

Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice

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Abstract: *Nullum crimen sine lege* and related doctrines that limit extraterritorial jurisdiction and confer immunity *ratione materiae* are not inconvenient obstacles to be circumvented, but crucial safeguards to be respected. These doctrines respond to the reality that the international community remains beset by serious moral disagreement, both about what count as just ends and about which harsh measures those ends might justify in circumstances of high-stakes political conflict. In such a world, in which very few hands are truly clean, unilateral invocations of universal principles must be viewed skeptically, and associated exercises of power treated guardedly. Prosecutions undertaken in the name of the international community must establish a requisite social, and not merely a moral, basis for condemning acts – including acknowledged human rights violations – as crimes, and for holding their state-authorized perpetrators as subject to individual penal responsibility.

An over-assertive approach to international criminal justice, to be pursued unilaterally in domestic justice systems, is troubling because it risks undermining what is arguably most valuable about international law. International law provides a framework for accommodation among the non-like-minded, and a normative basis for mobilizing broad opposition to the self-righteous violence of the powerful (even as it licenses uses of force where there is genuinely no reasonable alternative). Penal processes aim to identify villains, consequently to exclude them as bearers of recognized authority, and thus as partners in negotiation and accommodation. Appropriate though such outcomes are in an important subset of circumstances, it is dangerous to distract from the deeper truth that peace means peace with others as they are, not as we might like for them to be. One must seek peace, not always with the gentle, but often with the ruthless. A repudiation of that truth risks setting in motion, willy-nilly, a new ruthlessness to end all ruthlessness.

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INTRODUCTION

In recent years, scholars and advocates committed to the cause of international legality have almost uniformly expressed passionate enthusiasm for the burgeoning project of international criminal justice. In the international law literature, the word “impunity” appears exclusively as a pejorative (if not an epithet),¹ and scholarship routinely suggests creative circumventions of constraints on penal accountability that arise from a range of doctrines rooted in deference to state authority. State sovereignty is routinely cast as a realm of lawlessness that recedes insofar as international law advances, and nothing is seen to augur the advent of the international rule of law quite as much as extraterritorial prosecution of state agents for human rights and humanitarian law

¹ Illustrative is the response of six human rights organizations to Belgium’s 2003 curtailment of the reach of its penal laws: “‘With its universal jurisdiction law, Belgium helped destroy the wall of impunity behind which the world’s tyrants had always hidden to shield themselves from justice,’ said the groups. ‘It is regrettable that Belgium has now forgotten the victims to whom it gave a hope of justice.’” Human Rights Watch, “Belgium: Universal Jurisdiction Law Repealed” (Aug. 1, 2003), <<http://www.hrw.org/en/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>>.

So strong is the perceived repugnance of the term that the International Court of Justice felt the need to give rhetorical assurance that immunity does not equate to impunity, even in dicta that seemingly bolstered impunity by negative implication. *Case Concerning the Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v. Belgium (Yerodia)*, 2002 ICJ Rep. 3, para. 60. This curious passage spoke of Foreign Ministers remaining subject to prosecution in foreign-state courts, after leaving office, for crimes that they committed “in a private capacity,” *id.*, para. 61, even though private crimes in this context are obviously not of central concern, and continued immunity for crimes committed in a public capacity would amount to impunity. *See id.*, diss. op. of Judge *ad hoc* Van den Wyngaert, para. 36; William A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge Univ. Press, 2006), 159 & n. 31 (concluding that this language “largely overturned a somewhat more liberal ruling by the United Kingdom House of Lords in the celebrated *Pinochet* case”); David S. Koller, “Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court,” 20 *Am. U. Int’l L. Rev.* 7, 29 (2004) (“The Court’s judgment effectively creates a substantive defense, according absolute impunity in violation of ... the Court’s own stated goal of not equating immunity with impunity.”). The passage’s substantive significance is doubtful (the “private capacity” language may have been intended to leave other immunity questions open), but the rhetorical incongruity is remarkable.

violations.

Although the prevalent mind-set allows for controversies internal to criminal law doctrine, such as about expansive theories of what counts as personal participation in established international crimes,² an insistence on discerning, let alone advocating, public international law-based limitations to the reach of substantive penal norms encounters profound disfavor.³ Emblematic is the uni-directional “Princeton Principles” project: in setting forth prescriptions to expand national courts’ exercise of universal criminal jurisdiction, the proclamation pointedly cautions that these prescriptions “shall not be construed as limiting the continued development of universal jurisdiction in international law.”⁴ Where international criminal justice is concerned, the preponderant view

² Perhaps the most sweeping critique along these lines is Darryl Robinson, “The Identity Crisis of International Criminal Law,” 21 *Leiden J. Int’l L.* 925 (2008); see also Alison Marston Danner & Jenny S. Martinez, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,” 93 *Cal. L. Rev.* 75 (2005); Mark J. Osiel, “Modes of Participation in Mass Atrocity,” 38 *Cornell Int’l L. J.* 793 (2005).

³ Some noteworthy exceptions include Henry J. Steiner, “Three Cheers for Universal Jurisdiction – Or Is It Only Two?” 5 *Theoretical Inquiries in Law* 199 (2004) (giving a mixed account of the doctrine’s prospects); Madeline Morris, “Universal Jurisdiction in a Divided World,” 35 *New England L. Rev.* 337 (2001) (raising concerns); see also Anthony Colangelo, “The Limits of Universal Jurisdiction,” 47 *Va. J. Int’l L.* 1 (2005) (specifying the scope of the license that universal jurisdiction establishes). The most cited contrarian literature about international criminal justice comes from outside of the international law field, whether from the “New Sovereignist” school within U.S. foreign relations law, see Peter J. Spiro, “The New Sovereignists: American Exceptionalism and Its False Prophets,” 79 *Foreign Aff.* 9 (2000), or from political scientists of the “realist” school, see, e.g., Jack Snyder & Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” 28:3 *Int’l Security* 5 (2003-04); Henry A. Kissinger, “The Pitfalls of Universal Jurisdiction,” 80 *Foreign Aff.* 86 (2001).

⁴ *The Princeton Principles on Universal Jurisdiction* (Princeton University Program in Law and Public Affairs, 2001), Principle 13(3), at 35. The official Commentary attributes to the authors – a well-regarded group of scholars, jurists, and activists – an intention “to invite rather hinder the continued development of universal jurisdiction.” *Id.* at 41. Thus, “[a]ll of the participants felt that the Principles not be construed ... to constrain the evolution of accountability for crimes under international law. *Id.* at 55. However, one of the participants, Lord Browne-Wilkinson, dissented from the Principles insofar as they affected states not parties to the Torture Convention or to other instruments manifesting consent to the exercise of universal jurisdiction, and also inasmuch as the Principles would remove all immunities, *ratione personae* as well as *ratione materiae*. He commented as follows:

holds, more is better.⁵

In contrast, the present article will identify and defend those aspects of the international legal order that persist in impeding the reach of penal accountability. Rather than regarding these legal

[T]he Princeton Principles propose that individual national courts should exercise such jurisdiction against nationals of a state which has not agreed to such jurisdiction. Moreover the Principles do not recognize any form of sovereign immunity: Principle 5(1). If the law were to be so established, states antipathetic to Western powers would be likely to seize both active and retired officials and military personnel of such Western powers and stage a show trial for alleged international crimes. Conversely, zealots in Western States might launch prosecutions against, for example, Islamic extremists for their terrorist activities. It is naïve to think that, in such cases, the national state of the accused would stand by and watch the trial proceed: resort to force would be more probable. In any event the fear of such legal actions would inhibit the use of peacekeeping forces when it is otherwise desirable and also the free interchange of diplomatic personnel.

I believe that the adoption of such universal jurisdiction without preserving the existing concepts of immunity would be more likely to damage than to advance chances of international peace.

Id. at 49 n.20.

⁵ The prevalent attitude is expressed in such articles as: Mark A. Summers, “Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States that are Not Parties to the Statute of the International Criminal Court,” 31 *Brooklyn J. Int’l L.* 463 (2006); Ellen Lutz & Kathryn Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America,” 2 *Chi. J. Int’l L.* 1 (2001) M. Cherif Bassiouni, “Combating Impunity for International Crimes,” 71 *U. Colo. L. Rev.* 409 (2000); Jordan J. Paust, “It’s No Defense: *Nullum Crimen*, International Crime and the Gingerbread Man,” 60 *Albany L. Rev.* 657 (1997).

As to its particulars, this literature is generally accurate and well-considered. But paradoxically, a distortion arises from the literature’s predominant, and quite appropriate, focus on relatively uncontroversial cases of mass atrocities. Such contexts inspire fully justifiable efforts to overcome doctrinal obstacles to the assertion of prosecutorial authority over sovereign acts. However, those efforts tend not only to narrow the interpretation of legal limitations on the redress of injustice, but also to disparage those limitations. *See, e.g.*, Bassiouni, *supra*, at 421 (“The ICC reminds governments that *realpolitik*, which sacrifices justice at the altar of political settlements, is no longer accepted.”) In particular, the anti-impunity rhetoric tends to imply broadly that state officials who authorize or participate in their states’ violation of international legal obligations – especially human rights obligations – can be held personally accountable in foreign courts. As will be discussed below, this is the exception, not the rule, and remains so for sound reasons of principle and policy.

impediments as artifacts of the past, to be progressively overcome by the forces of enlightenment, or as stubborn political realities that represent the regrettable limits of righteousness in a world still dominated by self-interested power holders, this article will champion those impediments affirmatively as matters of principle, to be upheld – at least presumptively – even in the face of morally compelling causes.

What, besides the purest misanthropy, could account for an approach to international law that not only acknowledges, but seeks to solidify, restraints on the pursuit of individual accountability for states' unjust and unlawful acts? The approach might appear even more curious where the author affirms that law is not reducible to a set of social facts, as some versions of legal positivism would have it, but is rather a purposive process in which moral considerations play a legitimate role.⁶ It may be more curious still, when the author further admits that accountability in the exercise of state power counts among legality's foremost inherent purposes, and that unlawful state acts are "committed by men, not by abstract entities."⁷

The explanation for the contrarian approach lies in the purposes of global order given pride of place in the United Nations Charter: the establishment of a platform for peaceful accommodation

⁶ The methodological approach taken here, inspired significantly by the work of Lon Fuller and Ronald Dworkin, is less akin to positivism, *see* Bruno Simma & Andreas L. Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View," 93 *Am. J. Int'l L.* 302 (1999), than to the "new international legal process" theory, inasmuch as the latter considers "legal doctrine in light of the law's purposes and the polity's underlying principles," *see* Mary Ellen O'Connell, "New International Legal Process," 93 *Am. J. Int'l L.* 334, 336 (1999) (citing the canonical work of Henry M. Hart, Jr. and Albert Sacks). Yet in O'Connell's reading, the latter theory "not only supports the fullest accountability, but also would give international institutions the authority to decide for full accountability, despite contrary indications in positive international law." *Id.* at 351. I find this statement unexceptionable as applied to the uncontroversially atrocious cases on which she focuses, but troubling in its neglect of the countervailing purposes and principles that would properly preclude extraterritorial penal accountability in other cases.

⁷ International Military Tribunal (Nuremberg), Judgment and Sentence (Oct. 1, 1946), 41 *Am. J. Int'l L.* 172, 221 (1947).

among states representing a diversity of interests and values, and the protection of weak political communities from overbearing projections of power by strong foreign states.⁸ These purposes underlie what remains the primary organizing principle of the Charter-based order: the sovereign equality of states. An unbalanced pursuit of other purposes, morally compelling though they may be, would jeopardize that order's accomplishments, which are themselves morally compelling.⁹

To champion the purposes associated with sovereign equality is by no means to deny that international criminal justice can serve a useful – indeed, often complementary – function. Nor can there be any doubt that, as a result of the international community's practical and rhetorical affirmations of this function, penal norms have in recent decades developed substantially within the corpus of positive international law.¹⁰ Not only has the international system produced institutional apparatuses of its own to implement these norms, but it has increasingly “deputized” individual states to establish extraterritorial prescriptive and adjudicative jurisdiction over the most serious

⁸ The first two “Purposes” of the Organization listed in Article 1 are “To maintain international peace and security” and “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” U.N. Charter, arts. 1(1), 1(2). Consequently, “The Organization is based on the principle of the sovereign equality of all its Members,” *id.*, art. 2(1), and all states are bound to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,” *id.*, art. 2(4). These purposes are given forceful and authoritative elaboration in the “Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations,” G.A. Res. 2625 (1970) (“Friendly Relations Declaration”).

⁹ “If modern international society was instituted for anything, it was to prevent unnecessary confrontations and collisions between different states that are inspired and driven by the assertion of their own preferred values.” Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000), at 368

¹⁰ See generally Antonio Cassese, *International Criminal Law* 3-199 (Oxford Univ. Press, 2003).

violations of human rights and humanitarian law.¹¹

The real issues lie at the margins. Where existing positive norms of the international legal order that emphasize state authority – in particular, jurisdictional limitations, immunities, and *nullum crimen sine lege* – threaten to frustrate prosecutions of human rights violators, to what extent should interpretive creativity be brought to bear to fill gaps and to overcome barriers in the name of moral purposes? This article will argue that, especially where domestic courts exercise extraterritorial jurisdiction over foreign state agents, such interpretive creativity should ordinarily be resisted. Such resistance reflects, not a sterile formalism, but an affirmation that the doctrinal constraints at issue are central to the international legal order's moral project.

The first section below will summarize the challenge that the prevalence of ruthless responses to political crisis poses to a legal order that demands both human rights compliance and forbearance from unilateral impositions. The second section will elaborate rule-of-law considerations that constrain the retrospective application of one regime's criminal law to conduct that took place under a different regime. The third section will speak to the special problem of observing the rule of law in accounting for enactments of past regimes that systematized extreme injustice. The fourth section will argue for regarding international law as a worthy constraint on the pursuit of substantive justice. The fifth section will contend that the distinction between international human rights violations and international crimes needs to be rigorously observed rather than elided.

I. *Championing Legality in a Ruthless World*

¹¹ See *id.* at 284-98; Stephen Macedo, ed., *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: Univ. of Pa. Press, 2004).

Substantive justice and the rule of law represent distinct moral projects that, while often in harmony, are sometimes in tension.¹² The rule of law, presupposing human societies beset by both conflict of interest and moral disagreement, establishes rigidities designed to promote predictability and accountability in the exercise of power. Where legal constraint lacks sufficient rigidity to withstand the pressing demands of substantive justice, especially in a “horizontal” system that relies on the more powerful states for coercive norm implementation, the strong are unleashed to pursue substantive justice as they understand it.

Working relationships in the international arena largely depend on maintaining an “agreement to disagree,” not only about conflicts of interest, but also about matters of fundamental justice. The international legal order thus needs to maintain a balance between ideological pluralism – accommodating inconsistent and sometimes mutually antagonistic political moralities – and an insistence on the inadmissibility of practices reprehended by an overlapping consensus of disparate conceptions of justice.

Moreover, as will be elaborated more fully below, international law’s constraints on cross-border exercises of coercion and force are founded exclusively on respect for the sovereign authority of individual states. Where international law is seen to impugn that sovereign authority, and yet recourse to the trumping authority of the United Nations Security Council is unavailing (as is usual, given that body’s prevalent disunity), the commitment to forbearance from self-help is inevitably strained. It is unrealistic to expect international law’s insistence on the inviolability of a state’s territorial integrity and political independence to be heeded where international law itself is enlisted

¹² See, e.g., Ronald A. Dworkin, “‘Natural’ Law Revisited,” 34 *U. Fla. L. Rev.* 165, 186 (1982) (noting the conflict between one party’s “right to a better public order” and another’s “right to a consistent application of the public order”).

in the project of branding that state's government as criminal.¹³

In international criminal law, the consideration of ideological pluralism weighs most heavily in domestic court cases proceeding under the doctrine of universal jurisdiction. Unilateral assertions of extraterritorial penal jurisdiction over acts of foreign state agents are the most likely to pose a danger to the balance that international law represents,¹⁴ thereby undermining the international legal order's indispensable functions of facilitating accommodation and precluding the strong from imposing what they unilaterally perceive as justice.

The most serious problem promises to arise in the application of putative international penal norms to cases of what I will call "ruthlessness": measures incompatible with "universal" principles of deontological morality,¹⁵ and condemned widely in the abstract, but evaluated differentially in practice within the empirical international community, on the basis of differential regard for the ends to which these measures serve as a means. These ruthless measures constitute serious human rights violations, and some of them have been unambiguously criminalized. Many of them, however, are

¹³ See, e.g., W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law" 84 *Am. J. Int'l L.* 866, 875 (1990) (justifying "unilateral vindication of clear violations of rights when multilateral possibilities do not obtain" on the ground that "rights without remedies are not rights at all"); Reisman, "Unilateral Actions and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention," 11 *Euro. J. Int'l L.* 3, 15 (2000) (contending that "as the norms in question – international human rights norms – derive from a broader decision process than the body assigned to enforce those norms, the broader decision process sustains the norms and seeks alternative modes of enforcement").

¹⁴ "Unfortunately, considering the enormous effort and potential expense in collecting evidence, gathering witnesses, and trying accused perpetrators of horrific crimes committed extraterritorially, the motivation for almost every such national proceeding likely would have some foundation in politics or arise from a sense of judicial, and most likely Western, superiority." Anthony Sammons, "The 'Under-Theorization' of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals by National Courts," 21 *Berkeley J. Int'l L.* 111, 137-38 (2003).

¹⁵ For an introduction to the distinction between deontological and consequentialist approaches to morality, see, e.g., J.L. Mackie, *Ethics: Inventing Right and Wrong* (New York: Penguin Books Ltd., 1977), 149-68.

either (a) outside the scope of established international crimes,¹⁶ (b) on the margins of established international crimes,¹⁷ or (c) nominally within the scope of existing international crimes, but not really treated as international crimes when the “good guys” are the ones committing them.¹⁸

Whereas the elements of the most uncontroversial international crimes themselves entail or suggest inadmissible ends,¹⁹ ruthless measures, as herein defined, are *substantially related to cognizable governmental (or insurgent) objectives*.²⁰ Although presumptively wrongful in both

¹⁶ For example, as will be discussed at length below, the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment (“Torture Convention”), 10 December 1984, 1465 UNTS 85, 23 ILM 1027 (1984), confers extraterritorial penal jurisdiction over acts of “torture” as defined in Article 1, but not over “cruel, inhuman, and degrading treatment” as defined in Article 16.

¹⁷ For example, Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court codifies the customary war crime of “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” The uncertainty of this norm’s application to frequent occurrences in the course of armed conflicts is manifest. See Randall Peerenboom, “Human Rights and Rule of Law: What’s the Relationship?” 36 *Geo. J. Int’l L.* 809, 883 (2005) (expressing concern that “these exceedingly vague concepts are likely to result in outcomes determined more by power politics and contested normative views than legal considerations in many cases”).

¹⁸ The much-maligned *tu quoque* defense has considerable force where a standard’s legal validity ultimately rests on its manifestation in patterns of actual practice. Even at Nuremberg, German Admiral Karl Doenitz was successfully defended on the count of engaging in unrestricted submarine warfare on the basis of an affidavit from U.S. Admiral Chester Nimitz, who averred that he had done the same against the Japanese. See Gerry J. Simpson, “Didactic and Dissident Histories in War Crimes Trials,” 60 *Albany L. Rev.* 801, 806 n. 26 (1997). For an allegation of double-standards in the operation of the International Criminal Tribunal for the former Yugoslavia, see Paulo Benvenuti, “The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia,” 12 *Euro. J. Int’l L.* 503 (2001).

¹⁹ These include genocide (an effort “to destroy, in whole or in part, a national, ethnical, racial or religious group”), crimes against humanity (a “widespread or systematic attack ... against [a] civilian population”), and “a plan or policy or ... a large-scale commission” of grave breaches or other serious violations of the laws of war. Rome Statute of the International Criminal Court, Arts. 6, 7, and 8.

²⁰ I have elaborated on this distinction elsewhere. Brad R. Roth, “Just Short of Torture: Abusive Treatment and the Limits of International Criminal Justice,” 6 *J. Int’l Crim. Justice* 215, 227-30 (2008).

moral and legal terms, they can be differentiated from three other categories of acts: (i) acts that represent essentially private indulgences of sadism or venality under color of governmental authority; (ii) acts explicitly or implicitly in furtherance of a governmental purpose that is ruled out by the fundamental principles of the international legal order (e.g., genocide, crimes against humanity, ethnic cleansing); and (iii) acts in furtherance of a governmental purpose less extreme, but so manifestly illegitimate that the authorities do not even assert it to justify themselves (instead relying, for example, on factual denials).²¹

As distinguished from the genuine consensus that can be found to condemn wanton cruelty, genocidal policy, and manifest cynicism, the seeming universal reprehension of ruthless measures frequently turns out, on close examination, to be illusory. Affirmations of the acts' "inherent" wrongfulness often obscure deep disagreement about whether such measures could be justified in the service of what might appear – from some political or ideological standpoints, but not others – to be compelling societal needs.²²

²¹ As Philip Soper points out, what distinguishes the objectively unjust state from "the gunman writ large" is the former's claim to be acting justly. Philip Soper, "In Defense of Classical Natural Law Theory: Why Unjust Law is No Law at All," 20 *Canadian J. L. & Jurisp.* 201, 212 (2007). Where state agents manifestly lack a good faith belief that they are acting in the public interest, the international system's respect for state authority properly offers them little shelter. Similarly, little shelter can be found where the motivating conception of the public interest, even if *bona fide*, contradicts the principle of "equal rights and self-determination of peoples" upon which the international system's respect for state authority is predicated. See U.N. Charter, preamble and arts. 1(2), 2(1); see also Djura Ninčić, *The Problem of Sovereignty in the Charter and in the Practice of the United Nations* (The Hague: Martinus Hijhoff, 1970), at 256-58 (presenting the Charter's sovereignty and self-determination norms as intertwined).

²² Opinion polls consistently demonstrate this phenomenon in regard to coercive interrogation tactics, even when they may constitute torture. See, e.g., Associated Press, "Poll Finds Broad Approval of Terrorist Torture: Most in U.S., Britain, France, S. Korea Say Torture Justified in Rare Instances" (Dec . 9, 2005), <<http://www.msnbc.msn.com/id/10345320/>> ("In America, 61 percent of those surveyed agreed torture is justified at least on rare occasions. Almost nine in 10 in South Korea and just over half in France and Britain felt that way."). For a deeply reasoned, if problematic, defense of the use of torture in the interrogation of a sub-class of terrorism suspects, see Eric Posner & Adrian Vermeule,

Ruthless measures are not the exception in violent political conflict; in the best of circumstances, they are the rule, whereas in the worst, they give way to unrestrained brutality.²³ The morally better sides in such conflicts appear to have abstained from ruthlessness only to the extent that their histories have been successfully whitewashed.²⁴ Complicity in ruthlessness has been endemic in liberal as well as non-liberal societies;²⁵ supporters of forcible measures have either

“Should Coercive Interrogation be Legal?” 104 *Mich. L. Rev.* 671 (2006); *but see* Christopher Kutz, “Torture, Necessity, and Existential Politics,” 95 *Calif. L. Rev.* 235, 263 (2007) (arguing that “the defense of necessity runs out when it confronts pre-institutional rights, whose value is not a product of an instrumental calculus”).

²³ Robert S. McNamara’s recent introspections have drawn attention to grisly Allied measures in World War II that decent liberal-democratic states (and the bulk of their populations) have never repudiated:

We burned to death 100,000 Japanese civilians in Tokyo -- men, women, and children. ... Lemay said, “If we’d lost the war, we’d all have been prosecuted as war criminals.” And I think he’s right. He -- and I’d say I -- were behaving as war criminals. ... What makes it immoral if you lose, and not immoral if you win?

Quoted in Samantha Power, “War and Never Having to Say You’re Sorry,” *N.Y. TIMES*, Dec. 14, 2003, Sec. 2, 1 at 33.

²⁴ As John T. Parry points out, although torture is frequently said to be at odds with U.S. historical practice, the opposite is true. *See* Parry, “Torture Nation, Torture Law,” 97 *Geo. L.J.* 1001,1003, 1011-16 (2009) (noting systematic U.S. involvement, direct and indirect, in torture during counterinsurgent campaigns in Vietnam and Latin America) .

²⁵ The mainstream discourse remains far from coming to grips with the record of gross and systematic abuses that the U.S. committed directly in Korea and Vietnam, *see* Bruce Cumings, *The Origins of the Korean War, Vol. II* (Princeton Univ. Press, 1990), 753 (attributing hundreds of thousands of North Korean civilian deaths to U.S. strategic bombing); Michael Bilton & Kevin Sim, *Four Hours in My Lai: A War Crime and its Aftermath* (New York: Viking, 1992) (detailing the systematic nature of the violence that U.S. forces perpetrated against civilians in Vietnam), and by proxy in other Cold War-era conflicts, *see, e.g.*, Christopher Hitchens, *The Trial of Henry Kissinger* (New York: Verso Books, 2001); Raymond Bonner, *Weakness and Deceit: U.S. Policy and El Salvador* (New York: Times Books, 1984). But a sweeping characterization of U.S. Cold War policy makers as international criminals would miss the point: hardly anyone who had a role (or, for that matter, a rooting interest) on any side of any of these conflicts is entitled to engage in flights of deontological self-righteousness.

known, or known that they did not want to know,²⁶ that those measures were inflicting and would inflict egregious suffering on the innocent. Supporters have persisted in giving aid and comfort to the perpetrators of such measures in the belief – right or wrong, reasonable or unreasonable – that the end justified the means.

It is in such cases that the international order's pluralism is most consequential. Unilateral invocations of universal justice, absent adequate positivistic substantiation, ring hollow where assessments of guilt depend on the political sympathies prevalent in the venue.²⁷ As will be contended below, such invocations pose a threat both to the integrity of international criminal justice and to the broader project of international legal order.

Accordingly, this article will make the case that international criminal law should eschew appeals to supra-positive moral considerations that would, without benefit of a demonstrable consensus, extend the penal law's reach in derogation of existing legal limitations. Where the purported norms providing for the exercise of extraterritorial jurisdiction, for the invalidation of immunity, or for the criminality of a government-authorized act at the time and place in question cannot by credible methods be attributed (directly or indirectly) to the affirmations of the relevant sovereign states, and where the effort to fill the gap relies on a "universal" abstract principle that enjoys no actual consensus in application – however lamentably, from a moral standpoint – the

²⁶ See, e.g., Jack Goldsmith, "The Detainee Shell Game," *Wash. Post* (May 31, 2009) <<http://www.washingtonpost.com/wp-dyn/content/article/2009/05/29/AR2009052902989.html?hpid=opinionsbox1>> (arguing that seemingly more scrupulous detention policies merely end up restoring traditional U.S. reliance on "intelligence services from countries that have poor human rights records," so that "in many respects all we are really doing is driving the terrorist incapacitation problem out of sight, to a place where terrorist suspects are treated worse," while allowing us to "feel better about ourselves").

²⁷ See Steiner, *supra*, at 229 ("A political leader or military figure could be understood or imagined within one state or group as hero, in another as villain, within one state or group as freedom fighter, in another as terrorist").

prosecutorial interest must give way.

Whatever merit there may be in deriving non-penal norms from considerations of natural justice, the legal validity of norms that identify not mere wrongfulness, but criminality – let alone the extraordinary criminality associated with “enemies of humanity”²⁸ – must depend on acknowledged sources of social authority. Sweeping appeals to human dignity, however properly invoked in law as a shield,²⁹ are inadmissible as a sword.³⁰ Even the most egregious moral wrongs are crimes, in the legal sense, only when there is a requisite social, not just a moral, basis for characterizing them as such. That social basis must be established through conventionally accepted methods for attributing norms to the will of a political community that, at the time and place of the conduct, duly exerted authority. Moreover, where penal norms are applied extraterritorially, especially against persons operating under the putative authority of their own states, questions of adjudicative jurisdiction and functional (*ratione materiae*) immunity pose similar stakes – the determination on the merits being so heavily dependent on who gets to say – and must therefore be determined by similarly rigorous standards.

These proposed strictures on international criminal justice are important, not because any

²⁸ Universal jurisdiction is predicated on the idea that certain crimes establish their perpetrators as “*hostis humani generis*, an enemy of mankind.” *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

²⁹ In this context, I use the term “shield” to characterize the assertion of a norm to block the exercise of state power against individuals. Essentially the same assertion, of course, may afterward operate to extract reparation from the state for a violation, and would thus serve as a “sword” in the procedural sense, but the latter use can be seen as ancillary to the former. However, where the norm is invoked to hold individuals personally accountable, criminally or civilly, for acts that they committed as state agents, it is being used to authorize an imposition of state power upon them, and thus as a “sword.”

³⁰ Beth Van Schaack, though arguing generally to the contrary, concedes that “Referring to extratextual principles is more palatable with respect to holding states responsible for breaches than it is for criminally prosecuting individuals where penal sanctions are at issue.” Beth Van Schaack, “*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law & Morals,”⁹⁷ *Geo. L. J.* 119, 149 (2008).

great number of actual prosecutions that have occurred so far have contravened them, but because they are so sharply at odds with the rhetoric that has often surrounded those actual prosecutions. The problem here is not so much that “hard cases make bad law,” but rather that extreme cases generate bad dicta.³¹ Both judges and commentators, in their exuberance to herald a new day of individual accountability for human rights abuse, have invoked broad propositions that, removed from their particular contexts, open the door to exercises of power incompatible with the international rule of law.³² The goal of a more restrictive approach is not to stymie international criminal justice, but to render it safe for international legal order, thereby potentially emboldening otherwise-reluctant actors to implement it where genuinely appropriate.

II. *Law and Morality in Retrospective and Extraterritorial Prosecution*

A. Positivism, Naturalism, and the Rule of Law

A pedestrian account of restrictive approaches to extraterritorial and retrospective penal accountability associates such approaches with legal positivism, and casts them in opposition to natural-law conceptions of legality. In the most sweeping and unnuanced formulation, naturalism

³¹ A prime example of that maxim can be found in the *Eichmann* decision, which boldly and quite unnecessarily repudiated *nullum crimen sine lege*. See Attorney General of the Government of Israel v. Eichmann, 36 Int'l L. Rep. 277, 282 (Sup. Ct. of Israel, 29 May 1962) (“if it is the contention of counsel for the appellant that we must apply international law as it is, and not as it ought to be from a moral point of view, then we must reply precisely from a *legal* point of view, no such rule of international law is to be found”).

³² See, e.g., Prosecutor v. Furundžija, Trial Chamber, Judgment of 10 December 1998, <<http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>>, paras. 155-56 (asserting in dicta that a prohibition’s *jus cogens* character alone implies universal jurisdiction over individual violators and nullification of a state’s authority to immunize or amnesty the conduct); Van Schaack, *supra*, at 192 (“International judges, it turns out, are better able to represent the moral condemnation of the international community than are states engaged in multilateral negotiations with their own interests – including ensuring impunity – at heart. And so, where the law was silent, it was made to speak.”).

identifies legality with immutable and rather wide-ranging principles of substantive justice, the moral truth of which suffices to establish legal validity, irrespective of any grounding in effective political authority.³³ Legal positivism, in its most straightforward formulation, asserts, to the contrary, that legality derives from social facts, not moral truths, so that an unjust law is law nonetheless.³⁴

Thus, where violations of human dignity have reflected, rather than contradicted, the scheme of political authority in effect at the time and place of their occurrence, the archetypical naturalist would seem more disposed, not only to find criminality inherent in the acts themselves,³⁵ but also to find the victims' humanity as sufficient justification for attributing jurisdiction to prosecutorial apparatuses lacking otherwise-established authority over the territory or the perpetrators,³⁶ and to nullify immunities from jurisdiction that stem from the brute fact of the perpetrators having committed the acts in service of a foreign state's sovereign authority over its national territory. The archetypical positivist, to the contrary, would insist that the immorality of the conduct does not itself

³³ Martin Luther King, Jr.'s often-repeated quotation from St. Augustine that "an unjust law is no law at all," Martin Luther King, Jr., "Letter from a Birmingham Jail" (1963), from St. Augustine, *De Libero Arbitrio*, I, v. 11, appears to say just this, but to invoke it for that proposition is doubly misleading. First, King was concerned, not with questions of analytical or normative jurisprudence, but exclusively with those of political obligation; King was denying only that unjust laws were morally binding on the citizen. Cf. Soper, *supra*, at 202 (acknowledging that most theorists now interpret the maxim "as a claim in political or moral theory, not legal theory"). Second, King was not really calling for individuals to second-guess the justice of every enactment; he sought disobedience only to a specific subset of unjust laws, and then only in circumscribed ways. John Finnis has characterized the maxim as an overdramatization and distortion even of Augustine's actual meaning. John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), at 363-66..

³⁴ See generally John Gardner, "Legal Positivism: 5½ Myths," 46 *Amer. J. Jurisp.* 199 (2001).

³⁵ See M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," 42 *Va. J. Int'l L.* 81, 99 (2001).

³⁶ *Id.* at 101.

provide any legal basis for imposing penal accountability; and would set exacting empirical criteria for establishing the substantive and procedural requisites to prosecution.³⁷

There is some rudimentary truth in these generalizations, but they obscure, if not distort, the essence of the matter. For a start, the current state of the field of analytical jurisprudence does not admit of such tidy definitions of “natural law” and “legal positivism.” Each camp is itself divided on the essential meanings of these terms, and if one goes by some current accounts of the opposing positions, not only are the differences “normatively inert,”³⁸ but functionally, they have narrowed to near the vanishing point. The most widely-held natural-law theories acknowledge that social facts very substantially constrain the project of legal interpretation,³⁹ and a school of “inclusive legal positivism” allows that a norm’s legal validity may derive from its moral content rather than from its social source, provided that the given system’s established source doctrines authorize juridical recourse to moral principles.⁴⁰ The two sides differ as to little more than their formal way of accounting for exercises of moral and political judgment that both sides accept, not only as facts of

³⁷ *Id.* at 99.

³⁸ Gardner, *supra*, at 202; *see also* Brian Leiter, “Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence,” U. of Texas Law, Public Law Research Paper No. 34 (April 2005), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=312781>, at 18.

³⁹ *See* Soper, *supra*, at 205; Ronald A. Dworkin, “‘Natural’ Law Revisited,” 34 *U. Fla. L. Rev.* 165, 169 (1982); *see generally* Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard Univ. Press, 1986). Dworkin’s view has been aptly described as a third theory of law, intermediate between naturalism and positivism. John Mackie, “The Third Theory of Law,” 7:1 *Phil. & Pub. Aff.* 4 (1977); *see also* Soper, *supra*, at 206. The same can be said of Lon Fuller’s approach, which identifies law with a set of procedural requisites (law’s “internal morality”) rather than with conformity to a substantive conception of justice. *See* Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, rev’d ed. 1969).

⁴⁰ *See* Gardner, *supra*, at 201; Mackie, *supra*, at 5-6; Scott J. Shapiro, “The ‘Hart-Dworkin’ Debate: A Short Guide for the Perplexed,” U. of Michigan Public Law Working Paper No. 77 (March 2007), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968657>, at 22-26.

judicial behavior, but as legitimate judicial practice.⁴¹

More importantly, the real controversies over retrospective (i.e., post-regime-change) and extraterritorial penal accountability of state agents turn not on answers to the formal question of “what is law?” but on answers to questions of political morality that are begged by terms such as “the rule of law” and “*nullum crimen sine lege*.” Whether a practice is consistent with either of these principles depends on the animating purposes that one attributes to legal order.

According to Lon Fuller, law’s “internal morality” requires that enactments be general, well-publicized, prospective, clear, not contradictory of other laws, susceptible of compliance, stable, and enforced in a manner congruent with their declaration.⁴² But Fuller did not regard compliance with each of these criteria of legality as a necessary condition for calling an enactment a “law.” Indeed,

in England and America, it would never occur to anyone to say that “it is in the nature of law that it cannot be retroactive,” although, of course, constitutional inhibitions may prohibit certain kinds of retroactivity. ... [T]here would be a certain occult unpersuasiveness in any assertion that retroactivity violates the very nature of law itself. Yet we have only to imagine a country in which all laws are retroactive in order to see that retroactivity presents a real problem for the internal morality of law. ... A general increase in the resort to statutes curative of past legal irregularities represents a deterioration in that form of legal morality without which law itself cannot exist.⁴³

The real question, then, is not whether a given enactment counts as “law,” but whether, on the basis of a broader normative assessment, “the rule of law” is prevalent in the society in question, or

⁴¹ See Soper, *supra*, at 202. This is not to deny that the different approaches affect, in a more subtle way, whether and how judges confront substantive injustice. See Mark J. Osiel, “Dialogue with Dictators: Judicial Resistance in Argentina and Brazil,” 20 *Law & Soc. Inq.* 481 (1995).

⁴² Lon L. Fuller, *The Morality of Law*, *supra*, at 46-91.

⁴³ Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart,” 71 *Harv. L. Rev.* 630, 650-51 (1958). The article was Fuller’s famous response to H.L.A. Hart, “Positivism and the Separation of Law and Morals,” 71 *Harv. L. Rev.* 593 (1958).

whether a particular measure, in its overall context, enhances or diminishes that prevalence.⁴⁴

Fuller identified “the basic difference between law and managerial direction” as follows:

law is not, like management, a matter of directing other persons how to accomplish tasks set by a superior, but is basically a matter of providing the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as its guardian of the integrity of this system.⁴⁵

To paraphrase, what essentially distinguishes legality from its opposite – from what Locke referred to as “rule by extemporary arbitrary decree”⁴⁶ – is an overall orientation toward predictability and accountability in the exercise of power.

Predictability and accountability in the exercise of power are inherent in the project of legality for at least two reasons. First, virtually all invocations of the word “law” implicitly trade on this orientation. To use the word to describe an ordering process with the opposite orientation would violate conventional understandings of the language and thereby confuse one’s audience.⁴⁷

⁴⁴ Although his chief antagonist, the legal positivist H.L.A. Hart, insisted that the principles of “legality” and “the rule of law” were distinct from “law” as such, Hart’s understanding of the former was essentially identical to Fuller’s. See Jeremy Waldron, “Hart’s Equivocal Response to Fuller” (unpublished paper, 2008), available at <www.law.nyu.edu/idcplg?IdcService=GET_FILE&dDocName=ECM_DLX_016303&RevisionSelectionMethod=LatestReleased>, citing H.L.A. Hart, “Problems of the Philosophy of Law,” reprinted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (1983), at 114.

⁴⁵ Fuller, *The Morality of Law*, at 210.

⁴⁶ John Locke, *Second Treatise of Government* (1690), ch. 11, sec. 136 (“The legislative, or supreme authority, cannot assume to its self a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges; for the law of nature being unwritten, and so no where to be found but in the minds of men, they who through passion or interest shall miscite, or misapply it, cannot so easily be convinced of their mistake where there is no established judge; and so it serves not, as it ought, to determine the rights, and fence the properties of those that live under it, especially where every one is judge, interpreter, and executioner of it too, and that in his own case ...”)

⁴⁷ Jeremy Waldron reveals the point vividly as follows:

Second, predictability and accountability in the exercise of power are necessary, though not sufficient, conditions for the achievement of the most foundational ends associated with liberal-democratic political traditions. Predictability and accountability are, analogous to Rawls's notion of a primary good,⁴⁸ what everyone wants, regardless of what else anyone wants – insofar as “everyone,” even if not a liberal or a democrat, shares those traditions' most rudimentary concerns. The first of these is that individuals have the basic capacity to organize their lives,⁴⁹ with the security that everything that is not knowably prohibited is permitted, so that they need neither to live in terror of sudden impositions and unexpected punishments, nor to secure protection by “getting in good”

A word like “hospital” provides a good analogy. One of the meanings given for hospital in the *Oxford English Dictionary* is “[a]ny institution or establishment for the care of the sick or wounded, or of those who require medical treatment.” No one understands the term “hospital” unless he understands what hospitals are *for*. To describe one's establishment as a hospital is to hold out the promise of healing and care – even though it might turn out that the procedures actually used in a given institution making this promise are in fact harmful or hurtful to the patients. Now, if their harmfulness or hurtfulness is known and intended, that belies the sincerity of the description; we assume that Dr. Mengele is being ironic when he talks about his clinic at Auschwitz as a “hospital.” But we do not withdraw the term the instant harmfulness is discovered if we are sure that the institution in question has the treatment of the sick and the wounded as its aim. So this is a case in which the analytic separability of “hospital” and “actual non-harmfulness” conceals a deeper aspirational connection between the two.

Jeremy Waldron, “Does Law Promise Justice?” 17 *Georgia State U. L. Rev.* 759, 760-61 (2001). Waldron goes on to concede that “the promise of justice is not conveyed semantically by the word ‘law,’” *id.* at 766, but that concession seems undue in regard to the more modest promise of an orientation toward predictability and accountability in the exercise of power.

⁴⁸ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard Univ. Press, 1971), at 62.

⁴⁹ As Isaiah Berlin put it, “a frontier must be drawn between the area of private life and that of public authority.” Reasonable persons may well differ over the placement of the demarcation line, but liberty can be understood only as “the absence of interference beyond the shifting, but always recognizable, frontier.” Isaiah Berlin, “Two Concepts of Liberty,” in Berlin, *Four Essays on Liberty* (New York: Oxford University Press 1969), at 124-27. However small the space is behind that boundary, it is in that space that the individual can pursue interests and ends without regard to the preferences of state officials or others in society. *Nullum crimen* gives individuals the confidence to act freely right up to the boundary, including to “hide behind technicalities” that permit behavior that some might find contrary to “the spirit” of the law.

with dominant officials, subordinating themselves to the latter's will.⁵⁰ The second concern is that, regardless of what counts as legitimate authority in a society, the implementers of that authority – who may be untrusted, untrustworthy, or both – effectively be subjected in their purported implementation to fixed and knowable standards.

To be sure, some political orders, supported by *bona fide* (though typically hideous) political moralities, reject these concerns on principle.⁵¹ Totalitarian orders (in the true sense associated with Hitler, Stalin, and Pol Pot) seek to mold, not to accommodate, individual will, and while they may use legal forms to hold lower officials accountable to higher ones, they have often, in practice, been satisfied if lower officials, irrespective of abuses in their exercise of delegated authority, demonstrate personal loyalty to the upper leadership. It thus would be a mistake to characterize predictability and accountability in the exercise of power as empirically universal concerns. Still, it may be fair to say that the exceptions are normatively uninteresting.

A more significant proviso is that even where predictability and accountability are core concerns of political morality, they do not have the field to themselves. There are other concerns that may, in particular circumstances, be found legitimately to be in tension with those values. One could not justifiably say that legality is absent wherever those latter concerns, such as the need for flexible response to emergency, prevail.

“The rule of law” might best be summarized as the principle that “There shall be no exercise of power, except according to law.” But even were there an uncontroverted and unambiguous

⁵⁰ See Martin Krygier, “Marxism and the Rule of Law: Reflections After the Collapse of Communism,” 15 *Law & Social Inquiry* 633, 642-43 (1990).

⁵¹ See generally Ingo Müller, *Hitler's Justice* (Cambridge, Mass: Harvard Univ. Press, 1991); Harold J. Berman, *Justice in the U.S.S.R.: An Interpretation of Soviet Law*, rev'd ed. (Cambridge, Mass.: Harvard Univ. Press, 1963).

understanding of what counts as “law” in this context, consensus on the principle would scarcely be any the nearer.

First, one would need to specify what counts as an exercise of power. Although the present topic, prosecution, raises no problems in this area, it is worth noting that a formal devolution of authority to private actors to take decisions affecting the conditions of social life cannot properly withdraw such decisions from the subject matter, since the scope of the latter is defined not by formal categories, but by underlying substantive concerns.

Second, and most daunting, one would need to determine the meaning of “according to.” At one (impossible) extreme, this might mean “as dictated by”: the complete abolition of executive discretion. At the other (all too possible) extreme, it might mean “as authorized by,” so as to be satisfied merely by an all-encompassing legislative delegation of authority to the executive organ (as in a Reichstag conferral of “all power to the Führer”).⁵² Law always and necessarily licenses discretionary authority;⁵³ “the rule of law” is achieved when law sets boundaries to such discretion that are meaningful and reasonable, given the proper ends of governance.⁵⁴ But this is quintessentially a normative question, and minds will differ widely on the requisite nature and extent of those boundaries; there is no formal standard that could conceivably resolve the controversy.

Third, one would need to determine whether any society is serious – or can afford to be serious – about the “No,” the absolute claim for the illegitimacy of extralegal authority. A rule-of-

⁵² See H.W. Koch, *In the Name of the Volk: Political Justice in Hitler's Germany* (London: I.B. Tauris & Co. Ltd, 1989), 113-14 (detailing the Reichstag session of 26 April 1942).

⁵³ See William H. Simon, “Legality, Bureaucracy, and Class in the Welfare System,” 92 *Yale L.J.* 1198, 1224 (1983) (“There is a law of conservation of discretion: one limits the discretion of one set of actors only by increasing that of others.”).

⁵⁴ Martin Krygier refers to “a society where law *counts* in public life.” Krygier, *supra*, at 644.

law-oriented domestic political order tends to characterize the political entity's sovereignty as *constituted* by the order's legal norms, but as Carl Schmitt notoriously suggested (and as even such founders of the liberal ethos as Locke understood),⁵⁵ this is a troubled claim. An existential threat to the political order itself tends to reveal a residual constituent authority that withstands constituted order and (arguably) licenses extra-constitutional discretion.⁵⁶ The foundational Schmittian insight is that whereas norms govern in normal times, they give way in exceptional times; "sovereign is he who decides on the exception," and sovereignty is the power to suspend valid law.⁵⁷ (One can accept this conceptual point without in any way endorsing Schmitt's own applications of it.)⁵⁸

⁵⁵ See John Locke, *Second Treatise of Government* (1690), ch. 14, para. 160, on prerogative power:

This power to act according to discretion, for the public good, without the prescription of the law, *and sometimes even against it*, is that which is called prerogative: for since in some governments the lawmaking power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to execution; and because also it is impossible to foresee, and so by laws to provide for, all accidents and necessities that may concern the public, or to make such laws as will do no harm, if they are executed with an inflexible rigour, on all occasions, and upon all persons that may come in their way; therefore there is a latitude left to the executive power, to do many things of choice which the laws do not prescribe. [Emphasis added.]

See also Clement Fatovic, "Emergency Action as Jurisprudential Miracle: Liberalism's Political Theology of Prerogative," *6 Perspectives on Politics* 487, 491-94 (Sept. 2008) (comparing and contrasting Locke and Schmitt on this point).

⁵⁶ See Niccolò Machiavelli, *Discourses on Livy* [1517], bk. I, ch. 34, favoring the institution of "dictatorship," or emergency rule, on the ground that "when a similar method is lacking in a Republic, either observing the institutions (strictly) will ruin her, or in order not to ruin her, it will be necessary to break them." <<http://www.constitution.org/mac/disclivy1.htm#1:35>>

⁵⁷ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* [1922], George Schwab trans. (Chicago: University of Chicago Press, 2005), at 5, 9.

⁵⁸ Oren Gross and Fionnuala Ní Aoláin explain the perniciousness of Schmitt's solution to the conundrum as follows: "The dictator's unlimited powers are exercisable in the context of the extreme case – i.e., the exception. However, the only logical outcome of Schmitt's collapsing together the power to decide the existence of the exception and the breadth of counter-emergency powers to be used in order to bring the exception to a conclusion, and depositing them both in the hands of one person – the

Thus, invocations of the rule of law necessarily raise more questions than they answer. The concept is open-textured. Formal, analytic means cannot yield determinate judgments about whether a particular measure furthers or diminishes the phenomenon's prevalence, as such judgments necessarily reflect a weighing of the range of competing normative considerations that espousal of the principle does not preclude.

B. *Nullum Crimen Sine Lege*

Still, the sub-principle of *nullum crimen sine lege* lies at the core, rather than the periphery, of the rule of law. Criminal prosecutions are exercises of power not merely tolerated by law, but undertaken in the name of law. Whereas, for example, in time of war, legality may abide preventive detention measures, to be imposed temporarily on real and suspected enemies with relatively limited procedural safeguards and relatively low substantive thresholds, legality can never abide unjust convictions.⁵⁹ Undue criminal conviction differs qualitatively from other wrongful impositions, as it heaps insult upon injury; rather than treating the person as an adversary or even as a mere object,

sovereign dictator – is that the dictator's unlimited powers are never turned off.” Gross & Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge Univ. Press, 2006), at 165.

⁵⁹ Thus, the Geneva Conventions, which barely regulate long-term detention for substantial categories of persons, especially in non-international armed conflict, establish as a universal minimum standard applicable to all persons that “The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Common Art. 3, Geneva Conventions of 12 August 1949, 75 U.N.T.S. 31, *et seq.*, entered into force Oct. 21, 1950; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3, entered into force Dec. 7, 1978 (Protocol I of 1977), art. 75; *cf.* *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting) (“It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. ... But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient.”).

wrongful criminal conviction, in trading on legality, inflicts obloquy with the pretense of objectivity and fairness. Moreover, in appropriating the symbols of legality for that purpose, distorted penal processes degrade the legitimating value of legal forms.

Violations of *nullum crimen sine lege* are quintessential abuses of legality because they so frontally defy the concern for predictability and accountability in the exercise of power. The former concern corresponds to the familiar “notice” aspect of *nullum crimen sine lege*. Much of the debate about retrospective and extraterritorial prosecution goes to this aspect, with pro-prosecutorial arguments drawing on alternative sources of notice, such as natural justice or international treaty commitments unincorporated into domestic law, to overcome the limits of positivistic sources of law authoritative at the time and place of the act.⁶⁰ Such prosecutorial strategies are often questionable in their own terms, especially given that the existence of contradictory positive law typically reflects difference of opinion over what counts as natural justice, and that notice of an international legal obligation, without more, in no way implies notice that state authorization in contradiction to the obligation will be treated as legally null and void.⁶¹

It is important to add, however, that *nullum crimen sine lege* is not reducible to the problem

⁶⁰ See Van Schaack, *supra*, at 156.

⁶¹ In the U.S., for example, a “controlling executive act” is given legal effect even where it violates customary international law, *see, e.g.*, *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986); Jonathan I. Charney, “The Power of the Executive Branch of the United States Government to Violate Customary International Law,” 80 *Am. J. Int’l L.* 913 (1986), and statutes prevail over prior treaty commitments, *The Head Money Cases*, 112 U.S. 580, 598-99 (1884). Moreover, “while treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be “self-executing” and is ratified on these terms.’” *Medellin v. Texas*, 128 S. Ct. 1346, 1356 (2008) (citation omitted); *see also* Charlie Savage, “Videos Shed New Light on Sotomayor’s Positions,” *N.Y. Times* (June 10, 2009), available at <<http://www.nytimes.com/2009/06/11/us/politics/11judge.html?hpw>> (Supreme Court nominee recorded as saying (rather tendentiously), “Even though Article IV of the Constitution says that treaties are the ‘supreme law of the land’ in most instances they’re not even law”).

of notice. It is equally a problem of legislative and adjudicative institutions exceeding their legal authority in establishing an act's wrongfulness. A person might know that her act is condemned as criminal by some insurgent movement or hostile foreign government. She might equally know that there is a considerable chance that she will be on the losing side of the political struggle, and face prosecution for the act that she commits within the authorization of the currently recognized regime. Such facts fall far short of curing the *nullum crimen sine lege* problem.⁶² No basis for a criminal conviction can be found in the articulations, however morally enlightened or predictably efficacious, of an institution that lacked authority to resolve the question of the act's criminality for the time and place that the act was committed.

Where the international legal order had recognized the government and had omitted (so far) to establish the conduct as an international crime, thereby acknowledging state authority over individuals' conduct at the time and place in question, that order is estopped to criminalize, or to abide criminalization of, reliance on such state authority. To be sure, the international legal order establishes equal respect, not for governmental apparatuses as such, but for the underlying political communities. Yet those apparatuses serve as the communities' indispensable instruments for the coordination of activities establishing the conditions of social life. Members of the communities thus

⁶² On this logic, Salman Rushdie was "on notice" that Iran regarded his allegedly blasphemous literary activities as tantamount to a universal-jurisdiction crime, and therefore assumed the risk of punishment if Iran were ever to obtain jurisdiction over his person. I have elsewhere argued that the European Court of Human Rights committed a fundamental error in crediting this kind of argument in the case of former East German leaders prosecuted in the unified Federal Republic of Germany for establishing the Berlin Wall enforcement mechanisms. Brad R. Roth, "Retrospective Justice or Retroactive Standards? Human Rights as a Sword in the East German Leaders Case," 50 *Wayne Law Review* 37 (2004). The Court there stated that "anyone could have foreseen that in the event of a change in regime in the GDR these acts might constitute criminal offenses." Streletz, Kessler, and Krenz v. Federal Republic of Germany (hereafter, *Krenz*), 49 I.L.M. 773 (22 March 2001), available at <<http://www.echr.coe.it/Eng/Judgments.htm>>, at para. 48. This statement would as easily have validated "victor's justice" against any number of Western officials had the Communists prevailed in the Cold War.

have good reason to regard compliance and cooperation with their recognized governments as an appropriate (whether or not obligatory) contribution to a legitimate social project. Of course, they may be morally mistaken in this, and perhaps gravely so. However, international law, having acknowledged state authority at the time, cannot furnish a license to vilify, in the name of law, those who acted in reliance on that authority.

Moreover, the terms of peaceful and respectful cooperation in an ideologically diverse international community require that a prosecuting state's institutions reliably remain within the scope of the authority that international law acknowledges or establishes. Generally speaking, such institutions are not, and should not be, trusted to improvise an expansion of that authority.

Thus, *nullum crimen sine lege* should not be seen as a formalistic obstacle to the pursuit of justice. Nor is it in any way a mere artifact of legal positivism. It is itself a natural law principle – not in any mystical sense, but in the sense that it embodies concerns at the core of what it means, everywhere and always, to speak of a criminal conviction under law.⁶³

C. Jurisdictional Limitations and Immunity *Ratione Materiae*

In international criminal law, exorbitant extraterritorial assertion of prescriptive jurisdiction implicates the *nullum crimen* principle.⁶⁴ Most violations of international law lead to liability only

⁶³ This article is not intended as a contribution to contemporary analytical jurisprudence. Whereas contending schools of legal philosophy might use international criminal justice to illustrate a theoretical problem, this article is concerned with that topic as such, and is indifferent to whether naturalism or a positivism provides an analytically superior account of the normative dilemmas that international criminal justice poses. What is important to demonstrate, however, is that the article's normative claims are not incompatible with a naturalist account.

⁶⁴ See, e.g., Mark A. Summers, "The International Court of Justice's Decision in *Congo v. Belgium*: How Has It Affected the Development of a Principle of Universal Jurisdiction That Would Obligate All States to Prosecute War Criminals?" 21 *B.U. Int'l L.J.* 63, 93 (2003) ("the post-war [Geneva] conventions clearly grant states the authority to prescribe [law-of-war] violations in absentia.

for states as corporative entities. In support of only a small subset of states' human rights obligations does international law establish penal responsibility for individual participants in state action, and only within that range does international law license the exercise of universal jurisdiction.⁶⁵ A prosecuting state's extraterritorial penal legislation or judge-made doctrine violates *nullum crimen* where it asserts universal jurisdiction over an individual's participation in an international law violation that has not been established as an international crime.⁶⁶

A closely related limitation is the doctrine of immunity *ratione materiae*, or functional

Otherwise, state prosecutions of offenses based on the conventions would run afoul of the principle *nullem crimen sine lege*.”).

⁶⁵ Some scholars and jurists continue to assert, on the basis of the so-called “*Lotus* principle,” *Case of the S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 9 (7 Sept.), that exercises of extraterritorial penal jurisdiction are presumed to be permitted except where specifically prohibited. *See Yerodia, supra*, 2002 ICJ Rep. 3, diss. op. of Judge *ad hoc* Van den Wyngaert, paras. 48-51. In actuality, the *Lotus* “majority” opinion (only six of twelve judges, with the President voting twice) only admitted this as a possibility, never actually asserting this position definitively. *Lotus*, at 15-17 (“whichever of the two systems described above [extraterritorial criminal jurisdiction permitted unless specifically prohibited, or prohibited unless specifically permitted] be adopted, the same result will be arrived at in this particular case”); *see Yerodia*, sep. op. of Judge Guillaume, paras. 14-15. To the extent that it was ever valid, this “doctrine has fallen into obsolescence as a consequence of the development of the doctrine of jurisdiction according to which any State activity *iure imperii* requires a reasonable link.” Christian Tomuschat, “Concluding Remarks,” in Christian Tomuschat & Jean-Marc Thouvenin, eds, *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff, 2006), 425 at 439; *but see* Summers, *supra*, at 95 (invoking the separate opinion in *Yerodia* of Judges Higgins, Kooijmans and Buergenthal to assert the continued vitality of that doctrine).

⁶⁶ *See* Colangelo, *supra*, at 14-15. And yet, although the Torture Convention's universal jurisdiction provisions expressly pertain only to acts of “torture,” *see* Torture Convention, *supra*, arts. 1, 4, and 5, as distinct from “cruel, inhuman, and degrading treatment or punishment,” *id.*, art. 16, the official commentary to “Princeton Principles” calls for universal jurisdiction to be applied to the latter as well. *The Princeton Principles on Universal Jurisdiction, supra*, at 48-49. This prescription flies boldly in the face of the traditional determination in penal jurisprudence “not to fill omissions in legislation where this can be said to have been deliberate.” *Prosecutor v. Delalić, Mucic, Delic & Landzo (Čelebići)*, ICTY, Trial Chamber, Judgment of 16 Nov. 1998., para. 412.

immunity.⁶⁷ This form of immunity impedes a domestic court's exercise of jurisdiction over both current and former foreign-state agents for acts that those agents committed inside their national territory within the scope of their governmental functions, except insofar as those acts have been established as international crimes.⁶⁸ Antonio Cassese construes immunity *ratione materiae*, not as a procedural bar to jurisdiction, but as a "substantive defence," available to "any de jure or de facto State agent" performing official acts, establishing that the "violation is not legally imputable to [the agent] but to his state."⁶⁹

Cassese may overstate the case slightly; it may be more precise to characterize the doctrine as a procedural bar with substantive implications. Immunity *ratione materiae* is tied to the logic of state immunity, as it guards against the use of prosecutions and lawsuits against current and former state officials as a device to circumvent the immunities attaching to the state itself. Inasmuch as immunity *ratione materiae* exists for the state's, rather than the agent's, benefit, it is both broader and narrower in its coverage than the *nullum crimen* defense: broader, in that it applies even to those acts, committed under color of official capacity, that are crimes under the law of the agent's

⁶⁷ Immunity *ratione materiae* is conceptually distinct from the immunity *ratione personae*, or personal immunity, which applies exclusively to officials who conduct a state's foreign relations (including heads of state, heads of government, foreign ministers, and diplomats). Those who hold personal immunity are shielded from foreign-state legal processes altogether, irrespective of the subject matter of the controversy, but only during those officials' terms of service. See *Yerodia, supra*, 2002 ICJ Rep. 3; Cassese, *supra*, 265-67, 271-73.

⁶⁸ See, e.g., Dapo Akande, "International Law Immunities and the International Criminal Court," 98 *American Journal of International Law* 407, 412-413 (2004); Michael Akehurst, "Jurisdiction in International Law," 46 *Brit. Y. B. Int'l L.* 145, 240-44 (1972-73). This immunity follows from the traditional view that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill v. Hernandez*, 168 US 250, 252 (1897).

⁶⁹ Cassese, *supra*, at 266; accord Akande, *supra*, at 412-15.

state;⁷⁰ narrower, in that the state (perhaps following regime change) can decide *post hoc* to waive the defense, thereby leaving the agent “hung out to dry.”⁷¹

However, it is possible for the *nullum crimen* defense to arise directly from immunity *ratione materiae*, just as it may arise from an exorbitant assertion of extraterritorial jurisdiction. A prosecuting state’s effort to establish criminal liability for a non-criminal breach of international law violates *nullum crimen* even where the state’s internationally-recognized jurisdiction to prescribe (on, say, a “territorial effects” or “passive personality” rationale) may reach the perpetrator’s conduct, so long as immunity *ratione materiae* applies to the conduct. Where the foreign perpetrator acted inside his national territory and within the scope of his official capacity, immunity *ratione materiae* blocks the prosecuting state’s jurisdiction to prescribe, leaving no penal law that condemns the agent’s conduct. Even if the perpetrator’s state were to waive immunity *post hoc*, it would lack authority to waive the *nullum crimen* component, which would remain in place as a personal defense.

D. The Doctrine of Strict Interpretation (Lenity)

A corollary to *nullum crimen* is the doctrine of strict interpretation: “where there is a plausible difference of interpretation or application, the position which most favors the accused

⁷⁰ See, e.g., *Regina v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet III)*, 1 AC 147, 203 (Lord Browne-Wilkinson: ‘Actions which are criminal under the local law can still have been done officially and therefore give rise to immunity *ratione materiae*.’).

⁷¹ See, e.g., *Pinochet III*, *supra*, at 265, opinion of Lord Saville (‘These immunities belong not to the individual but to the state in question. They exist in order to protect the sovereignty of that state from interference by other states. They can, of course, ... be waived by the state in question.’).

should be adopted.”⁷² The familiar domestic law term for the doctrine is the principle of “lenity.”⁷³

The principle applies most straightforwardly where codification is present. As the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) has elaborated:

The rule of strict construction requires that the language of a particular provision shall be construed so that no cases shall be held to fall within it which do not both fall within the reasonable meaning of its terms and within the spirit and scope of the enactment. ... The accepted view is that if the legislature has not used words sufficiently comprehensive to include within its prohibition all cases which should naturally fall within the mischief intended to be prevented, the interpreter is not competent to extend them.⁷⁴

In international criminal law, the lack of thoroughgoing codification renders inevitable some flexibility in the application of the principle. State practice and manifestations of *opinio juris* (such as military manuals) are frequently taken to establish individual penal responsibility for “serious violations” of international norms that, while not expressly penal in nature, have systematically admitted of penal enforcement.⁷⁵ Moreover, as Antonio Cassese points out, “gaps or lacunae” are

⁷² Prosecutor v. Krstić, ICTY, Trial Chamber, Judgment of 2 Aug. 2001, para. 502; see Cassese, *supra*, at 153-57; *see also* Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002 (ICC St.), Art. 22 (2) (“The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”).

⁷³ Dan M. Kahan, “Lenity and Federal Common Law Crimes,” 1994 *Sup. Ct. Rev.* 345 (1994).

⁷⁴ Prosecutor v. Delalić *et al.* (Čelebići), *supra*, para. 410; *see* Robinson, *supra*, at 933.

⁷⁵ *See* Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005), vol. I, at 568-73, 604-605 (noting the relevance of military manuals). Most prominently, the ICTY has held “serious violations” of Common Article 3 of the Geneva Conventions to fall within its mandate; in order to qualify, the violation “must constitute a breach of a rule protecting important values,” “must involve grave consequences for the victim,” and “must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.” *Prosecutor v. Tadić*, Appeals Chamber Decision, 2 October 1995, para. 94. The *Tadić* court’s criteria, drawn from Nuremberg, emphasized “State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as

frequently filled by resort to “*general principles* of international criminal law, or to general principles of criminal justice, or to principles common to the major legal systems of the world.”⁷⁶ *Nullum crimen sine lege* does not necessarily entail *nullum crimen sine lex scripta*, even from a positivistic standpoint.

Where codification is absent, the requirement of strict interpretation needs to be applied to whatever basis the applicable legal order specifies as adequate to establish the penal standard. The substantive question remains whether there exists “a plausible difference of interpretation or application.”⁷⁷ The doctrine’s goal remains to provide for “fair warning” and for a barrier to “arbitrary and discriminatory enforcement.”⁷⁸ Given that international criminal law has most often been addressed to egregious atrocities rather than to borderline cases, even rather woolly penal standards have frequently found relatively uncontroversial application.

punishment of violations by national courts and military tribunals.” *Id.* at para. 128.

⁷⁶ Cassese, *supra*, at 155. Cassese further points out that many international rules have opened provisions – such as “other inhumane acts of a similar character,” ICC St., art. 7(1)(k) – that expressly or impliedly call for analogical reasoning to fill inevitable gaps. *Id.* at 155-56.

⁷⁷ Krstić, *supra*, para. 502.

⁷⁸ As the U.S. Supreme Court has declared:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnotes omitted); *see* Parry, *supra*, at 1041.

Some demands for relaxation of the principle, however, derive not from the need to acknowledge informal sources of positive law, but from claims that the principle itself is flawed in failing to allow consideration of the moral context of its application. Dan M. Kahan observes that the “notice” argument for lenity

works well when a court is applying a statute that sits on the boundary line between socially desirable and socially undesirable conduct. ... Because these laws are understood to invite individuals to come right up to the line between what is a crime and what is not, obscurity as to where that line is drawn is indeed grossly unfair. But the situation is quite different when the underlying conduct is located not on the border, but deep within the interior of what is socially undesirable. ... The purpose of these “interior” offenses is not so much to inform citizens of what conduct is prohibited as it is to create or increase criminal penalties for conduct that is already understood to be absolutely forbidden by independent laws or social mores. ... In this context, a person who consciously seeks to come up to the statutory “line” without crossing it is not attempted to conform her behavior to the law, but rather to evade punishment for admittedly wrongful or illegal acts.⁷⁹

The latter behavior that Kahan describes is sometimes said to be *malum in se*, as opposed to *malum prohibitum*, and therefore not entitled to the benefit of the lenity principle.⁸⁰ And indeed, where a genuine consensus of the relevant community is well known to regard the conduct as heinous, the absence of moral disagreement weighs strongly (though maybe not decisively) in favor of improvising penal standards. This solution quite plausibly applies in the international criminal justice context where, for example, state agents have inflicted cruelties, of a type unspecified in existing instruments or in expressions of *opinio juris*, that are either gratuitous or manifestly directed toward an illegitimate objective (e.g., terrorizing a local population so as to drive it from a

⁷⁹ Dan M. Kahan, “Lenity and Federal Common Law Crimes,” 1994 *Sup. Ct. Rev.* 345, 400-01 (1994) (emphasis added).

⁸⁰ Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House,” 105 *Colum. L. Rev.* 1681, 1692 (2005).

territory) – that is, not substantially related to a cognizable governmental purpose.

This, however, is precisely where extreme cases are prone to generate bad *dicta*. Consensus on the wrongfulness of conduct viewed in isolation does not imply consensus on the wrongfulness of conduct viewed in context. Where state officials authorize acts, the authorization likely reflects some *bona fide* – even if objectively misguided or reprehensible – conception of the public interest. Except where that conception itself represents mass persecution or some similarly inadmissible goal, such acts are not *malum in se* in the relevant sense, notwithstanding that their *presumptive* immorality is universally acknowledged and that they trigger state responsibility for breach of an international legal obligation.⁸¹ Even with respect to acknowledged serious human rights violations, states only exceptionally consent to subject their agents to international penal norms; absent such consent, express or tacit, states cannot be said to have authorized such external exercises of power over their agents.⁸² The authority for prosecution, which needs to be specifically conferred, is to that extent withheld. As the ICTY has recognized in elaborating the principle of strict interpretation, “It has always been the practice of courts not to fill omissions in legislation where this can be said to have been deliberate.”⁸³

The recent U.S. controversy over penal liability for torture provides an illustration. The

⁸¹ This is true even where the international obligations in question are “non-derogable.” Non-derogable means that there is no defense on the international plane to breach of the international legal obligation. It does not mean that a breaching act is *ultra vires* of state authority. See the discussion of *jus cogens*, *infra*.

⁸² Beyond the general principle of strict interpretation of penal norms, there is a further rule of treaty interpretation that militates against an expansive reading of international penal standards. Treaties must be read, in light of “any relevant rules of international law applicable in the relations between the parties.” Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969), art. 31(3)(c). Immunity *ratione materiae* is such a relevant rule.

⁸³ Prosecutor v. Delalić *et al.* (Čelebići), *supra*, para. 412.

Torture Convention establishes international penal responsibility for individual state agents for “torture” (Article 1), but only state responsibility for “cruel, inhuman, and degrading treatment” (Article 16).⁸⁴ A U.S. penal statute implements the Convention’s torture provisions (including conferral of universal jurisdiction).⁸⁵ A notorious 2002 memorandum of the Justice Department’s Office of Legal Counsel purported to ascertain the statute’s threshold of “severe pain or suffering.”⁸⁶ It is now widely agreed that the memorandum badly mis-specified this threshold,⁸⁷ but there remains a question of whether the very effort to identify the threshold with precision was, in Jeremy Waldron’s words, a “legally reputable enterprise.”⁸⁸

Waldron suggests that the *malum in se* nature of both torture and cruel, inhuman, and degrading treatment renders the effort to ascertain the boundary line between them both superfluous

⁸⁴ See Roth, “Just Short of Torture,” *supra*; Yuval Shany, “The Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment and Punishment: Can the Absolute be Relativized under Existing International Law?” 56 *Cath. U.L. Rev.* 837, 862 (2007).

⁸⁵ 18 U.S.C. §§ 2340-2340A.

⁸⁶ Jay S. Bybee, Assistant Attorney General, “Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,” 1 August 2002, *reprinted in* Karen J. Greenberg & Joshua L. Dratel eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge Univ. Press, 2005), 172. The memorandum’s most notorious claim was that “Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” *Id.* at 172. Unconvincing as this claim is, it should be noted that 18 U.S.C. §§ 2340-2340A is a universal jurisdiction statute addressed exclusively to acts occurring abroad, and thus primarily envisioned to apply to foreign state agents. Its threshold was therefore designed to identify “enemies of humanity,” rather than ordinary lawbreakers.

⁸⁷ See, e.g., Jose Alvarez, “Torturing the Law,” 37 *Case Western Reserve J. Int’l L.* 175, 197 (2006); Jordan Paust, “Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees,” 43 *Colum. J. Transnat’l L.* 811, 834-35 (2005); David Luban, “Liberalism, Torture, and the Ticking Bomb,” 91 *Virginia L. Rev.* 1425, 1454-56 (2005).

⁸⁸ Waldron, “Torture and Positive Law,” *supra*, at 1705.

and mischievous.⁸⁹ The memorandum “failed to mention that both categories of conduct were and are absolutely prohibited” in international law.⁹⁰ It thus wrongly presupposed that interrogators “are permitted to work somewhere along the continuum of the deliberate infliction of pain, and the question is: Where is the bright line along that continuum where the specific prohibition on torture kicks in?”⁹¹ For Waldron, then, notice of the precise location of “severity” boundary line is not only unnecessary, but a pernicious invitation to the gaming of the system:

[W]e need to remember that the charge of torture is unlikely to be surprising or unanticipated by someone already engaged in the deliberate infliction of pain on prisoners: “I am shocked -- shocked! -- to find that ‘waterboarding’ or squeezing prisoners’ genitals or setting dogs on them is regarded as torture.” Remember, we are talking about precision or imprecision in regard to a particular element in the definition of torture -- the severity element. The potential defendant is one who already knows that he is inflicting considerable pain; that is his intention. The question he faces is whether the pain is severe enough to constitute torture. It seems to me that the working definition in the anti-torture statute already gives him all the warning he needs that he is taking a huge risk in relying upon casuistry about “severity” as a defense against allegations of torture.⁹²

Waldron’s point, though persuasive in regard to the question of legal ethics with which he is primarily concerned,⁹³ is misleading insofar as it suggests that international criminal justice can

⁸⁹ *Id.* at 1700-09

⁹⁰ *Id.* at 1706.

⁹¹ *Id.* at 1705.

⁹² *Id.* at 1700.

⁹³ Given the specific context, Waldron is correct to question the ethics of the legal project that the memorandum represented (let alone the manner in which the project was carried out). In providing perpetrators with advance notice of which wrongs do not entail criminal liability, the project constituted deliberate complicity in human rights violations. There is good reason to believe that lawyers have a professional responsibility to avoid partaking in such a project. See David Luban, “Torture and the Professions,” *Crim. Just. Ethics* (Summer/Fall 2007), 2.

proceed without close regard to the “severity” threshold. States, in distinguishing torture from cruel, inhuman, and degrading treatment, deliberately established a basis for international penal liability up to that point, but no farther.⁹⁴ Short of international penal thresholds, states have maintained a monopoly of domestic authority over their agents’ conduct within national territory, in full contemplation that states from time to time exercise that authority in breach of their international legal obligations. Those agents cannot properly be held responsible to a supra-positive standard of “socially desirable conduct,” because states have reserved the last word on what counts as “socially desirable” for purposes of evaluating their own agents’ conduct.⁹⁵

Thus, in the zone of conduct to which states have refused to extend a positive penal norm, a locally authoritative decision to breach international obligations for the sake of a cognizable governmental purpose, such as extraction of information from alleged terrorists, vitiates the moral consensus needed to justify relaxation of the norm of strict interpretation. Lenity can arguably yield to a genuine moral consensus, but not to an illusory one.

Nullum crimen sine lege and the conjoined doctrines of jurisdictional limitation, immunity *ratione materiae* and strict interpretation reflect morally significant purposes of the international

⁹⁴ Note, however, that cruel and inhuman treatment committed against captured enemy soldiers and enemy civilians in international armed conflicts does give rise to universal jurisdiction under the terms of the Third and Fourth Geneva Conventions (Articles 130 and 147, respectively). Shany, *supra*, at 862. Moreover, while the more sweeping prohibition of cruel, humiliating and degrading treatment in Common Article 3, pertaining to all categories of persons, even in non-international armed conflicts, does not specify penal enforcement, the ICC Statute provides for penal sanctions, at least when the violations are “committed as part of a plan or policy or as part of a large-scale commission of such crimes.” ICC St., arts. 8(1), 8(2)(c). In addition, “serious violations” of that Geneva standard now plausibly give rise to universal jurisdiction as a matter of customary international law. See Henckaerts & Doswald-Beck, *supra*, vol. I, at 568-607; Roth, “Just Short of Torture,” *supra*, at 236.

⁹⁵ As John Parry’s study discloses, the U.S. negotiated actively to limit the definition of torture, and reinforced that definition’s narrowness by attaching interpretive understandings to its instrument of ratification. Parry, *supra*, at 1036-43. The purpose, Parry contends, was precisely “to preserve space for coercive interrogation.” *Id.* at 1046.

legal order. This is not to deny that these principles are subject to countervailing considerations. Legality is always a matter of judgment, and can never avoid balancing conflicting considerations of political morality. But respect for the *nullum crimen* principle creates a presumption that only an extraordinary justification can overcome. *Nullum crimen* is, after all, frequently known simply as “the principle of legality.”⁹⁶

III. *Extraordinary Circumstances: Rule-of-Law Standards in Judging the Unrechtsstaat*

The legal philosopher Ronald Dworkin contends (quite controversially) that interpretive judgment must include, *inter alia*, an assessment of “which interpretation, all things considered, makes the community’s legal record the best it can be from the point of view of political morality.”⁹⁷ While there is some reason to be concerned about Dworkin’s tendency, in his own normative jurisprudence, to take this abstract proposition as license to disregard inconvenient aspects of the “legal record,”⁹⁸ doubts about the probity of particular applications do not refute the proposition.⁹⁹

⁹⁶ See Cassese, *supra*, at 149 (“the principle of non-retroactivity of criminal rules is now solidly embodied in international law. It follows that courts may only apply substantive criminal rules that existed at the time of commission of the alleged crime.”).

⁹⁷ Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard Univ. Press, 1986), at 411.

⁹⁸ See Michael W. McConnell, “The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s ‘Moral Reading’ of the Constitution,” 65 *Fordham L. Rev.* 1259, 1270 (1997) (“The division of labor is as follows: The Dworkin of Right Answers decides all important contested cases, while the Dworkin of Fit defends against charges of judicial imperialism.”).

⁹⁹ Legal positivists, of course, reject the proposition. See, e.g., Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* 194, 209 (New York: Oxford Univ. Press, 1994). But their fidelity to *nullum crimen sine lege*, albeit merely as “a very precious principle of morality endorsed by most legal systems,” Hart, *supra*, 71 *Harv. L. Rev.* at 619, is seldom questioned. For positivists, there can be no other source of “*lege*” than the political order recognized as authoritative at the time and place of the act. Their critique of Dworkin’s brand of naturalism will thus be passed over here, as will this author’s reasons for rejecting that critique.

Even a determination of the law of a foreign jurisdiction must be sensitive to the reason why one wants to know what that law is. Certainly a judge does not properly seek to make the legal doctrine of foreign political community the best that it can be,¹⁰⁰ but nor is the judge, in making a finding of foreign law, acting as a social scientist or an historian. Rather, she is implementing some norm of her own system that requires due respect for the foreign entity, and the precise respect that is due depends on the nature of the decision that confronts the court. How ambiguities should be resolved may depend, for example, on whether a litigant is invoking foreign law as sword or as a shield.¹⁰¹

The problem takes on a special dimension when a judge in a rule-of-law-oriented system undertakes to determine the effects of law from a non-rule-of-law-oriented system.¹⁰² This topic has engendered considerable confusion, some of it introduced by none other than Lon Fuller. In his

¹⁰⁰ See Jacob Dolinger, "Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law," 12 *Ariz. J. Int'l & Comp. L.* 225, 240 (1995).

¹⁰¹ Additionally, a court can simply refuse to sustain a foreign law-based cause of action that contradicts a strong public policy of the forum jurisdiction, Restatement (Second) of Conflict of Laws § 90 (1969), but that rule is supposed to have "a very narrow scope of application," *id.*, § 90 cmt. a .

¹⁰² In his concurrence in the European Court's *Krenz* judgment (upholding the Berlin Wall prosecutions), Judge Levits contended that "there is no room for other solutions" than "to apply the 'old' law, set by the previous non-democratic regime, according to the approach to interpretation and application of the law which is inherent in the new democratic political order." In his view, "Using any other method of applying the law ... would damage the very core of the ordre public of a democratic state." *Krenz, supra*, Levits, J., concurring, paras. 7-8.

But it is hard to see why this is so in cases where nullification of unjust law operates as a sword rather than as a shield. To be sure, a liberal-democratic system must refuse applications of illiberal legal standards that would deny individuals the benefits of liberal justice. The anachronistic legal interpretation at issue here, however, is here precisely what works the denial of liberal justice (at least *prima facie*) by negating *nullum crimen*, itself a principle at "the very core of the ordre public of a democratic state." If there is a danger of eroding that core, it far more plausibly emanates from indulging the retroactive expansion of criminal liability in pursuit of material justice, a quintessential practice of illiberal regimes.

landmark debate with H.L.A. Hart in the pages of the *Harvard Law Review* in 1958, Fuller applied his critique of legal positivism to the question of retrospective justice in post-Hitler Germany. Unfortunately, in doing so, he conflated two questions: (i) whether Nazi Germany's state security enactments and the mode of their enforcement could properly be characterized as a form, however unjust, of "law"; and (ii) whether egregious acts (other than international crimes, such as prosecuted at Nuremberg), consistent with the dictates of established political authority during the Nazi period, could justifiably be construed retrospectively as crimes.

The first question is the one that analytical jurisprudence poses. It is, for present purposes, uninteresting. Nazi Germany did not observe the rule of law, and indeed, espoused a contrary doctrine of "legality," eschewing predictability and accountability in the exercise of power, as a matter of principle.¹⁰³ The political order did, as Fuller acknowledged, engage in standard legal regulation of many fields of activity, such as inheritance and contracts (even though no legal decision was immune from political interference if state or party officials took an interest in it). In areas related to Nazism's distinctive agenda, social regulation was decidedly non-standard. Enactments provided subjects with information about what was expected of them, but entailed no promise that acts not specifically prohibited were permitted.¹⁰⁴ Enactments operated to hold lower-level officials accountable to higher-level ones, but they were an instrument of, not a constraint upon, the policies of the highest organs of the state and the party.¹⁰⁵ Legalistic mechanisms were one

¹⁰³ See Müller, *supra*, at 68-81.

¹⁰⁴ See Müller, *supra*, at 75.

¹⁰⁵ As Hans Frank, Reich Commissioner for Justice, put it in 1936: "The National Socialist ideology, especially as expressed in the Party programme and in the speeches of our leader, is the basis for interpreting legal sources." Richard J. Evans, *The Third Reich in Power* (New York: Penguin Books, 2005), at 73.

means of implementing the leadership's will, but extra-legal means were tolerated and given retroactive "legal" imprimatur. The idea is summarized in the German term *Unrechtsstaat*.¹⁰⁶

It is not clear what, precisely, is to be accomplished by asking whether this mode of order counts as "law." The regime's enactments are usefully understood to have been law for some purposes, but not for others, and any sweeping answer is likely to obfuscate rather than to clarify the realities.

The second question is whether *nullum crimen sine lege* precludes prosecution of persons whose egregious conduct comported with the norms of the established order. Fuller's answer to this question plays out in the course of a famous, if not precisely factual, account of a 1949 West German prosecution of the wife of a World War II German soldier.¹⁰⁷ The wife had, in the wake of the failed 1944 assassination attempt against Hitler, truthfully informed the Nazi authorities of her husband's private anti-Führer grumblings, knowing – and indeed, intending, apparently for ulterior and utterly non-ideological reasons – the consequence: the Nazi justice system arrested her husband, convicted him of what was then purported to be a crime, and sentenced him to death

¹⁰⁶ For a discussion of uses and abuses of this term, see Jan-Werner Müller, "East Germany: Incorporation, Tainted Truth, and the Double Division," in Alexandra Barahona de Brito, Carmen Gonzalez-Enriquez & Paloma Aguilar, eds., *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford Univ. Press, 2001), 248 at 249 n.2 (*Unrechtsstaat* "refers to a state that not only perpetrates systematic injustice through its laws, but also breaks its own laws. What makes the notion so charged is that all too often the concept of *Unrechtsstaat* has served to lump together the Third Reich and the DDR."), 261 (post-reunification German courts convicted GDR officials by interpreting GDR law "in the way it might have been interpreted in a *Rechtsstaat*, in the way most favorable to human rights, when in fact the law was regularly instrumentalized for political purposes in East Germany"); Howard J. De Nike, "Judges on Trial: A Cultural View of the Prosecution of East German Jurists," 18 *PolAR (Political and Legal Anthropology Review)* 83 (1995).

¹⁰⁷ Hart invoked the case in "Positivism and the Separation of Law and Morals," *supra*, 71 *Harv. L. Rev.* at 615-21, and then Fuller commented on it at greater length in his response, "Positivism and Fidelity to Law – A Reply to Professor Hart," *supra*, 71 *Harv. L. Rev.* at 648-61. For details of the disparities between the actual case and the account of it that Hart and Fuller rendered, see H.O. Pappé, "On the Validity of Judicial Decisions in the Nazi Era," 23 *Modern L. Rev.* 260 (1960).

(though the death sentence was never carried out). Post-war prosecutors charged the wife under an 1871 statute, continuously in effect throughout the period, that had criminalized the illegal deprivation of a person's freedom.¹⁰⁸ The wife's defense, in Hart's and Fuller's telling of the story, was that the deprivation of the husband's freedom had not been illegal, as it had occurred pursuant to a pair of repressive Nazi-era statutes, from 1934 and 1938, implemented in accordance with Nazi-era standards of interpretation.¹⁰⁹

Fuller's response to this case is distinctive. A classical naturalist might simply have argued that the wife's act was so substantively unjust, and her defense so dependent for shelter on a legal order that notoriously regularized egregious substantive injustice, that legality, properly so called, demanded her punishment.¹¹⁰ But Fuller seems to have understood that such an approach would

¹⁰⁸ Hart, *supra*, 71 *Harv. L. Rev.* at 619.

¹⁰⁹ The 1934 Nazi statute criminalized, *inter alia*, "spiteful and provocative statements directed against, or statements which disclose a base disposition toward, the leading personalities of the nation," even where these statements were made in private "when the person making them realized or should have realized that they would reach the public"; the 1938 statute established the death penalty for publicly seeking "to injure or destroy the will of the German people ... to assert themselves stalwartly against their enemies." Fuller, *supra*, 71 *Harv. L. Rev.* at 653-54. Nazi courts "quite generally disregarded" the publicity element of the latter crime. *Id.* at 654.

¹¹⁰ The German legal scholar Gustav Radbruch, to whom both Hart and Fuller refer, adopted this approach. Radbruch articulated what has come to be known as his "formula" as follows:

The conflict between justice and legal certainty may be resolved in that positive law, secured by command and force, takes precedence even when its content is unjust and unreasonable, assuming however that the positive law does not depart from justice to such an unbearable extent, that it has to give way to justice as "incorrect law." It is impossible to draw a sharper line between cases of statutory non-law and law that is still valid in spite of an inappropriate content, but a different boundary line can be drawn with greater clarity: where no attempt is even made to achieve justice, where equality, which is the heart of justice, is consciously denied in the creation of positive law, then the law is not merely to be called "correct," it entirely loses its character as law.

Julian Rivers, "The Interpretation and Invalidity of Unjust Laws," in *Recrafting the Rule of Law: The Limits of Legal Order*, David Dyzenhaus, ed. (Oxford: Hart Publishing, 1999) 40, 42, quoting Radbruch, "Gesetzliches Unrecht und Übergesetzliches Recht," *Süddeutsche Juristenzeitung* 105-08

invite precisely the kind of subjective judgment, pertaining to the exercise of power over the most fundamental human interests, that the rule of law distrustfully precludes.¹¹¹ Therefore, Fuller set out to establish that the Nazi statutes and juridical practice at issue, through their violation of law's "internal morality," lacked the formal qualities of law, and so could simply be removed from the analysis, leaving only the 1871 statute condemning the wife's conduct. The 1934 and 1938 statutes were, after all, designedly vague in their proscriptions, and where even this was insufficient to serve the regime's purpose of criminalizing a "base disposition" toward the leadership, terms were routinely interpreted beyond their ordinary meaning: statements made in private were assimilated to those made in public, and the death penalty for one category of crime was transposed to a different category.¹¹² The statutes served as open-ended licenses to inflict severe repression on anyone manifesting opposition to the regime (all the more so, one imagines, in the wake of the 1944 assassination attempt against Hitler, which had been the subject matter of the husband's untoward comments).

Fuller's strategy for vindicating the wife's conviction, however expedient, was misconceived, for it confused the question of how the rule of law treats acts performed under a previously authoritative system with the question of whether that previous system conformed to the criteria of the rule of law. What matters for the former purposes – at least, to the extent that one

(1946). The formula is alluring in the realm of thought experiments, where the mind that judges the propriety of licensing such decisions is the same one that would be entrusted with the license to decide the extent of objective immorality. Real-life conferrals of discretionary authority are less reassuring. The sensibility underlying the rule of law is at least distrustful of, even if it does not absolutely exclude, such empowered moralism.

¹¹¹ "Professor Hart and others have been understandably distressed by references to a 'higher law' in some of the decisions concerning informers and in Radbruch's postwar writings." Fuller, *supra*, 71 *Harv. L. Rev.* at 659.

¹¹² Fuller, *supra*, 71 *Harv. L. Rev.* at 653-55.

does not wish to make the classical naturalist move – is the positive authoritativeness of the norms that the defendant followed, not the formal character of those norms. *Nullum crimen sine lege* places the burden on the prosecution to establish the criminality of the wife’s conduct on the basis of legal norms authoritative when and where the conduct occurred. This burden derives, not from formal considerations, but from the substantive concerns about notice and authority discussed above. The pertinence of those concerns turns on whether, at the time and place of the conduct, exculpatory norms were authoritative and applicable, not on whether those norms possessed or lacked a rule-of-law character.

The proper question was whether the 1871 act rendered the wife’s conduct a crime at the time of its commission, given its place alongside the enactments and officially espoused interpretive methods characteristic of the German legal order of 1944. To be sure, concealed judicial manipulations, manifesting a conscious corruption, would not affect the determination of the legal order’s standards; these would have been exercises of power, but not of authority, and would have created an expectation that one could get away with an act, but not an expectation that one was acting within the law. In contrast, however, idiosyncratic interpretive methods, if openly adopted, are undeniably part of a positive legal order.¹¹³ The wife’s conduct could be prosecuted in full

¹¹³ A substitution of interpretive method – attributing to words an “objective” meaning at variance with the meaning that they had in the legal culture in which they were embedded – is incompatible with the *nullum crimen* principle. No country’s legal enactments can be said to have meanings so objective that their terms can be applied without regard to their context and to the overall framework within which they are routinely interpreted. Persons operating within such a framework cannot properly be left at the mercy of a hostile outsider’s decontextualized semantic analysis. This author has harshly criticized the European Court of Human Rights for holding to the contrary in *Streletz, Kessler, and Krenz v. Germany*, *supra*, at para. 81. See Roth, “Retrospective Justice or Retroactive Standards?” *supra*, 50 *Wayne L. Rev.* at 50-56. For other critical accounts of the decision, see W. N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: T.M.C. Asser Press, 2006), at 244-48; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009), at 220-22, 375-76 (noting disapprovingly the retroactive nullification of a justificatory defense).

compliance with *nullum crimen sine lege* if, but only if, the Nazi regime, in seeking its own legitimation, traded on the existence of a legal order within which the wife's conduct would have counted as a crime.

Subsequent commentary has revealed a plausible (though far from incontestable) account of the legal facts and the wife's conduct on which a case within such specifications could have been (and in the actual event, was) made in the post-war West German court.¹¹⁴ But Fuller had no interest in making that claim, which would have fallen short of the point he was trying to establish.

Furthermore, in emphasizing the flawed character of the exculpatory norms, Fuller's theory of the case neglects the fact that the wife did no more than to report facts truthfully (so far as is reported) to officials who were, beyond cavil, duly authorized to receive such testimony. Fuller's analysis would more plausibly have had bearing on the criminal liabilities of the prosecutors and judges who applied the open-ended license,¹¹⁵ deriving from the Nazi legal order's distinctive

¹¹⁴ See Pappé, *supra*, 23 *Modern L. Rev.* at 267-68, 271. According to Pappé, the judiciary maintained a clear understanding that convictions of this type represented a subversion of their legal duties. "To regard intimidation in the interest of the ruling party as the declared purpose of the German criminal law at the time of the death sentence, as Hart suggests, is ... an arbitrary assumption." *Id.* at 271. Moreover, Pappé contends, the political subversion of judicial duty was notorious. "A mistaken belief in the legality of the court-martial procedure would be a defence only for a person who could not be expected to share the insights of ordinary members of the public." *Id.* at 268. In the actual case, the wife was found to have been fully conscious of the judiciary's departure from established legal standards, and in testifying in court in full knowledge of the consequences for her husband, willfully exploited that departure to her own selfish, apolitical ends. *Id.* at 268. For a contrary understanding of the openly espoused ethos of the German court system during this period, which might call into question both Pappé's analysis and the actual West German court holding, see Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. D. Schneider (Cambridge, Mass., Harvard Univ. Press, 1991) 68-81.

¹¹⁵ The Third Reich judges who sentenced the husband to death for maligning the Führer were not prosecuted. The reason, Pappé reports, "was not that they had been acting lawfully in the execution of public justice, but that they had the defence of intimidation, and that, therefore, no court would sentence them." Pappé regards the claim of danger to the judges as exaggerated, and the invocation of this excuse to reveal "an extremely weak point in post-Nazi judicature." Pappé, *supra*, 23 *Modern L. Rev.* at 268.

“jurisprudence,” to disguise an extreme act of mere political repression as the execution of a lawful sentence.¹¹⁶

The wife, however, was not responsible for implementing the German criminal code. Testifying truthfully in one’s country’s court system is nowhere a crime, however wicked the motivation. Morally speaking, of course, the wife’s conduct can be assimilated to snitching to the neighborhood mob boss about her husband’s hostility, in the hope and expectation of getting her husband “rubbed out.” But unless the German government in 1944 was too evil to count as a government, or the court too manifestly corrupt to have appeared, even by standards of the prevailing ideology, as a real court,¹¹⁷ the wife’s *nullum crimen* defense is sound.

¹¹⁶ *Nullum crimen sine lege* is justifiably interpreted to allow prosecution of conduct that, “at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” International Covenant on Civil and Political Rights (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (ICCPR), art. 15(2). This maxim cannot properly be used to circumvent empirical dissensus about the elements of a crime or, more relevantly, about justificatory defenses; legal systems in good standing within the empirical community of nations have been known to authorize state-security-inspired extemporary measures, and it is an abuse of “general principles” to nullify the exculpatory effects of such authorization. Even so, such principles might conceivably be invoked to condemn the use of unorthodox penal jurisprudence to disguise those measures’ inherent extemporary character. To portray the husband’s sentence as a judicial application of law, rather than as an essentially extemporary act, seems perverse, even though the soldier could hardly have lacked notice that his grumblings about the Führer, if disclosed, would have these penal consequences..

¹¹⁷ This latter was Pappé’s position. Pappé, *supra*, 23 *Modern L. Rev.* at 267-68. To be sure, some Third Reich judicial processes were open to such characterization, especially those directed against foreign nationals in violation of the international law of war. One set of Nuremberg prosecutions addressed such judicial proceedings. *United States v. Altstoetter*, III *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10* (William S. Hein & Co. ed. 1997), available at <http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf>. For example, defendant Guenther Joel “was convicted for using his [judicial] ‘authority and duty to review penal cases from the Incorporated Eastern Territories after the occupation of Poland’ ... to give ‘final authorization’ to nearly 100 illegal death sentences imposed by German courts between 10 September 1942 to March 1943,” sentences that the Nuremberg Tribunal found to have had “no legal basis either under the international law of warfare or under the international common law as recognized by all civilized nations.” Kevin John Heller, “John Yoo and the *Justice Case*,” May 1, 2008 post at <<http://balkin.blogspot.com/2008/05/john-yoo-and-justice-case.html>>, citing *Altstoetter*, *supra*, at 1131, 1140-42.

This is why Hart understood the Soldier's Wife Case to pose a dilemma. As he memorably put it:

in punishing the woman a choice had to be made between two evils, that of leaving her unpunished and that of sacrificing a very precious principle of morality endorsed by most legal systems. Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are. The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another.¹¹⁸

Fuller's response to this passage reveals the depth of his misunderstanding:

I hope I am not being unjust to Professor Hart when I say that I can find no way of describing the dilemma as he sees it but to use some such words as the following: On the one hand, we have an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it. On the other hand, we have a moral duty to do what we think is right and decent. When we are confronted by a statute we believe to be thoroughly evil, we have to choose between two duties.

If this is the positivist position, then I have no hesitancy in rejecting it. The "dilemma" it states has the verbal formulation of a problem, but the problem it states makes no sense. It is like saying that I have to choose between giving food to a starving man and being mimsy with the borogoves. I do not think it is unfair to the positivistic philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law. ...¹¹⁹

But Fuller was indeed "being unjust to Professor Hart," because Hart's position was in no way predicated on the proposition that "we have an amoral datum called law, which has the peculiar

¹¹⁸ Hart, *supra*, 71 *Harv. L. Rev.* at 619-20.

¹¹⁹ Fuller, *supra*, 71 *Harv. L. Rev.* at 656.

quality of creating a moral duty to obey it.” The relevant moral duty is not the duty of the regime’s subjects to obey the enactment, but the duty of the rule-of-law-oriented court, in its retrospective analysis, to take account of the considerations of notice and authority, as discussed above. Whether or not the facts of this case justify overriding them, these are weighty considerations, rooted in the imperatives of predictability and accountability in the exercise of power. Whatever else may be said of the comparative merits of positivist and naturalist accounts of such situations, it is to the credit of Hart’s positivism that it worked in this case to reveal, rather than to obfuscate, the moral dilemma.

In the end, Hart allowed that leaving such egregious wrongdoing unpunished might be more intolerable than using law to punish acts that were lawful when and where committed. He was willing to entertain punishing “grudge informers” such as the soldier’s wife, though he believed that the harm to legality would be better contained if the *ex post facto* criminalization were accomplished by overtly retroactive legislation, rather than left to a court’s untethered discretionary authority.¹²⁰ That proposal, which Fuller refused to characterize as “the most nearly lawful way of making unlawful what was once law,”¹²¹ at least addresses the accountability concern underlying the *nullum crimen* principle, ruling out the licensing of subjective reactions to the perceived moral qualities of a particular defendant.¹²² Far from being obtuse about law’s relationship to morality, as Fuller implies, Hart’s approach provides a superior basis for identifying the moral stakes of the legal

¹²⁰ Hart, *supra*, 71 *Harv. L. Rev.* at 619.

¹²¹ Fuller, *supra*, 71 *Harv. L. Rev.* at 661.

¹²² Given the wife’s plainly corrupt motive – in no way connected to a prevailing ideological view about the moral justification of draconian punishments for those privately manifesting disloyalty to the Führer – it is difficult to fault the intuition that her case should be singled out for harsh treatment. As an institutional matter, however, such assessments represent precisely the kind of subjective judgment, pertaining to the exercise of power over the most fundamental human interests, against which the rule of law distrustfully guards.

question.

Even Hart's suggestion, of course, confers on a post-regime-change legal order a doubtful authority to disrespect a defendant's adherence to a legal order internationally recognized as authoritative at the time and place of the conduct. However, it is important to note the nearly unique factors that mitigate the significance of this consideration in the case of Nazi Germany. Though Germany's government was internationally recognized, its commitment to "total war" – which entailed pan-continental aggression and multiple genocide – belies any sense of reliance, by the government or its subjects, on an international legal order according the Third Reich equal juridical respect among sovereign regimes. The Third Reich set out to destroy, and did effectively destroy, the existing international legal order; thus, those committing violence on its behalf – perhaps even those not directly involved in aggression or crimes against humanity -- were arguably estopped from asserting any defense peculiarly predicated on the prosecution's obligation to recognize that regime's authority at the time and place of its effectivity within Germany, or to dignify as "lawful" the decision of the regime's subjects to abet that regime's distinctive political project.

Although the Allies rejected, prior to Nuremberg, a proposal to deny combatant privilege to *Wehrmacht* soldiers participating in their state's unlawful offensive uses of force,¹²³ a narrower theory of estoppel, nullifying authorizations for especially ruthless means undertaken in service of a set of ends thoroughly inimical to international legal order, might be more compelling. Agents of the Third Reich were on notice that their acts were part and parcel of the "total war" that they might lose, and so, arguably, on notice that they might be judged on the basis of externally prevalent

¹²³ See Telford Taylor, *The Anatomy of the Nuremberg Trials* (New York: Little Brown & Co., 1992), at 37 (on the theory proposed by Col. William C. Chanler).

minimum standards.¹²⁴

As Hart's ambivalence makes clear, the assertion of *nullum crimen* is the start, not the end, of the conversation about what ought to be done. But whether seen in positivist terms as a moral principle external to "law" as such, or in naturalist terms as a juridical consideration within an inherently purposive process of law determination, *nullum crimen* is a compelling principle. Whatever conclusion one might draw about disregard for *nullum crimen* in post-Third Reich prosecutions, that disregard should not be taken as a model for disanalogous cases. In particular, it should not carry over to acts undertaken under the authority of more ordinary regimes, tyrannical though they may have been, that maintained standing within an operational international legal and political order.¹²⁵

IV. *Disagreement and the Moral Significance of Positive Law in the International Order*

At the core of the defense of international law's constraint on the pursuit of substantive justice is the phenomenon of moral disagreement. The most basic truth about the significance of positive law is expressed in Jeremy Waldron's simple statement: "There are many of us, and we

¹²⁴ This estoppel might apply, in particular, to officials exercising discretion under legal licenses – even ones grounded in an overt and elaborated jurisprudence – that sweepingly authorized the elimination of suspected threats to national security. Those officials could scarcely claim that the international community was bound to respect the source of this discretionary authority on the basis of the Third Reich's standing in the then-prevailing international order. One might analogize such limited respect to the legal prerogatives of Third Reich officials to the limited respect accorded to agents of an unrecognized government under the doctrine of "implied mandate." See *Madzimbamuto v. Lardner-Burke*, 1 A.C. 645, 728-29 (U.K. Privy Council, 1969) ("acts of sovereignty exercised by ... a usurper may have an obligatory force" where exercised to avoid disorder rather than to further the usurpation).

¹²⁵ In the respect, the subsequent demise of the German Democratic Republic – generally speaking, a member in good standing of a pluralistic international order in which Marxist-Leninist and other "garden-variety" dictatorships were major participants in norm formation – posed juridical questions properly understood as very different from those posed by the demise of the Third Reich. See Roth, "Retrospective Justice or Retroactive Standards?" *supra*, at 41-44.

disagree about justice.”¹²⁶ As Waldron’s work emphasizes, the need for a binding positive legal order at the domestic level stems as much from moral vehemence as from wilful self-interestedness.¹²⁷ This is no less true at the international level.

It is hardly remarkable that in any human society, law functions as an indispensable instrument of coordination and mutual restraint among constituent elements prone to conflicts of interest. But often neglected is the extent to which positive law – emanating from the “sovereign” authority of states, whether individually or collectively – operates as a response to conflicts rooted in *moral* disagreement. No society, domestic or international, can afford to allow its members to pursue justice, as they severally understand it, to the limit of their individual capacities. As Waldron points out:

the Rule of Law is not simply the principle that an official or citizens should apply and obey the law even when it disserves their own interests. It is the principle that an official or citizen should do this even when the law is – in their confident opinion – unjust, morally wrong, or misguided as a matter of policy. For the enactment of the measure in question is evidence of a view concerning its justice, morality, or desirability which is different from their own; *someone* must have been in favor of the law or thought it a good idea. In other words, the law’s existence, together with the individual’s own opinion, is evidence of *moral disagreement* in the community on the underlying issue. The official’s failure to implement the law because it is unjust, or the citizen’s doing something other than what the law requires because that would be *more* just, is tantamount to abandoning the very idea of law – the very idea of the community taking a position on an issue on which its members disagree.¹²⁸

Justice, however objective a phenomenon it may be, appears in various and clashing ways to the minds of any society’s members, who are no less prone to conflict when acting in a spirit of

¹²⁶ Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999), at 36; *see generally* Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999).

¹²⁷ Waldron, *The Dignity of Legislation*, *supra*, at 46, 51.

¹²⁸ Waldron, *The Dignity of Legislation*, *supra*, at 37.

righteousness than when pursuing unprincipled ends. It is this basic truth that led Kant, typically identified with the primacy of individual conscience, to call for compliance with – indeed, absolute obedience to¹²⁹ – the norms of a successfully established political order. Whereas James Madison famously ventured that “[i]f men were angels, no government would be necessary,”¹³⁰ Kant was more perceptive:

Even if we imagine men to be ever so good natured and righteous before a public lawful state of society is established, individual men, nations, and states can never be certain that they are secure against violence from one another, because each will have his own right to do what *seems just and good to him*, entirely independent of the opinion of the others.¹³¹

A domestic legal order solves this problem through the centralization of legislative, adjudicative, and executive authority, a centralization predicated on a notional commonality – however often illusory or imposed – of core interests and values within the political unit. The international legal order, however, is predicated on a much less robust perceived commonality of interests and values. Accordingly, while the latter order establishes positive legal obligations through treaty processes and norm-generating customary practice, it largely lacks centralized processes for the adjudication and enforcement of international legal norms. There is frequently no

¹²⁹ See Immanuel Kant, “On the Common Saying: ‘This May Be True in Theory But It Does Not Apply in Practice,’” in *Kant’s Political Writings*, ed. Hans Reiss, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1970), 61 at 81.

¹³⁰ James Madison, “The Federalist No. 51,” in Michael Kammen, ed., *The Origins of the American Constitution: A Documentary History* (New York: Penguin Books, 1986), 202 at 203.

¹³¹ Immanuel Kant, *The Metaphysical Elements of Justice*, trans. John Ladd (Indianapolis: Bobbs-Merrill, 1965), sec. 44, at 76, quoted in Jeremy Waldron, “Special Ties and Natural Duties,” 22 *Philosophy & Public Affairs* 3, 4-5, 14-15 (1993). Waldron’s work has built substantially on the observation that Kant attributed the perils of the state of nature not to selfishness, but to moral vehemence.

international court with jurisdiction over an alleged transgression, and even more frequently, no international body with the authority to compel compliance or to impose penalties for non-compliance. A territorial state's consent is most often a requisite, not only to a norm's recognition, but also to its implementation.¹³² The crucial question is whether, absent a state's consent to the implementation, within its territory, of norms recognized to be binding on that state, other states – whether individually, in an established “regional arrangement,”¹³³ or in an *ad hoc* “coalition of the willing”¹³⁴ – may find within international law a license to engage in extraterritorial application and enforcement of those norms: in other words, a right of self-help.

The problem, of course, is that self-help re-introduces the dangers that positive legal orders are meant to counter. Each state “will have [its] own right to do what seems just and good” – and internationally lawful – “to [it], entirely independent of the opinion of the others.”

The concern is most keenly felt in weak states, at once vulnerable to external impositions and lacking any capacity to impose their sense of justice on others. One might counter that it is only weak states' rulers who regard such license as a danger and an affront, whereas the ruled – at least in respect of impositions undertaken in the name of human rights law – would, or should, welcome such impositions. That contention presupposes, however, higher-than-evident levels of trust in, and

¹³² Apart from the special powers entrusted to the United Nations Security Council under Chapter VII of the Charter, no state or intergovernmental organization has – or even claims – law enforcement authority within the territory of a foreign state. *See, e.g.*, Restatement (Third) of Foreign Relations Law of the United States § 432(2) (1987) (“A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.”); *see also* G.A. Res. 46/182 (1991) (acknowledging that humanitarian operations within a state's territory require the state's consent).

¹³³ *See* U.N. Charter, arts. 52-53.

¹³⁴ *See Coalitions of the Willing: Avantgarde or Threat?* Christian Calliess, Georg Nolte & Peter-Tobias Stoll, eds. (Munich: Carl Heymanns Verlag GmbH, 2007).

trustworthiness of, the stronger actors, against whose intervention even tyrannical rulers of weak states can frequently mobilize opposition.

At the same time, even the powerful states, knowing that they are untrusted, have a long-term interest in averting both chaos and resentment that weighs against asserting a broad license to engage in self-help in respect of matters within the territory of foreign states. This commonality of interest between weak and strong states, as well among rival strong states, grounds an accommodation that presumptively bars any actor, however righteous, from disregarding an inner core of prerogatives and inviolabilities attendant to equal membership in the community of states. Only an exceptional process, established by the community of states itself and requiring an extraordinary concurrence of opinion, authorizes an override of the system's default rules.

International law represents – not exclusively, to be sure, but vitally – an accommodation among entities prone to conflict rooted, not only in competing interests, but also in systematic and profound disagreement about justice. Political conflict's much-lamented intractability is largely owing to its moral component; contestants are least willing to back down from positions taken as a matter of principle. Although human beings rarely disagree about the most fundamental moral principles in the abstract (e.g., “murder is wrong”), they all too frequently disagree about the application of those moral principles to unmediated struggles over the terms of public order (e.g., “one person's terrorist is another's freedom fighter”). While the specific configurations of contemporary international conflict can be ascribed to historical contingencies of the “Westphalian” state system, the animating tendency toward moral disagreement is endemic to the human condition.

In the absence of commonalities of substantive moral principle, participants in the international community need to find common ground on a different plane. The imperative to honor agreements – and other forms of accommodation on which others are led to rely – is not reducible to

a pragmatic concern of the “repeat player” to maintain a reputation that will enable her to obtain cooperation on subsequent “plays,” but is a duty, owed to the community, to maintain an expectation of compliance with established institutions. Moreover, “honor” itself is not without moral significance, as it reflects integrity and respect for the other. One honors agreements made with the unjust, mostly because it is irresponsible to do otherwise when morally important interests depend on maintaining one’s own and others’ ability to trade on the convention of agreement in similar future contexts, but also because treachery, even when employed against actors who are themselves immoral, incurs a moral taint.

The point is not that considerations of extraordinary injustice, even unilaterally conceived, may never override the duty to honor one’s formal commitments. It is that positive obligations may be morally binding even where they demand forbearance from the single-minded pursuit of one’s unilateral moral ends. Whatever the exceptions, they do not swallow the rule.

Thus, however paradoxical it may seem, restraint on the pursuit of justice is not only central to the mission of existing international law, but also central to any sound theory of international political morality that pertains to the development of international legal institutions. Unilateral impositions, deriving from a particular, empowered conception of universal morality, are more likely to be the problem than the solution. What Prosper Weil stated a quarter-century ago remains valid today:

At a time when international society needs more than ever a normative order capable of ensuring the peaceful coexistence, and cooperation in diversity, of equal and equally sovereign entities, the waning of voluntarism in favor of the ascendancy of some, neutrality in favor of ideology, positivity in favor of ill-defined values might well destabilize the whole international normative system and turn it into an

instrument that can no longer serve its purpose.¹³⁵

Interestingly, among human rights-oriented scholars, this argument has considerable (though by no means universal) appeal as applied to unilateral threats and uses of force,¹³⁶ and perhaps even to unilateral coercive economic measures such as secondary boycotts.¹³⁷ Yet some of the same scholars who embrace restraints on those categories of exertions by individual states or “coalitions of the willing” appear to see national courts’ exercises of extraordinary extraterritorial jurisdiction, nullifications of the immunity of foreign officials, and creative circumventions of *nullum crimen sine lege* as not only exempt from the pitfalls of such unilateral executive measures, but actually as a peace-building and law-developing alternative to such executive measures.

This is a fundamental mistake. Extraterritorial prosecution of foreign-state actors and forcible impositions upon foreign political communities are both conceptually and practically intertwined. Because the legal limitations on the two derive from the same jurisprudential concept,

¹³⁵ Prosper Weil, “Towards Relative Normativity in International Law?” 77 *Am. J. Int’l L.* 413, 423 (1983); cf. Alfred Rubin, “Actio Popularis, Jus Cogens and Offenses Erga Omnes?,” 35 *New Eng. L. Rev.* 265, 280 (2001) (“To ignore the problems of ‘standing’ or to assert that the rules already evident in international practice and codified in the positive law of the United Nations Charter do not apply in the case of some selected atrocities by some selected villains (but not to others), or that lawyers’ and judges’ views of ‘law’ can overrule the political decisions of the leaders of the various communities that compose the international community today, is much more than can be accepted by anybody truly concerned with peace and justice.”)

¹³⁶ See, e.g., Mary Ellen O’Connell, “Opposing the New Militarism,” 2008:1 *Foreign Voices* 5 (2008), <www.responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=495>; Jose Alvarez, “Notes from the President: The Schizophrenias of R2P,” 23:3 *ASIL Newsletter* (Summer, 2007), <<http://www.asil.org/newsletter/president/pres070927.html>>.

¹³⁷ See Andreas F. Lowenfeld, “Agora: The Cuban Liberty and Democratic Solidarity (LIBERTAD) Act,” 90 *Am. J. Int’l L.* 419, 430 (1996) (asserting “that (in time of peace) the exercise of jurisdiction ... to impose a secondary boycott ... is contrary to international law, because it seeks unreasonably to coerce conduct that takes place wholly outside of the state purporting to exercise its jurisdiction to prescribe”).

the likely consequence of the loosening of constraints in the former realm will be the erosion of constraints in the latter.

International legal constraints on the use of force are predicated not on a principle of non-violence, but on a principle of respect for a foreign state's authority within its boundaries.¹³⁸ To put the point colorfully, but without substantive exaggeration, the right against coercive intervention is the right of territorial political communities to be ruled by their own thugs and to fight their civil wars in peace. It reflects a pluralism that self-consciously sacrifices one set of genuine moral imperatives to another. It favors the creation and maintenance of a stable platform for peaceful and respectful accommodation among territorial political communities – which may be ruled, for the time being, by governments bearing incompatible conceptions of political morality – over licensing unilateral projections of power across borders in service of what might objectively be a just cause.¹³⁹ Although considerations of human rights may ground episodic exceptions to the non-intervention norm, human rights do not constitute a general qualification of the norm; rather, a state's right against dictatorial interferences in its internal affairs presumptively withstands the state's own violations of international legal norms, including human rights norms.¹⁴⁰

To the extent that extraterritorial jurisdiction licenses the vilification of foreign state

¹³⁸ See Robert Jackson, *The Global Covenant*, *supra*, at 368 (“perhaps the most fundamental [concern of modern international society] has been ... to confine religious and ideological *weltanschauungen* within the territorial cages of national borders”).

¹³⁹ “[W]hen contemplating military intervention, the United Nations (U.N.) usually has preferred not to differentiate between just and unjust reasons to intervene. Instead, the nations have favored treating all states as autonomous entities entitled to be left alone, and doing so on grounds of maintaining international peace and order, rather than advancing justice.” Thomas M. Franck, “Is Justice Relevant to the International Legal System?” 64 *Notre Dame L.J.* 645, 655 (1989).

¹⁴⁰ For detailed discussion of this point, see Brad R. Roth, “The Enduring Significance of State Sovereignty,” 56 *Fla. L. Rev.* 1017, 1033-37 (2004).

officials, it has the potential to undermine the platform that undergirds peaceful and respectful international relations. International efforts to secure the bases of human well-being routinely require the cooperation of political leaders to whom significant human rights violations can be attributed. Even recourse to force, both international and internal, must often be directed toward creating the conditions for a compromise that will respect the honor of the opposing party, notwithstanding the opponent's ruthless acts. Moreover, where ruthless acts have been committed with substantial popular support, particular leaders cannot be singled out for vilification without impugning underlying constituencies, thereby further complicating efforts to establish cooperation going forward. These are morally important reasons to forbear from the pursuit of retributive justice across borders, even though countervailing considerations may outweigh them in a limited set of circumstances.

Beyond being a general irritant to international relations, assertions of prosecutorial authority over the acts of foreign states within their territory, if routinized, can easily become an available tool for proponents of an antagonistic foreign policy.¹⁴¹ Indictments could be used as a rationale for hardening the government's position against a foreign state,¹⁴² akin to the insistence

¹⁴¹ No assurance should be drawn from the fact that such proponents have, up to now, opposed international criminal justice. Should the new normative tendencies achieve dominance, those favoring projections of power by strong states in the affairs of weak states will likely adapt their rhetorical approach to exploit its possibilities. An historical precedent is the Reagan Administration's remarkable shift from rejection to acceptance of human rights rhetoric in the early 1980s, and its invocation of human rights rationales in support of aggressive policies that preceded the rhetorical shift. See Cynthia Brown, ed., *With Friends Like These: The Americas Watch Report on Human Rights and U.S. Policy in Latin America* (New York: Pantheon, 1985), 3-23.

¹⁴² The U.S. indictment of Panamanian strongman Manuel Antonio Noriega, albeit for drug trafficking rather than human rights-related offenses, illustrates this point. See, e.g., Jeff Cohen & Mark Cook, "How Television Sold the Panama Invasion" (Fairness & Accuracy in Reporting, Jan./Feb. 1990), available at <<http://www.fair.org/index.php?page=1546>>.

that one never negotiate with terrorists.¹⁴³ More broadly, extraterritorial prosecutions might serve as a device to discredit advocates of a peaceful settlement, purporting to reveal the fecklessness of those who counsel – or who have in earlier instances counseled – restraint and compromise in the face of a certified evil. Instead of serving as a rationale for discouraging aggressive responses, respect for international legality may be invoked a reason to take aggressive action.¹⁴⁴

Worst of all, a legal attribution of criminality to adverse regimes may tend to present international institutions with enforcement demands that such institutions, dependent on consensus among non-like-minded states, characteristically cannot fulfill. At this fork in the road, where the international legal order's procedural strictures are perceived to frustrate that same order's imperative substantive ends, violations of use-of-force norms can be rationalized as implementing the true spirit of international law.¹⁴⁵ Instead of furthering accountability in the exercise of power, international criminal law may furnish a rationale to disparage and to flout those international institutions and processes that are designed to hold powerful states accountable.

International criminal justice must thus respect the inherent pluralism of the international legal order, or else play a part in that order's erosion.¹⁴⁶ Respect for strictures associated with the

¹⁴³ For an exemplar of such reasoning, see Louis Rene Beres, "International Law Requires Prosecution, Not Celebration, of Arafat," 71 *U. Det. Mercy L. Rev.* 569 (1994).

¹⁴⁴ See generally Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Order* (Cambridge: Cambridge Univ. Press, 2004) (elaborating the historical tendency of the international system to cast particular states as non-right-bearing outlaws).

¹⁴⁵ Such invocation of universal principles in the face of institutional deadlock is brilliantly exemplified in Reisman, "Unilateral Actions," *supra*. That model of argumentation was arguably decisive in winning over important liberal constituencies to the Bush Administration's decision to invade Iraq in 2003.

¹⁴⁶ The reasons given above may be taken as arguments against state consent to further expansion of universal jurisdiction, or as arguments for forbearance from prosecutions that have a valid basis in existing international criminal law. Both of those questions are beyond the scope of this article. For

international rule of law, even at the expense of substantive justice, safeguards that pluralistic order's foundations.

V. *International Legality and the Criminalization of Ordinary Human Rights Violations*

The international rule of law, in turn, is predicated on respect for states' presumptive monopoly of the last word on public order inside their respective territories. Although that monopoly no longer applies in respect to established international crimes, it continues to withstand violations of international obligations in general – including human rights obligations.¹⁴⁷

The establishment of an international crime requires a separate step, over and above the establishment of an international human rights norm.¹⁴⁸ Justice Geoffrey Robertson of the Special

present purposes, the point is that gaps in the positive criminalization of human rights violations result, not from some technical failure to have accomplished an unquestioned goal, but from countervailing considerations that ground continued resistance within the international community to an expansive license for extraterritorial prosecution. Consequently, courts have a responsibility to respect existing limitations, rather than to seek a work-around.

¹⁴⁷ “He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.” *Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences*, *supra*, at 221. However, these attributions of individual liability for participation in state acts typically occur where “the acts were *crimes* against international law, so it is doubtful whether they apply to breaches of international law which are not crimes against international law.” Akehurst, *supra*, at 243.

¹⁴⁸ As the ICTY has noted, “For criminal liability to attach, it is not sufficient . . . merely to establish that the act in question was illegal under international law, in the sense of being liable to engage the responsibility of a state which breaches that prohibition, nor is it enough to establish that the act in question was a crime under the domestic law of the person who committed the act.” *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, paras. 196, 199 (Nov. 29, 2002), cited in Van Schaack, *supra*, at 150 n. 139. For example, the ICTY has held that for a violation of Common Article 3 of the Geneva Conventions of 1949 to qualify, the violation “must constitute a breach of a rule protecting important values,” “must involve grave consequences for the victim,” and “must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.” *Prosecutor v. Tadić*, Appeals Chamber Decision, 2 October 1995, para. 94. However, as Van Schaack has pointed out, the ICTY's practice on this point has been more equivocal than this rhetoric suggests. Van Schaack, *supra*, at 154-57.

Court for Sierra Leone has articulated the crucial requisite for this second step as follows:

There must be evidence (or at least inference) of general agreement by the international community that breach of the customary law rule would or would now, entail international criminal liability for individual perpetrators, in addition to the normative obligation on States to prohibit the conduct in question under their domestic law. ... [I]t must be clear that the overwhelming preponderance of states, courts, conventions, jurists and so forth relied upon to crystallize the international law “norm” intended – or now intend – this rule to have penal consequences for individuals brought before international courts, whether or not such a court presently exists with jurisdiction over them.¹⁴⁹

In the illustrative case of *Sam Hinga Norman*, Robertson’s dissent asserted an insufficiency of evidence, regarding the international norm prohibiting enlistment of children in armed forces, that “by 1996 it was intended by the international community to be a criminal law prohibition for the breach of which individuals should be arrested and punished.”¹⁵⁰ Whether or not his assessment of the evidence was correct in that case,¹⁵¹ his criterion expresses the essence of *nullum crimen sine lege* as applied to international criminal law.

In the absence of an established international crime, state sovereignty, rather than being straightforwardly displaced by international legal obligation, retains a residual presence alongside international legal obligation. Paradoxical though it may seem, renunciation of a practice does not, in itself, entail renunciation of the legal capacity to authorize that practice. Schmitt’s notorious

¹⁴⁹ *Prosecutor v. Sam Hinga Norman*, Case No.SCSL-04-14-AR72(E), Judgment of 31 May 2004, Robertson, J., dissenting (hereafter “Robertson dissent”), paras. 17, 21 (available at <<http://www.sc-sl.org/CASES/CivilDefenceForcesCDFCompleted/AppealsChamberDecisions/tabid/193/Default.aspx>>). The majority opinion did not overtly depart from Robertson’s criteria. See *Norman*, Majority Opinion, at para. 37 (citing *Tadić* on “State practice indicating an intention to criminalize the prohibition”).

¹⁵⁰ *Norman*, *supra*, Robertson dissent, para. 21.

¹⁵¹ For the contrary assessment, see *Norman*, *supra*, Majority Opinion, paras. 44-51.

maxim, “Sovereign is he who decides on the exception,”¹⁵² while debatable in application to domestic legal orders, captures the essence of the relationship between domestic and international authority wherever an international crime has not been authoritatively established: states, as represented by the recognized governments, retain the legal capacity (even though not the right) to authorize measures in violation of the state’s ordinary international legal obligations.¹⁵³ In so acting, states incur responsibility for breach, and render themselves susceptible to adverse legal consequences, including the (appropriately limited) countermeasures of specially affected states or of the community of states.¹⁵⁴ However, the cluster of constraining norms discussed above – limits to extraterritorial jurisdiction, immunity *ratione materiae*, and *nullum crimen sine lege* – shields from personal liability officials and cooperating citizens operating inside their own national territory within domestic legal mandates. Internationally-acknowledged sovereign prerogative thus operates to protect individuals who act – albeit in an internationally wrongful manner – in the state’s service.

This rule applies even to norms that might plausibly be categorized as *jus cogens*.¹⁵⁵

Notwithstanding the indications of much scholarly commentary¹⁵⁶ and some judicial dicta,¹⁵⁷ a

¹⁵² Schmitt, *supra*, at 5.

¹⁵³ “International law ... recognizes the power – though not the right – to break a treaty and abide the international consequences.” Louis Henkin, *Foreign Affairs and the Constitution* (Mineola, NY: Foundation Press, 1972), 168.

¹⁵⁴ International Law Commission, Articles on State Responsibility (2001), arts. 48-54.

¹⁵⁵ *Jus cogens* refers to a “peremptory” norm, “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” Vienna Convention on the Law of Treaties, *supra*, art. 53.

¹⁵⁶ One source of confusion in this area is that some important scholars have popularized the term “*jus cogens* crimes.” See, e.g., M. Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*,” 59 *Law & Contemporary Probs.* 63 (1996); Leila Nadya Sadat, “Exile, Amnesty, and International Law,” 81 *Notre Dame L. Rev.* 955, 966 & n.31 (2006). These scholars use that term to highlight claims about additional legal consequences (such as the purported inadmissibility of amnesty)

norm's *jus cogens* status does not alone establish universal penal jurisdiction or the voiding of immunities.¹⁵⁸ *Jus cogens* norms do have important special characteristics that imply an element of “normative hierarchy”:¹⁵⁹ these norms, unlike ordinary customary norms, are obligatory

of certain acts that have been established to incur international criminal liability. Whatever the merit of those claims, the rhetoric has had the effect of leading less careful scholars to conflate *jus cogens* and international crimes – phenomena that do, of course, frequently coincide. See Bartram S. Brown, “The Evolving Concept of Universal Jurisdiction,” 35 *New Eng.L. Rev.* 383, 392-93 (2001) (cautioning against the over-identification of *jus cogens* with universal jurisdiction).

Moreover, the rhetoric of *jus cogens* crimes tends to present as settled what is, in actuality, a highly contentious assertion: that the duty of states to prosecute foreign-state officials for crimes of this nature is itself a *jus cogens* obligation that overrides constraining international legal norms of a “lower” status. A prohibition's *jus cogens* status does not, in itself, imply the same status for the obligation to prosecute the offense. See Ferdinandusse, *supra*, at 182; Shany, *supra*, at 867. Indeed, the International Criminal Court Statute seems to counterindicate *jus cogens* status for such prosecutorial obligations, since its call for surrender of suspects expressly yields to states parties' contrary treaty obligations to non-parties. ICC Statute, Art. 98.

¹⁵⁷ See, e.g., *Prosecutor v. Furundžija*, Trial Chamber, Judgment of 10 December 1998, <<http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>>, paras. 147, 155-56.

¹⁵⁸ See, e.g., Ferdinandusse, *supra*, at 182; Shany, *supra*, at 867; Andrea Bianchi, “Human Rights and the Magic of *Jus Cogens*,” 19 *Euro. J. Int'l L.* 491, 500 (2008) Several important recent decisions have, in the face of alleged *jus cogens* violations, upheld state immunity, the immunity *ratione personae* of sitting state officials responsible for diplomacy, and the immunity *ratione materiae* of state officials in civil cases. See *Case Concerning the Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v. Belgium (Yerodia)*, 2002 ICJ Rep. 3 (upholding the immunity *ratione personae* of a currently serving Foreign Minister from prosecution in a foreign-state court for crimes against humanity); *Al-Adsani v. Government of Kuwait (No. 2)*, 1996 ILR 536 (House of Lords holding that state immunity precludes civil suits against foreign states for torture); *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia*, 2006 UKHL 26 (House of Lords holding that state immunity precludes civil suits against foreign officials for torture, even though those officials are subject to criminal liability); *Al-Adsani v. United Kingdom*, 34 EHRR 273 (2001) (a closely divided decision of the Grand Chamber of the European Court of Human Rights, holding that human rights law does not require a state court to void foreign state immunity in civil suits for torture). As Hazel Fox has put it, state immunity “does not contradict a prohibition contained in a *jus cogens* norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a *jus cogens* mandate can bite.” H. Fox, *The Law of State Immunity* (Oxford University Press, 2002), 525.

¹⁵⁹ See Dinah Shelton, “Normative Hierarchy in International Law,” 100 *Am. J. Int'l L.* 291(2006).

notwithstanding the “persistent objection” of any individual state to their formation;¹⁶⁰ they admit of no “circumstances precluding wrongfulness” of their violation;¹⁶¹ and they limit the permissible content of treaties.¹⁶² However, while the international system will not recognize any ill-gotten gains from a *jus cogens* violation,¹⁶³ it has not (at least, so far) established that a governmental act, simply by virtue of being taken in breach of a *jus cogens* obligation, is *ultra vires* of state authority.¹⁶⁴

¹⁶⁰ See Michael Byers, *Custom, Power, and the Power of Rules* (Cambridge University Press, 1999), at 186.

¹⁶¹ ILC Articles on State Responsibility, *supra*, arts. 20-26, 50(1)(d) (peremptory norms preclude invocations of consent, self-defense, countermeasures, *force majeure*, distress, and necessity).

¹⁶² Vienna Convention on the Law of Treaties, *supra*, art. 53.

¹⁶³ It is true that “No State shall recognize as lawful a situation created by” a “gross or systematic failure by the responsible State to fulfil” a peremptory obligation, nor may it “render aid or assistance in maintaining that situation.” ILC Articles on State Responsibility, *supra*, arts. 40-41. However, these unlawful situations “virtually without exception” involve “legal claims to territory.” *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 ICJ Rep. 36 (9 July), Kooijmans sep. op., paras. 43-44; *see generally*, Stefan Talmon, “The Duty Not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Norm,” in Christian Tomuschat & Jean-Marc Thouvenin, eds, *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff, 2006), at 99-125. The provision thus appears to be little more than a restatement of the “Stimson Doctrine,” adopted in the 1930s in response to the Japanese use of force to create the satellite state of Manchukuo. *See, e.g.*, Howard Jones, *Crucible of Power: A History of U.S. Foreign Relations Since 1897* (Wilmington, Del.: SR Books, 2001), at 129. Such non-recognition follows directly from the U.N. Charter scheme, and entails no innovations.

¹⁶⁴ W. Michael Reisman reports (with no indication of either endorsement or disavowal):

In human rights discourse, *jus cogens* has acquired a much more radical meaning [than that contained in the Vienna Convention on the Law of Treaties], evolving into a type of super-custom, based on trans-empirical sources and hence not requiring demonstration of practice as proof of its validity. This new understanding of *jus cogens* renders national law that is inconsistent with it devoid of international and national legal effect, such that national officials who purport to act on the putative authority of that national law may now incur direct international responsibility.

Reisman, “Unilateral Actions and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention,” 11 *Euro. J. Int’l L.* 3, 15 n. 29 (2000). In reality, “in most ... cases where peremptory norms have been recognized, the legal consequences of this classification were

Nothing logically compels the step from a norm's supremacy within the international system to the international system's denial of legal recognition to all domestic authority shielding state agents from personal liability for breach.¹⁶⁵ As the International Law Commission has noted, "the category of international obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime. Too close an assimilation of the two notions may be an attractive simplification, but it does not appear to be conceptually acceptable."¹⁶⁶

This is the essential reason why, in the case of Chilean ex-dictator Augusto Pinochet, the ultimate decision of the British House of Lords found susceptibility to prosecution abroad only for those acts of torture committed after the Torture Convention came into force for Chile.¹⁶⁷ Even though the decision acknowledged torture to have been a violation of customary international law, and indeed a violation of *jus cogens*, long before the treaty's effective date, an exemption from

essentially imperceptible." Shelton, *supra*, at 306.

¹⁶⁵ This proposition would entail, among other things, the "Chanler thesis," which asserted that *Wehrmacht* soldiers participating in their state's unlawful offensive uses of force lacked combatant privilege and could thus be susceptible to prosecution for their combat violence as domestic crime. See Taylor, *supra*, at 37. A similar idea was conveyed in the first (3 votes to 2) House of Lords decision on the immunities of former Chilean Head of State Augusto Pinochet; according to Lord Nicholls (joined by Lords Steyn and Hoffman), "it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state. ... This was made clear long before 1973 and the events which took place in Chile then and thereafter." *Regina v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet I)*, 1 AC 61, 109 (2000); *cf. id.* at 115 (Lord Steyn); *id.* at 118 (Lord Hoffman). In the ultimate judgment, however, at most two of seven Law Lords (Lord Millett and apparently Lord Phillips) embraced this view. *Regina v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet III)*, 1 AC 147 (2000).

¹⁶⁶ International Law Commission, Commentary to the Draft Articles on State Responsibility (Art. 19) (1996) (available at <<http://www.icil.cam.ac.uk/Media/ILCSR/rft/Sr19.rtf>>), para. 62 ; see also Michael Byers, *Custom, Power, and the Power of Rules*, *supra*, at 184-185 n. 95.

¹⁶⁷ An additional reason concerned the principle of "double-criminality" in British extradition law – i.e., the need for British law, as well as Spanish law, to have established torture as a universal jurisdiction crime – but that aspect of the holding was not predicated on an interpretation of international law. See *Pinochet III*, *supra*, at 189 (opinion of Lord Browne-Wilkinson).

immunity was effected only upon the positive establishment of universal jurisdiction over foreign-state officials operating inside their national territory and within official capacity.¹⁶⁸ In the wake of the Torture Convention and state practices pursuant and parallel to it, official torture by now likely constitutes a universal-jurisdiction crime under customary international law as well, but this was not clearly so with respect to earlier periods (including, regrettably, the mid-1970s, when the bulk of the Chilean atrocities took place).

Beth Van Schaack has nonetheless discerned a tendency in international tribunals to elide the distinction between international obligations and international crimes, and thus between state responsibility and individual culpability. She observes that, for example, the ICTY has imputed individual criminal responsibility even with respect to Geneva norms that fall outside of the Conventions' "grave breaches" regime.¹⁶⁹ Yet it is important to note that even Justice Robertson's positivistic approach to *nullum crimen sine lege* does not exclude subsequent attributions of penal responsibility to initially non-penal norms, so long as patterns of state practice and manifestations of *opinio juris* properly evidence an authoritative decision of the international community to this effect.

¹⁶⁸ The lead opinion made the point as follows:

I have doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as an official function. At that stage there was no international tribunal to punish torture and no general jurisdiction to permit or require its punishment in domestic courts. Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime. But in my judgment the Torture Convention did provide what was missing: a worldwide universal jurisdiction.

Pinochet III, *supra*, at 204-05 (opinion of Lord Browne-Wilkinson).

¹⁶⁹ Van Schaack, *supra*, at 154 & n. 162, citing *Prosecutor v. Delalić et al. (Čelebići)*, *supra*, para. 176 ("While 'grave breaches' must be prosecuted and punished by all States, 'other' breaches of the Geneva Conventions may be so.").

Positivism insists that a norm's legal validity derives from its social source rather than its moral content;¹⁷⁰ it does not limit cognizable sources to treaties and legislation.

More troubling is Van Schaack's observation that "Tribunals have reasoned that, when conduct shocks the conscience of the international community, no formal notice of its penal consequences is necessary to prosecute offenders."¹⁷¹ Insofar as "no formal notice" here means dispensing with the need, not merely for official promulgation, but for the positive establishment of crimes on ground of the acts being *mala in se*,¹⁷² this directly contradicts Robertson's orthodox position, which he articulates with eloquence as follows:

Here, the Prosecution asserts with some insouciance that "the principle of *nullem crimen sine lege* is not in any case applied rigidly, particularly where the acts in question are universally regarded as abhorrent and deeply shock the conscience of humanity." On the contrary, it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime. *Nullem crimen* may not be a household phrase, but it serves as some protection against the lynch mob.¹⁷³

Although Robertson's endorsement of the moral significance of positive law is stirring, it needs some qualification. Rigidity in this field is a virtue, not for its own sake, but because it responds to a vital moral interest. The problem is not that it is wrong to prosecute "conduct that

¹⁷⁰ Gardner, *supra*, at 199.

¹⁷¹ Van Schaack, *supra*, at 156.

¹⁷² Van Schaack cites, for example, this characteristically equivocal language from the ICTY Appeals Chamber: "Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalization under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts." *Milutinovic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction: Joint Criminal Enterprise, para. 42, quoted in Van Schaack, *supra*, at 156.

¹⁷³ Robertson dissent, *supra*, at para. 12 (footnote omitted).

shocks the conscience of the international community”; the problem is that it is too easy so to characterize the conduct of disfavored actors.¹⁷⁴

Where individuals commit ruthless acts on behalf of political causes to which one is unsympathetic or indifferent, the acts “shock the conscience.” Where the acts are thought to be necessary expedients in the service of a compelling societal end, they turn out not to be so shocking, after all.¹⁷⁵ The hypothesized conscience of the international community is deontological; the empirical conscience of the international community, I submit,¹⁷⁶ is consequentialist. The ends of the “good guys” are widely perceived to justify their means; acts undertaken to further the cause of the “bad guys” are inevitably viewed less charitably. In an international system that reconciles a wide-ranging (though not unlimited) plurality of political moralities, it is dangerous to make generalizations about specific measures that “shock the conscience” irrespective of their political

¹⁷⁴ The *Norman* case itself was by no means as morally clear-cut as Justice Robertson’s formalistic argument suggests. The defendant led the Sierra Leone Civil Defense Force against a rebel group, the Revolutionary United Front (RUF), notorious for the grotesquerie of its mass atrocities. See Michael Nesbitt, “Lessons from the Sam Hinga Norman Decision of the Special Court for Sierra Leone: How Trials and Truth Commissions Can Co-exist - Part 1/2,” 8:10 *German L.J.* (1 Oct. 2007), available at <<http://www.germanlawjournal.com/article.php?id=866>>. Not only was Norman widely regarded as a hero in Sierra Leone, but given the dire moral consequences of defeat in that conflict, it is hardly clear that enlisting child soldiers to maximize his force’s fighting capacity was truly, in its context, shocking to the conscience. One might imagine that a village in danger of being overrun by the RUF would sooner muster its children to the collective defense than leave its children at the mercy of the marauders. This consequentialist argument is inadmissible in the presence of a firmly established and strict penal norm, but to the extent that the penal standard is being improvised by appeal to moral consensus, the point can hardly be considered immaterial.

¹⁷⁵ Some supporters of the Bush Administration have contended that United States constitutional jurisprudence governing cruel, inhuman, and degrading treatment or punishment prohibits – as “conscience-shocking” – only “conduct intended to injure in some way unjustifiable by any government interest.” *Chavez v. Martinez*, 538 US 760, 775 (2003). Although this is probably a somewhat misleading account of the constitutional doctrine, the doctrine plausibly establishes a sliding scale, evaluating harsh measures differentially in light of varying governmental needs.

¹⁷⁶ See Brad R. Roth, “State Sovereignty, International Legality, and Moral Disagreement,” in Tomer Broude & Yuval Shany, eds., *The Shifting Allocation of Authority in International Law* (Oxford: Hart Publishing Co., 2008), 123, at 151-61.

justifications. Universal-jurisdiction-based prosecutions that could proceed by appeals to conscience would inevitably generate widely varying results, depending on the political sympathies prevalent in the venue.

The global system's pluralism is, above all, a pluralism of conflicting consequentialist moralities. There is typically no dispute about the *presumptive* wrongfulness of the acts in question. Indeed, inasmuch as these are acknowledged as human rights violations, there is no legally cognizable dispute that the wrong suffered by the victims cannot simply be cancelled out by a countervailing social benefit.¹⁷⁷ There is nonetheless frequent dispute as to whether, in particular cases, exceptional circumstances justify inflicting the wrong upon that set of victims, dispute that typically reflects differential regard for the conceptions of legitimate and just public order that underlie the claims of justification.¹⁷⁸

The system's default position is that a state retains the sovereign capacity to authorize the act, thereby taking collective responsibility for the violation and shielding state agents from personal liability. Only where the international community of states comes to acknowledge the violation as an international crime is the state deemed to have renounced this sovereign capacity.

This step occurs most often with respect to those measures – for example, genocide, crimes against humanity, and gross or systematic violations of the laws and customs of war – that, far from being substantially related to cognizable governmental ends, entail or suggest, by their very nature,

¹⁷⁷ On “uncancelled wrongs” from the standpoint of moral philosophy, see Steven Lukes, *Moral Conflict and Politics* (Oxford Univ. Press, 1991), at 192-93.

¹⁷⁸ The philosophical aspects of these disputes are too complex to cover in this space. For present purposes, it is enough to notice the sociological aspects. A ready illustration can be found in the vituperative disputes that rage among liberal intellectuals who sympathize, respectively, with the Israeli and Palestinian causes. See, e.g., Malvina Halberstam, “Belgium’s Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?” 25 *Cardozo L. Rev.* 247 (2003).

either rogue activity or ends that the international community has authoritatively repudiated (such as “ethnic cleansing”). The phenomenon has extended, typically by express consent, to other specific measures as well (including, for example, torture and the use of chemical weapons), but the international community, as it stands currently, is very far from having sweepingly criminalized state recourse to ruthless means.¹⁷⁹

Whereas human rights norms should be read expansively to realize their object and purpose, international penal norms need to be read narrowly as derogations of affirmative legal limitations.¹⁸⁰ It would be highly distortive to transplant the expansive logic of human rights protection – appropriate to the use of law as a shield – to the very different task of identifying candidates for international vilification.¹⁸¹ The problem is all the worse where state agents’ status as “enemies of humanity” will be left open, through the removal of immunity *ratione materiae*, to determinations by those adverse to the governmental ends for which the ruthless means were invoked.

Yet, as Darryl Robinson, has noted,

a technique commonly used in ICL is (i) to adopt a purposive interpretive approach; (ii) to assume that the exclusive object and purpose of an ICL enactment is to maximize victim protection; and (iii) to allow this presumed object and purpose to dominate over other considerations, including if necessary the text itself.¹⁸²

¹⁷⁹ For greater elaboration of the point, see Roth, “Just Short of Torture,” *supra*, at 232-34.

¹⁸⁰ See Vienna Convention on the Law of Treaties, *supra*, art. 31(3)(c) (treaty interpretation must take into account “any relevant rules of international law applicable in the relations between the parties”).

¹⁸¹ And indeed, the need for the distinction cuts both ways. Were all breaches of human rights obligations to be regarded *ipso facto* as international crimes, it would follow logically, but perversely, that any practice that is not an international crime is not a breach of state obligation. To interpret the standard restrictively, as appropriate where the focus is on the wrongdoing of the perpetrator, would then have the effect of diluting the standard of state obligation toward the victim.

¹⁸² Robinson, *supra*, at 934.

Such an approach might be tolerable in the service of giving full effect to an international consensus that was real and manifest to the perpetrator at the time of the conduct, even if the requisite articulations of *opinio juris* lagged somewhat behind. But insofar as it would give effect to illusory consensus, and license partisan judgments in the name of universality, it would offend considerations fundamental to the international rule of law.

International penal norms represent the limits of a qualified pluralism. They place certain acts and actors beyond the pale, while otherwise leaving in place an agreement to disagree, not merely about peripheral matters, but about matters of freedom and tyranny, life and death. By observing positivistic standards in discerning the reach of international penal norms, jurists implement whatever overlapping consensus and compromise have been established among bearers of differing moral sensibilities. In this way, they avoid exaggerations of the scope of accord, exaggerations well suited to the pursuit of a partisan agenda.

CONCLUSION

The foregoing article intends a radical statement, albeit in service of a set of moderate prescriptions. The target of that statement is not international criminal law as it has generally operated in practice, but the exuberant rhetoric that has frequently accompanied that practice. The sweeping promise to “end impunity” for human rights violations should be a source of anxiety rather than enthusiasm, for it may well portend, not predictability and accountability in the exercise of power, but rather quite the opposite. To romanticize penal processes as holding perpetrators accountable to victims obscures their more typical tendency to hold the losers of political conflicts accountable to the winners. Human rights advocates, of all people, should think twice before

identifying with winners as against losers, and before engaging in advocacy that may conveniently aid in legitimating the impositions of the powerful.¹⁸³

Nullum crimen sine lege and related doctrines that limit extraterritorial jurisdiction and confer immunity *ratione materiae* are not inconvenient obstacles to be circumvented, but crucial safeguards to be respected. These doctrines respond to the reality that the international community remains beset by serious moral disagreement, both about what count as just ends and about which harsh measures those ends might justify in circumstances of high-stakes political conflict. In such a world, in which very few hands are truly clean, unilateral invocations of universal principles must be viewed skeptically, and associated exercises of power treated guardedly. Prosecutions undertaken in the name of the international community must establish a requisite social, and not merely a moral, basis for condemning acts – including acknowledged human rights violations – as crimes, and for holding their state-authorized perpetrators as subject to individual penal responsibility.

An over-assertive approach to international criminal justice, to be pursued unilaterally in domestic justice systems, is troubling because it risks undermining what is arguably most valuable about international law. International law provides a framework for accommodation among the non-like-minded, and a normative basis for mobilizing broad opposition to the self-righteous violence of the powerful (even as it licenses uses of force where there is genuinely no reasonable alternative). Penal processes aim to identify villains, consequently to exclude them as bearers of

¹⁸³ Darryl Robinson astutely points out the potential misfit between a “human rights liberalism” that views such international criminal cases from the standpoint of the prosecution and a “criminal law liberalism” that views them from the standpoint of the defense. Robinson, *supra*, at 931. But it remains disconcerting that human rights advocates should identify with prosecutorial authority, or for that matter, with the winning side of political conflicts. This may be attributable to a peculiar historical moment, with views having been forged by the experience of an extraordinary series of relatively peaceful transitions from authoritarian to liberal regimes. This author’s more pessimistic frame of mind reflects the influence of a different set of historical episodes, and a self-conscious identification with losers, rather than winners, of political conflict.

recognized authority, and thus as partners in negotiation and accommodation. Appropriate though such outcomes are in an important subset of circumstances, it is dangerous to distract from the deeper truth that peace means peace with others as they are, not as we might like for them to be. One must seek peace, not always with the gentle, but often with the ruthless. A repudiation of that truth risks setting in motion, willy-nilly, a new ruthlessness to end all ruthlessness.