

## International Criminal Law: Crimes Against Humanity and Universal Jurisdiction

Although the phrase “crime against humanity” has a long history, the first international prosecutions for the commission of crimes against humanity took place at the Nuremberg Trials that followed the Allied victory over Nazi Germany in the Second World War. Crimes against humanity were also among the crimes for which individuals were tried by subsequent ad hoc international criminal tribunals, including the International Military Tribunal for the Far East (the Tokyo Trials), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). In 1998, 120 states voted in favor of the Rome Statute, an international treaty creating a permanent International Criminal Court (ICC), and following ratification of the treaty by sixty states, the ICC was formally established in 2002. The Rome Statute empowers the ICC to prosecute individuals for crimes against humanity if they are citizens of a state that is party to the treaty, or if the act took place in the territory of a state that is party to the treaty, or if prosecution is authorized by the UN Security Council under Chapter VII of the UN Convention. Importantly, the ICC is intended to complement, not replace, national criminal systems; it prosecutes cases only when states are unwilling or unable to do so.<sup>1</sup>

In this chapter, we will address two philosophical questions raised by the practice of subjecting those alleged to have committed crimes against humanity to international prosecution. The first is a conceptual question: what, exactly, is a crime against humanity (CAH)? In what sense, if any, are crimes against humanity wrongs done to “humanity?” What distinguishes crimes against humanity from other types of crime? Does the label “crime against humanity” identify a distinctive wrong committed by those who perform such acts? Does a proper understanding of the concept of a crime against humanity explain why legal officials charged with drafting an international criminal code have insisted that it include the crime of a crime against humanity? The second philosophical question we will consider is

<sup>1</sup> International Criminal Court, “How the Court Works,” available at [www.icc-cpi.int/about/how-the-court-works](http://www.icc-cpi.int/about/how-the-court-works) (last accessed December 11, 2019).

a normative one: what justifies the *international* prosecution of actors accused of committing CAH? More precisely, what entitles a court to exercise criminal jurisdiction over an individual even in the absence of any connection between it and either the alleged perpetrator or the alleged victim of the crime? In terms that may be familiar, what justifies a court's exercise of universal jurisdiction?

Each of these questions has a doctrinal answer. For example, we might look to the Rome Statute creating the International Criminal Court for a description of a crime against humanity.<sup>2</sup> Likewise, we might locate the justification for a particular tribunal's right to prosecute certain actors for CAH in an international legal norm granting it that jurisdiction, for instance, the fact that the state in which the alleged crime took place is a party to the Rome Statute, or the existence of a customary international legal norm granting any domestic court universal jurisdiction over crimes against humanity.

These doctrinal answers fail to fully satisfy, however. With respect to the jurisdictional question, a doctrinal answer presumes the law's legitimacy, whereas what we seek is an explicit defense of that presumption, or should it prove impossible to provide one, an alternative justification that may require and serve to guide the reform of existing legal doctrine. For instance, in light of the criticisms enumerated in Chapter 6, we may doubt that state consent provides either a necessary or sufficient condition for the ICC's right to prosecute and punish individuals accused of committing crimes against humanity. Indeed, as we will see, the exercise of extra-territorial jurisdiction over CAH may mark an important shift away from a state-centered international order and toward an individual or human-centered one. A philosophical theory of international criminal jurisdiction may serve to make explicit the new understanding of what legitimates certain international acts immanent in this evolving practice. At the same time, by defending the new practice against proponents of the old one, and critiquing rival explanations of its legitimacy, particular theories of international criminal jurisdiction may also contribute to its development.

Likewise, our interest in the concept of a crime against humanity stems primarily from the role it plays (or should play) in the identification of what the law is, and what it ought to be. For instance, how should judges on the International Criminal Court understand, and so apply, the Rome Statute's requirement that murder, rape, etc., count as CAH only if they are part of a widespread and systematic attack? Likewise, how should the ICC interpret the Rome Statute's inclusion of "other inhumane acts of a similar character" in its enumeration of the acts that can count as crimes against humanity? If Dworkin is right when he maintains that in order to identify the content of the law we must engage in constructive interpretation, then we cannot answer these questions without at least implicitly appealing to the

<sup>2</sup> Rome Statute of the International Criminal Court, Part 2, Article 7, available at [www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf](http://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf) (last accessed December 11, 2019).

concept of a crime against humanity; that is, to an understanding of the distinctive wrong done by those who commit such acts that informs or is immanent in successive attempts by international actors to make explicit and precise the kind of conduct they aim to proscribe.<sup>3</sup> Legal positivists may well contest Dworkin's claim that in answering these or other questions regarding the characterization of a crime against humanity judges merely identify what the law is. Rather, positivists will argue they are making new law. Nevertheless, many positivists will also maintain that when they legislate these officials draw on particular understandings of what makes an act a CAH (a descriptive claim), and that one or another characterization of a crime against humanity is the one they ought to employ when they do so (a normative claim). Indeed, incontrovertible examples of legislation clearly illustrate the crucial role played by the concept of a crime against humanity. Consider, for example, the fact that the Rome Statute eliminates the requirement contained in the earlier Nuremberg Charter and the Statute creating the ICTY that such acts be connected to an armed conflict. Does this mark a moral improvement in international criminal law, or has it instead made it worse? It is hard to see how we can answer that question without getting clear on what a CAH is, or reflecting on the purpose(s) the criminalization of CAH serves.

Since our concern is with the concept of a crime against humanity that informs or is immanent in international criminal law, we ought to begin our inquiry with a review of attempts by participants in that practice to state explicitly the features of a CAH, whether in statutes or in judicial opinions. We can then try to extract from this collection of legal materials certain core features that appear to be essential to the concept, in light of which we can offer analyses that distinguish CAH from other types of crime, and perhaps also that justify international prosecution of those who commit them. While that exercise is an invaluable one, here we will simply rely on the conclusions of several theorists who have carried it out.<sup>4</sup> They largely agree that these core features include:

- (1) **A policy element:** CAH are committed, instigated, or at least tolerated as a matter of policy either by agents who exercise *de facto* (and perhaps also *de jure*) rule over the victims and the territory in which they reside, or by agents who are attempting to establish themselves as *de facto* (and perhaps also *de jure*) rulers over the victims and/or the territory in which they reside.
- (2) **A collective element:** Victims of CAH are targeted in virtue of their membership in a group, community, or civilian population, and are therefore denied their individuality.

<sup>3</sup> See the discussion in Chapter 4, section II.

<sup>4</sup> See David Luban, "A Theory of Crimes Against Humanity," *Yale Journal of International Law* 29, 1 (2004): 93–108; Massimo Renzo, "Crimes Against Humanity and the Limits of International Criminal Law," *Law and Philosophy* 31, 4 (2012): 443–4.

- (3) **A severity element:** CAH include, but are also limited to, the most severe evils human beings can inflict on one another, including murder, rape, torture, enslavement, forcible expulsion, and forcible sterilization. Following common practice, I will refer to these as crimes of the murder type and crimes of the persecution type.<sup>5</sup>
- (4) **An international element:** CAH are distinctly international crimes in two respects. First, states' rights to conduct their domestic affairs free from interference by other states, acting alone or in concert, does not extend to the commission of CAH, or arguably to immunity from prosecution and punishment for former officials who committed such acts while in office.<sup>6</sup> Second, the standing to prosecute and punish individuals for CAH does not depend on any "traditional jurisdictional link or *nexus* with the perpetrator, the victim, or the offence."<sup>7</sup> In the modern era, the exercise of criminal jurisdiction across international boundaries typically requires that a state or group of states assert a tangible connection to the alleged crime; for example, that it was committed by or against one of the state's citizens. This is not the case with CAH, which are characterized instead as of interest to all members of the international community.

We will proceed on the assumption that these features characterize the core of the concept of a crime against humanity. Nevertheless, it is important to recognize that judgments regarding the core features of the concept of CAH are always open to contestation on the basis of new readings of past practice, as well as in response to the continuing evolution of contemporary international (and domestic) legal practice.

In the next section, we critically examine several attempts to elaborate a concept of crimes against humanity that fits and justifies the policy, collective, and severity elements. These features serve to distinguish crimes against humanity from other types of crime, spell out one sense in which such acts wrong humanity, and point toward a justification for their inclusion in an *international* criminal code. In the following section, we consider two approaches to answering the jurisdictional question. Each begins with the claim that CAH constitute public wrongs, and then attempts to demonstrate that the "public" in question consists of all human beings. They differ in the arguments they offer for the latter conclusion, however. While some theorists argue that the dangers CAH pose to all human beings provides the moral grounds for universal jurisdiction, others argue that it is membership in an

<sup>5</sup> See Luban, "Crimes Against Humanity," 98–9.

<sup>6</sup> On this last point, see the International Law Commission's controversial Draft Article stating that immunity *ratione materiae* does not apply in the case of CAH. International Law Commission, Report on the Work of Its Sixty-Ninth Session, UN Doc. A/72/10 (September 11, 2017), available at <https://legal.un.org/ilc/reports/2017/>.

<sup>7</sup> Alejandro Chehtman, "Contemporary Approaches to the Philosophy of Crimes Against Humanity," *International Criminal Law Review* 14, 4–5 (2014): 818.

(emerging) moral or political global community that makes perpetrators of CAH answerable to courts that act on behalf of all humanity.

### I THE CONCEPTUAL QUESTION

Richard Vernon, David Luban, and Larry May all offer similar explanations for the policy element of CAH; that is, the fact that legal doctrine characterizes such acts as undertaken or condoned by states or state-like actors.<sup>8</sup> Each begins his argument with the observation that we need government to protect us from the worst types of treatment that humans can visit on one another. In most circumstances, life under government is prudentially superior to life in the state of nature. Unfortunately, the cure for the ills of the state of nature, namely, government, can itself become a grave threat to the welfare and even the survival of (some of) the governed. As Vernon points out, this is particularly true when government takes the form of a modern state, which combines large-scale administrative capacity, local authority (or de facto legitimacy), and territorial control, meaning both de facto and often de jure control over who may enter or exit the state's territory.<sup>9</sup> Together these features account for the potential of the modern state to become a far greater threat to human beings than what they would face in a state of nature. The concept of a crime against humanity reflects this fact. As Vernon writes, crimes against humanity involve "a systematic inversion of the jurisdictional resources of the state."<sup>10</sup> Luban describes such acts as "politics gone cancerous," a metaphor that invokes the image of institutions necessary for the flourishing of the body politic metastasizing to become a threat to the security and survival of some of its constituents, and so to the flourishing of the political community as currently constituted.<sup>11</sup>

Now consider the collective element, the idea that victims of crimes against humanity are necessarily targeted qua members of a group, community, or civilian population. Each of the aforementioned theorists attempts to explicate this element, and to defend it as an essential component of a crime against humanity. Before we examine their arguments, however, it may be worthwhile to consider the contrary position, namely, that we ought to abandon the presumption that crimes against humanity involve essentially the targeting of individuals qua member of a group, community, or civilian population. Advocates of this view might adopt one or more of the following strategies to reconcile it with the doctrinal requirement that CAH target a civilian population. First, they might argue that this doctrinal element

<sup>8</sup> Richard Vernon, "What Is Crime Against Humanity?" *Journal of Political Philosophy* 10, 3 (2002): 241–6; "Crime Against Humanity: A Defense of the 'Subsidiarity' View," *Canadian Journal of Law and Jurisprudence* 26, 1 (2013): 230–3; Luban, "Crimes Against Humanity"; Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2004).

<sup>9</sup> Vernon, "What Is Crime Against Humanity?," 243.

<sup>10</sup> *Ibid.*, 242.

<sup>11</sup> Luban, "Crimes Against Humanity," 116–19. For May's argument that CAH constitute violations of a Hobbesian justification for state sovereignty, see May, *Crimes Against Humanity*, p. 88.

simply reflects the historically contingent fact that the category of CAH was introduced to supplement the concept of a war crime, since that concept could not be used to prohibit or prosecute acts of the murder or persecution type outside the context of a war (and, arguably, until quite recently outside the context of an international as opposed to internal armed conflict). Second, they might argue that just as the notion of “attack” in the Rome Statute’s definition of a CAH as requiring “an attack on a civilian population” ought to be understood to require multiple acts of the murder and/or persecution type, so too “population” ought to be understood to require multiple victims.<sup>12</sup> Finally, and perhaps most importantly given the rationale for developing a philosophical theory of crimes against humanity, a person who concludes that acts of the murder or persecution type count as CAH if and only if they are examples of politics gone cancerous may argue that the doctrinal characterization ought to evolve to reflect that fact. Whether as a matter of constructive interpretation or of legislation, the “civilian population” element ought to be eliminated from the legal definition of a CAH, thereby making a single murder committed as a matter of policy a CAH, collapsing the distinction between rape as a war crime and rape as a crime against humanity, and rendering moot the need for theorists to explain the sense in which CAH deny their victims individuality by targeting them qua member of a group.

Whatever the merits of this strategy, Vernon, Luban, and May do not pursue it. Instead, each offers a different interpretation of the idea that CAH necessarily target individuals qua members of a group or community. May writes that:

[I]f an individual is treated according to group-characteristics that are out of that person’s control, there is a straightforward assault on that person’s humanity. It is as if the individuality of the person were being ignored, and the person were being treated as a mere representative of a group that the person has not chosen to join.<sup>13</sup>

On May’s account, then, murder, rape, torture, and so on, appear to count as CAH only if they are individuality denying, and what makes them individuality denying is that the victim is targeted in virtue of his or her perceived membership in an ascriptive group, meaning one that it is not within her power to join or leave.

Massimo Renzo raises a number of objections to May’s argument that crimes against humanity assault a person’s humanity by treating him or her according to characteristics that are out of her control.<sup>14</sup> For example, he points out that victims may be targeted for membership in groups that they choose to join (or that they

<sup>12</sup> Note that neither interpretation need commit a defender to the claim that a state does no wrong if, as a matter of policy, it targets a single person for a single act of murder or rape. Rather, he or she may argue that at least in the current circumstances the morally best international criminal prohibition is one that generates liability to international prosecution and punishment only in the case of multiple attacks and multiple victims.

<sup>13</sup> May, *Crimes Against Humanity*, p. 85.

<sup>14</sup> Massimo Renzo, “A Criticism of the International Harm Principle,” *Criminal Law and Philosophy* 4, 3 (2010): 272–3; Chehtman, “Contemporary Approaches,” 826.

could choose to leave). If people are targeted in virtue of their being Jews, it makes no difference whether they are members of that community because they were born into it (and have remained part of it) or because they voluntarily chose to join it by converting to Judaism. Assuming such attacks can count as crimes against humanity, it cannot be the case that they necessarily wrong their victims by targeting them in virtue of features over which they have no control. Renzo also observes that people may be attacked in virtue of properties over which they have no control other than membership in an ascriptive group, such as a woman targeted by a rapist because she is naturally attractive. If it is being attacked because of a feature over which one has no control that defines an assault on a person's humanity, then there is no justification for limiting crimes against humanity to attacks on people qua members of a group or community.

While these objections are compelling, there are a few places in May's discussion of the individuality-denying nature of crimes against humanity that point to a different way of characterizing that harm, one that does not appeal to denials of individual choice or autonomy. This characterization comes through in May's attempt to defend the claim that CAH not only deny the individuality of those who are actually murdered, raped, and so on, but of each and every human being. Humanity, he writes, "can be harmed when its members are harmed in certain ways; that is, when the members are not treated as fellow humans but as merely members of other less inclusive communities."<sup>15</sup> One way to interpret this remark is as follows. Perpetrators of crimes against humanity deny their victims' dignity, by which I mean their status as creatures with moral rights, or creatures entitled in their own right to certain types of treatment. Those who commit CAH explicitly or implicitly deny that it is being human that entitles a person not to be murdered, raped, tortured, and so on, and instead assert that only humans who are, for example, Christian, or "European," enjoy that status. This is the sense in which CAH are individuality denying; those who commit such acts deny that dignity attaches to each and every human being as such, that every individual is entitled to certain forms of treatment in his or her own right, independent of his or her membership in any particular group or community. It is this expressive element of murder, rape, torture, and other such acts, committed as a CAH that distinguishes such acts from "ordinary" murder, rape, or torture. Of course, CAH are not unique in conveying this individuality-denying message; rather, that property characterizes all hate crimes (or broader still, all hate wrongs). What distinguishes CAH from other hate crimes is that they are limited to the severest evils humans can inflict on one another, committed as a matter of policy by a state or state-like actor, and are properly subject to international prosecution and punishment.

<sup>15</sup> Larry May, "Humanity, International Crime, and the Rights of Defendants," *Ethics and International Affairs* 20, 3 (2006): 376.

The characterization of CAH as a subset of hate crimes easily accommodates the fact that victims sometimes choose to become members of the group in virtue of which they are targeted. Any attack on a Jew that targets her in virtue of her perceived membership in a group characterized as not human denies her individuality in the relevant sense, regardless of whether she or anyone else attributes her identity as a Jew to a choice she made. Likewise, the characterization of CAH as a subset of hate crimes can justify the intuition that certain attacks do not count as CAH even if the victims are targeted in virtue of some unchosen characteristic, for example, being naturally attractive. All we need claim is that the intuition reflects two assumptions: first, that the perpetrator does not intend to express the view that the characteristic in question renders the victim not human, and, second, that in the social context in which it is carried out the attack is not generally understood to express that position.

But what about May's claim that CAH harm each and every human being? How does the treatment of individual Jews as not human in virtue of their status as Jews, or of individual Tutsis as not human in virtue of their status as Tutsis, set back the interests of non-Jews or non-Tutsis in being recognized as human, as entitled in their own right to certain forms of treatment? One way of answering this question, which I discuss in the next section, looks to the effects of CAH, and in particular, the causal contribution that any particular campaign of CAH makes to the likelihood that others will become victims of a similar campaign. Apart from their effects on people's welfare, however, hate crimes also harm (or, perhaps better, wrong) people by perpetuating a lie regarding the grounds of dignity. Specifically, such acts convey the false message that it is membership in some ascriptive group or (imagined) community, one less inclusive than that of all human beings, that makes a person human in the moral sense synonymous with a creature with dignity. Even those who for any number of contingent reasons are at little risk of suffering setbacks to their welfare as a result of this lie are nevertheless wronged by those who assert it, something that on this account of the concept perpetrators of crimes against humanity necessarily do. All human beings, then, may rightly claim to be the victims of any campaign of crimes against humanity, for each and every human being may demand that he or she be recognized as an individual with dignity, entitled in his or her own right to certain forms of treatment.<sup>16</sup>

Both Vernon and Luban begin their analyses of the collective element of CAH with the observation that human beings are creatures who need to live in community with others. Crimes against humanity are particularly abhorrent, Vernon writes, because they are assaults on whole communities; that is, on individuals living in community with one another: "It is in communities that the primary requirements

<sup>16</sup> The claim that perpetrators of CAH wrong all human beings should not be confused with the claim that they wrong or harm them all equally. Rather, the immediate victims of CAH suffer additional wrongs, such as rape or torture. A victim of rape perpetrated as a CAH does not suffer a *greater* wrong than a victim of "ordinary" rape. Rather, she suffers the *additional* expressive wrong of being denied the status of a creature with dignity.



of human vulnerability are addressed, and so to assault communities is to heighten vulnerability to the maximum extent, by removing the principal line of defense against it.”<sup>17</sup> Widespread or systematic crimes of the murder and/or persecution type degrade and, in some cases, destroy the fabric of the particular communities in which practically all of us must live if we are to avoid the evils of the most extreme form of a state of nature, one characterized not only by the absence of the state but by the absence of any communal relations of mutual trust and mutual reliance. Although these communities may sometimes be composed of individuals who belong to the same racial, ethnic, religious, or political group, they need not be. It is a mistake, therefore, to interpret the phrase “targeted in virtue of being a member of a group” narrowly to mean member of an ascriptive group or, to anticipate another interpretation of the collective element discussed below, member of a group organized for political agency. CAH are not attacks on individuals qua member of a group; rather, they are attacks on individuals living in groups, or more precisely, in forms of communal life that serve to mitigate the threats the natural and social world pose to every person’s life and well-being. It is because living in community with others is something that practically all human beings must do to survive that attacks that severely degrade and destroy victims’ ability to do so are properly labeled crimes against humanity.

Luban, too, argues that because practically all humans need to live in groups to survive and to lead flourishing lives, we all have an interest in not being subject to attack simply in virtue of being a member of a group.<sup>18</sup> In part, this argument is a prudential one: since, by our very nature, we cannot avoid living in groups, the possibility that we will be targeted for attack simply because we belong, or are perceived to belong, to a particular group poses a grave risk to our well-being. This risk is distinct from ones we bear in virtue of properties we have as individuals; for example, a particular interaction we have with another person, or the particular arrangement of features that figure in our unique appearance or personality. It is also distinct from the risk posed by random acts of violence, in which the property in virtue of which the victim is targeted is incidental or peripheral to that individual’s identity and life. What distinguishes CAH from “ordinary” crimes are not the injuries done to the victim; a murder victim may well suffer the same setback to her interest in life regardless of whether she is targeted qua member of a group, or as an individual, or simply because she is in the wrong place at the wrong time. Rather, what distinguishes CAH murder from “ordinary” murder, and so what justifies enacting a criminal prohibition that specifically addresses such acts, is the fact that they originate in the belief that mere membership in a group can make people liable to the most horrendous treatment.

<sup>17</sup> Vernon, “What Is Crime Against Humanity?,” 244.

<sup>18</sup> Luban, “Crimes Against Humanity,” 111–20, 137–9.

Intertwined with this prudential rationale for criminalizing certain forms of conduct that target individuals qua members of a group is a second, moral, argument. It begins with the claim that human beings have a *right* not to be treated merely as a member of a group but also as an individual. That is, every human being can justifiably demand that he or she be recognized as an agent whose identity and life plan is not exhausted by, or reducible to, being a member of a particular group and working to advance that group's ends or flourishing. CAH wrong victims by violating this right, as well as by violating their rights to life, to bodily integrity, and so on, whereas ordinary murders do not. As Luban writes, crimes against humanity violate the victim's individuality, "respect for which requires that even my enemies must attack me because of who I am, not merely because of what group I belong to."<sup>19</sup> Note that this account, too, entails that individuals targeted for attack qua member of *any* group, and not merely a racial, ethnic, religious, or political one, suffer the denial of individuality that distinguishes murder, rape, and so on, as a CAH from "ordinary" murder or rape.

Luban's explanation of the distinctive wrong done to victims of CAH may appear to entail that states act unjustly whenever, as a matter of policy, they target people for certain treatment in virtue of their membership in a group. Although some might embrace this conclusion, others will argue that religious exemptions or selective hiring or admissions policies that target individuals qua members of particular groups serve to advance or realize justice. The crucial point to note here is that Luban's argument does not entail that it is always wrong to target people qua members of a group, only that doing so is wrong when it also denies their individuality. A policy of exempting individuals qua members of the Sikh religious community from a law requiring motorcycle riders to wear helmets does not deny the individuality of any Sikh man. Whether the law is nevertheless unjust is a separate question we need not explore here.

Although Luban describes the individuality-denying character of attacks that target individuals qua member of a group as an assault on the victims' nature as political animals, there does not appear to be anything specifically political about them. One way to make good on the idea that perpetrators of crimes against humanity target their victims as *political* animals is to argue that CAH are necessarily attacks on individuals qua members of a group organized for political struggle, or one perceived to be capable of becoming so organized in the future. By "political struggle," I mean any attempt to shape the terms on which members of a given community ought to live with one another. In light of the fact that human beings have different and sometimes conflicting conceptions of justice and the good life, as well as the scarcity of resources for realizing both, political struggle or contestation is

<sup>19</sup> Luban, "Crimes Against Humanity," 117. Even random attacks count as targeting me for who I am if we understand that broadly to include properties that are peripheral to my identity and life plan; for instance, being the person who happens to be walking by when a would-be gang member decides to commit the murder required for initiation into the gang.

an unavoidable feature of all human societies. One measure of the health or flourishing of a political community is its success at managing political struggle. The more members of the community view its law and legal institutions as legitimate, and, conversely, the less political order relies on prudential calculation, the healthier it is. Politics can often be unhealthy. But it turns cancerous or destructive only when actors adopt the goal of destroying the ability of certain others to engage in political struggle with them. Murder obviously serves this end, but so too can rape, torture, and so on.

In the modern world, political contestation typically takes place within or between states. CAH occur when some or all of the actors within the territory over which a state or state-like actor exercises *de facto* (and perhaps also *de jure*) control adopt the goal of severely degrading or destroying the ability of certain other actors within that territory to engage them in political struggle.<sup>20</sup> CAH reflect a shift in the perpetrators' conception of those with whom they are engaged in political struggle (or with whom they anticipate being so engaged) from adversaries to enemies.<sup>21</sup> Rather than viewing those individuals as partners in the pursuit of a common good the specifics of which are a matter of dispute, perpetrators of CAH conceive of them as an existential threat to the common good of a narrower or more exclusive political community.

The foregoing account explains the sense in which perpetrators' of CAH target their victims *qua* political animals. Since human beings manifest their individuality partly through political action, attacks on people *qua* political animals are necessarily individuality denying. But in what sense do such attacks necessarily target a person in virtue of his or her membership in a group? The answer is that politics is generally, and perhaps necessarily, a struggle between groups. This is so in two respects. First, conceptions of justice and of the good typically and perhaps necessarily reflect communal views, in other words, the views of individuals who are embedded in particular, historical, concrete communities. When individuals engage in political action, therefore, they almost always advance a conception of justice or the good they share with certain others. Second, and relatedly, in practically any human society successful political action, the actual exercise of governance, is a collective undertaking not an individual one. If the destruction of the victims' ability to engage in political action is an essential feature of CAH, and if individuals necessarily engage in political action *qua* members of specific groups in the two senses just specified, then it follows that those who perpetrate CAH must target their victims *qua* members of those groups.

<sup>20</sup> The international crime of aggression, in contrast, characterizes cancerous political struggles that span the *de facto* (and perhaps also *de jure*) territorial jurisdiction of two or more states. Note that here, too, institutions or actors occupying certain roles that serve to protect people against threats to their survival and well-being become threats to it.

<sup>21</sup> Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000), pp. 102–3; Michael Ignatieff, "Enemies vs. Adversaries," *New York Times*, October 16, 2013, available at [www.nytimes.com/2013/10/17/opinion/enemies-vs-adversaries.html](http://www.nytimes.com/2013/10/17/opinion/enemies-vs-adversaries.html) (last accessed December 11, 2019).

This explanation of why CAH necessarily target individuals qua members of a group may appear to be in tension with the claim that humans exercise their individuality in part by attempting to shape the terms on which they live with others in ways that reflect their individual conceptions of justice and the good. If these conceptions are those of the communities in which individuals are embedded, then would it not be more accurate to describe individual human beings as merely the mechanism whereby corporate agents engage in political struggle? Indeed, is this not the way in which perpetrators of CAH conceive of their victims, and doesn't the fact that politics is necessarily a collective undertaking warrant that conception? It does not; rather, this conception reflects a reductive, totalizing, conception of political identity that suppresses individual agency and creativity. It does so in part by ignoring the fact that political struggle takes place within groups as well as between them, from the most intimate communities of family and friends to the far larger communities of conationals, compatriots, and coreligionists. And it does so in part by ignoring the fact that human beings can and often do belong to multiple communities with cross-cutting membership. People may be members of different nations but the same religion, or belong to different racial groups but the same professional community, or participate in the same cultural community while serving in different political parties, and so on. CAH have their origin in a worldview that denies this multiplicity, one that substitutes for the diversity that actually characterizes human individuals and societies a picture not only of their opponents but also of themselves as uniform or identical. There is a world of stereotypes, where there is only the Jew, the Muslim, the black, the homosexual, the communist, the intellectual, with individual Jews, blacks, communists and the rest but tokens of the type. All one needs to know about others is what *type* they are, since that is all there is to know about them. Moreover, when actors view these normative identities as exclusive, when being Jewish, black, and so on, is perceived not just as a part of an individual's identity but its entirety, they conceive of political struggle as a zero-sum game rather than one in which it is possible to work together in pursuit of a common good, the flourishing of a single community to which all belong. Of course, even when widespread in a population this mindset need not give rise to mass atrocities, since the power differentials between groups may enable one to use less heinous means to suppress the other. Yet, like a chronic disease, the lingering belief that the other group poses an existential threat to the survival of one's own community can become inflamed by demographic, economic, technological, cultural, and environmental changes, and thereby spur actors to engage in campaigns of murder, rape, torture, "cleansing," and so on as a means to political triumph.

## II THE JURISDICTIONAL QUESTION

Having considered in the previous section several characterizations of the concept of a CAH, we turn now to a normative question. What, if anything, morally justifies international prosecution and punishment of actors who commit CAH, whether in

the domestic criminal court of a particular state exercising universal jurisdiction, or an international criminal court created by states, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Court (ICC)? Two features of extra-territorial prosecution in particular stand in need of a defense. First, the standing to prosecute and punish does not depend on any link between a particular state or international organization and the accused, such as the passive personality principle, which in a limited range of cases grants a state jurisdiction over citizens of other countries who commit crimes against its own citizens outside that state's territory. Second, an actor's liability to prosecution and punishment for the commission of CAH does not depend on the consent of the state that governed the territory where the acts were committed, either at the time the crimes were committed or at the time international prosecution is initiated.<sup>22</sup> These two features of so-called "pure" international criminal law, which includes CAH, constitute a momentous change in international law's doctrinal characterization of state sovereignty. A normative theory of pure international criminal jurisdiction aspires to justify, or in some cases to criticize, that change in legal doctrine.

One place to begin such a theory is with the idea that crimes constitute public wrongs, not merely private ones. If I deliberately deface your car, I commit both a tort and a crime. The former is a private wrong, and in virtue of being the victim of that wrongdoing you have the standing to seek reparation from me in a civil court. The latter is a public wrong, an act of vandalism or malicious trespass, in virtue of which the state has the standing to punish me. But in what sense does my act wrong the "public?" What is it about my defacing *your* property that gives *the state* a right to punish me? Indeed, what explains why only the state has a right to punish me, and not you, or any other third party? On what I will call the prudential account of criminal jurisdiction, the answer is that criminal acts either unjustifiably harm or pose an unjustifiable risk of harm to the "public," that is, to the people whose interests a given practice of criminal proscription, prosecution, and punishment seeks to protect. It is because criminal conduct harms them that the public is entitled to hold perpetrators accountable. In contemporary societies, this right is often exercised via the institutions of the state. In short, acting as their agent, the state has a right to punish people who unjustifiably impose harm or the risk of harm on those individuals who together constitute the public.

Who constitutes the public harmed by crimes against humanity, considered as an international crime? The very label "crimes against humanity" suggests one response, namely, that the public harmed by such acts is composed of all humanity, meaning each and every human being. But how do acts satisfying the doctrinal

<sup>22</sup> The principle of complementarity contained in the Rome Statute, the treaty creating the ICC, states a presumption in favor of domestic prosecution for CAH, but the Court retains a right to initiate criminal proceedings in the event that it (or the UN Security Council) determines that a state has not made a good faith effort to investigate allegations of CAH committed in its territory, regardless of whether that state consents to its doing so.

elements of a CAH committed in Syria, Myanmar, or North Korea, set back all human beings' fundamental interests in security and subsistence? Indeed, how do they even pose a *risk* of such a setback substantial enough to justify all humanity having a right to prosecute those who perpetrate such crimes?

Perhaps they do so by undermining, or threatening to undermine, international peace and security.<sup>23</sup> CAH may spur or perpetuate armed conflicts that spill across state borders, or that draw into such conflicts both neighboring and more distant political communities, or that create anarchic environments in which transnational criminal gangs and political groups engaged in armed political struggle elsewhere can conduct their activities. Yet it not clear that all examples of CAH impact international peace and security, or at least not in a manner that justifies the claim that *all humanity*, acting via the political institutions of a particular state or those of the entire community of states, has the standing to prosecute those who commit them. In some cases, the commission of CAH appear to have little, or no, impact on international peace and security beyond the region in which they take place, even where the incidence of such crimes rises to the level of mass atrocities.<sup>24</sup> Indeed, Renzo points out a morally perverse implication of this rationale for international criminal jurisdiction, namely, that whether such acts qualify as international crimes can turn on whether they take place at a remote location deep in the interior of a state's territory, or instead occur in a region abutting the border of several other states.<sup>25</sup> Consider, too, that if the only reason CAH warrant international prosecution is that they (threaten to) undermine international peace and stability, then punishment for committing such acts will have to be justified on deterrence grounds, in other words, as a form of anticipatory self-defense.<sup>26</sup> Those who reject deterrence as a moral justification for punishment because they think it impermissibly uses convicted criminals as a mere means for promoting others' fundamental interests will need to look elsewhere to justify international prosecution of CAH perpetrators.

Both May and Luban defend an alternative account of how CAH harm all humanity, namely, by making each and every one of us more vulnerable to being murdered, tortured, and so on, simply in virtue of our membership in a particular group.<sup>27</sup> Call this the contagion argument for universal jurisdiction: any instance of CAH threatens to infect other actors all over the world, encouraging them to view individuals belonging to certain groups as "not human," that is, as lacking dignity, or as not entitled to recognition as individuals, or as enemies in a life or death contest between two political communities. Moreover, those who perform CAH model the

<sup>23</sup> May, *Crimes Against Humanity*, pp. 84–8.

<sup>24</sup> Andrew Altman, "The Persistent Fiction of Harm to Humanity," *Ethics and International Affairs* 20, 3 (2006): 370–2.

<sup>25</sup> Renzo, "Criticism of the International Harm Principle," 276.

<sup>26</sup> Chehtman, "Contemporary Approaches," 825.

<sup>27</sup> May, "Humanity," 374; Luban, *Crimes Against Humanity*, 138–9.

kind of conduct warranted by such a worldview; as long as they go unchallenged, the very performance of such acts may well be taken as evidence of their justifiability.

The contagion argument rests on an empirical claim the veracity of which is subject to challenge. Andrew Altman, for example, writes:

[I]f Jews or Muslims are being targeted by a genocide, then it is not humanity that is thereby harmed but rather: first, those Jews or Muslims killed or otherwise directly harmed; second, other Jews or Muslims within reach of the perpetrators; and third, possibly, but not necessarily, Jews and Muslims elsewhere in the world. Baptists in the United States, Confucians in China, and Hindus in India would not seem to be harmed.<sup>28</sup>

This criticism fails to address May's and Luban's central contention, however, which does not concern the harm done to all human beings that results from Jews being attacked qua Jews, but the harm or risk of harm that follows for all human beings from the spread of an individuality-denying ideology, one that causally contributes to an increase in the incidence of assaults on people simply for belonging to a group, *whatever that group may be*. As Luban observes:

[T]oday we live in a world in which almost all nations are patchworks of ethnic, racial, religious, and cultural groups. In part, this is the result of globalization. But it is also the product of a century [or centuries] of wars and upheavals that have displaced hundreds of millions of people. . . . The crimes against humanity that drenched the twentieth century in gore proved that group-on-group politics has no built-in principle of restraint. And so, just as all women share an interest in ensuring that women are not killed solely for being women, and all Jews share an interest in ensuring that Jews are not killed solely because they are Jews, all human beings share an interest in ensuring that people are not killed by their neighbors solely because of their group affiliations; for all of us have neighbors whose group is not our own.<sup>29</sup>

Luban's claim that group-on-group politics lacks any "built-in principle of restraint" can be read to refer both to the absence of any limits on the *kind of conduct* in which actors engaged in such politics might engage, as well as the *kind of group* that might find themselves embroiled in it. Insofar as practically all human beings live as members of a group (or many different groups), the latter reading entails that all are vulnerable to being targeted as such, while the former reading points to the horrific treatment that may follow if or when we are.

Even when properly understood, the contagion argument may remain vulnerable to empirical critique. Most obviously, the data may fail to corroborate the causal claim Luban and May assert. But the challenge may also take a slightly more sophisticated form. For example, rather than being a cause of cancerous group-on-group politics, individuality-denying ideology may simply be a symptom that

<sup>28</sup> Altman, "Persistent Fiction," 369.

<sup>29</sup> Luban, "Crimes Against Humanity," 139.

societies suffer when certain other conditions are met, such as severe and rapid economic displacement. If so, then protection against CAH requires policies that address those conditions, not international criminal prosecutions. Moreover, as an attempt to make good on the prudential account of a public wrong, the contagion argument remains vulnerable to one of the moral objections raised against the argument that CAH wrong humanity by undermining international peace and stability, namely, that it appeals to deterrence in order to justify criminal punishment.

It is true that Luban explicitly embraces a forward-looking justification for prosecuting and punishing criminals against humanity. The most promising justification for international tribunals, he writes, “is their role in *norm projection*: trials are expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes and not merely politics by other means.”<sup>30</sup> Punishment, he adds, remains essential to communicating this message, even if at present international criminal law relies less on it and more on the ceremony of a criminal trial to achieve the aim of norm projection. However, this rationale looks less like traditional deterrence, which aims to shape actors’ future conduct by attaching prudential costs to engaging in certain types of conduct, than communicative or moral education theories of just punishment. The latter theories construe just trial and punishment as a form of moral address, one that aims at the perpetrator’s recognition that he acted wrongly, his choice to reform his values or character, and his reconciliation with the public he harmed (or wronged) by committing a criminal act.<sup>31</sup> Admittedly, Luban appears to focus more on the effects that pure international criminal law may have on the moral consciousness of future potential perpetrators of crimes against humanity than on the repentance, reform, and reconciliation of the actors actually subject to trial and punishment. But note, first, that we need not choose between these two aims. Second, where defenders of moral education or communicative theories of just punishment downplay or leave out the contribution that trial and punishment make to norm projection, this likely reflects their assumption that most members of the political community in question already endorse the norm the criminal violated. There is no need, then, to discuss the contribution the practice of criminal law makes to the moral education of the wider community. That assumption, which justifies focusing exclusively on the criminal’s moral development, does not yet appear to hold in the case of CAH. The upshot, then, is that even if at present the most morally consequential feature of pure international criminal law is the contribution it makes to shaping the moral consciousness of all human beings, this need

<sup>30</sup> David Luban, “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of the International Criminal Court,” in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), p. 576.

<sup>31</sup> See, among others, R.A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001).



not entail that it fails to address actual defendants as moral agents, or that it uses them as a mere means for producing a morally better world.<sup>32</sup>

The fact that all human beings are “parties in interest” to the prosecution and punishment of perpetrators of crimes against humanity seems to imply the moral justifiability of vigilantism, that is, that any human being may seek to punish such actors for their misdeeds. Luban argues to the contrary that the standing to punish also depends on an agent satisfying the demands of what he calls natural justice. These include basic procedural rights such as “the right to a speedy, public trial before an impartial tribunal that bases its decisions solely on the evidence, under rules designed to reach accurate verdicts” and “the right of the accused to confront the witnesses against him.”<sup>33</sup> It also includes certain prosecutorial duties, such as the obligation “to disclose exculpatory evidence to the accused,” and executive duties, such as maintaining humane conditions of confinement.<sup>34</sup> Only certain states and international tribunals satisfy the demands of natural justice, Luban maintains, and therefore only they are morally justified in subjecting accused criminals against humanity to trial, and punishing them if they are found guilty. They do so, however, neither in their own name, nor in the name of the victims – and not in the name of any particular political community, either. Rather, they act on behalf of all humanity.

The most fundamental objection to both May’s and Luban’s defense of international prosecution for CAH contests their reliance on a prudential account of what makes an act a public wrong. On this account, recall, criminal acts are ones that unjustifiably harm, or impose an unjustifiable risk of harm, on each and every member of the public. Legal theorists such as Renzo and R.A. Duff contend instead that we ought to understand public wrongs as wrongdoings for which an actor is *answerable* to the political community.<sup>35</sup> In the standard case, what makes an actor answerable to the political community is his membership in it. For example, in virtue of being a citizen of a particular state, an actor has certain moral obligations to the other citizens of that state, including a duty to obey its criminal law. It is his failure to discharge that duty, one he owes to the other citizens of the state as such, that entitles them to employ the institutions of the state’s criminal justice system to hold him accountable for his wrongdoing. While the infliction of harm surely plays a central role in a morally proper determination of which act types ought to be

<sup>32</sup> The argument in the text concerns the *in principle* justifiability of international prosecution as a means for norm projection. It leaves open the question of how well it has fared in practice. For concerns in this regard, see Tim Meijers and Marlies Glasius, “Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?” *Ethics and International Affairs* 30, no. 4 (2016): 429–47.

<sup>33</sup> Luban, “Fairness to Rightness,” 580.

<sup>34</sup> *Ibid.*

<sup>35</sup> R.A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007); “Authority and Responsibility in International Criminal Law,” in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), pp. 594–602; Renzo, “Crimes Against Humanity,” 454–60.

criminally proscribed, justifiable claims to jurisdiction flow from the fact that individuals are enmeshed in particular normative communities; that is, the fact that they occupy specific roles (citizen, for instance) in virtue of which they have specific responsibilities (to uphold the law, say).

Renzo suggests that “in the same way in which there are wrongs for which we are accountable to our fellow citizens in virtue of our membership in the polity, there are wrongs for which we are accountable to our fellow human beings in virtue of our membership in the wider community of humanity.”<sup>36</sup> CAH constitute one such wrong. In virtue of occupying the role of member in the wider community of humanity, each of us has a duty to fulfill the responsibilities that attach to that role, including upholding those norms that govern interactions between all human beings as such.<sup>37</sup> Upholding the norms of a particular community requires both obedience to those norms and holding other members of the community accountable if and when they violate them. Since CAH constitute a violation of a norm that binds actors qua members of the “wider community of humanity,” it follows that all human beings qua members of that same community have a right, and indeed a duty, to hold the perpetrators to account. International tribunals or, in a pinch, domestic courts exercising universal jurisdiction, provide a mechanism whereby the human community compels violators of its norms to answer for their wrongdoing.

Just as the prudential model of a public wrong is vulnerable to the objection that CAH do not harm all humanity, so too the accountability model of a public wrong is vulnerable to the objection that there is no “wider community of humanity” to whom perpetrators of CAH must answer. A description of individuals as citizens of the world is only metaphorical; there is no global state in which all humans occupy the role of citizen, only a community of states, with individuals occupying the role of citizen in a particular state (or perhaps two or three states). Neither does Renzo rely on the concept of community when arguing that human beings as such are owed certain forms of treatment. Rather, he distinguishes between “wrongs that consist in our failure to discharge duties that we have in virtue of our membership in the political community and wrongs that consist in our failure to discharge duties that all individuals have to each other independently of any social or political relationship.”<sup>38</sup> The latter duties correlate to individuals’ basic human rights, rights they possess in virtue of some *nonrelational* property or properties. There is a gap, then, between Renzo’s nonrelational account of what entitles all human beings to certain forms of treatment and his role-relational account of who has the standing to hold wrongdoers accountable, or conversely, to whom wrongdoers are answerable for their wrongful conduct. Put another way, even if Renzo successfully argues that all human beings belong to the *class* or *set* of creatures who enjoy basic (moral)

<sup>36</sup> Renzo, “Crimes Against Humanity,” 456.

<sup>37</sup> Renzo argues that these norms include many that contemporary international criminal law does not recognize, but I focus here only on the norm prohibiting CAH.

<sup>38</sup> *Ibid.*, 457.

rights, the account of legitimate jurisdiction he wishes to employ requires that he show all human beings to be members of a single *community*.

One might argue, as May does, that there exists a global *moral* community to which all human beings belong, one premised on solidarity in the face of our “common vulnerability to violence and harm.”<sup>39</sup> Yet if we understand solidarity as May does, namely, as “a sense of fellow feeling that comes from a recognition that the interests of others overlap sufficiently with one’s own interests to make of the interests of others one’s own interests,” then we have ample reason to doubt the existence of such a global moral community.<sup>40</sup> Indeed, Hannah Arendt’s expression of this very skepticism appears to be what motivates Luban’s attempt to offer a prudential, rather than a moral, justification for the prosecution and punishment of crimes against humanity. As she puts the point, “to fall back on an unequivocal voice of conscience – or, in the even vaguer language of the jurists, on a ‘general sentiment of humanity’ – not only begs the question, it signifies a deliberate refusal to take notice of the central moral, legal, and political phenomena of our century,” namely, the absence of any such sentiment.<sup>41</sup>

An alternative response to the objection that there is no global community of human beings to whom perpetrators must answer focuses on the contribution that the international prosecution of CAH can make to the construction of that community. This argument begins with the observation that communities exist in virtue of a set of agents engaging in a common or shared practice of deploying specific norms to hold one another accountable.<sup>42</sup> It follows that every attempt to deploy a norm to hold others accountable simultaneously presupposes the existence of a particular community and, when successful, contributes to making it the case that the community actually exists.<sup>43</sup> Where a particular practice of holding accountable has been fairly stable over the lifetime of most or all of those who participate in it, the existential implications of participating in that practice may go unnoticed; indeed, what are actually social facts may come to be perceived as natural ones. In contrast, challenges to a heretofore stable shared normative understanding can serve to reveal a particular social world to be one its participants collectively make via their practice of holding accountable. The treatment of CAH as an international crime illustrates this point. It directly challenges a shared understanding of the global political community as composed of individuals who exist only as citizens of particular states, an understanding central to the Westphalian ideal of international government. It asserts instead, in deed and not only words, a conception of humanity as members of

<sup>39</sup> May, “Humanity,” 376.

<sup>40</sup> *Ibid.*, 375.

<sup>41</sup> Quoted in Luban, “Crimes Against Humanity,” 137.

<sup>42</sup> Lefkowitz, “Sources,” 336.

<sup>43</sup> The fact that many defenders of the accountability model of the criminal law typically focus their discussion on the legal orders of moderately well-functioning modern states may explain why they ignore the contribution that a practice of holding accountable makes to the constitution of a set of individuals as a community.

a single global political community, one composed of individuals each of whom is entitled to certain forms of treatment in his or her own right. Together with the international human rights practice that began to emerge following the Second World War, international prosecution and punishment of criminals against humanity serves to make this vision a reality by acting as if it already is – or at least it aspires to do so.

At this stage in its history, the practice of international prosecution and punishment of CAH seeks to create the conditions for its own legitimacy. In subjecting perpetrators to trial, and in punishing them if they are found guilty, a tribunal such as the ICC purports to act on behalf of all human beings who, as members of a global political community, enjoy the standing to hold accountable any member accused of committing CAH. Yet it is partly through the international practice of holding actors accountable for such conduct that such a global community comes to exist. Even those who are optimistic that this effort to bootstrap such a community into existence is making headway and will ultimately succeed may also suspect that it has not yet progressed far enough to sustain the claim to legitimacy implicit in the practice of pure ICL. Whether this is so may be a question it is presently impossible to answer; while the old international political order has clearly suffered significant disruption, it is not yet clear whether it will be restored or whether the new one that pure international criminal law presupposes will take its place. As is often true of normative change, it may only be in hindsight that we can identify with any confidence if the attempt to transform the practice of international affairs has succeeded or failed. More importantly, however, the absence of a global political community in which all human beings as such are members need not entirely undermine the ICC's standing to prosecute and punish criminals against humanity. That is because we ought to expand the task of justifying international criminal jurisdiction to include a moral defense of the attempt to create a global political community in which all human beings enjoyed unmediated membership. This is familiar ground for legal and political theorists who have long sought to justify the state, or better, to justify the exercise of coercive government whatever institutional form it takes. The argument that actors who cannot avoid interacting with one another have a duty to submit to a common juridical order may provide an attractive starting point for those who seek to justify attempts to bootstrap pure international criminal law into legitimacy.<sup>44</sup>

<sup>44</sup> For a thought-provoking challenge to the assumption that the justification of universal jurisdiction depends on a special relationship between the court and the alleged offender, one that makes the latter answerable to the former, see Anthony R. Reeves, "Liability to International Prosecution: The Nature of Universal Jurisdiction," *European Journal of International Law* 28, 4 (2017): 1047–67. Reeves offers an instrumental argument to justify both a court's standing to punish and the distinction between private and public wrongs.