolitans employing this conditional sovereignty strategy argue that if the state is not justified in exercising its political autonomy, there is no moral presumption against external bodies prosecuting perpetrators of these crimes.\(^{53}\)

Andrew Altman and Christopher Heath Wellman have developed a conditional sovereignty account. The following is a reconstruction of this account in their “A Defense of International Criminal Law.”

\(1)\) Only legitimate states enjoy the right to self-determination.

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\(^{52}\) From above, (1) in the Nuremberg Problem states: A sovereign state has the right against external bodies to non-interference with respect to the governing prerogatives of that state.

\(^{53}\) Notice that this is similar to the Security Principle from May’s harm to humanity account. As the International Harm Principle is the unique feature of May’s account I focused on it above, however, my criticisms of the conditional sovereignty approach here, can also be applied to May’s Security Principle.
We respect the sovereignty of a state on the assumption that the authority it exercises is legitimate. Altman and Wellman make explicit that the right to self-determination or political autonomy with respect to the governing prerogatives of the state is a right of just those states that have legitimate authority to exercise coercion.

(2) To be legitimate, a state must (at least) adequately secure the peace within its territorial boundaries and protect the basic human rights of its citizens. To meet this requirement, the state must neither perpetrate nor permit widespread or systematic violations of those rights.54

This premise involves a stipulation of the definition of legitimate authority. Altman and Wellman begin with the normative status of human rights. For this argument, a legitimate state is one that does not violate (nor allow the violation of) the basic human rights of its citizens. The meaning of human rights here is not fully articulated, but it need not be too robust for their argument. No matter what human rights are, or where they get their normative force, they will presumably include the right not to be persecuted, killed, sterilized, forcibly emigrated, and the other evils that appear in the definition of crime against humanity.

Looking to an argument for the same general claim given by Altman and Wellman in their more recent “From Humanitarian Intervention to Assassination: Human Rights and Political Violence,”55 we can get a sense of what is motivating this articulation of legitimacy. Their argument in the latter piece begins with the assumption that the moral task that justifies the coercion of citizens by a state is the protection of basic human rights. They claim that the

54 Andrew Altman and Christopher Heath Wellman, “A Defense of International Criminal Law,” Ethics 115 (2004): 48. Where “widespread” as Altman and Wellman use the term “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.” And where systematic “is a partially quantitative notion, referring to acts that are part of some plan whose execution would result in many rights violations.”

reason a state is legitimate in exercising its authority is because doing so is the necessary means\textsuperscript{56} to the end of protecting the basic human rights of the citizens in question. So, when a state fails to protect the basic human rights of the citizens it is no longer legitimate.

This position has a certain resonance with a Lockean political view (in that it runs a kind of contractarian-friendly line, focusing on the normative force of human rights in a natural rights inspired way). Assuming that each individual is born with a set of inalienable, basic rights – they will only consent to transferring some of their power to a sovereign if doing so is necessary to the better enforcement of these rights. So, the authority of the sovereign comes from the consent of the subjects, and the consent would be given only when the sovereign protects and promotes the rights of the citizens. The sovereign is thus not acting as a sovereign (and should not enjoy the power of one) if it is failing to protect the basic human rights of the citizens.

(3) \textit{If a state perpetrates or permits crimes against humanity, it is not legitimate because crimes against humanity involve the violation of basic human rights.}

This premise is a straightforward implication from the definition of legitimacy Altman and Wellman provide, the nature of crime against humanity. Given that the legitimate political authority of a state relies on whether it protects the basic human rights of the citizens (from 2) and that crimes against humanity (by definition) are the violation of the basic human rights of the citizens, states in which these atrocities are perpetrated or permitted are not legitimate, and thus not sovereign.

(4) \textit{If a state is not legitimate, it has no right to self-determination (against external intervention or interference).}\textsuperscript{57}

\textsuperscript{56} “Necessary” here means best or only effective means to accomplish this end, where the end is urgent and thus not something that can be given up.

\textsuperscript{57} Altman and Wellman, “A Defense of International Criminal Law,” 46.
(5) If a state perpetrates or permits crimes against humanity, it has no right to self-determination (including a right against prosecution by external bodies for crimes against humanity).

As a conclusion we get that when crimes against humanity (or other widespread and systematic violations of basic human rights) are permitted or perpetrated within the boundaries of a state, there is no right on the part of that state to non-intervention/interference with its governing prerogatives by external bodies. Thus, there is no moral presumption against criminal trials for crimes against humanity conducted by external bodies.

This cosmopolitan strategy captures yet another important aspect of the standing to prosecute crime against humanity. It preserves the importance of harm to the victims in giving an adequate account of standing. As I discussed above, in both statist approaches individuals, including the individual victims of the atrocities, do not play a significant role in the justification of standing. This is a striking absence, as presumably we care about holding the perpetrators of crime against humanity accountable because of what they have done to people. Answers to the jurisdiction question that submerge or ignore the importance of the harm done to the victims of the atrocities miss something important.

Again, despite this virtue, the approach is unsatisfactory. It is crucially incomplete. It is not enough to show that an international institution has standing to prosecute crimes against humanity that one show that the state in which the crimes took place does not have a right to object to the prosecution. The cosmopolitan argues that because the state in which the crimes occurred has not respected basic human rights it has no legitimate claim to resist any external body trying to enforce those rights. I will refer to this as the “anyone” answer to the jurisdiction question.
One might think that this objection is somewhat misplaced, as Altman and Wellman’s argument that states in which crimes against humanity occur have no right to object to the interference by external bodies, does not imply an endorsement or defense of the claim that any external body has the standing to intervene in the state. My attribution of the ‘anyone’ answer to the jurisdiction question to Altman and Wellman rests on the conception of sovereignty at the heart of their view. The conditional sovereignty approach assumes that whether a state is legitimate depends only on internal features of the state, and its internal legitimacy determines whether or not it enjoys the rights of sovereignty against external bodies. This way of understanding sovereignty renders this status, from the point of view of those outside the state, as ‘on or off’ and dependent only on internal features of the state in question. In so doing, the strategy fails to provide resources for constructing principles concerning the relationship between states. Insofar as it fails to provide such resources, and instead argues that the sovereignty status for states in which crimes against humanity occur is ‘off,’ it addresses itself to any external body (rather than some particular external body like the United Nations). As the prosecution of crimes against humanity is an external matter (we are considering whether external bodies can have the standing to prosecute perpetrators), this approach is crucially incomplete.

To see how the ‘anyone’ answer to the jurisdiction question is a shortcoming of the strategy, we can distinguish the prosecution of crime against humanity from humanitarian

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58 The cosmopolitan approach need not do so (as I will argue in Chapter Three and Chapter Five), but Altman and Wellman’s formulation of the approach does.

59 See Chapter Three for a more robust discussion of the status of sovereignty and the importance of making a distinction between internal legitimacy and external legitimacy.
This is an important distinction to make and explore in this context of this discussion because Altman and Wellman use nearly the same argument to establish a justification for humanitarian intervention and the standing of international law with respect to crime against humanity. It is tempting to provide a similar argument in both these cases, because the way the Nuremberg Problem construes the challenge to an external body’s standing invites such a comparison. Namely, because both prosecution of crime against humanity by external bodies and humanitarian intervention concern crossing borders of states by force, in response to the violation of individuals basic rights. In this section, I contend that the “anyone” answer that the conditional sovereignty approach leads to, is more plausible for the question of who can intervene for humanitarian reasons, than for the question of who has the standing to prosecute crime against humanity.

To see this, imagine you are walking home late at night. You round a corner and encounter an assault: a large man has begun beating someone sitting on the bench waiting for a bus. You are moved to act and effectively break up the fight. In this situation it is natural to say that you justifiably intervened. Doing so may have involved violating the bodily integrity and autonomy of the assailant, but this was justified by the aid you provided to the victim.

Now, imagine you are again walking home late at night. This time you do not encounter an assault in progress, but the end of such an assault. In response, you decide to conduct a trial. You collect evidence, ask other witnesses for reports of what they saw, and set up a courtroom in your backyard. Moreover, you hold the assailant against his will until

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60 By humanitarian intervention I mean “the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.” This definition is taken from J.L. Holzgrefe, “The Humanitarian Intervention Debate,” in *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane, (New York: Cambridge University Press, 2003), 18.
the trial is concluded. You allow both parties to be represented by lawyers and each is allowed to present their case. You even solicit your neighbor to be the judge and decide the guilt (and punishment) of the assailant. I suggest that unlike in the first case, your actions in the second are not legitimate. In order for the action to be fully justified, you need not only sufficient reason to exercise certain powers, but the legitimate standing to do so. Something is wrong with the trial. Namely, it has some of the appearances of being a criminal trial, but you as a bystander do not have the standing to actually conduct a trial.

This example can help us identify what goes wrong when the conditional sovereignty cosmopolitan answers “anyone” to the jurisdiction question. While atrocities are being committed we are primarily concerned (and rightly so) with the direct and immediate well-being of the individual victims. Among other things, a good reason for intervening during an atrocity is that doing so will bring about good results. The analogy reveals the kind of reasoning at the heart of Altman and Wellman’s argument for jurisdiction as somewhat misdirected.

The analogy in the domestic context is one of justification (contrasted with excuse), rather than one of jurisdiction. In the domestic context, we take the fact that you were acting to prevent severe harm as a reason (but, not a sufficient reason) for violating the law. In the example above, one is legally prohibited from engaging in the bodily assault necessary to stop the kind of fight described. If prosecuted for the assault, you can argue that it was justified, on the grounds that you were acting to prevent severe harm to someone else. Notice, that this is not a jurisdictional issue at all. In acting to break up the fight, you are not asserting that the government does not have the standing to hold you accountable for your actions. You are asserting that you had a reason for breaking the law.
I have presented the analogy above as a jurisdictional issue in order to make sense of Altman and Wellman’s argument for the standing of external bodies to prosecute crime against humanity. However, in doing so we can see that rather than address the jurisdictional question, they have given an argument for justification for breaking a law, not the standing of the law itself. That “anyone” could be justified in intervening is plausible, but that the violation of human rights grounds jurisdiction of external bodies is another matter. Whether or not the “anyone” answer is a plausible answer to the jurisdiction question depends on an argument for standing that yields this result. Furthermore, that it will have good results does not settle whether something is a legitimate trial.

The conditional sovereignty approach relies on a clear standard for the external legitimacy of a state (that is, a standard for judging whether a state enjoys the rights of sovereignty with respect to other members of the international community). In this way, the approach is actually quite clear on domestic jurisdiction – the state enjoys the right to political autonomy only if it meets minimal conditions on the treatment of its citizens. What this approach does not address is what follows when a state fails to meet these minimal conditions on the rights of sovereignty. The approach is missing a positive normative account that grounds international jurisdiction.

This problem can be thought of as a more general problem about how we understand the connection between the nature of international justice and the rights of states, sovereigns or political communities. Altman and Wellman seem to think that the heavy theoretical work is done by showing that the state in question does not enjoy the rights of sovereignty, and say no more about the nature of international justice or international law. Not only is this a feature of Altman and Wellman’s conditional sovereignty and May’s reliance on the SP, but
can be seen quite clearly in the War Nexus approach. May’s initial security principle runs an argument for the standing of external bodies to breach the sovereignty of state in nearly the same terms as Altman and Wellman. While, the war nexus approach, as was indicated, assumes a strong state right to territorial integrity.

This heavy focus on the rights of states should not be surprising given the way that Nuremberg Problem is constructed. The problem is framed in terms of the governing prerogatives of the state, and challenges theorists to explain standing in terms of violations of the presumed moral standing of states. In order to solve the Nuremberg Problem, we need an analysis of the governing prerogatives of the state, or at least, an explanation of how to determine what falls within this category. As the governing prerogatives of states are often thought as articulated by the rights of sovereignty (political autonomy and territorial integrity) to provide such an analysis we will need to explore the status of sovereignty itself.

In the next chapter, I discuss different models of this relationship between international law or international justice and the status of sovereignty. After exploring different models provided by Hobbes, Kant, Walzer and Rawls I suggest that we adopt the Rawls’ model which holds that the status of sovereignty is, at least in part, constructed or defined by the principles of international justice. I then return to the Nuremberg Problem and show how the alternative response developed in like of Rawls’ model can solve this problem, and explore whether shares the virtue of accessibility with the more traditional responses to the problem.
CHAPTER THREE

ON THE STATUS OF SOVEREIGN STATES

INTRODUCTION

In Chapter Two I presented three approaches to answering the Nuremberg Problem that, despite their virtues, were unsatisfactory. In developing and evaluating these responses I identified four features of a good approach to answering the problem. An acceptable account: (1) is accessible – it relies on values and reasons that those subject to the law can understand and see as at least possible or plausible revision or extensions of the law as it is, (2) explains why the international community, itself, has standing to prosecute the atrocities at issue, (3) demarcates distinct realms of domestic and international jurisdiction, and respects the value of states as discrete political communities, (4) it preserves the importance of harm to the victims as individuals, and the moral value or standing of individual human beings more broadly.

I suggested at the end of Chapter Two that in order to answer the Nuremberg Problem we need a better understanding of the ‘status of sovereignty’ in international justice. The Nuremberg Problem relies quite heavily on the presupposition that the governing prerogatives of state include everything that occurs within the territorial boundaries of that state. Altman and Wellman challenge this presupposition by recasting the rights of sovereignty as conditional on a state’s respect for the basic human rights of its members. Although I argued that their approach to undermining the presupposition that a sovereign
state has exclusive political authority within its borders ultimately fails, their argument sheds light on a promising direction for developing a new response to the problem.

This chapter begins with the suggestion drawn from Altman and Wellman that to answer the Nuremberg Problem we need an account of the rights or standing of states. I will refer to the object of investigation as ‘the status of sovereignty.’ The aim of giving an account of the status of sovereignty may seem peculiar. Attributions of this status and its attendant rights is often, if not an implication of a more robust theory of political authority, then at least inseparable from such an account. Appreciating this history, I will focus on the role sovereignty plays in different accounts of the nature and content of international law or justice.

Even recognizing that sovereignty often plays a quite particular role in such an account, or is embedded in a robust normative model of the international community, a distinction between two ways of giving an account of the status of sovereignty can help orient the present discussion. The distinction is between sovereignty as an internally determined status and as an externally determined status. For the first, one might think that sovereignty is a status (that carries with it certain rights, interests, claims and protections) conferred on states by the members of that state, such that when we turn to the nature, content or domain of international justice we are confronted with a normative landscape populated by these free-standing entities. On the other hand, one might think that this status of sovereignty (and its bundle of rights, obligations, and the like) is, at least in part, shaped, articulated or determined by or conferred on states by the principles of international justice or international law.61 In this second view, the content or nature of international justice is not

61 I am focusing here on the status of ‘sovereignty’ and have said, as yet, nothing about judgments of ‘legitimacy.’ For our purposes, we can understand a ‘sovereign’ as an entity with a particular moral status that
constrained by navigating free-standing normative entities, but in part, shapes or otherwise determines which entities have which rights.

In order to understand the status of sovereignty and the role it plays in accounts of the nature and content of international justice, I begin with the Westphalia Model. The Westphalia Model has been the most influential model for understanding the status of sovereignty and the normative structure of the international community since 1648. Rather than argue directly against this model, I will explore different philosophical accounts that aim to justify or explain the normative features of the international community and nature and content of international justice or international law, including the status of sovereignty. Through this discussion I evaluate the different philosophical accounts according to the four desiderata I developed in Chapter Two (indicated above). Although these desiderata were developed as requirements on an account of the international community’s standing to prosecute crime against humanity, they are also more general desiderata regarding explanations of the normative structure of the international community and content of international justice.

This philosophical discussion includes a brief outline of the positions put forward by Thomas Hobbes and Immanuel Kant. These accounts provide background for a more thorough presentation of the models provided by Michael Walzer and John Rawls. The aim of this discussion is not to provide an argument from elimination against these four views. Rather, I will use the insights provided by these accounts, and critical discussion of them, to develop the resources for the model of the international community I endorse and build in Chapter Four and Chapter Five. This project of construction is not one of splicing together

implies a bundle of presumptive rights to political authority and territorial integrity. The status of sovereignty is importantly related to the judgment that the entity is ‘legitimate’ and I will return to this relationship below.
interesting features of standing positions. Instead, the construction is accomplished through a critical discussion of these canonical figures. This chapter concludes with a basic skeleton of a model of the nature of the international community (and particularly state sovereignty) that, when developed in later chapters, answers the Nuremberg Problem and meets the desiderata above.

**THE WESTPHALIA MODEL**

The Westphalia Model of the international community dominates both everyday and theoretical understandings of the nature of the international community. It is the conception of the international legal order created through or first articulated by the Peace of Westphalia in 1648 (ending the Thirty Years War in Europe). This conception of the international community is often thought of as constituting “a paradigm shift in the development of the present state system.”62 Mark Janis characterizes the shift this way:

> The Peace of Westphalia legitimated the right of sovereigns to govern their peoples free of outside interference, whether any such external claim to interference was based on political, legal or religious principles…Sovereignty as a concept, formed the cornerstone of the edifice of international relations that 1648 raised up. Sovereignty was the crucial element in the peace treaties of Westphalia, the international agreements that were intended to end a great war and to promote a coming peace. The treaties of Westphalia enthroned and sanctified sovereigns, gave them powers domestically and independence externally.63

The importance of ‘sovereignty’ in the Westphalia Model is especially important for our purposes. This description of the model focuses on the meaning of sovereignty that emerged

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during this paradigm shift, and which has come to be very important in international relations and international law since its inception.

Following James A. Comoroso we can identify the heart of the Westphalia Model as the view of the international order as:

a system of territorially organized states acting in an anarchic environment. These states are constitutionally independent (sovereign) and have exclusive authority to rule within their own borders.\textsuperscript{64}

The international community is an assemblage of sovereign states, which respect one another’s right to non-interference, and which generate obligations and rules with respect to one another primarily through intentional and explicit treaty or alliance, or tacitly through custom.

The Westphalia Model is recognized by many as providing the conceptual framework for the development of international law since 1648. In particular, the status of states as sovereign and equal agents. The fundamental importance of this sovereign equality of states to international law can be seen directly in the first principles of the Charter of the United Nations: “The Organization is based on the principle of the sovereign equality of all its Members.”\textsuperscript{65} As well as in interpretations and textbook presentations of the content of the international law:

The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality.\textsuperscript{66}


This status of sovereign equality attributed to states is taken to imply three basic norms or general principles for international law:

The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.\textsuperscript{67}

These general principles reflect what I referred to as the view at the heart of the Westphalia Model above: international law and relations as governing territorially discrete and independent states, which have exclusive political authority within their borders.

From this brief characterization we can distill four important features of the status of sovereignty within the model: it applies to states (and states alone), states are taken to enjoy exclusive political authority, they are independent, and they are territorially bound. The revolutionary nature of the Westphalia Model comes, in part, from the first feature. The treaty solidified the international community for purposes of international law as composed of states (governmental bodies). These states are taken to be those things with political authority that can legitimately exercise coercion within their physically defined borders. Finally, the states are taken to be independent entities in the international community, with equal standing, such that any binding instrument of international law is binding in virtue of the consent of the state parties or through tacit agreement established through custom or state practice.

As mentioned above, for our discussion we will take the Westphalia Model as the starting point, through which we can understand interesting features and innovations of the philosophical models. I will not directly critique the Westphalia Model, but use it as a frame for our discussion. It is particularly useful for these purposes because of its influence on the

\textsuperscript{67} Brownlie, 287.
development of public international law. With that, I turn now to the philosophical models, beginning with a brief discussion of Hobbes.

**Hobbes: Authority Within the State**

For Hobbes, ‘justice’ concerns relations between individuals. That is, the actions that we evaluate as just or unjust are those that concern individuals with respect to one another. Hobbes asserts this feature of justice, contrasting it with actions that can be evaluated in solitude, writing:

> Justice and injustice are none of the faculties neither of the body nor mind. If they were, they might be in a man that were alone in the world, as well as his senses and passions. They are qualities that relate to men in society, not in solitude.\(^{68}\)

Not only does Hobbes hold that justice concerns the relationship between individuals in society, he holds that it requires common principles or public rules. In order to judge something as just or unjust we need a common metric to evaluate the actions. This metric cannot be merely in the minds of the individuals, as there is no common way of knowing or evaluating these private judgments about what ought to be done.

Moreover, not only does justice require a common, public standard of evaluation, this common standard must be backed by the power to enforce the rules or principles. Thus, justice requires a common power over the individuals in a society. Hobbes expresses this feature of justice by identifying its absence in the state of war:

> To this war of every man against every man, this also is consequent: that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice.\(^{69}\)

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\(^{69}\) Hobbes, Chapter 13.
Further explaining the need for a common power and the identification of a common power of a certain kind with the existence of justice:

before the names of just and unjust can have place, there must be some coercive power to compel men equally to the performance of their covenants, by the terror of some punishment greater than the benefit they expect by the breach of their covenant, and to make good that propriety which by mutual contract men acquire in recompense of the universal right they abandon: and such power there is none before the erection of a Commonwealth.\textsuperscript{70}

The common power necessary for justice takes the form of a Commonwealth. This is most commonly understood as a domestic level governing body or institution.

This familiar account of the nature of justice from Hobbes is an important starting point as it puts on the table two important points of discussion going forward. The first is that it makes explicit the relationship between justice and public, articulated and enforced rules. This political or legal conception of justice may not include all judgments of what is just. For example, one may use the term ‘just’ in a moral sense, free of political claims. However, it sets an important relationship on the table that I will adopt. When discussing law or political conceptions of justice we are discussing common rules, backed by some power of enforcement.\textsuperscript{71}

The second point from this brief discussion of Hobbes is that it draws attention to two ways in which the term ‘sovereign’ can be used.\textsuperscript{72} The first is as a judgment about the authority of some person or body with respect to the subjects of the political community. This is the sense of sovereignty that Hobbes is primarily concerned with in the \textit{Leviathan} – the internal or domestic political authority of the sovereign. This is a vertical relationship

\textsuperscript{70} Hobbes, Chapter 15.

\textsuperscript{71} This is not to say that I adopt the strong position often attributed to Hobbes that this conception of political justice does not allow for actual laws being unjust.

\textsuperscript{72} This dual reference to the internal and the external domains will appear again in Walzer’s discussion of two kinds of judgments of legitimacy below.
between the subjects and rule-maker and enforcer. This use of ‘sovereignty’ can be contrasted with the notion of sovereignty from the Westphalia Model that emphasizes the horizontal relationship between these different governing bodies. This second sense of sovereignty is the one of interest in this discussion.  

Hobbes says little about this horizontal relationship between these domestic level sovereigns or how to extend the principles he develops in the domestic context into the international arena. Rather than attempt to do so on his behalf, trying to arbitrate textual interpretations and the use of Hobbesian resources in international relations, I will turn now to Kant’s account of international justice. Kant’s model builds on the account of political or legal justice above, but explicitly addresses the nature of international justice (and, at the same time, is critical of Hobbes’ theory even for domestic justice), and thus, provides a more robust picture to work with moving forward.

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73 This is not to say that they are unrelated or wholly independent. Just that the one we are after in this discussion is the second.

74 A thorough extension of Hobbes’ argument to the international case would take us quite far a field at this point. Much has been made of the Hobbes’ theory of justice in international relations, and arbitrating and evaluating this literature is a project unto itself. I will, however, note that the passage from *Leviathan*, Chapter 13, often taken as evidence that Hobbes’ himself argued against the possibility of international justice does not seem to imply such a strong claim. There he writes:

> in all times kings and persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators, having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms, and continual spies upon their neighbours, which is a posture of war. But because they uphold thereby the industry of their subjects, there does not follow from it that misery which accompanies the liberty of particular men.

Rather than an argument against the possibility of international justice, this passage seems to imply that Hobbes thinks that because sovereigns are able to provide sufficiently stable conditions for the security and industry of their members while remaining in a state of war with other sovereigns, the reasons to pursue a global sovereign are not as strong as the reasons we have for pursuing domestic sovereigns. Of course, the political authority of the domestic governments would not be exclusive under a global sovereign. A global sovereign could not be a sovereign over other (proper) sovereigns. Notice, that even this initial sketch of the options seemingly available to Hobbes: either (A) no binding international law, or (B) global sovereign, is strikingly un-Westphalian.
KANT: Recht, Freedom and the Pacific Federation

To understand Kant’s model it is best to start with the basic features of his more general political philosophy. Kant’s philosophy of Recht (right) begins with a distinction between two kinds of law giving: ethical and juridical. Ethical lawgiving makes an action a duty and also makes ‘that the action is required,’ i.e. supplies, the incentive to perform the action. Whereas, juridical lawgiving also makes an action a duty, but the incentives to perform the action can be inclinations or aversions, rather than duty itself.\textsuperscript{75} Recht concerns just the juridical duties, which govern external, practical relations of one person to another. The domain of actions is further restricted to those that are freely done.\textsuperscript{76}

Unlike Hobbes, the value motivating Kant’s political philosophy is freedom, particularly external freedom (contrasted with self-preservation). He writes in the Metaphysics of Morals:

There is only one innate right. Freedom (independence from being constrained by another’s choice) insofar as it can coexist with the freedom of every other in accordance with law.\textsuperscript{77}

This sense of freedom – independence from being constrained by another’s choice, I will characterize as external freedom, contrasted with the transcendental freedom which occupies other parts of Kant’s moral and theoretical philosophy.

Compulsion or coercion (as a way to create incentives/aversions) comes into the picture of Recht through the concept of external freedom as freedom from interference compatible with freedom of others under law. Kant’s argument for the role of and need for


\textsuperscript{76} Ibid.

\textsuperscript{77} Kant, Metaphysics of Morals, 6:237.
coercion for establishing external freedom is perhaps one of the best known parts of Kant’s political philosophy. Let’s look at it directly:

If then my action or my condition generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me wrong; for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law...Resistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hindrance to freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it.78

As violations of Recht are hindrances (or otherwise infringements or violations of) freedom, it is consistent with the principle of universal freedom (external freedom of all) that those hindrances themselves be “hindered.” Or rather, that we use coercion legitimately when it is used against violations of Recht because doing so is consistent with universal freedom for all.

This background reflects the insight from Hobbes that political or legal justice concerns public rules, backed by enforcement. Unlike Hobbes, however, Kant goes on to address international justice explicitly, using these resources. The most interesting aspect of Kant’s rich political philosophy for our discussion of sovereignty and international justice is his claim that the three aspects of public Recht (constitutional, international and cosmopolitan) are interdependent. In “The Doctrine of Right” Kant is direct and explicit about this interdependent relationship, writing:

There is hence cause to conceive, subordinate to the concept of public right, not only constitutional right, but also international right. Since the earth is not an endless surface but a finite contained surface, the two together inevitably lead to the idea of right of a state of peoples or cosmopolitan right. If the principle that limits external freedom by means of laws is lacking in only one

78 Kant, Metaphysics of Morals, 6:231.
of three possible forms of juridical condition, then the artifice of all others is inevitably undermined and must ultimately collapse.⁷⁹ [emphasis added]

This position, in contrast to Hobbes’ near silence, is striking and strong. Kant’s position is that in the absence of a juridical condition in one of the domains of public right, the others are destabilized or otherwise precarious.

To explain this strong relationship, we can turn back to the value of freedom motivating the account. Consider a situation in which one is a member of just state (that is, characterized by a juridical condition compatible with constitutional right), where this state does not, itself, stand in such a relation to the neighboring states. The external freedom established for the individual members of this state is not stable. The encroachment on the state by neighbors (conquest, war, or other forms of coercion) destabilizes the internal system established by such a state. To have domestic stability, the state must stand in peaceful relations with other states. Moreover, even in situations in which the stability of the internal ordering of a state is not at issue, disputes about claims to property across states, for example, claims to the use of fishing waters in the North Atlantic, require a determinate and lawful ordering of these claims at the international level in order for the individuals as members of states to be properly said to have a claim to fish particular waters.

We can see this interdependence of international and constitutional Recht from the other direction as well. A juridical condition between states – one that is characterized by treaty agreements and respect for the territorial borders and political authority of a state with respect to its own people is possible only when the states themselves are stable. That is, when they are ordered in a way that treats ongoing treaties (past any particular leader) as binding. Moreover, this kind of stability and the lawful ordering of claims required for a rightful

condition often requires some kind of just ordering (or the perception of a just ordering) within the state, so that it is not subject to revolution or other internal instability.

With this interdependence on the table, how does Kant understand the nature and content of international right? International right concerns not only the relationship between states, but between individual persons belonging to one state and individuals belonging to another, as well as between individuals and the entire other state. Kant begins building the model by taking states as individual agents, analogous to individual persons. Just as persons require a common power to articulate and enforce rules at the domestic level,

Peoples, as states, can be judged as individual human beings who, when in the state of nature (that is, when they are independent from external laws) bring harm to each other already through their proximity to one another, and each of whom, for the sake of his own security, can and ought to demand of others that they enter with him into a constitution, similar to that of a civil one, under which each is guaranteed his rights.

In the international context, this common power takes the form of a federation rather than a state. The federation is primarily characterized by a standing peace treaty between individual states. Kant explains the federation in this way:

But peace can be neither brought about nor secured without a treaty among peoples, and for this reason a special sort of federation must be created, which one might call a pacific federation. This federation would be distinct from a peace treaty in that it seeks to end not merely one war, as does the latter, but rather to end all wars forever. This federation aims not at the state’s acquisition of some sort of power, but rather at its securing and maintaining the freedom of a state for itself and also the freedom of other confederated states without these states thereby being required, as are human beings in the

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81 Ibid.

82 Kant thinks there is a contradiction in the existence of ‘a state of states,’ *Toward Perpetual Peace* 8:354. This is a quite interesting passage, but rather than delve into its complexities I will continue building Kant’s model and note this interesting claim that leads him to build the model in this particular way.
state of nature, to subject themselves to public law and coercion under such laws.\(^3\)

Notice, the standing relationships between the confederated states is meant to realize the freedom of the members. Through participation in the pacific federation, the states establish an order between themselves that guarantees and makes determinate the freedom (independence) of the states. It establishes spheres of operation (territories), safe from external interference (exclusive political authority).

Although this model begins with an analogy to the domestic case, Kant highlights an important point of disanalogy. Unlike domestic political institutions, the pacific federation does not have the political authority to compel compliance with the law. This is an important feature of the federation picture, because the non-coercive aspect of the model puts restrictions on the content of international Recht. The principles of the federation are restricted to just those that are voluntarily agreed to by the member parties, and are largely “you don’t attack me and I don’t attack you.”

Kant’s model of the international community and state sovereignty is state-centric. However, unlike the picture that appears in the Westphalia Model, the states come to acquire a right to external independence through the federation or international law, rather than coming to the table as “free agents.” States must secure and enjoy the right to external freedom (the driving force of Kant’s political theory) through a juridical condition with respect to other states. This is compatible, for Kant, with the state’s authority with respect to its own people being conferred or created by an internal relation of constitutional right. The proper juridical condition internal to the state is, in this respect, independent from the external juridical condition. However, despite being established in different domains,

\(^3\) Kant, *Toward Perpetual Peace*, 8:356.
constitutional and international Recht are interdependent. Both are necessary for the stability (perhaps, the existence) of the other. The status of sovereignty itself is complicated on Kant’s model. Clearly there is a sense in which a state has political authority with respect to its own subjects prior to participation in the pacific federation. However, the state’s independence (understood as its right to non-interference) is established only through participation in the federation. With respect to the status of sovereignty, political authority is established by the former, and autonomy or independence is realized through the latter. This is quite different from the picture of independent, authoritative bodies in the Westphalia Model, capable of making binding treaty agreement by mutual consent even though under no world authority or power.

**WALZER: POLITICAL COMMUNITIES AND SELF-DETERMINATION**

In contrast to the figures we have already briefly explored, Michael Walzer’s account of the status of sovereignty and nature of international community is grounded in a more pluralistic manner. Whereas Hobbes and Kant can be understood as responsive to one primary principle or value (external freedom for Kant and self-preservation for Hobbes), Walzer draws on a more complex set of values in constructing his theory of just war. Walzer’s position on the status and nature of sovereignty reflects the integrity of the common life of communities, as well as respect for individuals of these communities. He posits a complicated relationship between individuals, their communities and their governments.

Walzer’s account of the rights of political communities begins with the rights of individuals.

The rights [of political communities] are summed up in the lawbooks as *territorial integrity and political sovereignty*. The two belong to states, but they *derive ultimately from the rights of individuals*, and from them they take
their force…Individual rights (to life and liberty) underlie the most important judgments that we make about war. How these rights are themselves grounded I cannot try to explain here. It is enough to say that they are somehow entailed by our sense of what it means to be a human being…States’ rights are simply their collective form.  

Walzer grounds the Westphalia Model’s rights of states in the rights of individual members of the communities. The right to political autonomy combines both the state’s external independence and its internal political authority. This story, so far, seems familiar from Hobbes, as the status of sovereignty is determined by the vertical relationship between the individuals and the government of the state.

The rights of states, where states are understood as a union of the people of a political community and the government of that community, are an articulation of the moral standing of the state. The status of sovereign states is given by these two rights of states. Moreover, as assumed by Altman and Wellman’s conditional sovereignty approach, the status of any particular state is conditional on an internal feature of it. However, for Walzer, it is not conditional (directly) on respecting the basic human rights of the members, but rather on whether the political autonomy and territorial integrity of the state protects the common life of the members of the state.

*The moral standing of any particular state depends upon the reality of the common life it protects* and the extent to which the sacrifices required by that protection are willingly accepted and thought worthwhile. If no common life exists, its own defense may have no moral justification. But most states do stand guard over the community of their citizens, at least to some degree: that is why we assume the justice of defensive wars. And given a genuine “contract” it makes sense to say that territorial integrity and political sovereignty can be defended in exactly the same way as individual life and liberty.  

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85 Walzer, 54.
This changes the understanding of Walzer’s model just developed. At the domestic level, he is not advocating a vertical relationship between each individual and the government, but rather a horizontal relationship between the individuals that constitutes a political community, and a vertical relationship between this entity and the government.

To understand Walzer’s model, one needs to understand why protecting these rights of political communities (political autonomy and territorial integrity) is the best (perhaps only) way to respect, protect or promote the common life (and thus, the life and liberty) of the members of these communities. Although the status of sovereignty seems to be derived from an internal relationship (namely, that between the government and the political community) these rights of states are claims against external bodies. So, we need to understand the reasons external bodies have for respecting these rights, and what it means to do so. Walzer’s defense of this position draws heavily on John Stuart Mill’s essay on the duty of non-intervention.  

The value that supports this tight relationship between the rights of political communities and the rights of individuals is that of the self-determination of the people of the political community. Walzer defines the right to self-determination as the right of a people to “become free by their own efforts” if they can, and claims that “nonintervention is the principle guaranteeing that their success will not be impeded or their failure prevented by the intrusions of an alien power.” To better understand this conception of self-determination and the correlative duty of non-intervention we can turn directly to Mill’s essay.

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86 Where the duty of non-intervention is a state’s obligation to be non-coercive with respect to the governing prerogatives of foreign states, that is, the obligation to respect the rights of political autonomy and territorial integrity.

87 Walzer, 88.
Walzer, following Mill, maintains a close relationship between the value of self-determination and the duty of non-intervention. For Mill, this relationship is established through empirical claims about how a free society comes about. Writing about the dangers of intervention, Mill observes:

There can seldom be anything approaching to assurance that intervention, even if successful, would be for the good of the people themselves. *The only test possessing any real value, of a people’s having become fit for popular institutions, is that they, or a sufficient portion of them to prevail in the contest, are willing to brave labour and danger for their liberation...the evil is, that if they have not sufficient love of liberty to be able to wrest it from merely domestic oppressors, the liberty which is bestowed on them by other hands than their own, will have nothing real, nothing permanent.*

In this passage Mill explains that from the perspective of those outside any particular state, evaluating whether intervention is justified, the best evidence that such an intervention would be successful or valuable to the people it is meant to benefit, is that the people of the community have pursued (and perhaps, attained) this end for themselves.

Expanding on the conditions required for successful institutions of this kind, Mill writes:

*No people ever was and remained free, but because it was determined to be so; because neither its rulers nor any other party in the nation could compel it to be otherwise. If a people - especially one whose freedom has not yet become prescriptive – does not value it sufficiently to fight for it, and maintain it against any force which can be mustered within the country, even by those who have the command of the public revenue, it is only a question of how few years or months that people will be enslaved.*

In both this passage and the one above, Mill’s primary test of a people being fit for a political regime characterized by liberty is that the individuals of the community place the proper

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89 Mill, 6.
value on or have a sufficient love for liberty and are willing to fit and sacrifice for it. This kind of attachment to or value placed on liberty, Mill thinks, is also something that must be cultivated internally (and cannot arise from intervention). Rather,

When a people has the misfortune to be ruled by a government under which the feelings and virtues needful for maintaining freedom could not develop themselves, it is during an arduous struggle to become free by their own efforts that these feelings and virtues have the best chance of springing up.\(^{90}\) [emphasis added]

Through these passages we can see that Mill’s argument against intervention is primarily “it will not work.” He claims we are not able, through forceful intervention from the outside, to create a condition where institutions characterized by liberty are valued by or valuable to the members of the intervened in state. The language he uses to describe this can be difficult to read from a modern point of view – particularly because he describes communities as ‘fit’ for liberty. However, the point that forceful interventions in other nations with the end of creating liberal governments cannot, by their nature, accomplish the ends they are aimed at is a point one may find plausible or at least worth taking seriously.

Walzer recognizes an element of truth in Mill’s essay and builds an account of the value of self-determination and its political manifestation from it. Quite strikingly, Walzer recognizes in these passages a right-headed articulation of the value of self-determination, rather than as I did above, recognizing in Mill’s essay a plausible empirical generalization about the efficacy of intervention in other states. Walzer claims that Mill has identified the value and importance of the self-determination of peoples, and in so doing, given a characterization of the political value: self-determination. Walzer further argues that it is precisely this value that is manifested by the status of sovereignty, writing:

\(^{90}\) Mill, 6.
These are the truths expressed by the legal doctrine of sovereignty, which defines the liberty of states as their independence from foreign control and coercion. In fact, of course, not every independent state is free, but the recognition of sovereignty is the only way we have of establishing an arena within which freedom can be fought for and (sometimes) won.\footnote{Walzer, 89.} [emphasis added]

Walzer’s characterization of the value of self-determination is rooted in a people’s being able to create a sphere in which freedom is possible. He takes from Mill that this kind of freedom can only be established within a state. Moreover, he thinks that this value of self-determination is so important that the rights of political communities express or protect it. Since the rights of states are determined by the reality of the common life they protect, respect for a state’s rights is dependent on whether non-interference establishes a legitimate sphere of freedom within which the community can exercise this right to self-determination. Moreover, the right to self-determination is characterized in such a way as to build into it the duty of non-intervention.

With the normative foundations of the account more squarely in view, we can return to Walzer’s model of the nature and content of international justice. As the rights of states are political autonomy and territorial integrity, justice between states is primarily concerned with specifying what count as legitimate and illegitimate crossings of borders. Walzer builds these principles of legitimate border crossing in a ‘legalist paradigm,’ indicating that the obligations identified are binding and can be enforced. However, unlike Kant, he does not think that this legalist paradigm takes the form of an institution, even one as minimal as the pacific federation. The state’s right to political autonomy precludes, for Walzer, participation in an international institution that ‘makes and enforces law.’ The power to enforce the rights of states is instead decentralized to the states themselves. Enforcement takes the form of
forceful interference or violation of territorial integrity – war. War, when just, is the enforcement of international justice, namely, the rights of states. When war is unjust, it is an international crime – the violation of the rights of states.\textsuperscript{92}

The second principle of the legalist paradigm draws together Walzer’s account most clearly:

\textit{This international society has a law that establishes the rights of its members – above all, the rights of territorial integrity and political sovereignty}…these two rest ultimately on the right of men and women to build a common life and to risk their individual lives only when they freely choose to do so. But the relevant law refers only to states, and its details are fixed by the intercourse of states, through complex processes of conflict and consent.\textsuperscript{93}

This principle incorporates four important features of Walzer’s account. The first is that he thinks there is something properly referred to as ‘law’ between the states in the international society. The principles he identifies are not moral rules or norms – they are laws. Secondly, here he returns to the rights of individual persons as the primary normative building blocks of the account. At the same time, (and thirdly), the principles of international justice or the international law take only states as their objects and subjects. That is, the international law is binding on states, and concerns the rights of states. Finally, the law is created by the states themselves. Although the process of creation is unclear, he seems to indicate that agreement of the states plays a significant role in the nature and content of international law.

Even with this concise statement of the rights of states, it is not clear how Walzer understands the status of sovereignty. In the initial discussion of the rights of political communities he seems to claim that these rights of states are conferred on states, in a complicated way, by the members of the particular political community. In this initial

\textsuperscript{92} Walzer begins his theory of aggression with the claim that aggression (war) is the only international crime (with every other potential violation of international norms being relegated to mere misdemeanors), 51.

\textsuperscript{93} Walzer, 61.
discussion, sovereignty appears to be an internally conferred status. However, in discussion of the second principle of the legalist paradigm, Walzer is clear that the international community of states establishes the rights of the states. This confusion is due to an important distinction he makes in a paper responding to critics of this initial articulation of his account between external and internal judgments of legitimacy.

The distinction between internal and external judgments of legitimacy can be put this way:

states can be presumptively legitimate in international society and actually illegitimate at home. The doctrine of legitimacy has a dual reference...The two justifications do not coincide because they are addressed to different audiences. First, then, a state is legitimate or not depending upon the ‘fit’ of government and community, that is, the degree to which the government actually represents the political life of its people. When it doesn’t do that, the people have a right to rebel...The second set of arguments concerns the presumptive legitimacy of states in international society....They are not to intervene unless the absence of ‘fit’ between the government and community is radically apparent.\(^9^4\)

Notice that, for Walzer, not only are there two different standards for making judgments about the legitimacy of a state, the external standard is weaker than the internal standard. This is expressed by his first claim in the section quoted above: states can be legitimate in international society and illegitimate at home. Despite there being two different standards, the judgment that a state is legitimate, in both cases, refers to a fit between the people and their government. This suggests that rather than think of the internal and the external as different standards for judging whether a state is legitimate, we should think of them as different thresholds for making this judgment along the same dimension.

There are two different standards because these are two different positions one could occupy in judging whether a government fits its people. One could make this judgment from

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the point of view of the members of the state, and one could make this judgment from the point of view of those outside the state. As a member of a state, one has a privileged point of view for two reasons. The first is the people of a state have access to information or knowledge about this relationship of fit between the people and the government that no outsider to the state can know or understand (an epistemic reason), and the second is that people of a state have a unique and morally important relationship to the government (a normative reason).

Although Walzer appeals to both reasons (the epistemic and the normative), the epistemic reason for the different thresholds for judging legitimacy or fit is somewhat weak. It is not clear why we should think that because someone is subject to a government, they have a better understanding than someone not subject to that government of the fit between it and the people it rules. The normative reason is stronger, but requires more explanation. In particular, to accept the normative reason we need to understand why the unique relationship between the people and the government of the people is morally salient, and morally salient in such a way that it justifies a different threshold for attributions of legitimacy.

Returning to the discussion of the nature and value of self-determination above, we can construct the grounding of Walzer’s normative reason on his behalf. Recall, the judgment that a state is legitimate from the external point of view is the judgment that we, as an external body, ought to respect the state’s rights to political autonomy and territorial integrity. The rights of states are contingent on the state’s protecting the common life of its members, and can only be said to fail in doing so when it is so repressive that self-determination (as the ability to struggle to be free) nearly impossible (as in the case of massacre or enslavement). The internal judgment (and actions that manifest or result from
this judgment) that the state is illegitimate is part of a community’s exercise of the right to self-determination – and as such, it is up to the community to decide when and how it exercises this right. The external judgment that a state is illegitimate is not part of this important practice, and can only be acted on when doing so does not violate this right of the community. Presumably, the threshold for a community exercising its right to self-determination by rebelling against, or otherwise challenging the legitimacy of its government will be different (and perhaps lower) than the threshold at which external interference does not violate this right of the people.

Recognizing the asymmetry in the internal and external positions, Walzer argues that the external judgment of legitimacy must express or reflect this lack of knowledge:

The state is constituted by the union of people and government, and it is the state that claims against all other states the twin rights of territorial integrity and political sovereignty. *Foreigners are in no position to deny the reality of that union, or rather, they are in no position to attempt anything more than speculative denials*…Hence their conduct, in the first instance at least, cannot be determined by either knowledge or judgment. It is, or it ought to be, determined instead by a morally necessary presumption: *that there exists a certain ‘fit’ between the community and its government and that the state is ‘legitimate’.*…This presumption is simply the respect that foreigners owe to a historic community and to its internal life…So long as it stands, however, the boundaries of international society stand with it.  

In the face of limited information and the difference normative relationship, external bodies show respect for other communities by acting on the presupposition that there does exist some fit between the people and their government. This respect for other communities reflects not only our fallibility as external bodies, but: “our recognition of diversity and our

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95 Walzer, “Moral Standing of States,” 212.
respect for communal integrity and for different patterns of cultural and political development.”

Although Walzer argues that external judgments of legitimacy must begin from the presupposition that there does exist a fit, or union, of people and government, there can be externally illegitimate states. When even external bodies can determine that there is a radical failure of fit between the government and its people we, as external bodies, can treat the state as illegitimate (that is, not respect its rights to political autonomy and territorial integrity). Although Walzer has a near universal ban on any aggressive crossing of the borders, his legalist paradigm includes exceptions when respecting the rights of states is not compatible with the underlying moral value of self-determination. For our purposes, the most interesting reasons for lifting the ban is the third:

The ban on boundary crossings is subject to unilateral suspension, specifically with reference to three sorts of cases where it does not seem to serve the purposes for which it was established… - when the violation of human rights within a set of boundaries is so terrible that it makes talk of community or self-determination or “arduous struggle” seem cynical and irrelevant, that is, in cases of enslavement or massacre.97

On this point, Walzer seems to have a position quite similar to Altman and Wellman. The rights of states are conditional on an internal feature of the states themselves (in this case ‘fit,’ for Altman and Wellman ‘respect for basic human rights’). When external bodies are in a position to evaluate this failure of the internal condition (mass human rights violations of the kind in cases of massacre or enslavement), they can be justified in intervening.

The status of sovereignty in Walzer’s model cannot be neatly captured with our orienting distinction. Sovereignty seems to attach to the second (external) sense of legitimacy


97 Walzer, Just and Unjust Wars, 90.
for Walzer. That is, the sovereignty rights of states are what is under discussion in the judgments about external legitimacy. However, the object of the judgment is an internal feature of the state. The ‘fit’ between the people and the government. Thus, what confers the status on the state seems to be this internal fit – which is then recognized internationally.

There are many important and interesting features of Walzer’s model, and I find the structure of Walzer’s position quite attractive. He argues that we respect the rights of states because doing so protects what is valuable to and for individuals. For Walzer, this is the common life of the members of the community and their right to self-determination. What I find potentially problematic about this position is how he understands the values placed within the structure, and how they are weighted. In particular, I worry about Walzer’s characterization of the nature and value of ‘self-determination.’

As he characterizes it, self-determination “is the right of a people ‘to become free by their own efforts’.” This is a quite narrow and particular conception of self-determination, and seems to imply a similarly narrow conception of liberty and its value. In contrast, one might hold that liberty consists in individuals having access to basic goods and enjoying basic rights that allow them to shape their lives as they see fit. This is not to say that freedom from interference is not a central aspect of even this conception of liberty, however, it does not assume that non-interference is the hallmark of it, or even the best tool for achieving it. Walzer, while arguing that non-interference is instrumentally valuable, defines the value of self-determination in terms of non-interference. This strikes me as mistaken.

To see the trouble, take for example the freedom of expression. Freedom of speech is not freedom from interference with respect to personal expression for its own sake (or even defined as freedom from interference), but valuable insofar as it contributes to the pursuit of

98 Walzer, 88.
truth, or experiments in living, or the development of individuality. If we value the self-
determination of individuals and communities (another distinction Walzer is not quite clear
about in articulating his own position), it is not clear that the empirical conjecture that being
left to one’s own devices is the only way to achieve it is true, or properly aimed at what is
valuable about liberty.

A general diagnosis of my unease with how Walzer fills in the values in this
argument can be expressed as the worry that his account rests on and amplifies a
romanticization of the relationship between a people and its government (let alone the
relationship between members of a community). His picture, despite beginning with the
rights of individuals, quickly loses sight of these individuals. David Luban captures this
worry quite sharply, arguing:

National sovereignty, it was thought, gives people their most important
entitlement: a state the expresses their traditions, history and unity – their
“national soul.” Attack the state, and you attack the soul of its people.
Nationality may have originated as an ideology of liberation and tolerance: in
our century it is drenched in blood….The violence of modern nationalism and
its indifference to basic human rights arises, I believe, from the conviction that
the only right which matters politically is the right to a unified nation-state. Its
picture of the nation-state, however, is a myth. It emphasizes a nation’s
commonality, affinity, shared language, and traditions and history, what
Mazzini called “unanimity of mind.” The picture glosses over intramural class
conflict, turmoil, violence, and repression; these it represents as inscrutable
processes akin to national destiny.99

This objection, what I refer to as the romanticization objection, challenges Walzer to explain
why membership in a nation is more valuable to individuals than other rights. Luban
attributes to Walzer the position that ‘being a member of a nation’ is not merely valuable to
or for individuals, but of such value that it ought to be taken as the primary right or good of
individuals in the international context (trumping basic security and subsistence rights for

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individuals, as may be recommended by a less state-centric view, except in very extreme circumstances).

The romantic position relies on a nostalgic and white-washed conception of a nation as a unified community, characterized by affinity, shared traditions and history (that are, themselves, valued by or valuable to the members of the community and significantly contribute to the individuals’ flourishing, self-conception, and the like). This view of the value of the nation to individuals is romantic insofar as its conception of a nation is at odds with what nations are (or at least, have been the recent history). It ignores that nations are often internally diverse or pluralistic, if not (as if often the case) openly repressive, oppressive with respect to some members of the community, and sometimes violent. If we view nations as communities characterized, at least in part, by difference (and sometimes conflict of the kind Luban identifies) the value of membership in a nation to individuals is quite far from clearly greater than the value of basic security and subsistence rights. At most, membership in a nation is one value among others to and for individuals, or valuable contingent on its providing other goods or rights for individuals (perhaps basic security and subsistence rights).

**RAWLS: PEOPLE AND PEOPLES**

Rawls, in contrast to Kant, Hobbes and Walzer, is not best understood through the values or principles he is responsive to in constructing the principles of international justice. Instead, we can understand Rawls’ work as aimed at articulating and defending the proper philosophical process, procedure and point of view for determining the principles of international justice. Rawls, like Kant, begins his model of the nature and content of international justice with a domestic analogy: “This account of the Law of Peoples conceives
of liberal democratic peoples (and decent peoples) as the actors in the Society of Peoples, just as citizens are the actors in domestic society…” The content of the Law of Peoples (principles of international justice) draws on the account of justice Rawls develops for the domestic case. We envision an international original position, where the agents behind the veil of ignorance are liberal peoples rather than free and equal individual persons.

Representatives of the peoples are:

1. reasonably and fairly situated as free and equal, and peoples are 2. modeled as rational. Also their representatives are 3. deliberating about the correct subject, in this case the content of the Law of Peoples…Moreover, 4. their deliberations proceed in terms of the right reasons (as restricted by the veil of ignorance). Finally, the selection of the principles for the Law of Peoples is based 5. on people’s fundamental interests, given in this case by a liberal conception of justice.

We determine the content of the Law of Peoples through this process of determining the hypothetical agreement of agents of this kind.

Notice in this account Rawls has seemingly introduced a new moral entity (or named something new as a starting point): a people. Understanding ‘peoples’ is important for understanding the model, particularly its innovations. As a first pass, we know that peoples are not states, and have their own moral character. Rawls writes:

I use the term “peoples” to distinguish my thinking from that about political states as traditionally conceived, with their powers of sovereignty included in the (positive) international law for the three centuries after the Thirty Years’ War (1618-1648)…The powers of sovereignty also grant a state a certain autonomy in dealing with its own people. From my perspective this autonomy is wrong…The term “peoples,” then, is meant to emphasize these singular features of peoples as distinct from states, as traditionally conceived, and to highlight their moral character and the reasonably just, or decent, nature of their regimes.

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101 Rawls, 33.

102 Rawls, 25.
Further specifying then nature of peoples as agents in the international sphere, and thus having interests that shape the agreement in the international original position:

These interests of liberal peoples are specified by their reasonable conception of political justice. Thus, they strive to protect their political independence and their free culture with its civil liberties, to guarantee their security, territory, and the well-being of their citizens. Yet a further interest is also significant: applied to peoples, it falls under what Rousseau calls *amour-propre*. This interest is a people’s proper self-respect of themselves as a people, resting on their common awareness of their trials during their history and of their culture with its accomplishments...What distinguishes peoples from states – and this is crucial – is that just peoples are fully prepared to grant the very same proper respect and recognition to other peoples as equals.\(^{103}\)

In many ways this position is similar to Walzer’s account of states or political communities. What Rawls rejects is Walzer’s view that the government of the state, itself, is part of this moral entity.

States, for Rawls in the *Law of Peoples*, figure into the picture of international justice only once the principles of international justice have been articulated. It is what liberal and decent peoples would agree to that determine this content. Strikingly, Rawls thinks that the Law of Peoples:

\begin{quote}
will restrict a state’s internal sovereignty or (political) autonomy, its alleged right to do as it wills with people within its own borders...We must reformulate the powers of sovereignty in light of a reasonable Law of Peoples and deny to states the traditional rights of war and to unrestricted internal autonomy...It is significant that peoples’ rights and duties in regard to their so-called sovereignty derive from the Law of Peoples itself, to which they would agree along with other peoples in suitable circumstances.\(^{104}\) [emphasis added]
\end{quote}

More radically than any other model thus far, Rawls argues that status of sovereignty and the rights of sovereignty are determined by the hypothetical agreement of the peoples, not by the

\(^{103}\) Rawls, 34-35.

\(^{104}\) Rawls, 25-27.
internal relationship of a people and its government. In other words, sovereignty is conferred by the process or content of international justice.\textsuperscript{105}

“Peoples” are not only contrasted with states, but also with individual people. Just as Rawls is clear that international justice is not a matter of the agreement (expressed, tacit or hypothetical) of states, he is clear that it is not a matter of or for individuals in the sense explained below. Rawls contrasts his view with a cosmopolitan view, writing:

Some think that any liberal Law of Peoples, particularly any social contract such law, should begin by first taking up the question of liberal cosmopolitan or global justice for all persons. \textit{They argue that in such a view all persons are considered to be reasonable and rational and to possess what I have called “the two moral powers”…From this starting point they go on to imagine a global original positions with its veil of ignorance behind which all parties are situated symmetrically. Following the kind of reasoning familiar in the original position for the domestic case, the parties would then adopt a first principle that all persons have equal basic rights and liberties.}\textsuperscript{106} [emphasis added]

This conception of cosmopolitanism is a quite narrow one. It begins with a specific attribution of the powers of individuals as well as a specific conception of the appropriate order of questions, the relevant choice situation, and what is and is not behind the veil of ignorance. Working from all this, including the equal moral status of all individuals, Rawls’ cosmopolitan then determines that in light of the above (including equal moral status) we ought adopt a global original position, which has the result of a first principle of global justice that posits equal and basic rights and liberties of all persons.

\textsuperscript{105} The use of the term ‘process’ may be misleading. Rawls does not think that this is the outcome of an actual political process, but the articulation and identification of a set of norms justified by an argument that idealized parties would agree to the norms in a specified choice situation. As this refers to a manner of justifying I will refer to this as a process of identifying the content of international justice.

\textsuperscript{106} Rawls, 82.
Rawls objects to this kind of cosmopolitanism on the grounds that it assumes from the outset something that ought to be the result of a process of articulating the content of international justice.

To proceed this way...amounts to saying that all persons are to have the equal liberal rights of citizens in a constitutional democracy. On this account, the foreign policy of a liberal people – which it is our concern to elaborate – will be to act gradually to shape all not yet liberal societies in a liberal direction, until eventually (in the ideal case) all societies are liberal. But this foreign policy simply assumes that only a liberal democratic society can be acceptable. Without trying to work out a reasonable liberal Law of Peoples, we cannot know that nonliberal societies cannot be acceptable. The possibility of a global original position does not show that, and we can’t merely assume it.\textsuperscript{107}

The cosmopolitan, in attributing to each individual basic and equal (liberal) rights and liberties has put the cart before the horse. This attribution of these rights (i.e. “the equal liberal rights of citizens in a constitutional democracy”) ought not to be considered ‘basic’ and ‘foundational’ but ought to be the outcome of the process of constructing the content of international justice or the shape of international law, it is not a starting point for such a construction. These cosmopolitans do what the Westphalians do with the state – they assume a moral status (with all its attendant rights) going in, and this status ought to be the result of the process of determining the principles of international justice.

This is not to say that individuals play no role in Rawls’ model of the content of or domain of international justice. In fact, Rawls makes room for human rights\textsuperscript{108} that constitute part of international justice, and play the important role of bounding or shaping the rights of sovereigns.

\textsuperscript{107} Rawls, 83.

\textsuperscript{108} Human rights are importantly distinct from constitutional rights, or liberal democratic citizenship rights.
Human rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime’s internal autonomy.\footnote{Rawls, 79.}

The rights in question are those that are urgent (freedom from slavery and serfdom, security from mass murder or genocide, some liberty of conscience), and “the violation of them is condemned by both reasonable liberal peoples and decent hierarchical peoples.”\footnote{Ibid.} Their status in international justice comes from agreement by the peoples, but they refer to individuals. The role of human rights in the model is three-fold, derived from the more basic part in the system of setting “a necessary, though not sufficient, standard for the decency of domestic political and social institutions.”\footnote{Rawls, 80.} The three roles are:

1. Their fulfillment is a necessary condition of the decency of a society’s political institutions and of its legal order
2. Their fulfillment is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force.
3. They set a limit to the pluralism among peoples.\footnote{Ibid.}

In Walzer’s language – a government’s respect for the human rights of its citizens is the standard for the external legitimacy of the state.

Despite finding much of what Rawls says both right and radical, I have some worries about the model. The first is whether the Law of Peoples is truly global in the sense set out in the second desideratum of a good account in the introduction and in Chapter Two. Rawls’ model is clearly trans-national, that is, the Law of Peoples ranges over the liberal and the decent peoples. However, it is difficult to see how to extend the model to the cases that we

\footnote{Rawls, 79.} \footnote{Ibid.} \footnote{Rawls, 80.} \footnote{Ibid.}
are concerned with in this thesis, and whether the account has a role for the international community itself.

Rawls addresses the relationship between the Society of Peoples and burdened societies (economically and socially disadvantaged, such that liberal or decent ordering is not possible), as well as with outlaw states (regimes that refuse to comply with a reasonable Law of Peoples). With respect to the liberal and decent peoples’ foreign policy for engaging with outlaw states (presumably the class of states the capture perpetrators of crime against humanity) Rawls discusses the importance of “the long-run aim to bring all societies eventually to honor the Law of Peoples and to become full members in good standing of the society of well-ordered peoples.”113 He claims that achieving this aim is not a matter of political philosophy, but of political wisdom (and some luck). He then suggests institutions for joint advocacy, practices of criticism, economic sanctions and withdrawal of other mutually beneficial practices can be useful for achieving this end.

This discussion indicates quite clearly that the non-member societies are, in an important sense, not bound by the Law of the Peoples. By definition, the outlaw states are not moved by the Law of Peoples. They have reason to be, they ought to, but they are not. Well-ordered peoples have foreign policies with respect to outlaw states that set goals to pursue with respect to these states, and prescribe and prohibit some means for doing so. The well-ordered societies can by authorized by the Law of Peoples to use force (in certain conditions), which can cause the well-ordered societies to, at least minimally, act in accordance with the content of the Law of Peoples. However, the well-ordered societies and the outlaw states are not under ‘a common law.’ Their relationship is not a juridical condition, characterized by mutual accountability to shared rules. In fact, it is not clear that

113 Rawls, 93.
the well-ordered societies can hold the outlaw states accountable (as this would imply a reciprocal relationship and common rules); they can only attempt to force them to act in certain ways. Rawls’ suggested tools for engaging with outlaw states are means of convincing, controlling or coercing these governments, not holding them accountable. What Rawls’ model does not provide are resources for answering the Jurisdiction Question on its own terms. At best, Rawls’ account may give reasons for pursuing some kind of international criminal tribunal, but when the accused demands to know why the court has standing, Rawls cannot appeal to a common law to which the perpetrator is being held accountable.

My second worry with the model concerns Rawls’ use of ‘peoples’ as the primary moral agents or entities. As in response to Walzer, it is not clear whether the value of peoples is a romanticization inherited from a different time, and thus whether Rawls’ account runs the risk of falling prey to the romanticization objection above. On the one hand, Rawls does not significantly discuss the value of nations or nationality to individuals; on the other, he builds into the account robust and rich interests of peoples (including the individual members of a people valuing their shared history and customs). Moreover, he privileges the perspective of peoples by taking the proper philosophical point of view for determining the principles of justice to be that of peoples. The difficulty with assessing whether his view falls prey to this objection comes from the idealized nature of the account. Rawls begins by stipulating peoples as normatively robust entities, and it not clear whether ‘there are no things in the world that manifest those traits’ or ‘peoples are not really like that’ are objections to his view.

Raising the specter of the romanticization objection is not to deny that Rawls makes more room for basic human rights (and the importance of individuals in constructing the
principles of international justice) in his model than Walzer. However, one cannot help but be left cold by Rawls’ actual list of human rights. I agree with Rawls that an articulation of the human rights ought to be the outcome of the process of articulating the principles of international justice; however, his account of what grounds this process (hypothetical agreement of peoples) is problematic. Arguing that hypothetical agreement of peoples is the proper philosophical process for determining the content of the human rights norms seems to beg the question of whether national membership (or peoples-membership) is more valuable than other goods to individuals, by assuming that the point of view of peoples is the proper philosophical point of view for determining the content of international justice. If membership in a people (or nation) were just one value among others, it would not follow that international justice takes the form of a Law of Peoples, and not a Law of People (in which the rights of peoples are given, like the rights of states, by the philosophical process of articulating the norms).

**Proposal for a New Model**

Reflecting on this discussion we have found a way to move forward. Taking over from Hobbes and Kant, we see the need for common rules, backed by some kind of enforcement for political or legal justice at the international level. Given this positivist framework, Rawls’ strong position (and Kant’s) on the status of sovereignty as an externally conferred status is most fitting. As the status of sovereignty concerns claims states can make with respect to one another (and other external entities), grounding the status requires common rules or norms for the states (or other international actors). Within this framework, the status of states is determined by or articulated by or given content through the principles of international law or international justice. On this account, what it means to be sovereign is
not something we can determine prior to process of international articulation (whatever that may be). So, states are not the primary normative entities from which we build an account.

Rawls and Walzer, in recognizing an important gap between people of a community and the government in that community, focus the construction of their models on these groups (political communities or peoples). However, in so doing, they reify or romanticize the nature and importance of these groups. Their aim in beginning in this way is to capture the importance of political communities (a role for states in our desiderata-language), but they do this at too high a cost to the importance of individuals. This suggests room for beginning from the individuals and building an account that incorporates the value of local political communities (rather than the other way around).

In Chapters Four and Five I develop just such an account, which I refer to as the Alternative Cosmopolitan Account (ACA). The ACA begins by taking individuals as the primary normative entities and takes sovereignty to be a status determined by the international law. The ACA’s commitment to cosmopolitanism is developed and defended in Chapter Four, and the argument for the international community’s standing to prosecute crime against humanity constitutes the whole of Chapter Five.

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114 This is not to imply that the questions Walzer and Rawls set out to answer are the same, or the same as ours in this thesis. However, the model of the international community is something that we can talk about across theories aimed at answering different questions, because these models are accounts of the normatively basic entities and principles that any question of international justice must use or take into account.
CHAPTER FOUR

THE CONTENT OF COSMOPOLITANISM

MINIMAL COSMOPOLITANISM

In Chapter Three I suggested an Alternative Cosmopolitan Account (ACA) to responding to the Nuremberg Problem. This Alternative Cosmopolitan Account is an individualist account that takes persons as the primary or basic normative entities (as opposed to states, nations or peoples) for purposes of constructing the principles of international justice. In order to move forward, this cosmopolitan commitment needs to be spelled out more clearly.

As a first pass at identifying the nature of such a commitment, we can define it in contrast to statist accounts. The Westphalia Model takes states as the primary normative entities in the global or transnational domain. It holds that states are the objects and subjects of international law, and the claims and interests of states are taken as relevant fundamental normative reasons for evaluating the law (both particular law, the principles of international law and existence of institutions of international law). In contrast, a cosmopolitan account takes the claims and interests of individuals as the fundamental normative reasons salient to or grounding the claims about the principles of international justice. However, this negative characterization does little to suggest how we might move forward. What does it mean to take individuals as the basic normative entities in the international context?
As a second pass, we can further locate the cosmopolitan position by recognizing that individualism need not imply cosmopolitanism. Take individualism as the position that value-claims are grounded in moral features (including interests) of individuals. This position is compatible with a statism or nationalism in the international context. It could be the case that, as in Walzer’s view, the moral claims individuals make on one another are captured by or otherwise properly fall within the proper purview of local political communities, which then serve as the primary normative entities for constructing the principles of international justice. In Chapter Three I argued against this kind of individualism, suggesting that we develop an individualist account that is also cosmopolitan: an account on which, in the context of international justice, the basic normative entities are individuals.

In this chapter I will continue building this account by articulating the content of the commitment to cosmopolitanism at the core of this alternative account. The term ‘cosmopolitanism’ refers to a range of normative theories in both moral and political philosophy. Although theories of cosmopolitanism vary greatly, I follow Thomas Pogge in identifying the central idea of cosmopolitanism as the tenet that “every human being has a global stature as an ultimate unit of moral concern.” The cosmopolitan holds that each individual human being is a primary unit of moral concern for every other human being. This family of views is often contrasted with those that locate the source of moral obligations

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117 Being human is a sufficient condition for moral concern for many theories of cosmopolitanism, although not necessary for all such theories.
or limit the scope of moral concern to interpersonal relationships, or other more local attachments, as in fellow citizenship in a state, or shared local culture.

For the cosmopolitan each human being counts in a global moral community. When we talk about the demands of morality, the obligations of morality, or the principles of morality, we take into consideration the global moral community of which every human being is a part. With this initial identification of the family of views under the name cosmopolitanism, we can ask: what does it mean to say that each individual gets counted in the global moral community?

Some theorists give content to this commitment by claiming that we think of each person as having duties of humanity or obligations of humanity to all other human beings. We owe one another basic respect, or we see one another as the kinds of things that can put us under moral obligation, or we take other people as counting in our moral considerations, or that can make a legitimate claim on us. This way of fleshing out cosmopolitanism is often explained in the language of rights. For many, the commitment to taking each individual as an object of moral concern means to treat each person as the bearer of human, natural or innate rights (the difference between these modifiers is not important here). We find this commitment in the very first clause of the Preamble to the United Nations Universal Declaration of Human Rights: “...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”118

As explained in Chapter Three, Rawls argues against this way of understanding cosmopolitanism. He argues that in taking each individual as an ultimate unit of moral

concern and interpreting it in a certain way and using it with certain other assumptions, the cosmopolitan commitments herself to a system of equal liberal rights for all individuals, and thus is committed to a political position on rights the status of which ought to be the outcome of the process of determining the substantive content of international justice, rather than its starting point. In this chapter, I take up this challenge to cosmopolitanism. I present a minimal cosmopolitan that avoids this political commitment to the existence of robust rights (or some other articulation of a political status), but saves the normative foundations of international justice as the value and nature of individual human beings.

This project of articulating a minimal cosmopolitanism can be contrasted with giving a substantive cosmopolitan account. Here, I am concerned with the normative structure or features of the relationship itself, rather than with articulating norms, principles, rules or rights that are implied by this relationship or are otherwise characteristic of it. In part, this is in response to Rawls’ worry about cosmopolitans begging the interesting questions by building into their normative resources claims about rights and duties that ought to be the outcome of the process of articulating the principles of justice.\footnote{In Chapter Five, I provide an argument for the need for institutions (and how they can come to articulate the substantive claims one may expect in this discussion), based on the more formal features I identify and develop here.}

With that said my aim is to identify and explain the commitments of what I think of as the commonsense moral position that is shared by different cosmopolitan theorists. The commonsense moral position is that found in the United Nations Universal Declaration of Human Rights above, it is a commitment to the inherent dignity of all members of the family of humanity. This language is all around us, and although often presented as mere political rhetoric, the language points to something that we can all identify. It is the commonplace
belief that human beings bear an important relationship to one another as human beings, and this relationship has a moral character.

As a first step toward an articulation of this minimal cosmopolitanism, we can begin by recognizing that we need not ground or justify the commitment to cosmopolitanism using either rights talk or a global original position. Peter Singer’s famous three-step argument in “Famine, Affluence and Morality” does not require rights, but merely the premises (1) that suffering (no matter where it occurs) is bad, and that (2) we ought to prevent bad things from happening if we can do so without giving up something of significant moral worth. His argument is consistent with cosmopolitanism as formulated, and in fact, quite a bit more radical than many ways of filling out the normative foundations of the commitment, as it holds that all things that can suffer (a much greater group than human beings alone) are objects of moral concern.

The philosophical task of this chapter is to give an account of minimal cosmopolitanism that is sufficiently robust to ground the principles of international justice but which does not posit basic liberal rights. Beyond recognizing that we need not capture such a commitment in rights language, it is important to notice that cosmopolitanism is a commitment that crosses normative moral theories. It is a kind of commitment that is not the result of a particular normative theory, but a position shared by otherwise quite different theorists. As characterized briefly above, cosmopolitanism can be the belief that each human being has an inherent dignity, or counts in the moral calculus, or is a potential locus of (morally salient) suffering. The challenge to the articulation of the nature of this commitment in part comes from this diversity. It can at once render the commitment to cosmopolitanism

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so empty that it appears trivially true, or so implausibly demanding (both morally and psychologically) that it is clearly false.

I contend that the commitment to cosmopolitanism is a theoretical and practical commitment to the existence of a basic moral relationship that holds between all human beings, characterized by co-membership in the moral community, which centrally involves taking oneself and others as beings as sources of moral concern.

**THE BASIC MORAL RELATIONSHIP**

Informed by the commonsense moral position on the moral nature of the family or community of humanity, we can give an initial characterization of minimal cosmopolitanism as commitment to a basic moral relationship characterized by co-membership in the moral community. To give content to this claim, we must understand what is meant by ‘basic moral relationship.’ I use the term ‘relationship’ to capture the aspect of minimal cosmopolitanism that posits some kind of moral bond between individuals.

To make sense of the bound-to-one-another aspect of the co-membership relationship, we can characterize individuals as recognizing one another as having a kind of standing with respect to one another. They recognize one another as co-members in the moral community. ‘Recognition’ here is not a psychological claim. Not only would a psychological explanation of recognition fail to explain the normative commitments of cosmopolitanism, it is most likely a false.\textsuperscript{121} Instead, recognition in this context is normative. The cosmopolitan holds that we ought to recognize all other persons as co-members in the moral community, and act in ways compatible with this recognition.

\textsuperscript{121} Despite the commonplace and commonsense moral position above, the psychological reality of actually recognizing each other individual as a co-member of the moral community is not a likely explanation of why we find the moral claim true, or even plausible.
The question of why we ought to do so is an important one and can be raised seemingly whenever a normative claim is posited. For our purposes, the question of ‘why’ is not the project. This is not to say that there is no answer to why we ought to be cosmopolitans, or why we ought to recognize all persons as co-members of the moral community. It is simply to say that there is no general answer to this question, because it depends on the details of how you fill out the view. Although answering this particular justificatory question is not the project of this chapter, the view I articulate is compatible with different ways of giving this answer and is in conversation with such projects.

I use the modifier ‘moral’ in both ‘basic moral relationship’ and ‘moral community’ to indicate that this is a non- or pre-political conception of standing. The way we recognize other human beings in this relationship is not as beings with politically recognized and backed rights, or to whom we have enforced obligations. In other words, the standing of co-membership in the moral community is not a status conferred on the bearers by political bodies or institutions. Distinguishing the basic moral relationship of co-membership from a political characterization of status does not imply that this relationship is also somehow a-social or pre-social. The features of this relationship can be (and I believe are, in fact) distinctly social in nature.

In order to identify features of the basic moral relationship that give more content and depth to the position, I turn now to a critical discussion of three important works: Peter Strawson’s “Freedom and Resentment,” Thomas Scanlon’s *What We Owe to Each Other*, and Joel Feinberg’s “The Nature and Value of Rights.” The first feature I identify is that members of the moral community engage in participatory reactive attitudes. They take one another as participants or agents rather than mere objects. The second is that members of the

122 This gap proves important for the move to the political, which will be addressed in Chapter Five.
moral community value living in a way that is justifiable to other members. Finally, the third is that members of the moral community understand justification to one another, at least in part, as concerning impersonal institutions or practices, among which can be the practice of making claims on one another.

**FEATURE #1: PARTICIPANT REACTIVE ATTITUDES**

In “Freedom and Resentment” Peter Strawson identifies adopting the “participant” (rather than objective) reactive attitudes with respect to other people as fundamentally important to understanding attributions of moral responsibility. Strawson distinguishes these two kinds of reactive attitudes in virtue of what kind of being the reactor takes the reacted to, to be:

To adopt the objective attitude to another human being is to see him, perhaps, as an object of social policy; as a subject for what, in a wide range of sense, might be called treatment; as something certainly to be taken account, perhaps precautionary account, of; to be managed or handled or cured or trained; perhaps simply to be avoided, though this gerundive is not peculiar to cases of objectivity of attitude. The objective attitude may be emotionally toned in many ways, but not in all ways: it may include repulsion or fear, it may include pity or even love, though not all kinds of love. But it cannot include the range of reactive feeling and attitudes which belong to involvement or participation with others in inter-personal human relationships; it cannot include resentment, gratitude, forgiveness, anger, or the sort of love which two adults can sometimes be said to feel reciprocally, for each other.\(^{123}\)

This passage from Strawson is quite dense, so further explanation of this distinction between classes of reactive attitudes is in order.

Take, as a starting point, the example of a thunderstorm. When I am home in the middle of the night and hear a thunderclap and pounding rain, I react to the thunderstorm as an object. I can be frustrated with the thunderstorm because it is going to interfere with my morning commute, or I can be afraid of the thunderstorm because during the last one a tree

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branch fell and crushed my car. However, I cannot (reasonably) resent the thunderstorm, as this would imply that it could be held accountable for being a thunderstorm. Resentment would imply that my relationship to the storm is one characterized by reciprocal standing to hold accountable to moral norms. However, I cannot take the thunderstorm as an agent and, appropriately, react to it as such.\footnote{124}{“Appropriately” is important here. Sometimes we talk of resenting the weather – but this is a metaphorical use of resentment. It is taking up an inapt attitude, in order to express a kind of reaction that is as if the thunderstorm is an agent.}

Both ways of reacting to other beings, as objects and as participants, can be adopted with respect to other persons. I can react to my younger brother in the same way I react to the thunderstorm: as a being that is caused to act, manifests certain kinds of behavior as a result of the circumstances, and can be changed or controlled by external events and actions. Given his only recent emergence from the turmoil of teen-dom, the objective attitude (in point of fact) characterized many of my reactions to him in recent memory. However, unlike with the thunderstorm, if I \textit{only} take up the objective attitudes with respect to my brother (that is, in all cases I view him as an object and react to him as such) I am failing to treat him like a person.\footnote{125}{And, in fact, this is a formal way of putting his frequent complaints about the family’s collective adoption of the objective reactive attitudes with respect to him.} I am failing to attribute to him the participant status that includes an attribution of moral responsibility and thus, commits me to a relationship that is partially characterized by mutual accountability to moral norms.

With the distinction between objective and participant reactive attitudes in view, we can ask: why ought we take up this participant attitude with respect to other persons? Why is it inappropriate to adopt \textit{only} the objective attitudes to other human beings? Strawson’s response to these questions is that they are misplaced. He identifies “taking of others and
oneself as participants rather than objects” as fundamental to the human experience, as a basic feature of social human life. He goes so far as to say we are unable to sustain any attitude but the participant attitudes to other people, writing:

A sustained objectivity of inter-personal attitude, and the human isolation which that would entail does not seem to be something of which human beings would be capable.\(^{126}\)

The taking of the participant attitudes with respect to ourselves and other people (that is, reacting to our actions and those of others in a way characteristic of attributing moral responsibility and thus a mutual relationship of accountability to shared moral norms) is a basic feature of human social experience.

It is important to note that this taking up of the participant reactive attitudes is not merely a way of viewing other entities in the world. It cannot be captured entirely by the existence of beliefs about what kind of status is appropriate for ourselves and others. It is, in its nature, practical. It is about the in-the-world responses and practices of which we are a part. The reactive nature of the attitudes brings this out most clearly. Strawson is highlighting a way we react to and interact with one another. Most importantly, he draws attention to how our attributions of participant-status are manifested in our holding ourselves and one another accountable.

Strawson’s discussion of the importance of the reactive attitudes sheds light on the nature of co-membership in the moral community. Part of what it means to be a person is to have these attitudes with respect to one another. At the very least, he identifies a relationship that is both unique and valuable (or central to human life). It is unique in that it exists only between certain kinds of beings: those who can and do take up the participant attitudes with respect to one another. Secondly, it is valuable in that it is characteristic of what it means to

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\(^{126}\) Strawson, p. 9.
live as a person, with other people. If we take up only the objective attitudes with respect to others we give up something central to human nature, and what it means to live a human life. The value of human nature, or living a human life, is not something Strawson argues for directly, and something it would be too difficult to address here. What is important for the current discussion is the claim that the reactive-attitudes are taken to pick out a central and important ‘human characteristic’ the loss of which would make life less human as we understand it.

As the basic moral relationship is the central commitment of minimal cosmopolitanism, one may worry that characterizing it through the participant reactive attitudes is problematic. The reactive attitudes are responses to others in relative proximity. When someone steps on my foot and doesn’t apologize, I resent them. When someone in North Dakota steals a television, if I even ever find out about it, resentment is not the standard response (if, indeed, I respond at all). How could the reactive attitudes explain the any kind of relationship between people on opposite sides of the globe? To answer this question, we can turn to the second feature of co-membership in the moral community and how it deepens our understanding of the first.

**Feature #2: The Value of Justification**

In What We Owe to Each Other Thomas Scanlon argues for a contractarian account of right action: “an act is right if and only if it can be justified to others.”\(^{127}\) This position is explained and defended at great length, however for our purposes we need only focus on his discussion of why this account of right action gives us reason to act. One question Scanlon must answer in justifying his account of right action is: why would ‘that an action can be

justified to others’ give us reason to act? If this account of right action is to be binding on us, it should explain why it provides us with reasons (perhaps conclusive) to act in the way required by the theory. Scanlon responds to this question by arguing that “being justifiable to others” gives us reason to act because acting in a way that is justifiable to others is valuable to us as people.

This response, stated plainly here, is not terribly illuminating. To see what his response means let’s turn to a case Scanlon presents to motivate this thought: the political atmosphere of the United States in the early 1960’s

In the 1950’s many Americans believed, naively, that their institutions were uniquely justifiable; that America was free of class barriers, and that it was a society in which benefits were fairly earned. They therefore felt that they could enjoy these benefits in the comforting confidence that the institutions through which they had acquired them, though not perfect, were closer than any others to being ones that no one could reasonably object to. The combined blows of the civil rights movement and movement that arose in reaction to the war in Vietnam shattered these illusions beyond repair. Different people reacted to this in different ways, some by protesting against the war and working for civil rights, others by vehemently denying that the charges of injustice at home and criminality abroad had any foundation. What these reactions had in common was a deep sense of shock and loss; both testify, I believe, to the value people set on the belief that their lives and institutions are justifiable to others. [emphasis added]

Again this explanation is quite dense, so some unpacking is in order. Scanlon’s explanation of the passion and turbulence of the political movements of the 1960’s is that members of the community believed that the political institutions of their community were justifiable to all those subject to them. When the civil rights movement and protests against the war in Vietnam challenged this belief, people reacted either by joining in the call for change so that the institutions would be justifiable, or by passionately defending the institutions as they were. Both reactions can be explained by the value of living according to rules and under

128 Scanlon, p. 163.
institutions that are justifiable to others. Notice that in Scanlon’s explanation of this case, it is not the content of the reasons that is important for explaining the reactions. In his example, all parties to the conflict reacted with the same kind of energy and concern. It is the more formal feature of ‘being justifiable’ that motivates each of the parties.

Just as Strawson appeals to an “impossible to do otherwise” feature of human social life in explaining the importance of participant reactive attitudes, Scanlon takes the value we place on living in a way that is justifiable to others as explanatorily bedrock. He claims that placing value on justifiability characterizes what it means to live a human life, writing:

> what is particularly moving about charges of injustice and immorality is their implication for our relations with others, our sense of justifiability to or estrangement from them….when we look carefully at the sense of loss occasioned by charges of injustice and immorality we see it as reflecting our awareness of the importance for us of being ‘in unity with our fellow creatures’.\(^{129}\)

This adds a further element to the basic moral relationship. In particular, it brings into the picture the importance of being able to give one another reasons for what we do, and a commitment to the practice of doing so.

This insight gives depth to the first feature of co-membership in the moral community. The value of being justifiable to others enriches our understanding of what it means to take others as participants rather than objects. Not only do we respond to other people in a way that implies mutual accountability to moral norms, we value that they believe the shared moral norms are those they cannot reasonably reject. We value being able to give reasons for the norms to which we hold one another to account. In the same way that Strawson claimed that engaging in the participant reactive attitudes is a central part of human life, Scanlon attributes the value of justification to people. Both are presented as empirical

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129 Scanlon, p. 163.
generalizations, although not of the kind whose truth could be demonstrated by a survey. Rather, they are claims about the nature and importance of living a human life in the context of constructing a moral or political theory, clearly influenced by experience, but not further justified by normative principles or empirical demonstrations.

Finally, this discussion suggests a social feature of the basic moral relationship that was submerged in the discussion of the participant reactive attitudes. It helps us to see how someone in North Carolina could stand in a meaningful moral relationship with respect to the person who stole the television in North Dakota. They are both embedded in social groups that have shared moral norms, practices and perhaps institutions. Valuing that the norms, practices and institutions that I participate in and shape my life are justifiable to others subject to them is how I can have a co-membership relationship to people I will never meet. In recognizing other people as participants rather than objects, I value their being able to accept (or not reasonably reject) or my being able to give reasons for shared norms, practices and institutions.

As the aim of this dissertation is to establish the standing of an international institution, I am particularly interested in this social feature of Scanlon’s discussion. From what has been said thus far, co-membership in the moral community does not imply the need for a public institution, only that if there is one we value it being justifiable to those subject to it. In Chapter Five I develop the further argument that the full account of co-membership in a moral community, and the model of international justice and state sovereignty suggested in Chapter Three leads to the need for such an institution. With that said, I will turn to Feinberg and the third feature of co-membership in the moral community which will deepen
the analysis of this social feature of the basic moral relationship add more richness to the content of cosmopolitanism.

**FEATURE #3: SOCIAL PRACTICES**

To move forward in explaining what ‘co-membership in the moral community’ means, we must ask whether and how this value of justification and the importance of the participant reactive attitudes can serve as characterizations of an impersonal relationship. It is absurd to claim that each person has a personal relationship with each other person, and it would be bad for cosmopolitans should they be committed to a view that implies otherwise. I suggested above that to avoid this problematic way of understanding the commitment we begin by observing that human communities are characterized by customs, practices and institutions that mediate the relationships between individuals. These structural features of human communities make it possible to see how individuals could stand in an impersonal, co-membership relationship. Namely, as participants in these common, shared practices or institutions.

As said above, participant reactive attitudes and the value of justification contribute to our understanding of the basic moral relationship. This raises the question: how does or could an institution reflect the participant reactive attitudes and the value of justification? As an answer to this question, I will point to the practice of claiming and how it is manifested in shared practices and institutions. This renders the third feature of minimal cosmopolitanism somewhat different than the first and the second. For this third feature I offer an example of a practice that fulfills a particular role – it could be one among many social practices (manifested in institutions) that serves the purpose of mediating individuals in a community compatible with the value of justification and participant reactive attitudes. This need not be
the only practice that fulfills this role. The importance of this feature in developing the account of minimal cosmopolitanism is not in the claiming relationship itself (although I think it is very illuminating), but in the existence of social, shared practices and institutions that reflect or instantiate the importance of the participant reactive attitudes and the value of justification.

To see how the practice of ‘claiming’ is an example of the relevant kind, we first need to step back and say something about ‘rights.’ As mentioned in the introduction to this chapter, rights are often used to explain the content of cosmopolitanism. The attribution of basic human rights to all individuals in virtue of being human is often taken to be, if not the core of cosmopolitanism at least a central implication of such a commitment. Even recognizing the limitations and problems inherent in a rights-based cosmopolitanism, we need not throw discussion of rights out the window. The prevalence of rights talk indicates that rights language expresses an important aspect of the commonsense moral position that the basic moral relationship aims to capture. Thus, rather than posit rights as normative bedrock or primary explanatory content, it is helpful to think of rights as (sometimes, in some places) part of a practice that itself realizes the recognition of individuals as co-members in the moral community. To see how rights can be thought of as features of a practice that supports or realizes by a more fundamental relationship we can turn to Joel Feinberg’s “The Nature and Value of Rights.”

Feinberg locates the central normative importance of rights in the nature of claiming, and the value of being able to make claims on one another. He illustrates the importance of this practice through the well-known “Nowheresville” thought experiment. I am going to quickly
present the case, but will not linger over it, as Feinberg’s discussion of the ‘claiming’ relationship is of primary interest for our current discussion. With that said,

Try to imagine Nowheresville – a world very much like our own except that no one, or hardly any one (the qualification is not important), has rights. If this flaw makes Nowheresville too ugly to hold very long in contemplation, we can make it as pretty as we wish in other moral respects. We can, for example, make the human beings in it as attractive and virtuous as possible without taxing our conceptions of the limits of human nature. In particular, let the virtues of moral sensibility flourish. Fill this imagined world with as much benevolence, compassion, sympathy, and pity as it will conveniently hold without strain. Now we can imagine men helping one another from compassionate motives merely, quite as much or even more than they do in our actual world from a variety of more complicated motives.\textsuperscript{130}

To this fictional world we add: “duties, but only in the sense of actions that are, or believed to be, morally mandatory, but not in the older sense of actions that are due others and can be claimed by others as their right.”\textsuperscript{131} From which we get duties of positive law, and of charity. We also add: personal desert, where “desert is simply a kind of fittingness between one party’s character or action and another party’s favorable response, much like that between humor and laughter, or good performance and applause.”\textsuperscript{132} From which we get practices like: grading students, judges awarding prizes, tipping wait staff and similar judgments of apt or fitting reward.

Finally, we add to Nowheresville a Sovereign Monopoly of Rights. The Sovereign Monopoly of Rights introduces a notion of rights, but not one of subjective rights. In this case, there are no rights against the sovereign (the sovereign can harm but not wrong the subjects). The sovereign can create and enforce obligations that subjects have with respect to

\begin{footnotesize}
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\item[\textsuperscript{131}] Feinberg, 244.
\item[\textsuperscript{132}] Feinberg, 247.
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one another, but where these obligations are not owed to one another. They are owed directly or indirectly to the sovereign. With this addition we can derive practices of property ownership, bargains, deals, contracts, promises, appointments, loans, marriages, and other practices of a functioning polity.

Even acknowledging the important social practices that we can ground in the moral building blocks provided by Nowheresville, it is missing something present in our own moral community. The same inaptness that is felt when we considered taking up the object-attitude with respect to my younger brother reoccurs when we consider whether Nowheresville is a morally complete world. So, what’s wrong with Nowheresville? Feinberg’s answer is:

The most conspicuous difference, I think, between the Nowheresvillians and ourselves has something to do with the activity of claiming. Nowheresvillians, even when they are discriminated against invidiously, or left without the things they need, or otherwise badly treated, do not think to leap to their feet and make righteous demands against one another though they may not hesitate to resort to force and trickery to get what they want. They have no notion of rights, so they do not have a notion of what is their due; hence they do not claim before they take.\[133\]

Nowheresville lacks a particular kind of relationship citizens can have to each one another. It lacks the relationship of mutual status to claim one’s due from others.

However, it is not enough to merely note that Nowheresvillians cannot have this relationship, if the relationship itself is of no importance. Thus, Feinberg argues that this ability or standing to claim one’s due is of great moral value.

Having rights, of course, makes claiming possible; but it is claiming that gives rights their special moral significance. This feature of rights is connected in a way with the customary rhetoric about what it is to be a human being. Having rights enables us to ‘stand up like men,’ to look others in the eye, and to feel in some fundamental way the equal of anyone.\[134\]

\[133\] Feinberg, 249.

\[134\] Feinberg, 252.
The moral value of being able to stand in the claiming relation to others is tied to the nature of living as a person with other persons. It is the value of seeing yourself and others as having a kind of special status of equal worth or standing. Rights, and the attendant institutions that support rights, are features of living a valuable human life.

Feinberg’s discussion of the moral difference and importance of rights has many resonances with Strawson’s discussion of participant reactive attitudes. They both identify a practice of holding accountable to moral norms as a central and valuable feature of human social life. Strawson identifies this practice through interpersonal interactions and attitudes. We hold one another responsible for behavior and actions in everyday life through the reactive attitudes. Feinberg identifies the same relationship through the public practice of claiming and institutions that support this practice. The basic moral relationship, in this case, is mediated through public structures. Feinberg’s account of rights emphasizes not just the interpersonal aspect of the basic moral relationship, but the way in which it can be (and often is) realized through public practices. The basic moral relationship is manifested in personal interactions, as well as can be manifested through the social practices and public institutions that govern our lives.

The claiming relationship also deepens the understanding of the value of justification. It shows one way for this value to be manifested in practice. The social practice of ‘claiming one’s due’ is that of demanding that other persons act in a particular way with respect to oneself or provide sufficient reason for failing to do so. When someone brings a lawsuit against another person, for example, by claiming the use of a certain piece of property, she is demanding that the other person recognize her as owning that property, act in accordance with the norms of property ownership, or give sufficient reason why not. The practice of
claiming also provides a model for how the participant reactive attitudes can be manifested in public structures. Institutions through which people make claims (for instance, the courts) take the parties to the practice as participants. They are not treated as objects – subject to social control or conditioning. Rather, they are beings holding one another to shared norms, by giving and demanding reasons for their actions.

WHERE WE ARE IN BUILDING THE ACA

With the three features of the basic moral relationship on the table, as well as their relationship to one another, we can take stock of how far we have come in building the ACA. Recall from the concluding remarks in Chapter Three, the ACA takes individuals as the primary normative entities for constructing a model of the nature and content of international justice, and takes the status of sovereignty to be conferred by the principles of international justice. In Chapter Three I explained what it means for the status of sovereignty to be externally conferred, and gave reasons for this view of the status of sovereignty over the ‘internally conferred’ conception of sovereignty.

In this chapter, we set out to explain what it means for individuals to be the primary normative entities. In the first case, it is that the moral standing of individuals is not explained in virtue of moral norms or principles ultimately derived from another source. Individuals are the basic or ultimate sources of moral concern. Moreover, the moral standing attributed to individuals is not politically characterized, such that the status is the result of a process of articulating the content of political norms.

Recognizing that to understand this kind of cosmopolitanism we need more to say than ‘primary normative entity,’ I developed minimal cosmopolitanism, meant to capture the commonsense moral understanding of the importance of recognizing in our actions (or
through our institutions) the moral character of the community of humanity. Minimal cosmopolitanism holds that people stand in a basic moral relationship with other people, characterized by co-membership in the moral community. Co-membership in the moral community can be further characterized as having three important features. The first is that the individuals recognize and respond to one another as participants rather than as objects. This recognition manifests a belief that co-members of the moral community can and do hold each other accountable to shared moral norms.

The second feature is that co-members of the moral community value that the shared moral norms (as well as practices and institutions) to which they are holding one another accountable are justifiable to the other members. This value of justification reveals not only the impersonal yet social nature of the basic moral relationship (it can hold between people who will never even meet one another), it reveals how recognizing others as having the participant-status is a commitment to giving people reasons, or engaging in practices of reason giving.

Finally, the third feature is that co-members of the moral community participate in social, shared practices and institutions that reflect or instantiate the importance of the participant reactive attitudes and the value of justification. This feature not only highlights the importance of social practices for capturing the nature of the moral community, but lends richness to the first two features.

The aim of the ACA is to provide an answer to the Nuremberg Problem, and explain why the international community has jurisdiction with respect to crimes against humanity. Although we have made progress toward this goal by articulating the fundamental normative building blocks of the account (individuals as co-members in the moral community) we do
not, as yet, have the full account. In the next chapter I take up the starting point developed here, and show how an account of the international community’s standing to prosecute crimes against humanity can be built from these resources.
In Chapter One I developed an account of crimes against humanity. There I argued that we should understand crimes against humanity as widespread and systematic attacks on civilian populations, where widespread refers to the number of victims, and systematic refers to both the nature of the perpetrators (organized in such a way and powerful and enough to execute a plan of attack) and the manner of the execution, and ‘attack’ picks out actions that cause severe harm that deprives or risks depriving the victims of the basics that make life possible, tolerable or decent.

This characterization of crimes against humanity combined with the recognition that the perpetrators of such crimes are often the officials of institutions governing the civilians makes crimes against humanity a particularly interesting and important category for international justice. These atrocities raise a unique question for international justice because they are often committed within the territory of a state, and thus, assumed to fall within the jurisdiction or domain within which the state has political authority.

In Chapter Two I presented this jurisdictional puzzle about crime against humanity as the Nuremberg Problem, along with responses to this problem that were ultimately unsatisfactory. Through this discussion I identified four conditions on a good or adequate response. An acceptable account: (1) relies on values and reasons that those subject to the
law can understand and see as at least possible or plausible revision or extensions of the law as it is, (2) explains why the international community, itself, has standing to prosecute the atrocities at issue, (3) demarcates distinct realms of domestic and international jurisdiction, and respects the value of states as discrete political communities, (4) preserves the importance of harm to the victims as individuals, and the moral value or standing of individual human beings more broadly.

This discussion of unsatisfactory responses to the Nuremberg Problem also suggested the importance of understanding the status of sovereignty in responding to the problem. The Nuremberg Problem formulates the jurisdictional puzzle as one concerning what falls within the ‘governing prerogatives’ of a sovereign state. Responding to the problem requires an account of what it means to be a sovereign state, and the rights, obligations and interests that come from or with this status.

In Chapter Three I took up this suggestion and engaged in a critical discussion of different models of the nature and content of international justice and the status of sovereignty, focusing on those provided by Michael Walzer and John Rawls. Through this discussion I argued for developing an Alternative Cosmopolitan Account (ACA), in which individuals are the primary normative entities for constructing the nature and content of international justice, and the status of sovereignty is articulated by the principles of international justice.

Building on this in Chapter Four I gave an account of minimal cosmopolitanism that explains what it means to take individuals as the primary or basic normative entities for the ACA. Minimal cosmopolitanism holds that people stand in a basic moral relationship with other people, characterized by co-membership in the moral community. Co-membership in
the moral community can, itself, be further characterized as having three important features. The first is that the individuals recognize and respond to one another as participants rather than as objects. The second is that the co-members of the moral community value that the shared moral norms (as well as practices and institutions) to which they are holding one another accountable are justifiable to the other members. Finally, co-members of the moral community participate in social, shared practices and institutions that reflect or instantiate the recognition of the participant status of members of this community and the value of justification.

With these resources on the table, this final chapter completes my development of the ACA by showing how the moral relationship of minimal cosmopolitanism gives us moral reason for an international political institution that can articulate the content of international law and hold violators of it accountable. After constructing this bridge between the moral and the political, I argue that the prohibition on crimes against humanity is a plausible part of international law. Finally, I return to the Nuremberg Problem to explain how the ACA answers the problem, and meets the four desiderata on a good or adequate account.

**MOVING TO THE POLITICAL FROM THE MORAL**

Turning now to the argument for the international community’s standing to prosecute perpetrators of crime against humanity. We begin with individual people in a web of moral relationships, needs, demands and claims. Recall minimal cosmopolitanism’s characterization of the co-membership relationship: individuals recognize one another as participants (rather than objects) and value practices and institutions that respect this status of others and in which people give one another reasons such that the common norms are justifiable to those held accountable to them. Although the basic moral relationship is
undoubtedly social in nature, it is not a political relationship. Minimal cosmopolitanism does not include norms, rules or laws that are publicly articulated and enforced by a common power. As answering the jurisdiction question (a question about political institutions) is the aim of this chapter, we face the question of how this moral relationship provides moral reasons for the standing of a political institution at all, and if it does what kind of institution (and with what scope).

To build this bridge between the moral co-membership relationship and the political standing of an institution, we can begin with what we have: co-membership in the moral community. In the absence of a political institution (which articulates and enforces rules in the way required by the political/legal conception of justice introduced in Chapter Three), we run into a problem. To see why, let’s look at an example from Jeremy Waldron.

Suppose A and B are struggling for control of a portion of land. Each of them is a conscientious moral thinker, and each strives to reason responsibly about their rights. They both acknowledge – let’s say they acknowledge correctly – that an equal division would be unjust, but in their individual thinking they do not come up with the same conclusion: A is convinced that he is entitled to 60 percent of the territory and B is convinced that he (B) is entitled to 60 percent of the territory.  

We have a problem here. Both A and B have conscientiously tried to reason about what to do in this situation and have come to different conclusions. The matter is of great importance, so they cannot just walk away. Bargaining is not guaranteed to work for either of them, nor is fighting. Furthermore, this is not just a problem for A and B - but for A and B and however many other human beings they find themselves sharing the planet with. As Waldron puts it, imagine: “a quarter of a billion highly opinionated Kantians who are offering (and preparing to act upon) their rival individual assessments about the proper distribution of resources in a

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large and fruitful territory.”¹³⁶ This problematic situation can be described as a failure of private reason with respect to concerns of justice.¹³⁷ The example shows us the limitations on any one individual’s ability to use her own private reason to determine the right action in the context of actions that change the moral landscape for all.

I want to stress from the outset that this problem is not just a strange way of explaining a prisoner’s dilemma where the problem is taken to be that we find ourselves in a position of rationally acting against our best interests in the absence of a mechanism for enforcing cooperation. Rather, it is what I will refer to as an indeterminacy problem. In the absence of publicly shared, articulated, coherent, univocal, enforceable set of laws, the minimal cosmopolitan moral commitment to take one another as objects of moral concern with respect to actions that change the moral landscape for all has no determinate content.

Some of our actions are public actions in that they change the moral situations of other people. Perhaps with respect to one another, as in the case of entering a contract with someone else, or with respect to things, as in the case of property with which we began. Although you, on your own, may be able to generate a coherent set of principles about these actions this will not be sufficient to solve the problem. The problem of indeterminacy gets off the ground exactly because of the privacy of these judgments. Thus, we need some kind of institutional mediation of our relationships with one another that can not only articulate a set of coherent rules (and thus the content of the moral obligations we have to one another), but also enforce (in some manner) these rules.

¹³⁶ Waldron, 193.

¹³⁷ That this indeterminacy exists between all members of the moral community, including those we will never directly encounter, is an important aspect of the problem moving forward.
My articulation of the indeterminacy problem may strike some as quite strong, even after limiting the domain of concern to public actions. Tracing the indeterminacy problem to its Kantian roots, we see that Kant himself thought that the problem arose in situations like property claims (as in the example above), but did not necessarily extend to moral concern and obligations in general. Why think that in the absence of political institutions, our commitment to taking others as co-members in the moral community has no content (full stop)?

The first thing to say in response to this worry about the scope of the indeterminacy problem is to emphasize that I am concerned with the relationship between people understood as co-members of the moral community. There are many contexts in which we do not engage with other people as “co-members of the moral community,” but rather, as friends, as family, as colleagues or as neighbors. When I consider whether I ought to edit my sister’s Master’s Thesis this evening, the answer comes from reflection on what I owe Cate as my sister. This reflection does not require institutional mediation. In fact, in these cases we are suspect of political institutions giving content to these moral obligations. Not only would a political or legal institution be unable to do so (or only able to do so poorly), we think it ought not. It is consistent with my position to hold that special relationships of the kind listed above do not require institutional mediation for determinate moral obligations. In interpersonal relationships we build practices, traditions, habits, rules, and norms that give determinate content to our obligations (and have private mechanisms through which we hold one another accountable to them). Or, we can understand our special relationships as characterized by a commitment to a shared process of building a relationship where “determinate content to our obligations” is an unhealthy or otherwise unwelcome way of

138 Although, until we were adults similar cases definitely required parental mediation.
understanding the relationship.\textsuperscript{139} History, proximity, special ties or a joint commitment to creating a relationship are not characteristic of the basic moral relationship. In fact, ‘co-membership in the moral community’ exists between people who have never and will never meet. So, the resources we drawn on in these special relationships for figuring out what we ought to do are not present in the case at hand.

A more complete answer to the worry about my seemingly strong formulation of the scope of the indeterminacy problem can be given by returning to the characterization of minimal cosmopolitanism I developed in Chapter Four. Recall, minimal cosmopolitanism is formal rather than substantive. It holds that individual persons stand in a co-membership in the moral community relationship with other individuals, characterized by taking one another as participants (rather than objects), who value being justifiable to one another (and not just with respect to particular actions, but to rules or norms that govern them). Moreover, individuals participate in practices and institutions that reflect this value. Understood this way, our moral landscape initially prescribes only that we manifest in our actions and practices these formal features of the relationship (that we view one another as participants rather than objects, and act in a way that is justifiable to others, or have the rules and institutions be those justifiable to others). This requirement constrains the domain of right action, but remains in need of content.

To illustrate what I mean by ‘remains in need of content,’ we can ask the question: how do I recognize in my actions and practices others as a participants rather than objects? In part, the answer to this question depends on the actual shared practices taken to indicate such standing. For example, recognition of participant standing in the United States seems to include the punishment of violent offenders – punishment is the practice through which we as

\textsuperscript{139} I apologize to those I love and care about for failing to recognize this fact. I will continue to work on it.
a community indicate that a perpetrator is being held accountable to a shared rule. In contrast, during the Truth and Reconciliation Commission hearings in South Africa, punishment was not part of the practice of recognizing one another as participants and holding accountable to shared norms.\textsuperscript{140} In this way, not even the most basic prescription of minimal cosmopolitanism (treat others as participants) gives us particular rules, obligations or norms. This is not to say that certain actions won’t violate this basic prescription of minimal cosmopolitanism. Some actions will violate this requirement (in fact, crimes against humanity are a paradigm case in which it is clear that the victims are not being treated as participants), and that they do so provides reasons for judging those actions morally wrong.

Given the need for clear, coherent and consistently articulated public rules, we require an institution that mediates our co-membership in the moral community. Institutional mediation requires at least two things: determination and enforcement. By determination I mean the process of making something a public rule with specified content (articulating explicit, coherent, consistent prohibitions and permissions with respect to public actions). This process of making determinate the content of obligations need not assume that there is no private overlapping consensus on the wrongness of some action. Consider again crimes against humanity. These atrocities are horrific evils, the wrongness of which we think all reasonable people ought to acknowledge. The process of making determinate a prohibition on crimes against humanity is not the process of making it the case that crimes against humanity are wrong, but the process of articulating the exact prohibition as a public rule, consistent with a body of public rules. Reflecting on this, we notice two different things that

\textsuperscript{140} Archbishop Desmond Tutu identifies a South African cultural value ‘ubuntu’ as creating a context in which the Truth and Reconciliation Commissions could play a ‘holding accountable’ role for the community that such commissions may struggle to fulfill in Western cultures. In, \textit{No Future Without Forgiveness}, (New York: Image, 1999).
the process of determination could do with respect to any particular rule: it could make it the

the case that some action is wrong (perhaps, as in the example of traffic laws, where we need

coordination, but no moral difference is made by picking the left or the right side of the road

for us all to drive on); or it could make as a matter of public rule that some action is wrong

(as in the case of murder or crimes against humanity).

The ability to enforce the rules is also an important feature of institutional mediation.

It is only through the efficacy of the rules that they are given any real content. In the first

place, it would not solve the indeterminacy problem to have a list of rules that are not

enforced. This list would at best be another voice among others. The ability to enforce the

laws is necessary for the laws fulfilling the role of public rules. Without the guarantee of

general compliance with the laws that the power to enforce them in part ensures, individuals

cannot rely on the laws in the their own conduct. Enforcement is not only important for

making the content of the rules themselves determinate, but also settles the proper response

to violations of the rules. Through mediating the relationships between individuals, the

institution takes on the role of judging (or creating procedures for judging) whether some

action counts as a violation of the rule and dictates the proper response to such violations.

Take the US domestic criminal law as an example. Not only does the federal government

mediate the relationships between individuals by making law which gives determine content

(explicit permissions and prohibitions) to the obligations the members of the United States

have with respect to one another (as co-members of the political community), it settles who

properly responds to violations of these rules (itself or the states), and articulates rules for

‘holding to account.’ The state articulates rules for what count as fair criminal trials (i.e. -
due process) as well as for proper punishment (i.e. – the prohibition on cruel and unusual punishment, or minimum sentencing laws).

Although institutional mediation is required for determinacy, the rule or law made determinate is not necessarily the ground for or reason that the action prohibited by the rule is wrong.\(^{141}\) The moral wrongness of a particular action that is made a crime by the institution (say, murder) is a different matter than whether that action is a crime. I can (rightly) have reasons for the judgment that crimes against humanity are morally wrong, and it can fail to be the case (as it was for thousands of years) that any law (domestic or international) makes the prohibition on crimes against humanity a public rule. In this way, the moral wrongness of some action is neither necessary nor sufficient for something being a public rule.

Moral wrongness, however, can serve as a ground for reasons to create as a law a prohibition on some action, or as a standard for evaluating or criticizing particular rules. Given that institutional mediation is required by the basic moral relationship, we can use the moral prescriptions and character of the basic moral relationship to critique or criticize the institution. Consider, as an illustration of this point, political protests of capital punishment. The US federal government prohibits cruel and unusual punishment in the Eighth Amendment to the Constitution, and also determines whether and which sentencing laws fall to the individual states to make determinate. The particular states make this prohibition determinate by stipulating whether or not those found guilty of certain crimes (through courts of law, that themselves have certain rules and regulations for fair treatment of suspected perpetrators, etc) can be sentenced to capital punishment. Some citizens object to capital punishment on the grounds that it fails to treat the perpetrator as a person (perhaps,  

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\(^{141}\) The difference between rules that make it the case that something is wrong and rules that make it a matter of public rule that something is wrong is important here.
participant) or that it is not justifiable. These protesting citizens appeal to the features of the basic moral relationship to criticize (and hopefully change) the institution charged with mediating these relationships.

Just as the moral character of the co-membership in the moral community relationship can be used as an external standard for criticizing the institution charged with mediating the relationship, it is a ground for a moral reason to pursue such an institution. For co-members of the moral community to stand in the proper relationship to one another (including recognizing one another as participants, acting in ways that are justifiable to one another and participating in social practices that manifest recognition of the participant status and the value of justification) we require a public, political institution that mediates these relationships. In this way, co-membership in the moral community can be said to give us, as members of the moral community, reason to create, participate in, or promote such institutions.¹⁴²

We need, and have reason to pursue or promote, a public structure that mediates the basic moral relationship between individuals, making determinate the content of our obligations with respect to one another. I will refer to these public structures as states.¹⁴³ To get a full picture of how states are a solution to this practical problem, we need to look more closely at what it means for the state to mediate the relationships of the members of it. The

¹⁴² Before moving on, let me pause a moment and note that the way I have presented the picture thus far is potentially misleading. The state of nature tone of my presentation of the problem may suggest that I have a robust picture of what individuals are like without a state, or worse yet, a historical conjecture about how the existence of moral demands on individuals lead to the creation of states. I do not mean to suggest either of these things. I have presented the role of states in this way to draw attention to how states mediate morally salient relationships. This is consistent with the relationships only existing after some kind of public structure came into place. All we need to move forward in answering the jurisdiction question is a picture of individuals standing in a web of morally salient relationships with others, that are mediated by the state (regardless of which came first).

¹⁴³ Notice that this local public structure need not be a state (in the traditional sense conjured up by the term “the Nation-State”). I am going to work with the term state because we have states, and it captures the intuitive idea of a public structure that mediates and shapes relationships of the members of it.
mediation of a relationship can occur in many ways. At its core, mediation involves being a third party agent that can structure and allow for the host of relationships we stand in with one another. It creates a space for agreement and sets the rules by which people interact with one another. This is not a passive role, but is quite active. In this role, the mediator is an agent, acting on behalf of the community that charges it with doing so. It must create and constitute the foundations of the community and the institutions through which we can interact (or not) with one another.

Let’s look at an example of how the state mediates relationships between individuals. Take a straightforward kind of relationship: strangers in a local community – say, the small town where I went to high school, Holt, Michigan. When I was a kid I lived up the street from Valhalla Park. The local parents would play softball there on Saturday nights during the Summer. In order to have a summer softball league, the people of Holt needed to have something or someone like a public recreation department that coordinated the baseball fields, and who was sanctioned to remove people from the field who did not follow the community rules for using it.

Notice that this kind of enforcement is not possible in a one-to-one manner. You, as a softball team member, can threaten the other people using the field, but this is the behavior of a thug. It does not establish that you have a claim to the field – that you are using it by rights, or that they are in the wrong to stay. To do this, one needs a central body that has articulated, coherent and enforceable rules charged with the task of coordinating the use of the park. Thus, something like a public recreation department (in concert with a kind of police power) becomes a mechanism for mediating relationships between individuals (whether they know each other or not) in a community.
The need for determinate, articulated, coherent (within the context of a system of laws) and enforceable rules about what one may do will permeate very significant and seemingly insignificant aspects of our daily lives. We need answers to questions like: Can I build a restaurant here? Can my children attend this school? Can I take this shirt? Can I fire this person because I found out he has different religious beliefs than I do? Can I defend my property with lethal force? The only way to give these answers is through a public institutional structure.

Having given an argument for the need for a state level institution, I want to take stock of how far we have come in solving the indeterminacy problem. Recall that we began by acknowledging that every human being is an object of moral concern, and this, combined with the argument from indeterminacy, led to the need for a state. But, notice, the state considered on its own is not a complete solution to the problem. Moreover, the existence of states causes a second indeterminacy problem. Let’s look at these in turn.

It is fairly straightforward to see how a state is not a complete answer to the indeterminacy problem. States mediate the relationships of individuals living within a certain discrete territory. But individuals in a particular discrete territory (that is not fully global) do not exhaust the members of the moral community, and thus does not cover all of the relationships for which we will need mediating institutions.

In addition to not providing a complete solution to the indeterminacy problem, the problem itself reappears in a new way with the introduction of states. Once states are on the scene not only do we have each individual person in the moral community, but now, these people have constituted state-level mediating institutions that are in some way agents acting on behalf of these individuals, that themselves must interact with one another. So, we have
agents acting on behalf of communities of individuals that stand in relationships with other agents doing the same thing.

These different and overlapping relationships, and the ways in which they create indeterminacy problems, are better brought out in a specific case than in the abstract. So, let’s consider the example of Michigan, Wisconsin, Illinois and Indiana (the four states that border Lake Michigan) imagining that there is no such thing as the United State of America, and the question of their respective claims to use the lake for drinking water. So, how do we describe the case? There are two different morally salient relationships at issue: state-to-state, and individual-to-individual.

Let’s consider state-to-state first. The states of Michigan, Wisconsin, Indiana and Illinois are institutions that mediate relationships within their territorial borders. Part of this (let’s say) involves distributing clean drinking water. The states have laws, rules, and regulations with respect to drinking water that apply within their borders. However, when they must engage with one another over access to a common resource, Lake Michigan, they are in the same position that A and B were with respect to one another. There is no coherent, univocal, articulated, enforced set of rules that give content to their obligations with respect to one another and the use of the water.

Now, let’s return to the second kind of relationship, the individual-to-individual. This is the relationship with which we began. In the context of the use of Lake Michigan, we can see why the existence of a state is insufficient for solving the indeterminacy problem between individuals. Even as members of states, we do not get determinate content for all of our obligations, because there are people who are not members of our states who continue to be objects of moral concern. So, the same individual level indeterminacy problem persists into
our drinking water case. As a Michigander I have a morally salient relationship with each of the Wisconsinites that still needs to be made determinate.

With the reappearance of the indeterminacy problem we can mobilize the same argument as above to the conclusion that we need a public structure, charged with the task of mediating certain relationships. The solution is a global mediating institution that articulates a coherent, univocal, determinate body of law. Moreover, given the twofold indeterminacy problem, this body of law will have two parts: that which governs the relationship between individuals understood as members of the global moral community (rather than more specific communities) and that which governs the relationships between states. I will refer to these as cosmopolitan law and international law, respectively. ¹⁴⁴

The full nature of cosmopolitan law can be obscured by merely saying that it is part of a solution to the problems caused by the need to mediate individual-to-individual morally salient relationships. As I presented it in the example above, it could appear that I am saying that cosmopolitan law makes determinate the obligations between individuals understood as bare individuals. However, this is not the only possibility, which can be seen when we think about what individuals are. Individuals are embedded within many different communities, and have constituted states as mediating institutions that can act as agents on their behalf. So, cosmopolitan law can also include rules about how states (and other political institutions) interact with non-member individuals, as in the case of political asylum for refugees. Moreover, the other individuals to whom we have morally salient relationships outside the borders of our own state are also members of cultural and political communities. So,

¹⁴⁴ This distinction can be found in Immanuel Kant, The Metaphysics of Morals, trans. Mary J. Gregor, (New York: Cambridge University Press, 2003).
cosmopolitan law can include the relationship between our state as our agent, and groups of other non-member people, as in the case of foreign famine aid.

Thus far my development of the ACA does not address whether crimes against humanity are under the jurisdiction of the global mediating institution. To answer this question we first need to step back and be clear about what it would take to show that any particular kind of crime would fall under the jurisdiction of the global mediating institution. Are we asking whether it necessarily does? Or, whether it could? Rather than explore both of these options here I will focus on showing that it could be the kind of thing for which someone could be held to account through a global mediating institution.

My contention is that it could be, as it could be a rule of cosmopolitan law. To see why, recall that cosmopolitan law makes determinate the content of our obligations to members of other states. Part of what our state does for us is act as a mediator for our relationship to people who are not members of our own state. So, what we need to show is that the global mediating institution could make an obligation to people who are not members of our own state determinate in a way that includes this prohibition on crime against humanity. Answering for sure whether this prohibition really is part of cosmopolitan law is in part an empirical question that we do not have the space or resources to answer here. In particular it will depend on how this prohibition and its particular articulation fit into an internally coherent system of rules.

The work of systematizing and making coherent the various elements of public international law is something best left to international lawyers and legal theorists. However, we as philosophers have a bit more to say than merely that it is possible that this prohibition is part of a coherent system of cosmopolitan law. We can say that it is a plausible part of
such a system. Insofar as the rules are about making determinate the obligations holding between people as members of the moral community, it is plausible to think that part of what we owe other people as objects of moral concern is access to mechanisms of accountability for the kinds of widespread and systematic atrocities that we call crimes against humanity.

I want to directly address a worry one might have about the need for an institution to make determinate a prohibition on crimes against humanity. The examples I gave above to explain the central moves in my account are situations in which reasonable, right-minded people can easily disagree. I argued that because private judgment is insufficient for settling these questions we need a public institution that can make the content of these obligations determinate. One might object that crimes against humanity, unlike property disputes, are so horrific that all reasonable people know that they are violations of what we owe to one another. This raises the question, how does the argument from indeterminacy shed light on the standing of an institution that redresses these atrocities?

Although crimes against humanity are so horrific it is reasonable to expect that all people should agree that they are violations of what we owe to others, some atrocities are not actually viewed as such. An example of this is the only recent classification of rape as a weapon of war. It was only in 1996 that rape was treated as such. Prior to the indictment of Bosnian Serbs for sexual assault through the International Criminal Tribunal for Yugoslavia rape was not recognized as a distinct war crime.

Even assuming that there are no disputes about the moral evil of crimes against humanity, institutional mediation is still required to establish the prohibition on them as a public rule, rather than a private belief. Its status as a public rule makes the prohibition something to which an institution speaking in the name of the community, as a mediating
agent charged with the task, can hold people to account. The publicity of the rule makes the redress of its violation something more than and different than being bullied by a thug. A vigilante state that takes it upon itself to hold officials of another state accountable may be a well-meaning moral avenger, but in acting on its private judgment it acts as a thug none-the-less. Moreover, it settles that the institution in question is the proper agent, through settling the proper response.

With that, we have the elements of the ACA on the table and argued for. It has been a long and somewhat winding road, so before turning to evaluating whether the ACA answers the Nuremberg Problem and meets the desiderata on an acceptable account, it will help to bring the various threads of back together into one big picture.

The principles of international justice, including the status of state sovereignty (with its attendant rights and claims), are given content and made determinate by a global mediating institution. The ACA does not give substantive content to these principles (as the approach holds that it is part of the mediating institution’s role to do so), but it does require that the institution reflect the participant status of those subject to it, and the value of justification. In this way, the ACA recommends a global mediating institution as a public institution that reflects and manifests the co-membership in the moral community relationship identified as minimal cosmopolitanism. The existence of an institution of this kind is justified according to its playing this (required) role. We as co-members of the moral community have reason to promote, pursue, and participate in such an institution because, through it, we stand in the proper co-membership relationship to others in the moral community. This relationship requires an institution that makes the obligations we have to one another determinate as public rules to which individuals can be held accountable.
Such an institution has the standing to prosecute perpetrators of crimes against humanity insofar as it makes determinate a prohibition on these crimes, and makes determinate that jurisdiction over these cases is a matter of international law (rather than exclusively domestic law). As above, whether or not the institution actually does so is not something the approach can stipulate. However, from the point of view of the ACA a legal prohibition (at the international level) on crimes against humanity is a plausible part of the cosmopolitan law, because a prohibition of this kind at the international level would create a mechanism of accountability for perpetrators of actions and creators/enforcers of political policies that radically fail to treat persons as participants rather than objects or to be justifiable to those subject to them. Moreover, as crimes against humanity are often carried out by those in power within a state against civilians of the state, a prohibition on them at the international level would provide a mechanism of accountability, the existence of which is usually systematically denied to the victims of such crimes at the domestic level. In the absence of a global mediating institution, we, as members of the moral community, have reason to create, pursue or promote the creation of such an institution, and to advocate for it making determinate a prohibition on crimes against humanity.

**Answering the Nuremberg Problem**

With the ACA now fully spelled out we can evaluate it as a response to the Nuremberg Problem. Recall, the Nuremberg Problem is an argument against the standing of external bodies to prosecute perpetrators of crimes against humanity. Responses to the problem must either object to one of the premises, or show how the conclusion, otherwise, does not follow. The argument is:
(1) A sovereign state has the right against external bodies to non-interference with respect to the governing prerogatives of that state. (Premise)

(2) A political or legal response to self-regarding events is a governing prerogative of a sovereign state. (Premise) By definition, a self-regarding event is an event that occurs wholly within the territorial boundaries of a single sovereign state, is carried out only by members of that state, and is carried out only against members of that state.

(3) So: A sovereign state has the right against external bodies to non-interference with respect to a legal response to self-regarding events. (1, 2)

(4) Crimes against humanity (i.e., systematic and widespread attacks on civilians by the civilians’ sovereign state) can occur wholly within the territorial boundaries of a sovereign state, are carried out only by members of that state, and are carried out only against members of that state. (Premise)

(5) So: Crimes against humanity can be self-regarding events.

(6) So: sovereign states can have a right to non-interference against external bodies with respect to the legal response to crimes against humanity in some cases (viz., those cases where the crime against humanity is a self-regarding event).

The ACA gives a straightforward answer to the Nuremberg Problem: it denies (2). That a crime against humanity took place within a state does not imply that the political or legal response to the crime (some kind of accountability holding) is within the exclusive governing prerogatives of the state in which it occurred. The scope of the political authority of a sovereign state is, in some part, determined by the international law as made determinate by the global mediating institution.

Returning now to our four conditions on an adequate response to the Nuremberg Problem. Recall the first condition is accessibility. The accessibility criterion requires that the principles of the account be compatible or consistent with the values or principles underpinning the law as it is, such that the recommendations can be seen as revisions (or extensions) of that law. That I have met the accessibility requirement is somewhat difficult to
establish in the context of this argument as it concerns a close legal analysis of public international law. I do not have the resources here to fully establish accessibility, but will instead establish that the ACA is consistent with some key features of the public international law. To that end, I will discuss two features of my account and their compatibility with some important features of public international law: sovereignty as an externally determined status, and minimal cosmopolitanism.

Taking up whether sovereignty as an externally determined status is compatible with public international law, a careful look at the discussion of the reserved domain of state sovereignty in public international law is important. “Reserved domain” is a technical term that refers to what falls within the exclusive jurisdiction of domestic legal systems, that is, the international legal principles of reserved domain establish what falls within the governing prerogatives of states (as opposed to international or otherwise transnational bodies). Ian Brownlie presents and describes reserved domain in this way:

Matters within the competence of states under general international law are said to be within the reserved domain, the domestic jurisdiction, of states. This is a tautology, of course, and as a matter of general principle the problem of domestic jurisdiction is not very fruitful...The general position is that the ‘reserved domain’ is the domain of state activities where the jurisdiction of the state is not bound by international law: the extent of this domain depends on international law and varies according to its development...As a separate notion in general international law, the reserved domain is mysterious only because many have failed to see that it really stands for a tautology.\(^{145}\)

Particularly interesting for our project is his claim that those engaged in the debate about reserved domain often fail to recognize the description of what falls within domestic jurisdiction as a tautology. By this he means that from the point of view of international law, the principles of reserved domain cannot be used to show that some action is not within the

jurisdiction of an international court because, by definition, the content of international law determines what does and does not fall within the international jurisdiction.

Understood this way, the legal articulation of ‘reserved domain’ conforms with my account of sovereignty as an externally conferred status. My position holds that the rights of sovereignty are given through or by international law, including the domain of a state’s exclusive political authority. To the extent that this aspect of public international law reflects my position that it is the content of international law that determines the rights of states (what it means to be sovereign, and that some entity is sovereign), this aspect of the law supports my view as accessible.

Furthermore, as Brownlie notes, this feature of public international law is not merely as a matter of principle (what the law says), but what international bodies do (a matter of practice).

In practice United Nations organs…have taken action on a wide range of topics dealing with the relations of governments to their own people. Resolutions on breaches of human rights, the right of self-determination and colonialism and non-self-governing territories have been adopted regularly…Certain issues, principally those concerning the right of self-determination and the principle of non-discrimination in racial matters, are regarded as of international concern by the General Assembly, apart from express reference to any threat to international peace and security.\(^{146}\)

The UN, and members of it, claim to have a legitimate interest in the self-regarding affairs of states. This claim is manifested in the UN’s regular adoption of principles concerning the states’ treatment of their own citizens. This practice element is especially important for our purposes, as state practice is taken as a source of international law (that is, to be appealed to in determining what the law is), and thus, again, supports the claim that my view is accessible.

\(^{146}\) Brownlie, 293.
Turning now to the second element of my position that I will address with respect to meeting the accessibility criterion: minimal cosmopolitanism. As discussed in Chapter Four, the first clause of the Preamble to the United Nations’ Declaration of Human Rights:

..Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.147

In the public international law, we have this foundational document, along with a host of other decisions, treaties, and conventions that make reference to and entrench in the law a commitment to the universal dignity of persons.148 Including, but not limited to: the Preamble to the Charter of the United Nations, International Covenant on Civil and Political Rights, American Convention on Human Rights, International Covenant on Economic, Social and Cultural Rights, the Helsinki Accords, the UN Standard Minimum Rules for the Treatment of Prisoners, the UN Declaration on the Elimination of Discrimination Against Women, and the UN Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind.

In some ways, the meaning of dignity makes the commitment to the normative status and importance of individuals for international justice even more robust in the public international law than in the ACA. The law takes ‘human dignity’ to support substantive claims about human rights. In the ACA I give a formal account of the relationship between persons as human beings that makes sense of why we would engage in the political process of articulating these rights. The minimal cosmopolitanism of the ACA in not only compatible with the recognition of individuals as important normative entities for constructing the

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principles of international law justice, but explains why the UN (or a similar institution) would rightly engage in the process of articulating the content of human rights.

The second criterion on an acceptable account is that it clearly address and make room for the role of the international community, itself. Recall, the conditional sovereignty approach failed to do so, by providing only the negative claim that states in which crimes against humanity occur cannot object to external bodies crossing their borders, rather than a positive argument that the international community has an interest in the commission of crimes against humanity. The ACA meets this desideratum, as it identifies a global institution as having this standing to hold perpetrators of crimes against humanity accountable. Above, I argued that there is a unique role for a global mediating institution, and thus, have identified the international community as having the standing to hold to account perpetrators of crime against humanity. The commitment to moral cosmopolitanism assures that the ACA is fully global (as the moral relationships in need of mediation hold between all persons), as the indeterminacy problem arises whenever there are at least two political bodies that do not stand under a common institution.

The ‘international community’ in ACA is a term used not only for the collection of states (as is often assumed by more traditional state-centered accounts), but refers to the entire constellation of individuals, local institutions and the global mediating institution itself. In this way, ‘international community’ comes to mean all of us, together with the bodies we have charged with mediating the basic moral relationship along with more local relationships (as with compatriots, neighbors, those we share a continent with, etc). It is in this sense that the ACA is a deeply federal account, which makes room for not only
individuals, but sits comfortably with the existence of different political institutions at various levels.

The third criterion on an acceptable account is that it respect and demarcate different domains of jurisdiction – domestic and international. My federalist view involves clearly demarcating what role states play and over what they are sovereign. States mediate relationships of strangers in proximity, often with shared values or cultural ties. The international institution mediates the relationship of these states to one another and the relationship of members of the global moral community, as members of the global moral community. The value of domestic level political institutions is preserved in this picture, as they will play a vital role in constituting and shaping the lives of members of those communities. The ACA places a different value in the domestic political communities than other accounts we have seen, as it does not hold that domestic political communities are valuable for their own sake. However, this difference does not mean that the ACA fails to recognize the importance of local bodies – only that the range of options available to individuals with respect to the nature and constitution of such political institutions is in some part constrained by principles of international justice.

Finally, the fourth criterion is to recognize the importance of persons in the overall picture. The ACA has at its normative foundation not only individual persons, but a view on which all individuals are morally bound to one another. The global mediating institution has standing to prosecute crime against humanity because it makes determinate the content of the demands of justice that hold for all members of the global moral community. Thus, an international institution that prosecutes crimes against humanity fulfills obligations that we all have, as co-members of the moral community, with respect to the victims of the atrocities.
The reason we have, as individuals, to create, promote or otherwise pursue the existence of such an institution is that we, as individuals, require such an institution to mediate the moral obligations we have to one another. In this way, the ACA provides an account on which the standing of the global mediating institution is not only rooted in the nature and value of individuals, but the existence of such an institution is necessary to fulfill (by making determinate) the obligations we all have with respect to the victims (and perpetrators) of atrocities.

**CONCLUDING REMARKS AND FUTURE DIRECTIONS**

In this thesis I set out to answer the jurisdiction question: *Could an international tribunal have the standing to prosecute perpetrators of crime against humanity, and if so, in virtue of what does it have this standing?* To answer this question I developed the Alternative Cosmopolitan Account, which gives, as an answer to the first part of this question, a resounding “it depends.” The ACA holds that the standing of international institutions, including particular international tribunals, is grounded in or justified by the institution’s mediation of the basic moral relationship between individuals. It is in virtue of the need for such an institution and the cosmopolitan commitment to the moral importance of the co-membership in the moral community that such an institution has the standing to hold those who violate international law accountable.

The ACA is, in many ways, a formal (rather than substantive) account. It does not prescribe particular principles of international justice or particular content for public international law. Rather, it prescribes that there be such a process, and that the process recognize the status of individual persons as participants (rather than objects) as well as the value of justification. It is for this reason that the ACA also answers “it depends” to the
question of whether crimes against humanity are included in the content of public international law (and fall under international jurisdiction). I have given reasons for crimes against humanity falling within the domain of international law and jurisdiction namely, that it being an international law (and enforced by an international institution) provides a mechanism for holding perpetrators accountable that is often unavailable in domestic contexts, and in so doing, it respects the victims of such atrocities as people who have been wronged. However, it is an important feature of the view that such specific content as the prohibition on crimes against humanity is given by the actual institutions, themselves.

The ACA addresses the worry raised by Arendt from the Introduction. Arendt reports a worry raised by Israelis at the time of Eichmann’s prosecution by the State of Israel, that the Nuremberg Tribunal’s prosecutions of those responsible for the Holocaust, in taking crimes against humanity to be crimes against us all, ignored that the atrocities were carried out against the victims. The worry is that international prosecutions express that the crime is against humanity and merely carried out on the bodies of the victims, rather than against the victims themselves. The ACA does not construe crimes against humanity as crimes against the international community or against all of humanity, itself. Instead, it holds that the crimes are committed on and against the victims. An international institution’s role is to make it the case that the actions are, in fact, crimes (rather just radically morally wrong), and to provide a mechanism through which the perpetrators can be held accountable for what they did to the victims.

This commitment to the standing of an institution depending on its mediating relationships by articulating and enforcing laws raises an important question about the standing of current international institutions, as well as the legitimacy of actual prosecutions
of crimes against humanity which many think of as *ex post facto* prosecutions. From what I have argued in this thesis, we cannot answer the charge raised by Mohammad on the International Criminal Court’s behalf. The grounding I have provided for the standing of international institutions provides us with some resources to evaluate whether particular institutions can have standing. We can ask of an institution: does it articulate a coherent, consistent body of law? Were the norms to which the perpetrators are being held accountable determinate public rules? Does the institution respect individuals as participants? Do the practices of the institution manifest the value of justification by giving reasons that those subject to the institution can reasonably accept (or not reasonably reject)?

It is in only providing some (but not all of the necessary) resources for evaluating particular institutions that the ACA can only establish necessary conditions (rather than sufficient conditions) for legitimate international prosecutions of perpetrators of crimes against humanity. This is not to say that the ACA makes no progress on these further conditions. At the very least, it sets an agenda for the further questions that need to be explored. With the resources of the ACA on the table we can go on to ask what more would be required to demonstrate that an international institution is legitimate. Knowing that it is charged with the task of mediating relationships between individuals as co-members of the moral community, and between the political institutions charged by these individuals with mediating more local communities, we must go on to ask what is required for the institution to exercise its authority to do so. Must the institution be democratic in nature – such that those subject to it (explicitly, tacitly, or hypothetically) consent to it exercising this power? Can we force people and state level institutions to obey the laws of an international
institution? If the institution must be democratic, which bodies must consent – the individuals, or the agents charged with representing the individuals?

Finally, the ACA provides us with a starting point for evaluating questions about the legitimacy of institutions in transition. Throughout this thesis I have discussed institutions as fully formed entities. In the context of international justice this is an idealization. The public international law is dynamic; it is evolving and changing seemingly every day. The ACA prescribes that we create, promote or pursue an international institution that can fulfill the role of a mediating institution. This prescription can seem to have limited utility in the context of a developing institution. We know that we ought to pursue its existence, but how do we do so? What tools can we use in doing so? The ACA does not provide conclusive answers to these questions, but it does tell us where to look. The institutions in transition can be evaluated according to whether they advance the goal of developing an institution that plays the role stipulated by the ACA. Moreover, the account prescribes a moral foundation to appeal to in these judgments: the value of persons as participants (rather than objects) and the requirement that the institution make determinate the obligations of co-members of the moral community.

Although through developing the ACA I have completed the first step toward answering the jurisdiction question and developing a moral theory of international criminal law, there is important work yet to be done.
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