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Guyora Binder\*

AUTHORITY TO PROSCRIBE AND PUNISH  
INTERNATIONAL CRIMES†

*Although criminal jurisdiction is usually exercised by governments, offences can also be proscribed by international law, and punishment can be imposed by international tribunals. This article critically examines the legitimacy of such exercises of international criminal jurisdiction. It reasons that criminal law can plausibly be justified as a cooperative institution that achieves the public good of a rule of law, with its attendant benefits of social peace and equal dignity of persons. It then argues that such a beneficial rule of law requires a punishing authority with the executive capacity to protect those it claims to regulate. It would follow that criminal prohibitions may not be justifiable if they cannot be enforced systematically. Because the international legal system generally lacks the executive capacity required for a rule of law, the article suggests that international criminal punishment is justifiable as supportive of a rule of law only in rare circumstances. Finally, the article considers whether an alternative expressive rationale can, nevertheless, justify occasional prosecutions as useful in legitimizing international humanitarian norms. It questions whether the expressive benefits of such prosecutions can outweigh the expressive risks of promising protection the international legal system cannot deliver.*

**Keywords:** criminal law, international law, International Criminal Court, jurisdiction, punishment theory

I Introduction

Jurisdiction comprises the powers to legislate, to adjudicate, and to execute law. Criminal jurisdiction includes the legislative power to proscribe conduct and the adjudicative power to impose punishment for it.

Thus far, criminal jurisdiction has received more attention from international law scholars than from criminal law scholars. International lawyers see jurisdiction, generally, and criminal jurisdiction, in particular, as

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essential attributes of state sovereignty. Thus, the criminal jurisdiction of a sovereign state is presumptively legitimate and raises a problem of international law only when it conflicts with the sovereignty of another state.

By contrast with international law scholarship, criminal law scholarship questions the legitimacy of criminal jurisdiction itself. Criminal law theorists Antony Duff and George Fletcher have each argued that the justice of punishment depends not only on the accused's desert, but also on the authority of some institution to impose punishment for the offence charged.<sup>1</sup> Or, as Alejandro Chehtman puts it, '[T]he question about the justification for legal punishment is not only about whether it is *permissible* to punish an offender . . . , but rather, and crucially, about whether some particular body . . . has the right to do so.'<sup>2</sup> Criminal punishment is, after all, an exercise of coercive power. In a liberal society, such a use of force must be justified as legitimate.

Although criminal jurisdiction is usually exercised by national and sub-national governments, offences can also be proscribed and punished by international law. Thus, international law has long defined such offences as piracy, slave trading, and war crimes, and more recently has added crimes against humanity and genocide.<sup>3</sup> The power of states to collectively proscribe international crimes was asserted after World War II when the victorious allies established an *ad hoc* tribunal to try Nazi leaders not only for war crimes but also for the novel offences of crimes against humanity and aggression. It was reaffirmed by the creation of *ad hoc* international tribunals for the conflicts in Yugoslavia and Rwanda.

The Rome Statute creating the International Criminal Court also proscribes international crimes. This treaty confers jurisdiction on the International Criminal Court to punish war crimes, crimes against humanity, and genocide committed (1) on the territory or by a national of any signatory or (2) in a conflict the UN Security Council has asked the Court to investigate.<sup>4</sup> The criminal law applied by the Court is defined by the

1 Antony Duff, 'Authority and Responsibility in International Criminal Law' in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (New York: Oxford University Press, 2010) 589 at 591–2; George Fletcher, *The Grammar of Criminal Law: Foundations* (New York: Oxford University Press, 2007) at 152–5, 247–52.

2 Alejandro Chehtman, 'Citizenship v Territory: Explaining the Scope of the Criminal Law' (2010) 13 *New Criminal Law Review* 427 at 428.

3 Ronald C Slye & Beth Van Schaack, *International Criminal Law: Essentials* (New York: Aspen, 2008) at 6–45. A sceptic might argue that customary international law did not proscribe these offences, but only permitted the state to proscribe them extraterritorially.

4 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90, arts 5, 12, 13 (entered into force 1 July 2002) [Rome Statute]. The court is required to defer to national courts willing and able to prosecute such crimes occurring on their territory or by their nationals; *ibid.*, 17. Signatories may also invite the court to judge crimes

Rome Statute rather than by national codes.<sup>5</sup> Signatories consent to the Court's application of such law, and some states automatically incorporate treaties into their own law. Yet the collective definition of crimes by treaty is arguably an international exercise of legislative jurisdiction to proscribe. And certainly, that is true in so far as that law is applied to non-signatories in cases referred by the Security Council.

Most international lawyers also hold that customary international law permits states – and presumably the international tribunals they establish – ‘universal’ adjudicative jurisdiction to punish serious international crimes occurring anywhere.<sup>6</sup> Thus, one possible implication of characterizing an offence as an international crime is this expansion of adjudicative criminal jurisdiction. Indeed, in one of the few books in English on criminal jurisdiction, Chehtman analyses international criminal liability as a form of extraterritorial criminal jurisdiction.<sup>7</sup> In addition to supporting universal jurisdiction to punish international crimes, some international lawyers also hold that states and international organizations have a right of military intervention to prevent such crimes.<sup>8</sup> This right of humanitarian intervention can be thought of as a kind of universal executive jurisdiction to enforce international criminal law.

Because universal jurisdiction and humanitarian intervention are both primarily directed against misconduct by government officials, they challenge national sovereignty. Thus, Andrew Altman and Christopher Wellman argue that states permitting systematic human rights abuses should forfeit the protections of sovereignty.<sup>9</sup> Indeed, they reason that failure to

committed on their territory or by their nationals; *ibid*, art 14. Yet the court may also exercise jurisdiction over a signatory adversely by finding it unwilling or unable to prosecute, and it may exercise jurisdiction over a non-signatory in a situation referred by the Security Council.

5 *Ibid*, arts 6, 7, 8, 9.

6 David Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’ in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (New York: Oxford University Press, 2010) 569 at 569–70 [Luban, ‘Fairness’].

7 Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (New York: Oxford University Press, 2010) at 87–139 [Chehtman, *Philosophical*].

8 See Fernando Teson, ‘The Liberal Case for Humanitarian Intervention’ in JL Holzgrefe & Robert O Keohane, eds, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (New York: Cambridge University Press, 2003) 93 [Teson]. *Cf.* Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1 at 4 [Simma]; Antonio Cassese, ‘*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ (1999) 10 EJIL 23 at 25–6 [Cassese].

9 Andrew Altman & Christopher Heath Wellman, *A Liberal Theory of International Justice* (New York: Oxford University Press, 2011) at 69–95 [Altman & Wellman]. See also Anthony Sammons, ‘The “Under-Theorization” of Universal Jurisdiction: Implications

protect a population from ordinary criminal violence suffices to justify the exercise of extraterritorial criminal jurisdiction by other states.<sup>10</sup>

While this argument reduces the obstacle national sovereignty poses to international prosecution, it also raises the bar for justifying the exercise of criminal jurisdiction by any authority. If government must earn the power to punish by protecting rights effectively and uniformly, criminal jurisdiction would seem to require a reliable enforcement capacity the international legal system lacks. This article will explore this problem from three points of view.

First, it will develop a justification for the power to proscribe and punish that depends on its regular and effective exercise and its popular legitimacy. We will see that criminal law can plausibly be justified as a cooperative institution that achieves the public good of a rule of law, with its attendant benefits of social peace and security of status. Criminal law achieves authoritative resolution of disputes by mobilizing the community of those subject to its jurisdiction to accept its proscriptions and participate in its judgments of blame. It motivates this participation by promising to secure to each such person equal dignity as the bearer of inviolable rights. Conceived as a cooperative institution for producing a public good, criminal law is justifiable as beneficial in reducing violence, fair in repaying compliance with security and dignity, and legitimate in winning the assent of those it governs. Yet criminal law's efficacy, fairness, and legitimacy depend on its effectiveness in preventing much potential violence and punishing most actual violence. It follows that criminal prohibitions may not be justifiable if they cannot be enforced systematically.

Second, the article will assess Alejandro Chehtman's 'jurisdictional theory of international crimes'<sup>11</sup> in light of this proposition. Chehtman's defence of international criminal liability is particularly salient because he agrees with criminal law theorists that the 'scope of [the] . . . power to punish is determined by the reasons that justify . . . holding the power to punish.'<sup>12</sup> Moreover, he agrees that punishment is justified by its contribution to a rule of law that provides effective protection. Thus, Chehtman justifies criminal punishment as necessary to the public good of

for Legitimacy on Trials of War Criminals by National Courts' (2003) 21 Berkeley J Int'l L 111 at 114 [Sammons].

<sup>10</sup> Altman & Wellman, *ibid* at 76–82. Their argument is consistent with the recently proposed doctrine of 'responsibility to protect'; see *Implementing the Responsibility to Protect: Report of the Secretary-General*, UNGAOR, 63d Sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009) at para 11(a); Catherine Powell, 'Libya: A Multilateral Constitutional Moment?' (2012) 106 Am J Int'l L 298 [Powell].

<sup>11</sup> Chehtman, *Philosophical*, *supra* note 7 at 87.

<sup>12</sup> *Ibid* at 56.

criminal law's being 'in force.' This good secures the dignity of a population by vindicating their rights against violence. On this basis, Chehtman objects to most extraterritorial exercises of jurisdiction as practically incapable of achieving this benefit. Nevertheless, he defends extraterritorial jurisdiction to punish international crimes as the only means to punish leaders and officials pursuing inhumane policies. Yet we will find that it is very difficult to reconcile international criminal liability with his premises. It seems unlikely that these extremely rare prosecutions would achieve the good of international criminal law's being 'in force' or make any tangible contribution to the security or dignity of the world's population. His claim that the good of international criminal law's being 'in force' is achieved by any punishment, however infrequent and ineffectual, contradicts his approach to the extraterritorial jurisdiction of states. Applying his normative premises consistently, however, we will find international criminal punishment justified only in the rare circumstance that foreign forces have already intervened effectively in defence of human rights.

Third, the article will consider an alternative response to the critique that the international law of crimes is practically unenforceable. Perhaps the deficiencies of international criminal liability as a rule of law balance each other out: its expected ineffectuality arguably renders its expected illegitimacy acceptable and vice versa. David Luban argues that the conventional liberal challenge to criminal punishment is less applicable to international tribunals for this reason.<sup>13</sup> According to Luban, ordinary criminal punishment must be justified because the power to proscribe and punish can give rise to a comprehensive power to govern. Yet, since an international tribunal cannot parlay its very limited criminal jurisdiction into such a power, it needs less justification. Whatever influence the International Criminal Court exercises, Luban argues, will be expressive, as it dramatizes the wrongdoing of a few selected offenders in spectacular trials.<sup>14</sup> By such means, international criminal law, he argues, will 'build its legitimacy from the bottom,'<sup>15</sup> persuading the global public to support its norms. The difficulty with this expressive justification for exemplary trials is that criminal punishment does not only express a message about the wrongdoer. It also expresses a message about the punishing authority: that it enforces a legal order committed to preventing or punishing all similar offences and vindicating the dignity of all such victims. Thus, criminal punishment confers credit as well as blame.

<sup>13</sup> Luban, 'Fairness,' *supra* note 6 at 581–4.

<sup>14</sup> *Ibid* at 574–6.

<sup>15</sup> *Ibid* at 588.

If international legal institutions lack the capacity and commitment to suppress international offences, however, that credit is undeserved.

## II *The normative basis of criminal jurisdiction*

### A PUNISHMENT AS A POLITICAL INSTITUTION

Criminal punishment is a collaborative institutional practice of applying criminal laws. To justify punishment is, therefore, to explain the political legitimacy of an institution, not the moral permissibility of an act. As I have argued in previous work, familiar accounts of punishment as utilitarian and retributive are more persuasive and more compatible with one another when punishment is conceptualized as an institutional practice.

Retributivists commonly argue that an individual ethical duty to maximize utility could as easily justify framing and afflicting the innocent as punishing the guilty.<sup>16</sup> Yet this argument is misapplied against utilitarian theories of punishment like Bentham's which justify punishment as the outcome of a transparently utilitarian policy process. It invokes hypotheticals in which well-meaning officials make the public believe that the guilty are being punished in order to achieve deterrence.<sup>17</sup> Yet it would not maximize utility to empower officials to deceive the public in this way because public officials are governed by the same selfish motives as potential offenders and will serve the public welfare only in so far as they are properly incentivized and monitored.<sup>18</sup> A publicly announced policy of permitting officials to deceive the public would sow insecurity and conflict, while a secret policy would violate the preconditions for the pursuit of utility and would be precluded in a properly designed utilitarian state. Stripped to its essentials, the retributivist argument is this:

Premise 1: utilitarianism is the moral view that we should each serve only the value of utility.

Premise 2: honesty and legality are rival values, external to utility.

Conclusion: therefore utility demands that public officials lie and break the law.

<sup>16</sup> EF Carritt, *Ethical and Political Thinking* (Oxford: Clarendon Press, 1947) at 65. See also HJ McCloskey, 'An Examination of Restricted Utilitarianism' (1957) 66 *Philosophical Review* 466 at 468–9 for similar examples.

<sup>17</sup> Robert Goodin, *Utilitarianism as a Public Philosophy* (New York: Cambridge University Press, 1995) at 70; John Rawls, 'Two Concepts of Rules' in Gertrude Ezorsky, ed, *Philosophical Perspectives on Punishment* (Albany, NY: State University of New York Press, 1973) 82 at 87.

<sup>18</sup> See generally, Guyora Binder & Nicholas Smith, 'Framed: Utilitarianism and Punishment of the Innocent' (2000) 32 *Rutgers LJ* 115, explaining and supporting an institutionalist interpretation of Bentham and other utilitarian thinkers.

Yet premise 1 mischaracterizes utilitarianism. Utilitarianism addresses society as a whole rather than individual actors. It recommends that society organize itself politically so as to be able to achieve public utility by generating and implementing policy that can be seen to serve public welfare when tested in open debate before a democratic public. This, in turn, requires that democratic citizens be able to monitor and supervise officials. These process requirements for the pursuit of public utility impose obligations on officials of honesty and fidelity to law. Thus, premise 2 is also false. As necessary procedural conditions for the identification of public utility, honesty and legality are constitutive of that value. In short, critics of the utilitarian theory of punishment generate a pseudo-problem by mischaracterizing it as a theory about how punishment is morally justified rather than a theory about how to make it politically legitimate.

We can generate a parallel pseudo-problem for retributivism by identifying it with a character like Detective Hank Quinlan in *Touch of Evil*, who achieves desert by planting evidence to frame the guilty, or a *Magnum Force* that conducts extrajudicial executions.<sup>19</sup> Does not retributivism compel individuals to inflict deserved punishment irrespective of whether it is authorized by law? The parallel implied argument is

Premise 1: retributivism imposes a moral obligation to render desert without compromise.

Premise 2: honesty and legality are rival values, external to retribution.

Conclusion: therefore, public officials are sometimes bound to deceive the public or break the law to achieve desert.

This argument is also flawed because it ignores the political structure of retributive punishment as a cooperative enterprise that imposes role-bound obligations. In retributivism, the duty is not to harm or wreak revenge upon moral wrongdoers but to punish legal wrongdoers according to law. The primary point of retributive punishment is to impose authoritative denunciation of wrongdoing and recognition of the equal dignity of victims and offenders as subjects of legal rights. Such authoritative denunciation and recognition are necessarily collaborative enterprises because authority is a social construct. Individuals fulfil their duties of contributing to retributive punishment, not by inflicting suffering, but by collectively supporting the authority of law to impose blame and suffering. In Kant's retributive theory, retributive justice cannot be achieved by an individual

<sup>19</sup> *Touch of Evil*, 1958, DVD (Universal City, CA: Universal International, 2000); *Magnum Force*, 1973, DVD (Burbank, CA: Warner Bros Pictures, 2001). A more sympathetic example is Detective McNulty, who facilitates perjured testimony to frame a brutal murderer for a different killing; 'All Prologue,' DVD: *The Wire*, Season 2, episode 6 (New York, NY: HBO, 2008).



because it requires an effectual legal system that confers and protects rights. Moreover, justice requires that law be collectively self-imposed by those subject to it through participation in a democratic process of collective law making. Thus, the value of retributive justice requires that punishment be regular, effectual, public, and democratically legitimate.<sup>20</sup>

Thus, the utilitarian and retributive theories of punishment are not best considered moral defences of punishment. They are political theories, defining conditions for the legitimacy of coercive enforcement. Punishment cannot be justified by the desert of a particular perpetrator or the utility of punishing him. Instead, we must show why it is fair or efficacious to task a particular institution with imposing punishment. In short, justifying punishment is always a problem of justifying the jurisdiction of a particular punishing authority. If so, the propriety of punishing a tyrant does not just depend on whether he deserves it or whether it is expedient. It also depends on whether there is an institution competent to punish him.

#### B CRIMINAL JURISDICTION AND THE RULE OF LAW

Modern legal theorists generally view law as a system of social control characterized by formal authority and involving acceptance of directives merely because of the process by which they are issued. Although legal directives are often enforced by coercive sanctions, some influential legal theorists deny that this is a necessary feature of legal systems.<sup>21</sup>

A 'rule of law' is a different matter: it arguably must have teeth. A 'rule of law' connotes that law is 'regular' in its requirements and that it 'rules' – that law is applied and enforced.<sup>22</sup> In his influential list of the procedural requirements of legality in 'The Morality of Law,' Lon Fuller includes 'generality,' 'clarity,' 'prospectivity,' and 'constancy,' which roughly comprise a requirement of regularity. Fuller also includes 'congruence,' which means that law must actually be applied.<sup>23</sup> The requirement that law rule is often contrasted with the rule of man. Albert Dicey's influential formulation of the rule of law includes the idea of equality before the law,<sup>24</sup> which implies universal subjection to and

<sup>20</sup> Guyora Binder, 'Punishment Theory: Moral or Political?' (2002) 5 *Buff Crim L Rev* 321 at 350–66.

<sup>21</sup> HLA Hart, *The Concept of Law* (New York: Oxford University Press, 1994) at 27–40; Joseph Raz, *Practical Reason and Norms* (New York: Oxford University Press, 1999) at 157.

<sup>22</sup> Jeremy Waldron, 'The Concept and Rule of Law' (2008) 43 *Ga L Rev* 1 at 14–28.

<sup>23</sup> Lon L Fuller, *The Morality of Law*, revised ed (New Haven, CT: Yale University Press, 1969) at 33–94; David Luban, 'The Rule of Law and Human Dignity: Re-examining Fuller's Canons' (2010) 2 *Hague Journal on the Rule of Law* 29 at 30–1.

<sup>24</sup> Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution*, 5th ed (New York: Macmillan, 1897) at 185–7 (rule of law as equality before law). See also, David Dyzenhaus, 'Judicial Independence, Transitional Justice, and the Rule of Law' (2003)

protection by law and precludes the direct rule of one person over another. To prevent such personal subordination, law must exhaustively regulate violence. This is the chief purpose of criminal law.

Criminal law is distinctive in that a *public authority* – paradigmatically the state – *forbids* conduct and imposes *punishment* for committing it. Criminal law is integral to a rule of law that suppresses vengeance and gives the state a ‘monopoly on legitimate force.’<sup>25</sup> Whatever the other purposes of criminal law, it asserts public control over the use of violence. Drawing on both utilitarian and retributivist sources, the remainder of this section develops the concept of criminal law as a system of public proscription and punishment that regulates violence.

### 1 *Prohibition*

Criminal law is distinctive in proscribing conduct. Law sometimes attaches burdensome legal consequences to conduct without evaluating it. Thus, expectation damages in contract merely internalize the promisee’s costs in the promisor’s decision whether to perform while permitting – even encouraging – efficient breach. By contrast, criminal law does not merely attach a consequence to offences. In punishing offenders, it denounces them personally and forces them to suffer deprivation or injury, with no direct benefit to anyone else. Moreover, criminal law authorizes the use of coercive force, sometimes deadly force, to prevent offences. Thus, criminal law disapproves offences *ex post* and forbids them *ex ante*. Criminal guilt therefore implies not only wrongdoing but also defiance of the law.<sup>26</sup> Criminal punishment responds by reasserting the authority of law.<sup>27</sup> It presupposes a prior exercise by someone of legislative jurisdiction to proscribe, conferring on someone executive jurisdiction to prevent.

In the terminology developed by Guido Calabresi and Douglas Melamed, expectation damages and compensatory damages are liability rules, whereas a rule that forbids injury is either a property rule or an inalienability rule.<sup>28</sup> A liability rule imposes a duty to compensate for

10 Otago L Rev 345 at 358–9, stating that the requirement of civic equality is implied by the practice of reason giving, which is in turn implicit in Fuller’s requirement that law be intelligible.

25 Max Weber, ‘Politics as a Vocation’ in Hans Heinrich Gerth & Charles Wright Mills, eds, *From Max Weber: Essays in Sociology*, translated by Hans Heinrich Gerth & Charles Wright Mills (New York: Oxford University Press, 1958) at 77.

26 Jean Hampton, *The Intrinsic Worth of Persons: Contractarianism in Moral and Political Philosophy*, ed by Daniel Farnham (New York: Cambridge University Press, 2006) at 79–94.

27 *Ibid* at 108–50.

28 Guido Calabresi & A Douglas Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (1972) 85 Harv L Rev 1089 at 1107.

injury but does not forbid injury. Criminal protections of consent such as prohibitions against theft and sexual assault may be seen as property rules. Criminal injuries which the victim may not authorize by consent such as child rape and homicide may be seen as violating inalienability rules.

Why should some conduct be forbidden rather than just priced or discouraged?

Calabresi and Melamed argue that transfers are likely to be more economically 'efficient' if they are consensual. They reason that intentional injuries should be forbidden by a property rule because it should be possible to bargain with a known victim and find out how much compensation that victim will demand before consenting to a specific injury. By contrast, the endangerment of many should merely be discouraged by a liability rule because it would be too costly for the risk imposer to bargain with all potential victims in advance.<sup>29</sup>

Yet there are also dignitary costs to a liability rule when the victim is known and the injury is intentional. Ignoring the owner's will is an insult, implying the owner counts for less than the offender. To say that a known victim can be bargained with at low cost is to say that the offender and victim are already in a communicative relationship such that injury without prior communication is nevertheless expressive, conveying a message of disrespect. Intentional injury of a known victim is *personal* and is understood as such.

Not all criminal offences violate individual entitlements. Some violate duties to cooperate in the production of public goods. It is often said that coercion is required to motivate cooperation because government cannot easily bargain with individual defectors by, for example, withholding the benefits of public goods like national defence, clean air, or safe traffic conditions. Proscribing and punishing morally ambiguous regulatory offences associates them with violent crimes against persons. Criminal law thereby mobilizes our gratitude for the state's protection against violence and uses it to motivate compliance with other cooperative institutions. Thus, the legitimacy of criminal enforcement of civic duties like taxation rests, in large part, on the criminal law's success in protecting individuals from violence.

## 2 *Punishment*

Criminal law is distinctive not only in proscribing but also in imposing punishment. We can define punishment as affliction imposed by an institution because of blame for committing forbidden conduct. Punishment

<sup>29</sup> Ibid at 1108–9.

is a practice of coercion, afflicting the offender regardless of his or her wishes. Punishment is unusual as a legal remedy because it inflicts injury purposefully, not just as a predictable by-product of some other aim.

Because punishment afflicts on the basis of blame, it is not only a coercive but also an expressive practice. Punishment denounces an offender as responsible for a forbidden act. By thus denouncing the offender, punishment implicitly justifies the coercion it imposes as deserved for wrongdoing.

In expressing blame for a previously forbidden act, punishment also implies a certain relationship between the offender and a punishing institution. The offender is to blame not just for a wrong but also for disobedience. Thus, along with blame, punishment expresses a claim to *authority*, the authority to direct behaviour. Even punishment of children within a family has this structure. In punishing, the parent claims legitimate authority as a decision maker for the family and implies that the child has violated a justly imposed duty. Thus, to punish is to act in role, as an agent of an institution that also imposes obligations on the person punished. The wrong it denounces is not just an injury to an individual but is also an injury to an institutional interest. In responding to the violation of a norm, punishment treats the person punished as also an agent with institutional responsibilities. Thus, it implies a shared enterprise, uniting those subject to the authority of the punishing power in a moral community.

The idea of punishment as an institutionally authorized enforcement of a norm helps us to distinguish punishment from revenge. Revenge lacks the claim to represent an institution toward which both punisher and punished owe a duty of obedience. Revenge can be taken against an avowed enemy toward whom one recognizes no duties. It need not be motivated by a claim of injustice. Yet revenge can also serve as a customary response to perceived wrongs. In a fragmented, stateless society, revenge may be the only means of redressing a grievance between members of different social groups.

Yet revenge is provocative because, in many cultures, unreciprocated force is the prerogative of superiors disciplining subordinates. Thus, violence is an implicit claim to governing authority that, until required, subordinates the victim. In cultures governed by notions of martial honour, accepting violence without resistance implies a cowardly acceptance of subordinate status and invites further violence.<sup>30</sup> Thus, victims face

<sup>30</sup> For classic accounts of honour-based feuding, see Bertram Wyatt-Brown, *Southern Honor: Ethics and Behavior in the Old South*, (New York: Oxford University Press, 1983); William Ian Miller, *Bloodtaking and Peacemaking: Feud, Law and Society in Medieval Iceland* (Chicago, IL: University of Chicago Press, 1990).

intense pressure to avenge injuries. Because revenge lacks the backing of a higher authority, however, it is often experienced as a fresh wrong, demeaning the original perpetrator, who is then honour-bound to continue the dispute by avenging this insult. This destructive dialectic of responsive vengeance can continue indefinitely.

Punishment is designed to end this dialectic by providing an authoritative determination of who is in the wrong. In so far as they accept the punishment as authoritative, members of the society deny the significance of the injury as an exercise of governing authority over the victim. This undoes the damage done the victim's dignity and restores equality of status between perpetrator and victim.<sup>31</sup> If an important purpose of punishment is to affect the social status of the victim, punishment must engage the participation of society's members in authoritative judgments of blame. This authoritative denunciation of the offender's wrongdoing renders the injury to the offender retributive rather than retaliatory.

Unlike vengeance, punishment is authorized by an institution to which the person punished owes allegiance. Punishment removes the burden of pursuing vengeance from the victim and precludes the punished offender's reasserting the justice of his initial offence by retaliating against the victim. If the offender accepts the authority of the punishing institution, he can only establish the justice of his position by addressing arguments to that institution.

Adil Haque has proposed that international criminal tribunals can help re-establish the rule of law after civil conflicts because opposing sides can accept the punishing power as impartial.<sup>32</sup> Yet, on our analysis, the authority to punish requires more than the appearance of impartiality: it requires the allegiance of those subject to punishment. This condition may be difficult for international institutions to meet.

### 3 *Public authority*

In criminal punishment, the punishing institution is a public authority to which offender and victim both owe allegiance, typically the state.<sup>33</sup> In proscribing and punishing, this authority promises to suppress the cyclic violence of vengeance by discouraging both provocative and retaliatory violence through denunciation and coercion. The public authority also obviates retaliatory violence by subordinating the offender to public

<sup>31</sup> Hampton, *supra* note 27 at 108–50.

<sup>32</sup> Adil Haque, 'Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law' (2005) 9 *Buff Crim L Rev* 273 [Haque].

<sup>33</sup> See generally Nicola Lacey, *State Punishment: Political Principles and Community Values* (New York: Routledge, 1988), treating justification of criminal punishment as a problem of political obligation.

authority and by recruiting the entire membership of society to denounce the offence. The victim's status is protected everywhere that the public authority's law is enforced. By delegating their power of revenge to a state and accepting its exclusive authority to achieve retribution for offences of violence, private parties cooperate to achieve the public good of a rule of law. Blood feuds are a classic collective action problem, in which a pattern of individually rational conduct makes everyone worse off. A rule of law solves this collective-action problem by creating public capacity to resolve disputes.<sup>34</sup>

Criminal law transforms private injuries into public wrongs by proscribing and punishing them. By treating the victim's injury as a matter of public concern, criminal law clothes each member of society in an equal status of civil dignity or 'inviolability,' in Frances Kamm's terminology.<sup>35</sup> This transformation of private into public wrongs makes an attack on the rights of any member of society an attack on the dignity of all. This dignity gives every member of society reason to identify with law and that identification can motivate compliance more effectively than deterrent threats do.<sup>36</sup>

Just as loyalty to the rule of law helps make it effectual, effectiveness in suppressing criminality and protecting rights is also important to fostering loyalty to the rule of law. A system of criminal justice that lacks the capacity to protect rights regularly lacks credibility in denouncing rights violations and restoring victims' damaged dignity. Competing social groups are likely to rely on militias and gangs for protection instead. The result is likely to be the vicious cycle of the blood feud rather than the virtuous cycle of the rule of law.

Criminal law, as we have described it, requires an institution with the authority to proscribe and to blame and the power to coerce. By systematically preventing or punishing degrading violence, criminal law can protect the equal dignity of those subject to its proscriptions. By delivering on this promise of equal dignity, a rule of law can motivate those

<sup>34</sup> There is little evidence that marginally harsher sanctions improve deterrence in a society with a functioning criminal justice system; see Anthony N Doob & Cheryl Marie Webster, 'Sentence Severity and Crime' (2003) 30 *Crime and Justice* 143 at 181–9. However, the absence of such a system in collapsed states, for example, can lead to astronomically high levels of violence, with dire secondary effects on public health and welfare; see Randolph Roth, *American Homicide* (Cambridge, MA: Belknap Press of Harvard University Press, 2009) at 9–10, 18–9. The effectiveness and credibility of a rule of law are matters of degree, but there appears to be a 'tipping point' below which isolated acts of punishment make little contribution to a rule of law.

<sup>35</sup> Frances Kamm, 'Inviolability' (1995) 20 *Midwest Studies in Philosophy* 165.

<sup>36</sup> Tom R Tyler, *Why People Obey the Law* (Princeton, NJ: Princeton University Press, 2006) at 178, 269–70.

subject to its proscriptions to accept the duty to obey, to join in blaming offenders, and to suffer punishment if they offend. General acceptance of such duties of cooperation increases compliance and diminishes the need for coercion. Thus, both welfarist and retributivist reasoning converge to justify proscription and punishment that promote the public good of a rule of law. Yet a rule of law makes a promise to protect equal dignity. A legal system ‘unwilling or unable’ to keep that promise arguably has no business exercising criminal jurisdiction.

### III *A jurisdictional critique of international criminal liability*

#### A CRIMINAL JURISDICTION AND ENFORCEMENT CAPACITY

The rule-of-law defence of punishment offered in Part II implies that justified exercise of legislative jurisdiction to proscribe and judicial jurisdiction to impose punishment also require the capacity to exercise executive jurisdiction. This part applies that principle in assessing international criminal jurisdiction.

International lawyers usually identify five bases for the exercise of criminal jurisdiction. The most commonly invoked is territorial jurisdiction, jurisdiction over criminal acts taking place or having effects in locations where the punishing authority has exclusive effective control. Territorially based legislative and judicial jurisdiction presuppose executive enforcement capacity because the very concept of territory entails this. It may be, as Mireille Hildebrandt’s contribution to this workshop attests, that digital technology has outmoded the concept of territory.<sup>37</sup> Perhaps exclusive control over conduct in one place is no longer possible – if it ever was – without exclusive control everywhere. Nevertheless, the concept of territory presupposes at least a claim to executive jurisdiction and an aspiration to effective control.

Other bases of jurisdiction include ‘active personality,’ the jurisdiction of a state over the conduct of its nationals wherever committed, and ‘passive personality,’ the jurisdiction of a state over conduct injuring its nationals, wherever located. Perhaps active personality jurisdiction also presupposes a measure of enforcement power, since citizens have entitlements vulnerable to forfeiture, even when they are abroad. ‘Protective jurisdiction’ extends to conduct anywhere that injures government interests, such as the authenticity of its currency or the secrecy of its military plans. Universal jurisdiction extends to internationally proscribed conduct committed anywhere, perhaps in order to protect such international interests as ‘humanity,’ ‘peace,’ or ‘freedom of navigation.’

<sup>37</sup> Mireille Hildebrandt (2013) 63 UTLJ 198 at 203 [present issue].



In his subtly reasoned book on extraterritorial criminal jurisdiction, Chehtman sets out to identify the principles that can best justify the international law of criminal jurisdiction as it stands, but also to propose reforming legal doctrines that cannot be thus justified. He takes as given that the world 'is divided into' self-governing territorial states, and 'the existence of international criminal tribunals.'<sup>38</sup> Yet there is an obvious asymmetry between these two premises: territorial states are vastly more consequential institutions than international criminal tribunals are. The jurisdictional principles Chehtman develops to accommodate the importance of territorial states are quite persuasive. However, they prove incommodious for the international criminal tribunals he is also committed to justifying.

Rather than basing his conclusions on the sovereign equality of states, Chehtman derives the scope of criminal jurisdiction from principles justifying the power to punish. He explains criminal punishment on a basis similar to our rule of law rationale: punishment is justified in so far as it contributes to the public good of criminal proscriptions' being 'in force' and thereby secures the dignity of a population as persons with legally protected rights. The central insight of his book is that extraterritorial jurisdiction is presumptively illegitimate because law cannot, as a practical matter, be 'in force' where the legislating authority lacks executive power to enforce it. Where law cannot be in force, it cannot secure the dignity of those it claims to govern. Unable to achieve their justifying benefit, extraterritorial proscription and punishment are presumptively illegitimate. On this basis, he rejects most extraterritorial applications of national criminal law, especially those based on the nationality of perpetrators and victims.

Nevertheless, Chehtman endorses universal jurisdiction to impose international criminal liability. He argues that a belligerent state cannot be trusted to protect enemy soldiers and civilians in war time against war crimes by its soldiers. The criminal jurisdiction of the enemy state is also insufficient, he argues, because, while it has the motivation to punish, it lacks the capacity. Security against impunity for war crimes, therefore, requires extraterritorial punishment by third states or international tribunals with both the motivation and capacity to punish. Similarly, he argues, the territorial state cannot provide the requisite security to its own population against grave human rights abuses by its officials. Securing that population's dignity also requires extraterritorial application of international criminal law by third states or international tribunals with the motivation and capacity to punish.

<sup>38</sup> Chehtman, *Philosophical*, supra note 7 at 2–3.



These conclusions seem contradictory. Chehtman does not explain why potential victims should think that extraterritorial powers have any greater capacity to enforce international criminal law than they have to enforce national law. He finds it impossible for anyone to believe that the law of one sovereign state can protect her on the territory of a second sovereign state – but not impossible to believe that international law protects her there.

Yet, since international law recognizes active and passive personality jurisdiction, sovereignty is not necessarily coextensive with territory, and there is no logical barrier to the criminal law of one state applying in the territory of another state. Thus, we should understand Chehtman's claim that extraterritorial national law lacks credibility as a claim about popular consciousness rather than logic. He seems to assume that territorial jurisdiction best promotes feelings of security and dignity because ordinary people associate the force of law with territorial control. But if so, it seems unlikely that ordinary people think that international criminal law is 'in force' within their own countries, protecting their dignity. In short, Chehtman does not convincingly exclude international criminal liability from his critique of extraterritorial criminal liability as incapable of producing the benefits of law 'in force.'

#### B LAW 'IN FORCE'

Cehtman grounds the right to punish in its service to the 'public good' of a system of criminal law 'in force.' He reasons that a system of criminal law requires proscriptive rules, with punishment of violators authorized by the proscribing authority. He adds that applying such a system against crimes of violence protects the security of persons and their dignity as persons with legally protected rights.

Although Chehtman's concept of 'law in force' closely resembles the concept of 'rule of law' developed here, his account of this public good differs in an important respect. The present discussion concluded that a system of criminal punishment that achieves popular legitimacy tangibly improves well-being by motivating compliance, obviating vengeance, and enabling cooperation to repair the social status of crime victims. However, Chehtman equivocates as to how integral these consequences are to the good of a system of criminal law's being in force. To be sure, in arguing that law's being 'in force' justifies punishment, he emphasizes its benefits:

The benefit that a system of criminal laws being in force provides to individuals in a given state is hardly trivial . . . In a society which only allows for private self-defense and retaliation as responses to wrongdoing the situation would quickly deteriorate and individuals would end up living in constant fear, as living

conditions in failed states tend to illustrate . . . Punishment . . . conveys the message that the protection of law is real.

Furthermore . . . when the criminal law operates in the way advocated here . . . it contributes to . . . a kind of order based on the moral significance of . . . rights. . . . [T]his sense of dignity and security is arguably an essential component of our well-being.<sup>39</sup>

Yet, despite the ‘enormous’ benefits he claims for punishment in suppressing violence, obviating vengeance, and banishing fear, Chehtman insists that ‘none of these beneficial aspects of the institution of legal punishment are necessary to justify’ it.<sup>40</sup>

Yet, if ‘law in force’ does not prevent or vindicate many violations of legal rights, how does it secure dignity? Chehtman’s idea is that each act of punishment confers dignity on all holders of the right vindicated, by definition, because it attributes to them the status of persons protected by general laws. On this view, even isolated instances of punishment would still honour all members of society by implying that they are protected, even if this implication is patently false. If the claim of protection is not credible, however, its expression cannot enhance subjective feelings of security. Moreover, if the punishing authority cannot mobilize general participation in blaming, punishment may not even repair the dignity of the victim of the particular crime punished, let alone enhance the dignity of anyone else. Both accounts of the public good produced by punishment emphasize its expressive implications. However, in our account, the expressive implications of punishment matter because they have consequences for behaviour and for social status. Conceived as social status, dignity is not a hollow consolation but a good people care deeply about.

Cehtman defends his claim that the justifying benefits of punishment do not depend on its consequences by pointing out the ineffectuality of punishing international crime in particular:

[O]ur interest in preventing crimes . . . is more clearly served by a liberty to stop and harm [offenders] . . ., rather than by a power to punish them . . . NATO’s military intervention against Serbia, for one, had a much stronger impact on stopping crimes being perpetrated in the former Yugoslavia . . . than the establishment of the International Criminal Tribunal for the former Yugoslavia . . . or any other threat of extraterritorial punishment. Indeed, the massacres in Srebrenica occurred two years after the creation of the ICTY, and the atrocities in Kosovo were perpetrated six years later.<sup>41</sup>

<sup>39</sup> Ibid at 40–1.

<sup>40</sup> Ibid at 42.

<sup>41</sup> Ibid at 41.

Chehtman adds that ‘deterrence is weak in such contexts due to . . . the limitation of resources and limited number of prosecutions, [and] the lack of political legitimacy of most extraterritorial courts from the point of view of the targeted groups or individuals.’<sup>42</sup> In flaunting the deficiencies of international criminal courts, Chehtman assumes his conclusion. He cites their ineffectuality as evidence that effectuality is not an essential benefit of a system of criminal law in force, so as to later argue that international criminal law need not be effectual to be in force.

### C CHEHTMAN’S DEFENCE OF TERRITORIAL JURISDICTION

Chehtman argues that, since enforcement of a system of criminal law throughout a territory would enhance the security and dignity of everyone in the territory, penal jurisdiction should extend to all offences committed within a territory, regardless of the nationality of the offenders or the victims.<sup>43</sup> But if criminal law is beneficial, why confine it to a territorial population?

Chehtman offers three reasons. First, he argues that the population of the proscribing state has no very strong interest in the protection of persons in other states.<sup>44</sup> Yet it is not obvious why individuals in an arbitrarily bounded space have a stronger interest in the welfare of others within the boundary than outside it. Do residents of Fort Erie, Ontario benefit more from criminal law in distant Vancouver than in nearby Buffalo? His other two arguments are more substantial, however. Thus, he argues that persons in the other state have an interest in self-government which militates against a foreign government’s being able to apply its law in their territory.<sup>45</sup> Finally, he argues that neither population could have a substantial interest in one state’s law protecting the population of another state because such a law could not do so effectively.<sup>46</sup>

While an individual is abroad, the only system of criminal law that can meaningfully contribute to her (relative) sense of dignity and security is the criminal law of the territorial state . . . Because of the features of this public good, it cannot be enjoyed extraterritorially.<sup>47</sup>

Thus, national law cannot be ‘in force’ abroad for the simple reason that national governments lack executive power there. Hence, the justifying benefits of criminal law depend on its enforceability.

<sup>42</sup> *Ibid* at 45.

<sup>43</sup> *Ibid* at 56–9.

<sup>44</sup> *Ibid* at 58, 60–1.

<sup>45</sup> *Ibid* at 59.

<sup>46</sup> *Ibid* at 67–8.

<sup>47</sup> *Ibid* at 68.

In sum, Chehtman's defence of territorially based criminal jurisdiction identifies three conditions for legitimate punishment: self-governance, reciprocity, and effectuality. Thus, the law imposing liability on a population must have its consent; must aim to protect its members as subjects of legal rights; and must have the capacity to do so. These three conditions define a political community whose members cooperate in respecting a scheme of legal rights from which all benefit. Yet Chehtman provides no moral reason why that community must be geographically discrete.

Sometimes nearby violence threatens our sense of security and dignity more than remote violence, but not always. Members of geographically dispersed social groups can feel more affected by remote violence within or against their own group than by nearby violence affecting some other community. If neighbouring groups habitually engage in reciprocal violence, they have a common interest in the enforcement of law against both groups. But if violence is insular, neighbouring groups may be indifferent to one another's rates of violence. On the other hand, if territory happens to be an efficient basis on which to organize policing, we might have a prudential reason to organize executive jurisdiction along geographic lines. If legislative and judicial jurisdictions need to be coextensive with executive jurisdiction to justify punishment, we would then have reason to define all three geographically.<sup>48</sup>

Because Chehtman prioritizes territory over nationality as a basis of criminal jurisdiction, he concludes that crimes committed by and against visitors should be punished by the territorial state. On the same premises, he rejects most extraterritorial applications of active and passive personality jurisdiction.

Yet most of these conclusions can also be justified on the basis of the political relationships involved, without giving any intrinsic significance to territory. Punishment can be justifiably imposed on nationals who offend against visitors because those nationals are punished according to laws that are effectively enforced, that protect them reciprocally, and to which they have constructively assented. Punishment of locally offending visitors also satisfies the requisites of reciprocity and effectiveness as long as they are punished under laws which are generally enforced and which protect them as well. If they have entered the jurisdiction voluntarily and

<sup>48</sup> An example of such reasoning is the case of *R v Hape*, [2007] 2 SCR 292, 2007 SCC 26, McLachlin J, holding the right against unreasonable searches and seizures in the Canadian Charter of Rights and Freedom inapplicable abroad on the basis that Canada's legislative jurisdiction could not extend beyond the limits of its executive jurisdiction. I make a narrower claim, however: that *criminal* legislative and adjudicative jurisdiction should not extend beyond executive jurisdiction.

the laws' proscriptions, procedures, and penalties meet international human rights standards, we may deem them to have assented to jurisdiction also.

Extraterritorial application of passive personality jurisdiction can be rejected under these principles because foreigners offending against a visitor on foreign territory are neither protected by the criminal law of the visitor's state nor consulted in its legislation, and they have done nothing to signal their consent. Moreover, proscriptions directed at foreigners on foreign territory are not likely to be enforced systematically and so lack the effectiveness required for a rule of law.

Active personality jurisdiction is somewhat more justifiable. Even though the offender's state lacks executive jurisdiction abroad, offending nationals are likely to return home eventually. If extended by democratic legislation to nationals protected from similar offences at home, active personality jurisdiction seems compatible with the dignity and self-governance of those punished. A polity might criminalize offences committed by its nationals abroad that also violate the law of the territorial state, in the interest of good relations. Such punishment might enhance protection of nationals from crime if done pursuant to an international agreement committing other states to reciprocate. Of course, the justice of extraterritorial punishment of nationals abroad depends on the justice of punishing the same conduct committed at home.

What about an offence committed between two nationals abroad? If active personality jurisdiction is permitted, such an offence would be punishable, which seems like the right result. Indeed, Chehtman approves jurisdiction where one national lures another over the border into another country in order to commit a crime with impunity. Yet he offers the peculiar rationale that this result is required by the territorial principle<sup>49</sup> – presumably, required to prevent the territorial principle from having implausible implications! The more straightforward explanation for why the interaction between compatriots abroad should be subject to their country's law is that such law defines their mutual obligations as members of a political community.

Surprisingly, Chehtman approves extraterritorial application of protective jurisdiction. He supports punishing foreign officials for espionage against our government on their own soil, arguing this would advance the common interests of 'individuals in' our country (even if they are foreign nationals?).<sup>50</sup> Yet such a proscription would be undemocratic, non-reciprocal, and ineffectual, failing all three of our jurisdictional principles.

<sup>49</sup> Chehtman, *Philosophical*, supra note 7 at 66.

<sup>50</sup> *Ibid* at 72.

## D CHEHTMAN'S 'JURISDICTIONAL' DEFENCE OF INTERNATIONAL CRIMINAL LIABILITY

Chehtman offers a 'jurisdictional' justification for international criminal liability for two types of crimes: war crimes and human rights abuses committed by governments against their own populations. He argues that offences are justifiably proscribed and punished by an extraterritorial authority when very grave offences are committed pursuant to government policy.<sup>51</sup> He reasons that the government of the territorial state cannot credibly proscribe its own wrongs. He adds that, while international proscription of official wrongs comes at some cost in self-government, this is outweighed by the benefits to security and dignity of there being a law 'in force' against governmental abuses. He then proceeds to argue, on a similar basis, that all states should have universal judicial jurisdiction to punish such international crimes:

[T]he collective interest . . . in a rule being in force against [international crimes] . . . warrants conferring upon every state the power to punish those who violate that rule. This is required, at least, if these criminal rules are to provide any meaningful sense of dignity and security to them. In the absence of a centralized mechanism of distribution of criminal competence for international crimes, universal jurisdiction provides us with the closest we can get to these rules having any real sense of bindingness.<sup>52</sup>

Having endorsed universal jurisdiction to punish international crimes in order to maximize enforcement, Chehtman reasons that it may be exercised by international tribunals like the ICC as well as by states.

This argument is vulnerable to two objections. First, it ignores the ability of national legal systems to credibly restrain official abuse through constitutional norms and structures. To the extent that anyone feels secure in her dignity as a subject of rights, it is likely because of national law, not international law. Second, it overestimates the contribution the possibility of international criminal punishment could make to such feelings of security. Extraterritorial states and tribunals are unlikely to enforce international laws against government abuse for the same reason they are unlikely to enforce any other laws within a territorial state: because they lack executive authority there.

On the other hand, we can justify foreign punishment of government atrocity on the basis of Chehtman's normative premises in the unusual circumstances when foreign forces justifiably exercise executive authority. Recall that Altman and Wellman argue that a government that attacks its own people loses any claim to represent them or to exclude

<sup>51</sup> Ibid at 101–3, 109.

<sup>52</sup> Ibid at 121.

other states from fulfilling the basic responsibilities of government in their stead.<sup>53</sup> Chehtman agrees that any government is justified in intervening militarily to resist and prevent ongoing atrocities.<sup>54</sup> While the customary legality of humanitarian intervention remains controversial,<sup>55</sup> even sceptics now accord the Security Council the power to declare a humanitarian crisis a threat to peace and security and to organize or authorize a military intervention.<sup>56</sup> Security Council Resolution 1973, authorizing such intervention in Libya and invoking the Libyan government's 'responsibility to protect,' illustrates this power.<sup>57</sup> In any case, Chehtman appears to have no objection to extraterritorial *executive* jurisdiction to stop grave human rights abuses.

Once an intervening state has assumed executive power, there is no longer any barrier to its achieving the public good of 'law in force.' Yet, at that point, it no longer needs universal jurisdiction or any other form of extraterritorial jurisdiction to punish crime because, as occupier, it has succeeded to the powers and responsibilities of the territorial power. It can punish international crimes on the same jurisdictional basis that authorizes it to punish national crimes.<sup>58</sup> So justifying jurisdiction to punish international crime is simple, but not necessarily easy. All a state need do to earn the legal right to punish atrocity is intervene to put an end to it.

Yet this does not resolve the question of whether these atrocities are properly punished as offences against international law. In many cases, international criminal liability will be unnecessary because the atrocious conduct will have been illegal under national law. States may have incorporated international humanitarian law into their military codes, applying it to captured enemy soldiers as well as their own. Yet even if they have not, these international humanitarian law standards may still be applicable as domestic common law. All belligerents immunize their

<sup>53</sup> Altman & Wellman, *supra* note 9 at 76–82. For similar arguments, see Powell, *supra* note 10; Anthony Sammons, *supra* note 9; Teson, *supra* note 8.

<sup>54</sup> Chehtman, *Philosophical*, *supra* note 7 at 110–3.

<sup>55</sup> See e.g. Simma, *supra* note 8 at 2–4; Cassese, *supra* note 8 at 24–5; Michael Byers & Simon Chesterman, 'Changing the Rules about Rules? Unilateral Intervention and the Future of International Law' in JL Holzgrefe & Robert O Keohane, eds, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (New York: Cambridge University Press, 2003) 177; Jose Alvarez, 'The Schizophrenias of R2P' in Philip Alston & Euan MacDonald, eds, *Human Rights, Intervention, and the Use of Force*, (New York: Oxford University Press, 2008) vol 10, bk 2 at 275.

<sup>56</sup> Cassese, *supra* note 8 at 2–4; Simma, *supra* note 8 at 25.

<sup>57</sup> SC Res 1973, UNSCOR, 66th sess, 6498th mtg, UN Doc S/RES/1973 (17 March 2011).

<sup>58</sup> For an argument that the humanitarian occupier is bound to realize international human rights norms, even at the cost of altering local law, see Gregory H Fox, *Humanitarian Occupation* (New York: Cambridge University Press, 2008).

soldiers from criminal liability both at home and abroad for lawful combat and must draw those standards of lawfulness from some source.

Whether or not they specifically proscribe crimes against humanity and genocide in their national criminal law, all states criminalize such abuses by proscribing ordinary offences of violence like murder, sexual assault, kidnapping, and torture. Thus, we can redescribe the problem of international criminal liability as a court of occupation's choice as to whether to recognize a government policy of atrocity as providing a justification defence to the officials who carried it out. We can think of international criminal law as merely precluding courts of occupation (including international courts) from enforcing local laws that violate international humanitarian or human rights standards. On this theory, tyrants could be punished as common criminals under local law.<sup>59</sup> An advantage of this approach is that liability under national criminal law presumptively meets the reciprocity and self-governance conditions for legitimate proscription.

In sum, Chehtman's premises imply that states may legitimately exercise or delegate to an international tribunal jurisdiction to punish foreign government officials for mass murder if they intervene militarily in defence of the victims. Having done so, their jurisdiction would no longer be extraterritorial. Because occupiers exercise executive jurisdiction, they can realize the public good of law in force. Because extraterritorial states otherwise lack such enforcement capacity, however, their occasional exercise of judicial jurisdiction to punish the isolated offenders who blunder into their territory would not serve what Chehtman regards as the justifying purpose of punishment. Such punishment cannot meet the test of effectuality.

#### IV *The expressive significance of prosecuting international crimes*

##### A PROSECUTION AS VINDICATION OF LAW

From the standpoint of liberal political theory, criminal punishment is 'a form of state violence'<sup>60</sup> in need of justification. Criminal punishment coerces, inflicts injury, and violates liberal neutrality by imposing official value judgments.<sup>61</sup> If these transgressions of freedom are justified only

<sup>59</sup> A possible obstacle to such prosecutions would be statutes of limitation in some jurisdictions.

<sup>60</sup> Luban, 'Fairness,' *supra* note 6 at 575.

<sup>61</sup> See Guyora Binder, 'The Culpability of Felony Murder' (2007–8) 83 *Notre Dame L Rev* 965, 970–1, 1052–9 (tension between retributive punishment and liberal ideal of value neutrality).



in order to achieve the public good of a rule of law, justified punishment must be systematic. This requires both executive power and judicial capacity. These requisites are lacking when state and international tribunals exercise extraterritorial adjudicative jurisdiction to try international crimes.

While extraterritorial states have little reason to respect the sovereignty of territorial states that attack their own populations, a right of military intervention does not equal a justification for punishment, *unless exercised*. Upon exercising such a right, the intervening state is no longer extraterritorial. Absent such intervention, however, a state has no more capacity to enforce international criminal law abroad than it has to enforce its own criminal law abroad.

International institutions also lack the enforcement capacity to prevent or systematically punish international crimes. The Security Council is a cumbersome, veto-bound executive body. Its jurisdiction over internal conflicts is controversial because of their contingent relationship to international peace and security. The Council's jurisdiction is even less well established over stable dictatorships successfully pursuing policies of atrocious repression. There are also political barriers to Security Council action, as illustrated by the recent resistance of permanent members Russia and China to intervention in the Syrian revolution.

The institutional capacity of international courts is bound to be extremely limited. Unless they are located in the affected territory and attached to an occupation force with governing authority and capacity, they have little access to witnesses or power to arrest defendants. Yet international crimes are, by definition, systemic in their perpetration and effects, involving large numbers of victims, participants, and witnesses who will likely fear both prosecution and retaliation from defendants and their supporters.<sup>62</sup> Thus international criminal prosecution is destined to be radically selective as to the situations it investigates and the perpetrators it pursues. It cannot aspire to be even-handed in vindicating the equal dignity of victims. No population is likely to develop a sense of security of status, trust in government, or confidence in law enforcement because of the few successes of international tribunals.

Yet, as David Luban argues, the fact that punishment of international crime cannot be justified like state punishment – as necessary to vindicate a rule of law – does not preclude its being justified in some other way. Luban argues that proscription and punishment of international crimes need not meet as demanding a standard of legality, precisely

<sup>62</sup> Rome Statute, *supra* note 4, arts 6–7 (definitions of genocide and crimes against humanity).

because the international legal system lacks executive power. It is in less danger of using the power to punish to repress dissent or persecute enemies. If international criminal liability cannot achieve the benefits of a rule of law, neither can it achieve the harms of tyranny.<sup>63</sup>

Luban claims that punishment is not even really the point of international proscription of war crimes and domestic atrocities. Advocates of international tribunals aim at trials rather than punishments.<sup>64</sup> Such trials are primarily expressive in function, a kind of ‘political theater.’<sup>65</sup> According to Luban,

the most promising justification for international tribunals is their role in norm projection: trials are expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes and not merely politics by other means. In recent years, philosophers have studied expressive theories of punishment; the norm-projection rationale adds an expressive theory of trials . . . The decision not to stage criminal trials is no less an expressive act than the creation of tribunals; and the expressive contents associated with impunity . . . are unacceptable . . . The point of trials backed by punishment is to assert the realm of law against the claims of politics.<sup>66</sup>

But is this ‘expressive’ justification for international criminal liability sufficiently distinct from Chehtman’s to escape its difficulties? To be sure, Luban characterizes prosecution of international crimes as expressive rather than coercive in purpose, but can this expressive purpose be achieved without effective enforcement capacity? He compares his expressive account of trials to expressive accounts of punishment offered by RA Duff and Jean Hampton.<sup>67</sup> Yet, in these theories, punishment does not merely ‘project norms’ by expressing that the crime was wrong. In both theories, punishment expresses that the crime was wrong in disrespecting the victim’s dignity as an equal member of a community of persons protected by legal rights and in flouting the authority of that community’s laws. The last sentence of Luban’s paragraph invokes the ‘realm of law’ and the need for punishment to vindicate it. It is not clear

<sup>63</sup> Luban, ‘Fairness,’ supra note 6 at 584–6.

<sup>64</sup> Ibid at 575. Elie Wiesel, for example, proposed that Eichmann be released rather than punished after his trial; Martti Koskeniemi, ‘Between Impunity and Show Trials’ (2002) 6 Max Planck Yearbook of United Nations Law 1 at 3 [Koskeniemi]. See also Ruti G Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000) 46–9, 66, arguing that representative trials suffice to fulfil the expressive aims of transitional justice.

<sup>65</sup> Luban, ‘Fairness,’ supra note 6 at 576.

<sup>66</sup> Ibid at 576–7.

<sup>67</sup> Luban, ‘Fairness,’ supra note 6 at 576, citing Jean Hampton & Jeffrie G Murphy, *Forgiveness and Mercy* (New York: Cambridge University Press, 1988), and RA Duff, *Trials and Punishments* (New York: Cambridge University Press, 1986) at 235–62.

that trials can express the message of legality Luban ascribes to them if 'law' is nothing more than the set for political theatre, a façade with no edifice behind it.

## B OTHER EXPRESSIVE FUNCTIONS

That trials for international crimes serve an expressive purpose does not distinguish them from any other criminal trials because criminal punishment is ordinarily aimed at vindicating the law and the dignity of those it protects. Nevertheless, let us consider what other expressive functions might justify such trials. I will discuss five potential benefits of trials for international crimes: articulation of law, authorization of intervention, legitimation of transitional justice, backstopping reconciliation, and truth telling. Each of these functions, too, is likely to be undermined by a lack of enforcement capacity.

### 1 *Articulation of law*

Although criminal punishment does not effectively enforce international legal norms against atrocity, such law can nevertheless be enforced by means of executive power. Trials can explain and justify such exercises of power by reference to these legal norms. Thus, the Nuremberg prosecutions did not and, given their limited focus on leaders, could not fully enforce international prohibitions on war crimes and crimes against humanity. Nevertheless, these trials usefully articulated legal norms that the Allies had already enforced, at great sacrifice, by defeating the Nazi regime, destroying its machinery of death, and liberating its surviving victims. The trials explained the magnitude and importance of this achievement and could be invoked to justify further actions, such as the political reconstruction of the defeated states, the integration of Europe, and the creation of the United Nations and other international institutions.

Thus, by contrast with more recent international prosecutions, the Nuremberg prosecutions had the merit of having gained authority from and contributed authority to the largely just and efficacious exercise of executive power. The prosecuting powers earned a measure of moral authority to punish Nazi atrocities because they did something about them.<sup>68</sup> In so doing, they asserted and exercised something like the governing authority of a sovereign state. International human rights seem a lot more legally authoritative when they are backed by an army.

The optimism about international law that proliferated in the wake of World War II arose in part from the success of the Allied war effort as an

<sup>68</sup> To be sure, this authority was undermined by their own offences, largely left unpunished.

experiment in transnational governance, mobilizing entire societies for war, coordinating these efforts, and ultimately projecting this collaborative enterprise across the globe. The Security Council was an effort to perpetuate that alliance and its global leadership, while the United Nations project of decolonization was an effort to perpetuate that alliance's moral authority as liberator. We are used to the idea that military mobilization fosters nationalism, but in this case, it also fostered internationalism.

Thus, the Nuremberg trials began at the historic high water mark for effective multilateral power, underwritten by the military hegemony of the United States. Under these fleeting circumstances, the trials' message that the defeat of Germany represented the enforcement of law was credible.

The difficulty with law articulation as a justification for contemporary international criminal prosecution is that the circumstances rendering this message credible do not always obtain. Granted, the end of the Cold War enabled the resumption of international institution building, some experiments with internationally authorized intervention, the formation of *ad hoc* and hybrid international criminal tribunals, and ultimately, the formation of the International Criminal Court. Yet the performance of the international community in humanitarian crises has been very different from its performance during World War II. Although NATO eventually intervened in Kosovo, there was no effective intervention in Croatia, Bosnia, or Rwanda. In these settings, there was no international use of force for trials to legitimate as law enforcement. Accordingly, when the *ad hoc* tribunals for these conflicts 'asserted the realm of law,' the only material embodiments of that law they could point to were the trials themselves. This was law articulation without the corresponding reality that justified it as truthful. It seems that articulation of law, like vindication of law, depends on the availability of executive power.

While punishment of international crime is less justifiable where nothing is done to prevent it, it does not follow that the international community is always obliged to prevent it. There are sometimes good reasons, both prudential and moral, to eschew humanitarian intervention. Such intervention can spread or prolong conflict and lead to foreign military rule, bloody insurgency, or state collapse. All of these possibilities pose their own humanitarian risks. Yet if we therefore decide it is not really necessary to prevent atrocity, it cannot really be so important to punish it either.

## 2 *Authorizing intervention*

Even if an international court cannot command an international police force and impose an international rule of law, it might encourage compliance by persuasive means. Thus, even without a credible threat of

military intervention, international legal institutions might promote democratic transition in conjunction with international civil society. To the extent that repressive governments persist because of the recognition and cooperation of other states, international support for democracy movements might tip the political balance toward change. The success of such a movement in one country often emboldens such movements in neighbouring countries with similar societies and regimes. The ICC's indictment of Muammar Gaddafi after the Libyan revolution had begun provides an example of the Court's supporting and seeing its judgments 'enforced' by civil society.<sup>69</sup>

Yet there are reasons for caution. Criminal prosecution will typically come too late in the process to help topple a dictator and the threat of it may even impede a negotiated transition. Nor would we want the International Criminal Court to be driving such a process along. A policy of deliberate destabilization and regime change is fraught with humanitarian risks. Revolutions can be bloody failures or lead to anarchy or civil war. Not only is the ICC a foreign institution but, unlike a meddling foreign government, it lacks the military capacity to come to the aid of those it may have put at risk. So it should probably only play this role in conflicts in which the Security Council has already intervened or authorized effective intervention. Such caution is reflected in the Rome Statute, which limits the non-consensual jurisdiction of the International Criminal Court to situations referred to it by the Security Council.<sup>70</sup> Yet this ordering of the lines of authority between Security Council and International Criminal Court largely precludes the Court from authorizing intervention and limits it to the law articulation function.

### 3 *Legitimizing transitional justice*

Another purpose of international criminal prosecution could be to help secure a democratic transition by helping to build a rule-of-law culture in the transitioning state. Recall Adil Haque's suggestion that international courts can assist societies riven by bloody group conflict by providing an impartial forum for prosecuting atrocity. The international community can determine fault and spare the new regime's courts the suspicions and resentments they would provoke by deciding such cases.<sup>71</sup> Yet the use of an international court for transitional justice also poses dangers. First, it communicates that the municipal legal system

<sup>69</sup> For a defence of the ICC indictment of Gaddafi along these lines, see Mark Kersten, 'The ICC in Libya: Beyond Peace vs Justice' (May 10, 2012) online: Justice in Conflict <<http://justiceinconflict.org/2012/05/10/the-icc-in-libya-beyond-peace-vs-justice/>>.

<sup>70</sup> Rome Statute, supra note 4, arts 12, 13.

<sup>71</sup> Haque, supra note 32 at 297.

lacks impartiality and legitimacy. Second, the international tribunal may be no better equipped than national tribunals to legitimize just verdicts to the defeated community. Indeed, it may seek to dramatize its impartiality by prosecuting a few culprits from each side, even where there is a vast disproportion between the wrongs committed by the two sides to a conflict.

Once again, an international court's very limited capacity prevents it from enforcing law credibly. Of course, this may be precisely what is intended in turning this job over to a foreign court of temporary jurisdiction with squeamish scruples about harsh punishment. The result may be, not to legitimize transitional justice, but to outsource the impunity required for a peaceful transition.

#### 4 *Backstopping reconciliation*

A fourth approach would give international criminal trials a secondary role in facilitating transitions to a rule of law regime. Suppose we think the best path to establishing trust and legitimacy after an internal conflict is a non-punitive truth commission that incentivizes the culprits to self-identify, admit wrongdoing, apologize, publicly acknowledge the dignity of their victims, and implicate their accomplices. As Luban admits, 'truth and reconciliation commissions may do a better job' of fulfilling the expressive aims of 'promoting social reconciliation, giving victims a voice, and making a record.'<sup>72</sup> Nevertheless, a truth commission arguably requires the stick of criminal prosecution to make the carrot of immunity effective. Could the International Criminal Court support the transition to a rule of law by backstopping a truth commission in this way? Unfortunately, this function requires a prosecutor who can credibly threaten to bring lots of prosecutions and a court with the capacity to try them. Once again, the ICC's limited investigative and adjudicative capacity makes it ill suited to this role.

#### 5 *Truth telling*

This brings us to a fifth possibility: that the function of international criminal prosecution is not retribution, deterrence, or even the vindication of individual victims. Instead, it is simply truth telling, documenting the wrongs committed and how they occurred.<sup>73</sup> If so, again, a non-punitive truth commission may perform this function more comprehensively. And comprehensiveness matters because the value of truth can be

<sup>72</sup> Luban, 'Fairness,' *supra* note 6 at 576.

<sup>73</sup> For discussion of the tensions between truth telling and assigning moral credit, see Koskeniemi, *supra* note 64; Guyora Binder, 'Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie' (1989) 98 *Yale LJ* 1321.

violated by what is not said as well as by what is. Here, I worry that the inherent selectivity and limited capacity of international criminal prosecution will obscure more than it reveals about what happened. Moreover, assignment of the prosecutorial and judicial roles to representatives of the international legal community itself communicates something that may or may not be true.

One problem with selective punitive gestures deployed from a safe distance is that they violate what Ronald Dworkin regards as the distinctively legal virtue of ‘integrity.’<sup>74</sup> Integrity is the principle that justice is always comparative, requiring consistency of principle across cases and even different areas of law. In this context, integrity militates against punishing any act in isolation. All crime arises in a social context and all criminal liability distorts and simplifies that context in assigning blame to individuals. As Mark Drumbl and Darryl Robinson have pointed out, this is particularly true of human rights abuses, which are typically committed on a large scale by organizations and which have systemic causes.<sup>75</sup> On the other hand, criminal law gives decision makers considerable discretion in assigning individual responsibility for collective behaviour. Rules of vicarious liability can distribute blame quite broadly, but they can be applied selectively. Thus, opportunistic punishment of a few individuals can assign blame for collectively produced injury in misleading ways.

This problem is compounded by the fact that patterns of human rights abuse often arise in societies essentially governed by criminal organizations. The traits of sociability, conformity, and submissiveness that discourage humans from offending in societies governed by a rule of just law also encourage us to collaborate in societies run by thugs.<sup>76</sup> If we flout social norms by offending in a society governed by a rule of just law, we probably deserve to be blamed; but if we yield to social norms in a society governed by tyranny and terror, our blame may be attenuated. An instructive example here is the agonizing *Erdemovic* case, decided by the ICTY, punishing a Croat recruited into a Bosnian Serb militia under somewhat coercive circumstances and then forced at gunpoint to

<sup>74</sup> Ronald Dworkin, *Law's Empire*, 9th ed (Cambridge, MA: Harvard University Press, 1986) at 95–6, 225.

<sup>75</sup> Mark Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2005) 99 *Nw UL Rev* 539; Haque, *supra* note 32 (roots of humanitarian crises in group conflict); Darryl Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21 *Leiden J Int'l L* 925 at 926; see also Koskeniemi, *supra* note 64 at 13–6.

<sup>76</sup> See generally Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Harper & Row, 1974), explaining experimental demonstration of willingness to comply with authoritative directives to harm others.

massacre civilians.<sup>77</sup> It appears that he later persuaded fellow soldiers to disobey another mass execution order and was subsequently shot for it.<sup>78</sup> Thus, had he been killed for futilely refusing the first order, he arguably would not have been in a position to save lives by resisting the second order. This was one of the ICTY's few prosecutions, made possible because the traumatized offender turned himself in and sought punishment while more blameworthy offenders escaped liability.

While the absence of a rule of law may dilute the guilt of offenders, it also reduces the standing to punish of legal authorities. If other states could have saved victims and discouraged collaboration by intervening against the tyrants and decided it was inexpedient to do so, they are in a weak position to judge those who made an expedient choice to collaborate when they had no such opportunity to opt out. States that were part of the web of circumstances that produced atrocity should not later help themselves to an undeserved absolution by finding others to blame.

While the punishing authority expresses evaluations of offenders and victims, it also expresses messages about itself in the very act of ascribing its evaluations to the law. Joel Feinberg's famous essay about the expressive functions of punishment actually says very little about blaming offenders or vindicating victims. Instead, it emphasizes claims about the law itself. Feinberg discusses four expressive functions: authoritative disavowal, symbolic non-acquiescence, vindication of the law, and absolution of others. The first three encompass claims that the law forbids the offence, does not approve it, and is committed to suppressing offences of its kind. The fourth implicit claim, absolution from blame of those not punished, applies to government officials as well as private citizens.<sup>79</sup> An implicit message of all criminal liability is that injury to a legally protected interest was caused by individual culpability rather than social conditions created or permitted by official policies.

These self-congratulatory messages are necessary to punishment's beneficial consequences. Only by expressing that the *law* disavows and condemns the offender's act can the offender's claim to dominion be

<sup>77</sup> Rosa Brooks, 'Law in the Heart of Darkness: Atrocity & Duress' (2003) 43 Va J Int'l L 861 at 863–6; *Prosecutor v Drazen Erdemovic*, IT-96-22-A, Appeal Judgment (7 October 1997) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: ICTY <<http://www.icty.org/case/erdemovic/4#acjug>>.

<sup>78</sup> *Prosecutor v Drazen Erdemovic*, IT-96-22-A, Sentencing Judgment (29 November 1996) (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) at para 81, online: ICTY <<http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj961129e.pdf>>.

<sup>79</sup> Joel Feinberg, 'The Expressive Functions of Punishment' in Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970) 95.



refuted and the victim's dignity restored. Only by showing its commitment to opposing such acts can the punishing authority reassure other potential victims that it will prevent violence when it can and punish violence when it cannot. Finally, only by condemning the offence as proscribed by generally applicable law can the punishing authority present the punishment as impartial retribution rather than partisan revenge. Thus, any imposition of punishment as required by law implies a broader commitment to enforce a rule of law systematically. It seems the truth telling function of the criminal trial is not so easily separated from its law vindication function because punishment implies a claim to vindicate law. If a tribunal makes such a claim insincerely, it serves neither legality nor truth.

#### V *Conclusion*

Justified criminal punishment is punishment according to law. It requires not only desert but the justified exercise of legislative and adjudicative jurisdiction by some institution. Such jurisdictional authority depends on protecting potential victims and offenders in their dignity as subjects of legal rights. Protecting this dignity requires consistent defence and vindication of such rights. Thus, justified adjudicative criminal jurisdiction also depends on the power to make law effective, which is to say the exercise of executive criminal jurisdiction.

The international community of states has now established an international court to occasionally punish grave human rights violations. Yet that community – perhaps for good reasons – has not committed itself to defend and vindicate international human rights with any regularity. Realizing human rights worldwide requires much more than denouncing a few exemplary perpetrators. It entails the strenuous and morally compromised task of fostering rule-of-law states. Theatrical criminal trials blame perpetrators for human rights violations, but they also absolve the international community that proscribes, prosecutes, judges, and punishes. It is not obvious that this symbolic transaction is a net gain.