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ORIGINAL PAPER

Prosecuting Crimes Against Humanity: Complementarity, Victims' Rights and Domestic Courts

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Abstract
In this paper I argue that when states commit, assist, or culpably fail to prevent crimes against humanity against their own people, they should, subsequently, have primacy in prosecuting those crimes. They have a presumptive right (and duty) to punish perpetrators, and so a claim against third parties not to do so. In contrast to those who emphasise the importance of national sovereignty, I set out a *victim-centred* justification for this claim. I argue that victims of crimes against humanity, and members of groups that have been targeted for these crimes, have a special interest in having their status as members of their political community re-affirmed. Punishment *by* their state of war-related crimes against them has the expressive function of re-affirming their status as equal members of their national community, and the state's commitment to protecting their rights. I set out some reasons to think that this is valuable for victims and members of targeted groups. These interests, I argue, are weighty enough to ground the primacy of states in prosecution.

Keywords International criminal law · Punishment · Crimes against humanity · International courts · Philosophy of international law

Between 1976 and 1983, Argentina was ruled by a series of military juntas. These juntas carried out a campaign of political repression which included extra-judicial murder, disappearances, and torture against their political opponents—socialists, trade unionists and other dissidents. Estimates of the total number disappeared range from 9,000 to a high of 30,000.[1] Since the restoration of democracy in 1983, over

[1] Brysk, Alison, "The Politics of Measurement: The Contested Count of the Disappeared in Argentina," *Human Rights Quarterly*, 16 (4), 1994, pp. 676–92. As James Brennan points out, the figure of 30,000 is almost certainly an over-estimate; *Argentina's Missing Bones: Revisiting the History of the Dirty War* (Oxford: Oxford University Press, 2018), p. 6, n. 16.

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3,000 individuals have been criminally charged with complicity in these atrocities. As of July 2019, 915 have been convicted, including for crimes against humanity.[2] Most would agree, in cases like this, that perpetrators should be brought to justice. But *who* should bring them to justice? On one line of thought, crimes of this kind—heinous crimes, committed as part of systematic attacks against civilians—are the concern of humanity as a whole. They are, quite literally, crimes *against humanity*. As such, one might think, international institutions, such as the International Criminal Court, should have primary responsibility for bringing perpetrators to justice.

In this way I argue against Cecile Fabre who argues that international courts such as the International Criminal Court should have primary jurisdiction, and other proponents of universal jurisdiction such as Larry May and Massimo Renzo.[3] I argue that international courts and third-party states should, in accordance with the Rome Statute of the International Criminal Court, have a *complementary* role in prosecuting crimes against humanity of the kind I discuss here. Only when a state proves unable or unwilling to prosecute perpetrators of crimes against humanity do international courts and third-party states have the right (and duty) to prosecute.

1 Jurisdiction for Crimes against Humanity

1.1 Crimes Against Humanity

On the face of it, it should be obvious what crimes against humanity are. Crimes against humanity are particularly heinous crimes such as murder, rape, enslavement, and so on. At a second glance, however, while it seems fairly clear *which acts* can count as crimes against humanity, it's far less obvious what the *context* of these acts must be for them to count as crimes against humanity.[4] According to Article 7 of the Rome Statute of the International Criminal Court, crimes against humanity are particularly heinous crimes committed as part of a systematic attack against a civilian population, though they need not have *discriminatory* intent.[5] They need, in other words, to have a "collective" dimension. For some theorists, crimes against humanity need not have this collective dimension: even crimes carried out solely against individuals can count. What is distinctive about crimes about humanity is that, in violating basic rights, they target the humanity of their victims.[6]

In the face of this disagreement, I have no wish to stake out a position on what counts as a crime against humanity. Instead, I will single out a particular *class* of crimes against humanity and argue that these crimes have distinctive normative

[2] See Ezequiel A. Gonzalez-Ocantos, *The Politics of Transitional Justice in Latin America* (Cambridge: Cambridge University Press, 2020), p. 14.

[3] Note that I am not objecting to the principle of universal jurisdiction itself.

[4] Massimo Renzo, "Crimes against Humanity and the Limits of International Criminal Law", *Law and Philosophy*, 31 (4), 2012, pp. 443–76, at p. 444.

[5] David Luban, "A Theory of Crimes against Humanity", *Yale Journal of International Law*, 29 (1), 2004, pp. 85–168, at p. 104.

[6] Renzo, *op. cit.*, 448; Cecile Fabre, *Cosmopolitan Peace* (Oxford: Oxford University Press), pp. 181–3.

features and warrant punishment in a certain way. The class I single out here is the class of crimes against humanity committed as part of a widespread attack against a civilian population as part of intra-state conflicts, and for which *their* state is *culpable,* either because it committed those acts, or because it aided, abetted or deliberately or negligently failed to prevent them. Putting it more finely, the crimes against humanity I am concerned with in this article have the following contextual features:

(i) They are committed as part of a systematic or widespread attack against a civilian population, and the perpetrators are aware of this attack.[7] (*The systematicity feature.)*
(ii) They are committed against civilians either (a) as part of deliberate state policy by *their state*, or (b) by organised non-state groups at the behest, or with the support, of their state, or (c) by organised non-state groups, where their state has both the capacity to prevent them and knowledge of their occurrence, but deliberately fails to prevent them. (*The state responsibility feature.*[8])

Two examples of crimes against humanity that have the *state responsibility* feature are (i) crimes against humanity committed as part of Argentina's "Dirty War", a campaign of extra-judicial execution, torture and disappearances by the state security forces against leftists and other opposition elements, and (ii) crimes against humanity carried about by the Janjaweed, a state-backed militia engaged in a conflict with rebel groups in Darfur, a province of Sudan. These two examples fall under (a) and (b) respectively.

Now I focus on this class of crimes against humanity for two reasons. The first, less important, reason is that there is a widespread agreement that violations of basic human rights that have these contextual features count as crimes against humanity. The second reason is much more significant. Crimes against humanity of this type wrong their victims in three distinctive ways, in addition to violating their basic rights against being killed, tortured and so on. Firstly, the state that is entrusted with protecting their rights has systematically violated them.[9] States are held responsible

[7] The condition that the acts must be carried out "with knowledge of the attack" is a way of saying that there is a requirement of double *mens rea* for crimes against humanity: that is, knowledge not just of the attack, but of the systematic and widespread nature of the attack. I thank an anonymous reviewer for clarification on this point.

[8] With respect to (b), I wish to side-step questions about the international jurisprudence with respect to the assignation of state responsibility to states for the conduct of non-state groups. In 1986, ruling on *Nicaragua v. the United States*, the International Court of Justice ruled that the United States was not responsible for the conduct of the anti-government Contras because it lacked "effective control" over them, despite providing them a high degree of support; see Jan Arno Hessbruegge, "Human Rights Violations arising from the Conduct of Non-State Actors", *Buffalo Human Rights Law Review,* 11, 2005, pp. 21–86, at pp. 53–9. I want to sidestep the jurisprudential issues that arise here and stipulate that what I have to say about this sub-class of crimes against humanity applies in cases where the state supports, but lacks effective control over, non-state actors.

[9] There are two interpretations of this claim: on the first interpretation, states have a special responsibility to their people in virtue of there being associative duties between citizens—that is, there is a special moral relationship between citizens, and a state's responsibility to its people is just an extension of this. On the second interpretation, states have a special responsibility to their people in virtue of the fact that

for protecting the basic rights of their people.[10] There is something distinctively wrong about having one's basic rights violated by a person or entity that is responsible for protecting those rights.[11] Secondly, as well as having an interest in having their rights protected, people have an interest in being publicly acknowledged as members of a political community with a claim to equal concern and respect. The state's violation or culpable failure to protect their rights has the expressive function of denying their standing as warranting protection by the state, and so as members of the political community. This is also true of people who stand in relation to primary victims in certain ways, depending on the context. For instance, where the crimes against humanity for which the state is culpable are *discriminatory* in nature, members of the targeted group have their standing as equal members of the political community denied. Finally, people have various interests in continued residence in the region or area in which they customarily live, in being able to exercise certain political rights and in access to certain other goods that come with membership in a national political community. Crimes against humanity of the type I single out here undermine or threaten each of these interests, as I show in Sect. 2.

1.2 Punishment

One important aspect of punishment is its *expressive* dimension.[12] There are different purported aspects of this expressive dimension: for some, such as Joel Feinberg, the expressive function of punishment helps to maintain the authority of the law and allows the state to disavow certain conduct.[13] Other philosophers, such as Jean Hampton, argue that punishment serves to express the moral parity of victims

Footnote 9 (Continued)

assigning states (or their people) these rights will most effectively enable people to discharge their moral duties. For a defence of this second view see Robert E. Goodin, "What's So Special about our Fellow Countrymen?", *Ethics*, 98 (4), 1988, pp. 663–86. What I say below about states' special responsibilities to their people is neutral between either interpretation.

[10] It's important to note here that a state's "people" does not exclusively mean its citizens. Instead, it should be taken to mean "permanent residents". There are two reasons for this: the first is that many states have permanent populations that they deprive of citizenship, such as the Gulf states and their migrant or Bedoon populations. The second is that stripping a group of citizenship is often a precursor to crimes against humanity.

[11] For a similar view, see Richard Vernon, "What is a Crime Against Humanity", *Journal of Political Philosophy*, 10 (2), 2002, pp. 231–49. See also David Luban, *op. cit*., p. 117.

[12] Cf. Joel Feinberg, "The Expressive Function of Punishment", *The Monist*, 49, 1965, pp. 397–423; Andreas von Hirsch, *Censure and Sanction* (Oxford: Oxford University Press, 1993); Anthony Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001). I should note here that Duff prefers the term "communicative" to "expressive": he argues that communication necessarily involves, while expression does not, a "*reciprocal* and *rational* engagement", *op. cit*., p. 79 [italics in original]. This distinction is not important here.

[13] Gert, H.J., Radzik, L. and Hand, M, "Hampton on the Expressive Power of Punishment", *Journal of Social Philosophy*, 35, 2004, pp. 79–90, at pp. 79–80.

with those who have wronged them.[14] For my purposes in this paper, both of these expressive aspects of punishment are important.

I should note, however, that I am not claiming that what *justifies* punishment is its expressive function. My argument relies only on the following two claims: (1) the expressive dimension of punishment is an important aspect of the institution and (2) the expressive aspects of punishment are relevant to determining *who may punish*. Let me say more about (2). My claim is that, even if the expressive aspects of punishment do not explain why individuals are liable to punishment in general, the expressive aspects can factor in the explanation why particular groups or individuals have the right to punish.[15] Let's suppose that we have two possible distributions of rights to punish. On the first distribution, A has the right to punish a particular offender, T. On the second distribution, B has this right. From the point of view of the justifying aim of punishment, whether that be deterrence or retributivist considerations, the two distributions are equally good. However, A's punishing T would be better from an expressive point of view. So we have *pro tanto* reason to prefer A's punishing T.

In Sect. 3, I shall argue that, given the existing complementarity regime for prosecution of crimes against humanity, domestic primacy in prosecution and international primacy are roughly on a par from the point of view of any plausible candidate justifying aim of punishment. I do not, then, need to commit myself to any account of the justification of punishment in general. All the work in my argument about how rights to punish should be distributed is done by the account I give of the expressive value of distributing and exercising rights to punishment in a particular way.

1.3 Who Should Have Jurisdiction?

Domestic courts have primary jurisdiction over crimes against humanity under the Rome Statute for the International Criminal Court, with the International Criminal Court having an ancillary role in the prosecution of these crimes. The principle that governs the ICC's relationship to domestic courts is the principle of "complementarity". The ICC can exercise its jurisdiction with respect to the classes of crimes specified in the Rome Statute only if domestic states are unable or unwilling to prosecute those crimes, or if they are unable or unwilling to do so in a genuine and fair way.[16] To sum up: domestic courts have primacy with respect to the prosecution of crimes against humanity—the ICC is a "reserve court".

In this article, I argue that the Rome Statute gets things the right way around. States, and domestic courts, *should* have primacy when it comes to the prosecution of crimes against humanity (or at most, the sub-class of these crimes I specified

[14] Jean Hampton and Jeffrie G. Murphy, *Forgiveness and Mercy* (Cambridge: Cambridge University Press, 1988), Ch. 5.

[15] I do not mean to imply that expressive considerations are the only things that can determine the choice of who is to punish.

[16] Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford: Oxford University Press, 2008), p. 4.

in 1.1). States have the *presumptive right* to prosecute, and, as such, a presumptive claim against the prosecution of their nationals by other states or international organisations.

My defence of this claim is a victim-centred argument. That is, I argue that the primary reason for domestic primacy is the interests that victims have in *their* states prosecuting perpetrators. I do not defend this claim on the grounds of the importance of national sovereignty in general. I do not argue here, for example, that individuals have a morally weighty interest in their political community enjoying self-government, and this interest grounds a claim to exclusive jurisdiction with respect to the prosecution of crimes committed on their territory.[17] This argument would appeal to the interests of *all* members of a given political community. In contrast, I am arguing that the most important reasons to give domestic states primary jurisdiction, with respect to prosecuting the sub-class of crimes against humanity I described above, are the interests of *victims.* Secondly, I am not arguing that the presumption in favour of domestic prosecution these interests ground is indefeasible.

To re-iterate, my view is that domestic priority should have priority in prosecuting the sub-class of crimes against humanity I described above. Against this view, Cecile Fabre argues that the direction of complementarity should be reversed—that is, that international courts should have primacy when it comes to the prosecution of crimes against humanity, with domestic courts playing an ancillary role, stepping in only in limited circumstances. According to Fabre, "[A] genuinely cosmopolitan account of punishment for war-related crimes is committed to the revised interpretation of the principle of universal jurisdiction coupled with a reversal of the complementarity principle".[18] Fabre argues that both victim-centred and victim-neutral considerations support "universal jurisdiction" and a reversal of complementarity in favour of international courts. The victim-centred considerations: to restrict the right to prosecute crimes against humanity to domestic states is to leave victims vulnerable to states' unwillingness or inability to prosecute those who have wronged them.[19] The victim-neutral considerations: crimes against humanity have, according to Fabre, a universal dimension: "[I]n so far as we ought to conceive of one another, irrespective of borders, as one another's moral equals, any such crime, committed anywhere in the world, is of concern to us all."[20] On Fabre's view, these considerations jointly motivate the view that all human beings have jurisdiction over crimes against humanity; they have both the right to punish these crimes, and are under a *prima facie* duty to do so. Fabre sums up her view as follows:

It is precisely because the right to punish is divorced from territoriality that the principle is aptly labelled "universal jurisdiction". In effect, it consists in turning on

[17] For an overview of an argument to ground this claim, see Alejandro Chehtman, *Philosophical Foundations of Extraterritorial Punishment* (Oxford: Oxford University Press, 2010), pp. 27–29. Chehtman does not believe this argument establishes the impermissibility of extraterritorial punishment (pp. 28–9): he believes that the interests that ground a political community's right to self-government (and thus, to criminal jurisdiction) can be overcome.

[18] Fabre, *Cosmopolitan Peace,* pp. 200–1.

[19] p. 201.

[20] p. 202.

its head the complementarity principle as set out by the Rome Statute. According to the principle, you recall, sovereign states have primary jurisdiction over the punishment of wrongdoers, and the International Criminal Court has jurisdiction when states cannot or will not punish. On my account, by contrast, states have jurisdiction over those crimes *only* when international judicial institutions will not go or when it is better from the point of view of justice after war (for reasons mentioned a couple of paragraphs ago) that they should not go. In doing so, however, states would simply act on behalf of humankind—and not exercise a prerogative of sovereignty.[21]

Fabre, as the quote suggests, does admit that there can good reasons, both practical and "expressive" for state-level prosecution—she gives the following case as an example:

But practical feasibility is not the only reason for entrusting that state with that particular punitive task. Consider the case of Sergeant Alexander Blackman, a British Royal Marine who was given a lifelong jail sentence by British courts in November 2013 for having deliberately shot to death an unarmed and wounded Taliban fighter. So long as Britain deploys its forces abroad, particularly in support of transitional administration or occupying regimes, it behoves on its leadership to show to local civilian populations and to its own combatants that it will not leave those crimes unpunished, both as an expression of a commitment to human rights and as a means to deter combatants who fight on its behalf and at its behest to deter them from committing similar crimes. To have that combatant prosecuted and punished by the International Criminal Court at the Hague would not have achieved that.[22]

In the next section I will argue, amongst other things, that these expressive considerations are *general features* of cases involving jurisdiction over prosecution for crimes against humanity, at least in the sub-class of cases I described in 1.1. There are, in these cases, *typically* expressive reasons to prefer domestic prosecution. I will argue that victims and members of victimised groups have a claim that their states prosecute. States, in turn, have a presumptive right to do so. Complementarity is the correct role for international courts.

What I say in this paper does not entail that states should have primacy with respect to the prosecution of crimes against humanity committed on its territory by non-state groups *without* a link to state—for example, crimes against humanity carried out by FARC in Columbia, or the Provisional Irish Republican Army. However, my argument does not entail that states should *not* have primacy with respect to prosecution in these cases. It is simply silent about this matter. I believe that establishing domestic primacy in these cases would require a separate argument—the arguments I canvass here do not ground domestic primacy—neither are they incompatible with it, however. This paper is also silent on the matter of who should have responsibility for prosecuting crimes against humanity carried out by a state against those who are not permanent residents—visitors and asylum seekers, for example. Again, establishing domestic primacy with respect to these cases would require a separate argument. What I have to say here is limited in scope.

[21] *Op. cit*., pp. 206–7.

[22] *Ibid,* pp. 203–4.

Finally, there is question about whether states that have committed crimes against humanity have the *standing* to prosecute perpetrators. Antony Duff sums up the idea of standing as follows: "[…] what gives *A* the right to blame *B*, [and what are] the factors that undermine that right?"[23] One natural thought when it comes to prosecuting crimes against humanity is that states that have carried out these crimes lack the standing to prosecute them. In response to this, I would note that, although we attribute legal responsibility to states, our judgements about blame are far more closely tied to *individuals* and *regimes* or governments. Consider again the Argentine Dirty War; do we blame the Argentine state (or even the people of Argentina as a whole), or the individuals who made ordered and carried out the crimes? Although we can assign legal responsibility to states, it is less clear that we can assign blame to them. In cases where it appears that we do assign blame to states, this is likely because blame is widely shared among a state's population (as in the case of Nazi Germany, for example).

It seems, then, that whether not a state has standing to prosecute crimes against humanity depends on facts about the individuals who rule that state. If those individuals are closely connected with the crimes being prosecuted, or have committed other crimes against humanity, or publicly supported the commission of those crimes, etc., then very plausibly they do lack standing to prosecute. But if there is clear daylight between those individuals and the people being prosecuted and their deeds, then there will be no serious question of standing.[24] "Clear daylight" means, at the very least, non-complicity and no history of crimes of similar gravity. A stronger interpretation of this phrase might take it to mean that a full transitional process is required for state officials to have standing to prosecute domestic crimes against humanity. I will remain sceptically neutral on this question; sceptically because, for example, it seems plausible that a democratically elected government could carry out crimes against humanity and be replaced by a another democratically elected government that had the standing to prosecute the officials of the former. Let me set this aside for now.

2 Victims' Claims to Domestic Prosecution of War-Related Crimes

In this section, I first set out the distinctive ways in which the sub-class of crimes against humanity I focus on in this paper harm victims and members of groups discriminatorily targeted at them (hereafter persecuted groups). I then outline how *domestic* prosecution of perpetrators can repair these harms.

[23] R. A. Duff, "Blame, Standing, and the Legitimacy of the Criminal Trial", *Ratio*, 23 (2), 2010, pp. 123–40, at p. 124. I thank an anonymous reviewer for pressing me on this issue.

[24] One complicating factor might be that the perpetrators of crimes against humanity might be the victims of other kinds of injustice by the state—distributive injustice, for example. This might mean that the state lacks standing to prosecute—more work is needed to establish the relationship between the severity of a crime and the factors that can lead to loss of standing; see Victor Tadros, "Poverty and Criminal Responsibility", *The Journal of Value Inquiry*, 43, 2009, pp. 391–413.

2.1 The Distinctive Wrongs of Some Species of Crimes Against Humanity

In this sub-section, I will outline the distinctive harms and wrongs that attach to the sub-class of crimes against humanity I characterised in 1.1. My claim is that these harms are harms and wrongs *over and above* the more basic harms involved in crimes against humanity—for instance, torture, murder, and so on. For my purposes, the most salient thing about these crimes in this sub-class is that they involve failures—either through deliberate wrongdoing or through negligence—of states to protect their people. We can single out four distinctive wrongs and harms that attach to crimes against humanity of this sort:

1. Expressive wrongs to direct victims.
2. Expressive wrongs to members of *ascriptive groups* targeted by crimes against humanity.
3. Harms of displacement or insecurity of residence.
4. The harm of loss of access to certain goods of membership of a national community.

I will deal with each of these in turn.

2.1.1 Expressive Wrongs to Direct Victims

It is a commonplace that for some instances of wrongful harm, if Jones wrongfully harms Smith, Jones treats Smith as less than his moral equal. We think that there is an expressive aspect to wrongdoing of this sort—there is some status or quality that Smith has, *qua* human being, with which Jones's treatment of Smith is not compatible.[25] Even if it is not the justifying aim of punishment, it is important to express the moral parity of Jones and Smith.

When it comes to serious and wrongful harms committed by states, or at their behest, or which they negligently failed to prevent, there is something further that is expressed. When the state or its agents wrongs Smith, it does not just fail to recognise his standing *qua* human being, but also *qua* citizen. Smith's standing as a citizen gives him a claim against his state to protect his rights.[26] The state and its agents have a duty to protect Smith from, at least, serious wrongful harm. When a wrongful party stands in this relationship to the wronged party, there is a further wrong.

Furthermore, Smith not only has an interest in enjoying the rights that should follow from citizenship, but in it being publicly known that he is a citizen and enjoys that standing. When the state commits serious wrongs against Smith, its conduct sends a message that it does not regard Smith as entitled to the protections that should attach to citizenship. The state declares "open season" on Smith.

Notice here that I haven't committed myself to the claim that it is Smith's interest in the state publicly expressing recognition of his moral status that justifies the

[25] Hampton, *op. cit*., pp. 135–6.

[26] For stylistic considerations I refer only to "citizens" (and use cognate terms such as "civic"), but as I explain in note 10, *supra*, what I say here should be considered to be true of long-term residents also.

imposition of punishment on those who have wronged him. As Victor Tadros argues, it is not clear that this interest is in general weighty enough to justify the harms of punishment, or the costs of establishing a criminal justice system.[27] However, given that punishment, let's grant, *is* justifiable, the value of recognition can make a difference as to the choice of *who* is to punish.

2.1.2 Wrongs to Tertiary Victims

When the state commits or culpably fails to prevent systematic serious wrongdoing directed at members of a particular ascriptive (e.g., ethnic or religious) or political-ideological group it wrongs not only those who are *direct* victims of the serious wrongdoing, but all members of that ascriptive group who live in its territory.

As with wrongs against direct victims, the members of groups wronged by their state have two further complaints—the state fails to extend to them the protection to which they are entitled, *qua* citizens, and the state commits an expressive wrong against the group as a whole by failing to act in a way that is compatible with their equal civic status. With respect to the first wrong, when a state commits or culpably fails to prevent serious harms to members of a group characterised by either political-ideological commitment or distinct ascriptive identity, it undermines the civic status of all members of the group. It does so not only by signalling that members of this group do not enjoy the protections that ordinarily come with citizenship, and so making them more liable to serious harms from third parties, but also by expressing to these people that, because of their ascriptive or political identity, it does regard them as having equal civic standing.

2.1.3 The Harms of Displacement and Insecurity of Residence

In cases like that described above, where serious wrongdoing is systematically targeted towards members of political-ideological or ascriptive groups, there are harms to members of those groups, whether they are direct victims of wrongdoing or not. These are the harms of *displacement* and *insecurity of residence*.[28] Individuals generally have a claim to stable occupancy of the particular areas in which they live; if they can no longer safely reside in those regions, either because they are being directly removed, or because by remaining they are put at risk of serious harm, this a serious wrong against them.

All kinds of victims—whether direct victims of serious wrongdoing, their relatives and close friends (secondary victims) and tertiary victims—can suffer the wrong of displacement. Systematic mass attacks against civilians, especially when targeted against political-ideological or ascriptive groups, make it unsafe for people to stay in the region where those attacks are occurring. When people have to move

[27] Victor Tadros, *The Ends of Harm* (Oxford: Oxford University Press, 2011), pp. 105–8.

[28] For accounts of individual's interests in stable residence and the harms of removal and displacement, see Anna Stilz, "Occupancy Rights and the Wrong of Removal", *Philosophy & Public Affairs,* 41 (4), 2013, pp. 324–56; Cara Nine, "The Wrong of Displacement: the Home as Extended Mind", *Journal of Political Philosophy*, 26 (2), pp. 240–57.

or are made physically insecure in their current place of residence for this reason, they are further wronged in addition to the harms attached to the attacks themselves.

2.1.4 Loss of Goods of Membership

Membership of states—for all but the most tyrannical or dysfunctional of these—comes with a package of benefits. The most obvious of these benefits is protection from serious physical harm. But there are other, more amorphous, benefits, such as the ability to carry out certain individual or collective political activities—the state provides an institutional framework for political conduct, such as forming political parties, standing for election, canvassing elected representatives, and so on. More controversially, membership in a state, and its associated national community, can provide its members with goods such as self-respect, collective pride, and a sense of secure belonging. When people, or the groups to which they belong, are systematically subjected to serious wrongdoing by or the behest of their state, they stand to lose these goods. Because these goods are important, this is a further harm to them.[29]

Let me say a little more about each of these goods, and how crimes against humanity threaten them.

2.1.4.1 Membership and Political Activity People have an interest in being able to undertake political activity within an institutional framework. When institutions assign specific roles to publicly identified individuals, and give those individuals, or groups of them, certain legal powers and responsibilities, the people who are subject to those institutions know who to hold accountable for its decisions and who they should canvass. When a local hospital is closed, or an incinerator is built on a beauty spot, people know to whom they should protest and who, if they have the opportunity, they should electorally punish. Without institutions that publicly assign specific powers and responsibilities to particular individuals, many forms of political activity would simply be pointless. If the identities of all state officials were secret, or all political decisions were made by coin-flip or random number-generator, there would be no point in citizens expressing their political preferences.

When the state commits, sanctions or culpably fails to prevent systematic serious wrongdoing against its citizens, this undermines their ability to exercise their political rights in the following two ways: (i) directly, by removing the basic conditions for them to exercise these rights, through serious injury, coercion or displacement; and (ii) indirectly, by making victims (of all kinds) fearful or otherwise wary of carrying out political activity. Being subject, or liable to, systematic mass attack gives people very good reason to "keep their head down" and avoid any activity that might draw attention to them. It is also likely to erode trust between compatriots, which some have claimed as an important background condition for willingness to

[29] This of course does not apply to cases where the group has been exterminated—that is, where the group is a victim of genocide.

participate politically.[30] Because individuals have a strong interest in being able to carry out political activities of the sort I described in the previous paragraph (even if a non-basic interest), undermining through wrongdoing their ability to do so harms them over and above the other harms imposed on them.

2.1.5 Other Membership Goods

People derive certain further goods from their membership in a national group.[31] For example, many people feel pride in the collective achievements of their nation, and they enjoy the sense of security that comes from membership in a group for which membership is a matter of belonging, and not achievement.[32] When their national identity is attached to a particular state, they may feel pride in the collective achievements of that state, or in the good qualities that state has.[33] We can sum this up as follows: there is a group of goods that people derive from their identification with a state and its associated nationality, goods that derive from their identifying with their state and positively appraising its achievements and qualities.

For an individual to enjoy these goods, it is necessary that they have certain psychological features—that is, they must, as I've said, identify with state and its associated nationality: that is, believe themselves to belong to it, and positively evaluate it (at least in some respects). It would be very strange, after all, to imagine someone deriving pride in the achievements of a group to which he either did not belong or thought poorly of.

The relationship between crimes against humanity and this second class of membership goods should be straightforward. When people are subjected to these crimes by or at the behest of their state, they may lose access to these goods, either because (i) they can no longer identify with their state or (ii) they can no longer positively appraise the state, its qualities, and collective achievements. Both are especially likely to be true where those crimes are targeted at political-ideological or ascriptive groups.

One objection to this line of argument is that many wrongdoings that do not rise to the level of crimes against humanity strip people, individually or collectively, of

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[30] For a discussion of trust in relation to transitional justice, see Colleen Murphy, *Conceptual Foundations of Transitional Justice* (Cambridge: Cambridge University Press), pp. 134–9. On the empirical claim about the relationship between trust and political participation, there is a scholarly debate between those who think that trust *is* an important background condition for political participation and those who argue that distrust of elites and political institutions can mobilise political participation; for an overview, and for some empirical findings, see Marc Hooghe & Sofie Marien, "A Comparative Analysis of the Relation between Political Trust and Forms of Political Participation in Europe", *European Societies*, 15 (1), 2013, 131–52.

[31] I am here taking "national group" to mean a group that shares an attachment (whether it be citizenship or permanent residence) to a *state*, rather than to a pre-political cultural group. I do not mean to deny, however, that people do not also derive goods from a national group in the second sense.

[32] Cf. Avashai Margalit and Joseph Raz, "National Self-Determination", *Journal of Philosophy*, 87 (9), 1990, pp. 439–61, at p. 446.

[33] Matthew Kramer has recently argued that positive features of a society—such as high achievement in the arts and science ("societal excellence")—is linked with citizens' warranted self-respect; *Liberalism with Excellence* (Oxford: Oxford University Press, 2017), Ch. 8.

membership goods of the kind described here. For example, if a law had the effect of making it difficult for members of a particular ethnic group to register to vote would both (i) alienate them from their political community and (ii) directly deprive them of political rights. Yet this would not, by itself, rise to the level of a crime against humanity. So why discuss loss of membership goods in relation to crimes against humanity? It might be thought that I am implicitly arguing that there is nothing distinctive about crimes against humanity, at least from the point of view of the harms involved. But I am not arguing that. I am merely pointing out that a sub-class of crimes against humanity can involve the harms I've described, over and above the more basic harms involved in crimes against humanity. The relevance of this is, as I shall argue, that the kind of harms produced by a crime against humanity makes a difference as to who should punish that crime. Certain harms require certain remedies.

2.2 Domestic Prosecution as Remedy for Harm

One aspect of punishment, as I've said, is what it *expresses*, or communicates. Punishment, it's claimed, can express a commitment to the moral parity of those who have been wronged.[34] But punishment can also express less general commitments than to moral parity between victims and wrongdoers. Consider, for example, a case where a regime led by a military junta deliberately targets members of an ethnic minority, whose members are residents of the state, for systematic serious wrongdoing. This regime is subsequently overthrown and replaced with a democratically elected government who decide to prosecute the members of the former junta for, *inter alia,* their crimes against the members of the persecuted ethnic minority. After a fair trial, the members of the former junta are convicted, and punished. Punishment here expresses not simply a commitment to the moral equality of the victims of the state-led persecution, but also to (i) the special responsibility of the state to protect the rights of the *primary victims* of the wrongdoing, and (ii) the state's commitment to protecting the rights of all members of the ethnic minority and that those who wrong members of this group will not be treated with impunity. In a nutshell, the state's punishment of the junta expresses a commitment to the *civic*, as well as the moral standing of the junta's victims.

The content of the message expressed by the state in prosecuting the junta, then, is *inter alia*:

(i) That victims (both primary, second and tertiary) are full members of the political/national community, with the attendant rights that this entails.
(ii) That the state will enforce those rights against others.
(iii) That the state will punish those who violate or have violated those rights.
(iv) That those who violate or have violated those rights are blameworthy, and do not enjoy the support of the political/national community.

[34] Cf. Hampton, *op. cit.*

There are two further implications of the state's communicating its commitment, through punishment of wrongdoers, to the civic status of those who have been wronged by, or belong to groups targeted for, crimes against humanity. The first is that it might provide the necessary assurance to people in both categories that the state will, from now on, protect them from serious wrongdoing. Given this assurance, they will not feel as pressed to leave their homes in search of refuge, nor need they fear that political activity will bring persecution down on their heads. Prosecuting the former junta, in the case above, may remedy two of the harms I listed above: displacement and the loss of ability to exercise political rights.

The second implication is that this might *repair* the relationship between the state and victims, or between the nation as a whole and the portion of it that has been subjected to serious wrongdoing. There are two ways it might do this: (i) by making it possible for the victims of serious wrongdoing, and members of persecuted groups, to positively evaluate the character of their society and its collective achievements; and (ii) by reconciling victims and persecuted groups with their compatriots. With respect to (i), state prosecution of serious wrongdoers can reassure victims and members of persecuted groups not only of the state's commitment to protecting their rights and of their equal civic status, but of the state's commitment to pursuing justice in general. It becomes possible, therefore, for people to positively assess the character of their society, and to derive warranted pride or self-respect from their membership of it.[35] Much the same is true with respect to (ii): victims and members of persecuted groups may be re-assured of the attitudes of their compatriots towards them—that they do not regard what was done to victims as correct, and that they see victims as entitled to protection by the state.[36] In this way, domestic prosecution of perpetrators can help bring about the important political good of *reconciliation*.[37] Victims, and members of persecuted groups, can start to see themselves as part of a national community once again, and to enjoy the benefits that follow from this identification.[38]

[35] At least, it might be a necessary condition; if there is good reason to think that the majority, or a large section, of the citizens support the atrocities, then prosecution of perpetrators will not be sufficient for reconciliation.

[36] There is also evidence that domestic prosecution of perpetrators of crimes against humanity can improve trust in *institutions* such as the judiciary. As Ezequiel González-Ocantos illustrates, however, we have no empirical evidence that trials increase trust in the judiciary *in the medium or long-term*, and, secondly, prosecution of perpetrators comes with risks: when judgements of defendant culpability is split along partisan lines, prosecution of perpetrators can erode support for the judiciary among certain constituencies; González-Ocantos, "Evaluations of Human Rights Trials and Trust in Judicial Institutions: Evidence from Fujimori's Trial in Peru", *International Journal of Human Rights*, 20 (4), 2015, pp. 445–470.

[37] For a discussion of political reconciliation in the context of transitional justice, see Colleen Murphy, *op. cit*. See also Catherine's Lu's account of the relationship between reconciliation and the alienation produced by what she calls "political catastrophes"; *Justice and Reconciliation in World Politics* (Cambridge: Cambridge University Press, 2017), Ch. 6.

[38] There may be complicating factors with respect to multi-national conflicts such as the Bosnian War, which pitted that country's three national groups—the Bosniaks (or Muslims), Serbs, and Croats—against each other. Laurel Fletcher and Harvey Weinstein point out that the perceptions of the trials of perpetrators by the International Criminal Tribunal for the former Yugoslavia split by national group.

This reparative function is another respect in which domestic prosecution is superior to prosecution by international or foreign courts. For although international or foreign prosecution may go some way to expressing the moral parity of victims, it cannot *repair* the relationship between victims and their state in the way that domestic prosecution can.

There is a caveat to these claims. State prosecution of serious wrongdoers will only have the expressive and reparative functions I've claimed for it if it expresses a genuine commitment by the state to the civic equality of victims and members of persecuted groups, and not a mere displacement of responsibility for wrongdoing onto particular individuals. In other words—state prosecution must not be a mere "scapegoating" of individuals, but part of a genuine change in the relationship between the state and those who have been wronged. For example, suppose, in the scenario involving the persecuted ethnic minority above, that the state singles out some former senior regime officials for prosecution but does nothing to flatten serious inequalities of political influence between members of this ethnic group and their compatriots, or tolerates lower-level abuses against this group, such as discrimination in housing or employment. Or, suppose the state, instead of prosecuting on the basis of justifiable principles (e.g., prosecuting all involved state officials above a certain level of seniority), prosecutes only enemies of the current regime, and leaves its allies alone.[39] In these cases we would not think that domestic prosecution expressed a commitment to the civic equality of victims or members of persecuted groups. So state prosecution of serious wrongdoers must be (i) carried out in accordance with certain justifiable principles and, where crimes against humanity were targeted against political-ideological or ascriptive groups, and (ii) complemented by attempts to settle the legitimate grievances of those groups.

Of course, it may be very difficult to come up with a workable legal test for whether or not a state is scapegoating. The point I am trying to make is that a state that engages in scapegoating, and is publicly seen to be so engaged, will not realise the goods that domestic prosecution is supposed to bring about. But given, as I've mentioned, the possible difficulty of coming up with a legal test, we may have to err on the side of giving states leeway with respect to who they choose to prosecute. There may, in fact, be very good reasons to prosecute some rather than other individuals—some perpetrators may still be influential, and capable of causing havoc. Prosecuting some individuals may be deleterious to overall social peace.

Footnote 38 (Continued)

Each national group was eager to see itself as the principal victim of the conflict, and interpreted the trials in this light; "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation", *Human Rights Quarterly*, 24 (3), 2002, pp. 573–639. Similarly, James Meernik demonstrates that arrests and prosecution of suspected war criminals has improved attitudes between national groups in Bosnia only slightly, if at all; "Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia", *Journal of Peace Research*, 42 (3), 2005, pp. 271–89. For a more recent overview of these issues, see Milan Marković, "The Impact of the ICTY on the former Yugoslavia: An Anticipatory Postmortem", *American Journal of International Law,* 110 (2), 2016, pp. 233–59.

[39] Including allies who have committed war crimes. Sometimes a new regime needs to rely on particular constituencies to retain power, including constituencies whose members were involved in carrying out war crimes. In these cases, there might be countervailing reasons to avoid destabilising a (democratic) transition by prosecuting members of those constituencies.

To re-iterate, there is something distinctively important about the fact that it is the *domestic state* that is doing the punishing of perpetrators. The victim-centred justification for the primacy of states in prosecution is really about the interests that victims and members of persecuted groups have in repairing their relationship with their state. When the state carries through the prosecution of perpetrators, and does so in an acceptable manner, it expresses both its rejection of the permissibility of those crimes, and its commitment to the civic status of victims and members of persecuted groups. There is something of additional value, I have argued, in having domestic states prosecute perpetrators, especially when those perpetrators are former senior state officials or even heads of government.

In summary, I've outlined the ways in which domestic prosecution can express a commitment by the state to the civic equality of victims and persecuted groups, and so remedy the harms associated with state-backed or tolerated crimes against humanity. In the next section, I will argue that this gives us good reason to prefer that states have primacy when it comes to prosecuting that class of crimes against humanity.

One final caveat: nothing I have said here precludes saying that states might have an all-things-considered duty to offer amnesties to, or to simply refrain from prosecuting, perpetrators of crimes against humanity. It may be the case that the interests that victims have in their states punishing perpetrators is not enough to justify prosecution, because the expected cost of doing so is too high. Prosecuting perpetrators might prove destabilising, for example in a post-conflict situation.[40]

This point about amnesties raises a serious question: if states do decide, for good reasons, to offer amnesties to perpetrators, may third-party states or the International Criminal Court justifiably prosecute those perpetrators? I don't hope to answer this question fully here, but let me give a brief sketch of an answer. To start with, we ought to distinguish between two cases: cases where third-party or international prosecution of perpetrators would seriously undermine social peace in the domestic state, and those in which it would not. In the former case, there are strong reasons to respect the decision of the domestic state. In the second case, however, it is harder to explain why third-party states and international courts should refrain from prosecution. After all, under the principle of universal jurisdiction, they too have responsibility for prosecuting crimes against humanity, even those committed extraterritorially. Moreover, given that the argument of this paper is that the reasons to give domestic states priority in prosecution are victim-centred, and not sovereignty-based, it would seem inconsistent to privilege domestic states' amnesty decisions at the expense of victims' claims to the prosecution of those who have wronged them.[41]

[40] Researchers have found little empirical evidence of this in Latin America—the region most prominently associated with human rights trials of former regime officials. See: Kathryn Sikkink and Carrie Booth Walling, "The Impact of Human Rights Trials in Latin America", *Journal of Peace Research*, 44 (4), 2007, pp. 427–45.

[41] I thank an anonymous reviewer for raising this issue. For discussion of the relationship between domestic amnesties and universal jurisdiction, see Juan E. Mendez and Garth Meintjes, "Reconciling Amnesties with Universal Jurisdiction", *International Law Forum*, 2, 2000, pp. 76–97, and Naomi Roht-Arriaza, *The Pinochet Effect: Transitional Justice in the Age of Human Rights* (Philadelphia, PA: University of Pennsylvania Press, 2005), Ch. 7.

3 The Complementarity Principle: Which Way?

So far, I have argued that there are victim-centred reasons for domestic states to have primacy when it comes to the prosecution of the class of crimes against humanity I picked out in Sect. 1. At first sight, this view might seem at odds with the principle of *universal jurisdiction*, a legal principle according to which *all* states, regardless of the nationality of the perpetrators, or the territory on which the crimes were committed, have the right to prosecute certain crimes, including crimes against humanity.[42]

The principle of universal jurisdiction can be motivated, normatively speaking, by both victim-centred and victim-neutral considerations. The victim-centred considerations: placing crimes against humanity under universal jurisdiction best protects the interests that victims have in having justice carried out against the perpetrators of serious crimes against them—states, after all, are often unwilling to prosecute their own nationals for these crimes.[43] To vest jurisdiction over crimes against humanity solely in states is to leave victims, as Fabre says, "vulnerable to the vagaries of punishing states' effective exercise of [their right to punish]".[44] The victim-neutral justification for universal jurisdiction is as follows: crimes against humanity concern not only those who have ties of nationality to victims, but everyone. Insofar as all persons are of moral concern to us, we have a *prima facie* duty to punish crimes against humanity.[45]

The existence of this *prima facie* right, however, is compatible with an all-things-considered duty to refrain from intervening in the punishment of crimes against humanity committed by nationals of other countries. In Sect. 2 I argued that victims and members of persecuted groups have an interest in having *their* states punish perpetrators. This interest gives them a claim, not only that their state punish perpetrators, but that foreign states, individuals and international organisations refrain from doing so, provided that their own state is able and willing to.

States have a *presumptive claim*, then, to the right to punish their own nationals for the class of crimes against humanity picked out in this article. Other states, international organisations and foreign nationals have a duty to assist domestic states in this task, but a presumptive duty to refrain from actually meting out punishment for those crimes themselves. Only where a state proves unwilling or unable to prosecute its own nationals do these other entities have a right (and a duty) to punish.

Defending this claim that victims have a claim that their *own* state punish domestic perpetrators of crimes against humanity does not entail rejecting the principle of universal jurisdiction. Indeed, as I've noted, according to the Rome Statute of the

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[42] For an overview Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), pp. 555–8; M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practices", *Virginia Journal of International Law*, 42, 2001, pp. 81–162. For a philosophical discussion of the principle see Alexander Chehtman, *Philosophical Foundations of Extraterritorial Punishment* (Oxford: Oxford University Press, 2010).

[43] Cf. David Luban, *op. cit.*, p. 138.

[44] Fabre, *op. cit.*, p. 201.

[45] *Ibid*, p. 202. Massimo Renzo makes a similar point in a different way; he argues that we are fundamentally *answerable* to humanity as a whole for certain crimes, *op. cit.*, pp. 466–7. See also Hannah Arendt, *Eichmann in Jerusalem* (New York, NY: Viking Press), p. 261.

International Criminal Court, the ICC international courts has a complementary role in punishing perpetrators of crimes against humanity. That is the position I defend here: I am just trying to establish that there are victim-centred considerations that ground the primacy of domestic states in the punishment of state-backed or tolerated crimes against humanity against states' own citizens and long-term residents.

In Sect. 1 above, I pointed out that my argument does not rely on any particular justification for punishment. It relies only on the lesser claims that expressive considerations can give us good reasons to vest the power to punish in domestic institutions. Moreover, this argument is also compatible with the most well-developed account of the justification of *extra-territorial* punishment. Consider, for example, Alexander Chehtman's account of extra-territorial punishment. Chehtman argues that the principle of universal jurisdiction is grounded in people's collective interest in "there being a legal system in force prohibiting international crimes such as genocide, crimes against humanity, and war crimes. For this to obtain, it is necessary that states have universal jurisdiction over these crimes."[46] This is quite compatible with domestic states having primacy in prosecution—the fact that international institutions must defer to domestic institutions does not vitiate the presence of a legal system that prohibits the relevant crimes. This reply also holds in the case of another purported justification for punishment: deterrence. Someone might object that universal jurisdiction provides a greater deterrent effect to potential perpetrators of crimes against humanity. But again, domestic primacy does not vitiate universal jurisdiction, and so it does not vitiate the deterrent effects of universal jurisdiction.

There is a more challenging version of this objection. Suppose we think that the justification for punishment is retribution. In that case, mightn't we think that we have *pro tanto* reason to give priority to the state or international court that will apply less lenient penalties to perpetrators of crimes against humanity?[47] How should we weigh this against the reasons to prefer domestic prosecution? My argument for domestic priority in prosecution is a victim-centred argument—it appeals to certain interests that victims have in *their* state prosecuting those who have wronged them. Among these interests are *expressive* interests: interests in having their state express something about civic status. For prosecution of crimes against humanity to successfully express the civic equality of the wronged, the penalties must be of a certain severity. Suppose a state convicts its former dictator for crimes against humanity, only to sentence him to six months' house arrest and a moderate fine. A sentence like this would only be an insult to the dictator's victims. The same is true in cases where the state is not able to impose penalties of the kind that would incapacitate those who have been convicted, or where it fails to properly apply criminal sanctions. In these cases, the rationale for domestic priority would not apply. One implication of this is that we should adopt a more expansive reading of "able and willing to prosecute". It is not enough for a state to merely go through the motions of prosecution: if it convicts, it must apply penalties that are appropriately severe. If

46 Chehtman, *op. cit*, p. 133.

47 Of course, this is true only up to a point: we mightn't think that we have *pro tanto* reason to prefer that perpetrators be tried in a jurisdiction that applies the death penalty.

it fails to apply severe penalties, international courts or third-party states are under no duty to refrain from prosecuting.

Suppose, however, that the domestic state imposes penalties sufficient to successfully express the civic equality of victims, but the penalties it imposes would still be less severe than those of another state, or international court. If the justifying aim of punishment is retribution, then do we not have *pro tanto* reason to prefer that the jurisdiction with stiffer penalties prosecutes? My reply to this is straightforward: we should give much greater weight to the victim-centred considerations I canvassed in the previous section than to considerations of this sort when assigning rights to punish. I argued in the previous section that prosecution by the domestic state not only has an expressive dimension—it also *repairs* some of the harms incurred by victims; chiefly, by re-asserting their equal civic status and helping to reconcile them to their state and national community.

Saying that these victim-centred considerations *outweigh* the retribution-based reasons we have to favour jurisdictions with less lenient punishments does not mean that the argument of this paper is incompatible with retribution as a justification for punishment. It simply means that some of the reasons that retributive theories say we have are weaker than the victim-centred reasons I've canvassed.[48]

At this point, someone might object that giving states priority in prosecuting the class of crimes against humanity I've picked out here is, at best, futile, and at worst an impediment to justice. States, the thought is, are unlikely to prosecute crimes against humanity carried out by state officials against their own people, or, at least, to do so satisfactorily. As Larry May puts it:

when the State is involved in the assault on individuals, there is an opening for prosecution by an international tribunal. In addition, when it is the State that is the victimizer, and not merely that the State allowed the attacks to occur, then it normally makes little sense to argue that a domestic tribunal should prosecute the crime since it is so unlikely that the State could impartially prosecute itself.[49]

This objection overlooks the fact that there are many clear-cut examples of states prosecuting former officials for crimes against humanity, usually as part of transitional justice arrangements. Latin America, in particular, is a stand-out example of this: starting with Argentina in the 1980s, many Latin American states have successfully prosecuted former regime officials for crimes against humanity—including Chile, Peru, and Guatemala.[50]

A final objection: it might be thought that my argument that domestic states should have primacy in punishing the class of crimes against humanity I've described here does not target the "against humanity" element of those crimes.

[48] Another issue, which I thank an anonymous reviewer for raising, is that there may be good reasons to give comparatively lenient sentences to perpetrators of crimes against humanity. This is because we may wish to reserve the heaviest penalties for the most serious crime—i.e., genocide. Applying the most severe penalties for comparatively less serious crimes might possibly weaken the expressive power of punishing *genocidaires*.

[49] Larry May, *Crimes Against Humanity* (Cambridge: Cambridge University Press, 2004), p. 88.

[50] For an overview of criminal justice arrangements in respect of former regime officials in Latin America, see Ezequiel A. Gonzalez-Ocantos, *The Politics of Transitional Justice in Latin America* (Cambridge: Cambridge University Press, 2020), pp. 14–16 in particular.

My argument is that certain harms attach to a sub-class of crimes against humanity. These harms may be remedied by domestic prosecution, but *not* by international prosecution. My objector might say that although this argument might ground a presumption that the state should punish the perpetrators of crimes against humanity, it does not ground the claim that the state should have primacy in punishing them for crimes *against humanity*—merely for the ancillary harms that result from these crimes. My reply is that, from a practical point of view, it makes no difference. If we have a choice between two bodies meting out punishment—one, the domestic state, and the other, an international court, the domestic state should have primacy. At this point my objector could say that domestic courts and institutions should have primacy in punishing the ancillary aspect of the crimes, but that international courts and institutions should also be allowed to mete out punishment for those aspects of the crimes that might be said to wrong humanity as a whole.

The problem with this approach is that it is precisely by punishing what we might call the "core" elements of crimes against humanity—the egregious physical harms, such as murder, torture, and so on—that states remedy the ancillary harms. A state will not suitably express its commitment to the civic status of the people its former officials have wronged unless it punishes them for the crimes against humanity of murder, torture, and so on. It is important to note here that states should not simply prosecute perpetrators for murder, torture, and so on, but for crimes against humanity of torture, murder, and so on.[51]

On this line, one need not reject the claim that crimes against humanity are, in some sense, committed *against humanity as a whole*. All I have claimed is that a class of crimes against humanity involve certain ancillary harms to their victims, harms that can only be remedied by domestic prosecution and punishment of perpetrators. Moreover, as Massimo Renzo points out, states can prosecute crimes against humanity *on behalf of* humanity as a whole.[52] This illustrates one of the asymmetries between domestic and international prosecution: domestic states can perform the functions of international courts, but international courts cannot perform the expressive role that I have attributed to domestic courts in this article.

Let me close with two important points: first, as I've said my argument for the primacy of domestic courts in prosecuting crimes against humanity does not rely on any claim about the importance of respecting national sovereignty. Secondly, one need not deny that crimes against humanity are everyone's concern, regardless of the nationality of the victims or perpetrators, in order to hold that domestic states should have primacy in punishment—one not even need to believe that people should give greater weight or concern to the interests of their compatriots. It is just a matter of

[51] I thank an anonymous reviewer for this point, and for referring me to the case of the Rwandan genocide fugitive Michel Bagaragaza, who attempted to have himself tried for murder in Norway rather than by the ICTR. The ICTR found that because Norway did not have on its statute books the crime of genocide, it would not be fitting to try Bagaragaza in that jurisdiction, as he would have been prosecuted for the lesser crimes of murder, etc. See *Prosecutor v. Michel Bagaragaza* (Decision on the Prosecution Motion for Referral to the Kingdom of Norway) ICTR-05–86, 19 May 2006. An upshot of this point is that domestic states ought to incorporate laws against crimes against humanity into their criminal codes.

[52] Massimo Renzo, "Responsibility and Answerability in the Criminal Law", in R. A. Duff *et. al.* (eds) *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013), pp. 209–36, at p. 227.

recognising that people have important interests in having their own state punish perpetrators, and that these interests are sufficient to put others under a presumptive duty not to punish these crimes. When their own state fails to punish, they have a claim on others—international organisations or other states—to step in.

4 Conclusion

In conclusion, I have argued that when states commit, assist, or culpably fail to prevent crimes against humanity committed against their own people, victims and members of persecuted groups have a claim that *their* state punish perpetrators. I argued for this claim by pointing out that victims have an interest in having their state publicly express, through punishment of wrongdoers, not only its recognition of their moral status, but also recognition of their *civic* status. The justification for the primacy of domestic states in the prosecution of crimes against humanity, then, is not primarily to do with the importance of respecting state sovereignty, but with the interests of victims.

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Declarations

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