Michigan Journal of International Law

Volume 43 | Issue 2

2022

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https://doi.org/10.36642/mjil.43.2.criminal

CRIMINAL LAW IN A WORLD OF STATES

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INTRODUCTION

An important shift is taking place in criminal law theory. For more than a century, debate in criminal law theory has been dominated by two ways of thinking about how to justify criminal law, one grounded in legal moralism and the other in utility. Criminal law, the prevailing camps argue, is best understood as either a means of responding to moral wrongdoing or a means of efficiently deterring harm. Increasingly, however, scholars have argued that we should reconsider the prevailing thinking about the nature of criminal law, criminal wrongdoing, and criminal punishment.[1] Such concepts cannot be properly understood through the frame of moral wrongdoing or utility alone. Rather, criminal law must be understood through the context of the role it plays *within the state*, as a coercive political institution. And thus, any justification for criminal law, proponents of this view argue, must be grounded in a broader political theory of the state's authority. While these accounts mark a break with the dominant approach of the last century, they involve a return to an earlier tradition that sought to situate our thinking about criminal law in a theory of the state more broadly.[2] And drawing on this earlier tradition, the contemporary proponents offer a range of different visions of how to understand the state's role. Yet consistent across all of these accounts is an insistence that criminal law is, and must be, anchored in the state.[3]

This new (or renewed) way of thinking about criminal law resolves many of the shortcomings of the moralist and utility-based accounts.[4] However, the focus on the state in these "political theory"[5] accounts of criminal law gives

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1. *See infra* Part I.

2. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 4–15, 91 (C. B. Macpherson ed., Hackett Publ'g 1980) (1690); THOMAS HOBBES, LEVIATHAN, chs. XXVII–XXVIII (Edwin Curley ed., Hackett Publ'g 1994) (1651).

3. *See, e.g.*, R.A. DUFF, THE REALM OF CRIMINAL LAW 117 (2018).

4. *See infra* Part I.

5. I borrow this terminology from Lorenzo Zucca. Lorenzo Zucca, *The Constitution of Criminal Law*, 70 U. TORONTO L.J. 27, 28 (2020) (describing such accounts as "political

rise to two significant challenges of its own. These challenges emerge when we turn our attention from an internal view of the state—on which such accounts focus—to the world beyond its borders.

The first challenge concerns whether this new way of thinking about the justifications of criminal law, in fact, holds up when we take stock of the conditions beyond the state. Proponents of the leading political theory accounts of criminal law argue that the state's authority is justified by the unique role the state plays in organizing relations among its members in a rightful way.[6] Criminal law, on such accounts, is justified because it is necessary to allow the state to play this role. Yet the conception of the state at the heart of such accounts seems to sit in a vacuum. When we recognize that each political community exists, not in a vacuum, but in a world of states and persons beyond its boundaries, it becomes less evident that the state can, in fact, play the role proponents of this view propose.

On some accounts, for instance, the authority to punish is justified as part of the state's fundamental role in securing order under the rule of law among members of a political community.[7] Public force on behalf of us all is justified because it displaces the private force of individuals. Can this authority still be justified, however, when we recognize that threats to the order among a state's members might come from beyond the political community—through interstate war or violence by foreign private actors? Can the state's authority still be justified, in other words, in a world where the state's claim to secure order among its members can be undermined by actors external to the state?

The second challenge that arises from the shift in criminal law theory concerns how we ought to make sense of the phenomenon of criminal law that is not, in fact, anchored in the state. Most notably, the political theory accounts give rise to a substantial challenge for the standard picture of *international* criminal law. On most contemporary accounts, the defining quality of international criminal law is the fact that international crimes are not related to a particular political community.[8] As some scholars have put the point, all international crimes should be seen, not as crimes against a given state, but rather as, "quite literally, crimes *against humanity*."[9] Indeed, to the extent that the state comes into view in most accounts of international criminal law, it is thought to be an adversary of the field. The state and its

theories of criminal law"); *see also* VINCENT CHIAO, CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATE 72 (2018) (discussing a "'fully political' standard of justification").

6. See *infra* Part I.

7. *See infra* Part I.

8. *See infra* Part II.

9. David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 569, 571 (Samantha Besson & John Tasioulas eds., 2010) (emphasis added); *see also* Ryan Liss, *Crimes Against the Sovereign Order: Rethinking International Criminal Justice*, 113:4 AM. J. INT'L L. 727, 739–46 (2019) (discussing the "Humanity Theorists" of international criminal law).

sovereignty are commonly understood as obstacles that must be overcome by international criminal justice.[10]

The tension between the state-based shift in criminal law theory and the standard view of international criminal law is significant. It raises questions about international criminal law's self-perception as "criminal law" properly so-called. And it raises questions about the legitimacy of the field's invocation of the ordinary coercive trappings of criminal law, all the while claiming an international, non-statist character and scope. If proponents of the political theory accounts of criminal law are correct that a proper justification of criminal law requires that we anchor the field in a political theory of the state, can we continue to view international criminal law *as criminal law*? Or more to the point, is it legitimate for the field to function as a regime of criminal law—directing coercive prohibitions, prosecution, punishment, and denunciation at an individual?

At first blush, these two challenges seem unrelated—one concerning the viability of the *conception of the state* on which the political theorists of criminal law rely, and the other concerning international criminal law's viability *as criminal law*. In this article, however, I argue that they have a common solution. I do so by explaining that the standard picture of international criminal law gets it wrong: Far from being untethered from the state, international criminal law is deeply anchored in the state and the system of states; and, far from being an adversary of state sovereignty, international criminal law has helped to constitute (and I will argue, *should* help to constitute) the system of sovereign states. In doing so, international criminal law secures the global conditions that are necessary for the state, as conceived by this new line of criminal law theorists, to exist. With this new perspective, international criminal law no longer seems like an outlier to a political theory of criminal law, but rather a necessary precondition for it. And the vision of the state on which this new line of criminal law theory is grounded no longer seems detached from the world beyond its borders, but rather a constituent part of a global *system of states*, each acting to maintain that system.

I make this argument in five Parts. In Part I, I describe the recent shift in criminal law theory, which calls for theories of criminal law to be better grounded in a political theory of the state. In Part II, I explain the two challenges that arise from this line of thinking when we turn our attention from an internal view of the state to the world beyond the state's borders.

I propose a resolution to these challenges in Parts III and IV. In Part III, I argue that the standard picture of international criminal law mischaracterizes the field as it has developed over modern history. Examining the history of the field reveals that the state and the system of states have been front and center in the function that international criminal law has served. During this period, international criminal law has played a distinct and consistent role: It

10. Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979, 980 (2005) (noting "international criminal law scholars see sovereignty as the enemy").

has criminalized conduct that attacks the organizing principles of the international system of sovereign states. Through the prosecution of such crimes, international criminal law acts to maintain this state system.

In Part IV, I argue that this new perspective on the role that international criminal law *has* played directs us to a new theory of international criminal law that resolves the two international challenges facing the political theory accounts of criminal law.[11] As I explain, international criminal law is justified on the basis that it secures or constitutes the *global conditions* necessary for the state (as conceived by the leading political theories of criminal law) to function.[12] In doing so, a framework of international criminal law makes the conception of the state that the political theorists of criminal law propose, and a world of such states, possible.

Finally, in Part V, I consider how the turn to the political theory accounts of criminal law may also help define the limits of international criminal law's role. In particular, this turn highlights the need to better situate international criminal law within broader questions of global justice.

I. THE STATE AND CRIMINAL LAW

For much of the twentieth century, the market on criminal law theory in English-language scholarship was cornered by two ways of thinking.[13] During the first half of the century, the leading accounts argued that criminal law and criminal punishment were justified on utilitarian grounds. Criminal law's regime of prohibitions and harsh treatment for those who breached such prohibitions was justified in pursuit of the important goal of deterring harmful conduct.[14] These utility-oriented accounts long dominated the field; however, they eventually came under serious critique for, among other things, their inability to explain why we ought to limit the imposition of criminal sanctions

11. This roughly tracks an interpretivist or rational reconstruction approach to understanding international criminal law. We need to grasp the way the law functions accurately to evaluate plausible justifications for it. *See*, *e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986); R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN CRIMINAL LAW 6–15 (2007); DUFF, *supra* note 3, ch. 1.

12. Depending on the particular account, this claim can be seen as either a conceptual or an empirical one. *See infra* notes 62–67 and accompanying text.

13. On the dominance of utilitarian and moralist accounts, see, e.g., Malcolm Thorburn, *Criminal Punishment and the Right to Rule*, 70S U. TORONTO L.J. 44, 51–53 (2020) [hereinafter Thorburn, *Criminal Punishment*]; Malcolm Thorburn, *Constitutionalism and the Limits of the Criminal Law*, *in* THE STRUCTURES OF THE CRIMINAL LAW 85, 85–90 (R.A. Duff et al., eds., 2012) [hereinafter Thorburn, *Constitutionalism*].

14. *See, e.g.*, Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266 (1975). The initial turn to utilitarian approaches was driven by liberal reformers who sought to limit the use of state coercion to conduct that harmed others. *See, e.g.*, JOHN STUART MILL, ON LIBERTY (1859). A related trend was the focus on rehabilitative approaches. On the rise and fall of such approaches, see A.E. Bottoms, *An Introduction to "The Coming Crisis"*, *in* THE COMING PENAL CRISIS 1 (A.E. Bottoms & Ronald H. Preston eds., 1980).

to a wrongdoer.[15] Famously, as critics argued, a utility-based account does not have the resources to explain why—in principle—we ought not punish completely innocent people (whether connected to the wrongdoer, or unrelated to the crime altogether) if such punishment would help deter harmful behavior.[16]

The weight of these critiques gave way to a new line of thinking about the justifications for criminal law and criminal punishment in the latter half of the century: legal moralism.[17] Responding directly to the need to connect the justification of punishment to those who deserved it, legal moralists argue that we should think of criminal law as a means of responding to moral wrongs. Criminal conduct is not (simply) harmful behavior, but *morally wrongful* behavior; and this character of criminal wrongs justifies sanctioning those who violate criminal law's prohibitions (and those individuals alone).[18] Arguments along these lines come in two prominent forms. Traditional moral retributivists, like Michael Moore, argue that criminal punishment constitutes the just deserts of those who commit moral wrongs generally.[19] According to this line of thought, criminal sanctions are the necessary and justified response to moral wrongdoing.[20] Others, such as Antony Duff, agree with Moore's view of crimes as moral wrongs, but focus on the significance of criminal trials rather than criminal punishment. For Duff, criminal law is justified as an inherently communicative enterprise, allowing us to call moral wrongdoers to account for what they have done.[21]

Both utilitarians and legal moralists tend to start their inquiry with the fact of criminal law's existence and ask what might justify a structure of

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15. Hart famously sought to bridge the divide with a mixed theory of criminal law. H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1 (2008). On the shortcomings of this account, see John Gardner, *Introduction*, *in* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW, at xiii (2008); Malcolm Thorburn, *The Radical Orthodoxy of Hart's Punishment and Responsibility*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 279 (Markus D. Dubber ed., 2014).

16. *See, e.g.*, GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW, at xix (1978); *see also* Gardner, *supra* note 15, at xvii–xxi; Thorburn, *Constitutionalism*, *supra* note 13, at 89; *infra* note 33 and accompanying text (discussing other shortcomings of such accounts).

17. While it had a resurgence in the twentieth century, retribution as the justifying aim of criminal law has longstanding roots, which had been displaced by liberal utilitarian theory in the nineteenth century. On the ebb and flow of retributivism, *see* JOHN BRAITHWAITE AND PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 2–5 (1990).

18. *See, e.g.*, MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 35 (1997) ("To serve retributive justice, criminal law must punish all and only those who are morally culpable in the doing of some morally wrongful action.").

19. *Id.* We may have practical reasons for limiting the scope of criminal law, but in principle it encompasses all of moral wrongdoing. *Id.* at 661–65, ch. 18.

20. *See id.* at 35.

21. *See, e.g.*, DUFF, *supra* note 11, at ch. 8; DUFF, *supra* note 3. On the shortcomings of legal moralist views, see ALAN BRUDNER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE 15–19 (2009).

prohibitions and harsh treatment of the character of criminal law largely in the abstract. Both sorts of accounts assume—without always interrogating the reasons for—the existence of a legitimate authority through which criminal law can be enforced.[22] In doing so, they offer an account of criminal law's role where the state and the basis for its authority are secondary to the aims to which that authority ought to be put.[23]

Indeed, for such theorists there seems to be little inherent connection between the state and criminal law at all. On the traditional utilitarian and legal moralist accounts of criminal law (with some exceptions, such as Duff's account, which I return to below),[24] there is no principled reason why a criminal wrong ought to be the concern of any *particular* state—such as the state where the crime took place or the state of the nationality of the offender. If some state without any factual connection to the crime could help deter future harm or give a moral wrongdoer their just deserts by prosecuting and punishing an offender, on these accounts there seems to be no reason, in principle, to deny that state's standing to do so.[25] There may, of course, be practical reasons why we might want to limit jurisdiction in particular ways, but not principled ones based on the justifying aim of utility or moral retribution. More profoundly, these theories do not offer a principled reason why *states* are the proper party to respond to criminal wrongdoing at all. If the point of criminal law is to deter harm, why can't any entity (including private persons) that is able to do so take up this role?[26] And if the point of criminal law is simply to respond to moral wrongdoing, ought not private persons be entitled to punish wrongdoers for committing moral wrongs?[27]

Scholars have begun to critique the absence of the state in the picture these theories paint. Duff, for instance, frames his theory in explicit opposition to the unbounded nature of Moore's leading moral retributivist account. As Duff stresses, Moore's failure to offer a principled explanation for why criminal law should not be the mutual concern of any and all states seems inconsistent both with the jurisdictional limitations we actually see in the

22. *See* Thorburn, *Criminal Punishment*, *supra* note 13, at 53.

23. *Id.*

24. *See infra* notes 29–30.

25. *See* DUFF, *supra* note 3, at 74–75, 97 (discussing this aspect of Moore's account); R.A. Duff, *Responsibility, Citizenship, and Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 125, 133–35 (R.A. Duff & Stuart Green eds., 2011) (discussing the same). Of course, a utilitarian account could offer empirical arguments for limits on jurisdiction, such as the fact that unlimited jurisdiction does not, in fact, deter crime, or that it leads to coordination problems or inefficiencies, etc. Short of such arguments, the aim of deterrence does not necessitate any limitation on jurisdiction.

26. This is especially true on a Razian account of authority. *See, e.g.*, Anthony R. Reeves, *Liability to International Prosecution: The Nature of Universal Jurisdiction*, 28:4 EUR. J. INT'L L. 1047 (2018).

27. *See, e.g.*, Michael S. Moore, *A Tale of Two Theories*, 28 ETHICS 27, 42 (2009) (acknowledging this point and suggesting *practical* reasons for limiting such authority to the state); *see also* DUFF, *supra* note 3, at 38–39 (discussing Moore's account).

doctrine (which generally limit jurisdiction over crimes to states with a territorial or nationality nexus), and with our intuitions about the nature of criminal law.[28] In contrast, Duff frames criminal law as a *relational* moral undertaking,[29] one between an accused citizen and her political community.[30] And, as Malcolm Thorburn argues, the inability of leading utilitarian and legal moralist theories to provide a principled reason why private citizens ought not engage in criminal punishment is inconsistent with the near universal rejection of vigilantism among the legal systems of the world.[31] In light of the disconnect with the way criminal law actually functions, such accounts do not seem to be properly characterized as theories of criminal justice.[32] And they leave foundational questions of criminal law unanswered.[33]

Against this background, a line of scholarship has emerged in recent decades placing the state front and center in our thinking about the justifications for criminal law.[34] Unlike the traditional utilitarians or moralists, this new approach does not start from the question of what role *criminal law* ought to play in the abstract. Rather, it starts from an account of the role the *state* ought to play in organizing relations among its members, and then consider what

28. *See, e.g.*, DUFF, *supra* note 3, ch. 3.

29. Criminal wrongs for Duff are just a subset of all moral wrongs, and criminal law is just one form of calling to account for moral wrongdoing. Similar communicative exercises occur with respect to moral wrongdoing within the family, the workplace, among friends, etc. *See, e.g.*, R.A. Duff, *Relational Reasons and the Criminal Law*, *in* 2 OXFORD STUDIES IN PHILOSOPHY OF LAW 175 (Leslie Green & Brian Leiter eds., 2013).

30. *See* DUFF, *supra* note 3, ch. 3.

31. *See, e.g.*, Thorburn, *Criminal Punishment*, *supra* note 13, at 61; Thorburn, *Constitutionalism*, *supra* note 13, at 92–93; *see also* Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070 (2008).

32. *See* Thorburn, *Constitutionalism*, *supra* note 13, at 86.

33. Most importantly, by focusing on moral desert or utility such accounts fail to address the question of whether the *authority* of an entity engaging in coercive punishment is justified. *See, e.g.*, GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL, VOL. 1: FOUNDATIONS 152–55 (2007) ("None of these purposes is legitimate unless it is based on an abstract right of the state to punish offenders."); Corey Brettschneider, *The Rights of the Guilty: Punishment and Political Legitimacy*, 33 POL. THEORY 175, 183 (2007); CHIAO, *supra* note 5, at 27–31.

34. An early call to move in this direction in English language scholarship can be traced to Fletcher. *See* FLETCHER, *supra* note 16, at xix. On the contemporary shift in the direction, see Malcolm Thorburn, *Introduction: Criminal Law Theory*, 70 U. TORONTO L.J. 1 (2020). For recent examples, see CHIAO, *supra* note 5; ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY, ch. 10 (2009); Thorburn, *Constitutionalism*, *supra* note 13; Ekow Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. LAW & PHIL. 457 (2015); DUFF, *supra* note 3, at 117; Alice Ristroph, *Sovereignty and Subversion*, 101 VA. L. REV. 1029 (2015); BRUDNER, *supra* note 21, at 16; LINDSAY FARMER, THE MAKING OF THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER (2016); MATT MATRAVERS, JUSTICE AND PUNISHMENT: THE RATIONALE OF COERCION 237–68 (2000); Zucca, *supra* note 5. For earlier contributions, *see* NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES, at xi (1988) (arguing punishment must be understood "within the context of an integrated political philosophy"); BRAITHWAITE & PETTIT, *supra* note 17 (exploring the connection between a theory of criminal law's role and a theory of the state).

role—if any—something like criminal law should play in that structure.[35] While such an approach marks a break with the prevailing trend of the past century, it entails a return to older ways of thinking about the justifications of criminal law as embedded in a political theory of the state; indeed, most modern proponents of such accounts draw on the work of liberal and republican scholars dating back centuries. The growing influence of the political theory trend in criminal law scholarship is evidenced, for instance, in the fact that Duff—one of the leading proponents of legal moralism—has situated his own account in this shift. In a refinement of his long-developing account, he accepts that we "must theorize criminal law as part of the institutional, legal structure of the state—a theorization that belongs to political philosophy rather than moral philosophy."[36]

There is a great deal of variance across this new school of criminal law theory. But among these accounts are several significant commonalities. Most contributions see the state as crucial for structuring relations among persons in a particular way that only a state and its legal order can ensure. And most suggest that something like criminal law is a lynchpin in this system of legal order.[37]

One camp, which we could describe as the "Public Authority Theorists," argues that the state offers the necessary structure through which we can live together with others as free and equal persons.[38] This account starts from the basic liberal premise that we, as equals, all have a right to freely determine our own purposes in life, to the extent that doing so does not interfere with the equal right of everyone else to do the same thing.[39] But it would be impossible, proponents explain, to realize this foundational entitlement without the state and its law. In the absence of the legal order that the state offers, we encounter the "problem of lawlessness, in which the independence of each is subject to the arbitrary choice of every other."[40] In order to live together as equals we must each have a sense of how we can act while still respecting each other's equality, and we must have a means to uphold those limits on

35. *See, e.g.*, DUFF, *supra* note 3, at 149 (describing such theories as "setting criminal law in the context of the state, and . . . the distinctive ends that the state should serve"); Vincent Chiao, *What is the Criminal Law For?*, 35 L. & PHIL. 137, 148–49 (2016) ("[J]ustifying the criminal law should be seen as part and parcel of justifying coercive public authority in general.").

36. DUFF, *supra* note 3, at 149; *see also* DUFF, *supra* note 11, at 11.

37. These accounts often describe this role of criminal law as addressing "civil order" or "civil peace." *See, e.g.*, FARMER, *supra* note 34.

38. Most notably, this camp includes the accounts of Thorburn and Ripstein. *See*, *e.g.*, Thorburn, *Constitutionalism*, *supra* note 13; RIPSTEIN, *supra* note 34, ch. 10. The argument has connections to Brudner's account, grounded in a Hegelian tradition. *See generally* BRUDNER, *supra* note 21 (offering an Hegelian-inspired account of contemporary criminal law). On the phrase, "Public Authority Theorists," see Liss, *supra* note 9, at 766.

39. *See, e.g.*, JACOB WEINRIB, DIMENSIONS OF DIGNITY: THE THEORY AND PRACTICE OF MODERN CONSTITUTIONAL LAW 47–48 (2016).

40. *Id.* at 56.

each other's actions. However, without the state, any effort to police the bounds of what being free and equal requires between us would inevitably involve the sort of unilateral action that violates our status as equals.[41] Such a context would entail rule by domination—where how we treat each other is determined by each of us individually, and the weak are subject to the choices of the powerful.[42]

Thinking about the state as a public authority offers a unique solution to this problem. In acting on our behalf to create a common set of laws delineating our rights, a common set of courts to adjudicate violations of those rules, and a common executive to enforce those rules, the legal order of the state provides a framework to overcome the problematic unilateralism of human interaction, wherein we are otherwise each subject to the will of each other. A legal order that speaks on behalf of us all can mediate claims amongst us without subjecting you to my arbitrary force or me to yours.[43] On this way of thinking, it is only when a state is organized in a manner consistent with this animating principle that its authority over the population is justified.[44]

For Public Authority Theorists, criminal law and criminal punishment serve a foundational role in making such a legal order possible. On their account, the commission of a crime is an attack on the very structure of equality under the law; as Thorburn puts the point, "the offender challenges the most basic promise of the rule of law: that we will never be subject to the arbitrary will of others, but only to the general laws that are the product of the legitimate public authority."[45] In committing a crime in breach of the public authority's rules, the offender replaces public rules with her own rules. In this

41. Thorburn, *Constitutionalism*, *supra* note 13, at 97–102; Malcolm Thorburn, *Punishment and Public Authority*, *in* CRIMINAL LAW AND THE AUTHORITY OF THE STATE 7, 30–31 (Antje Du Bois-Pedain, Magnus Ulvang, & Petter Asp eds., 2017) [hereinafter Thorburn, *Punishment*]; Malcolm Thorburn, *Criminal Law as Public Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 21, 42 (Antony Duff & Stuart P. Green eds., 2011); *see also* WEINRIB, *supra* note 39, at 15.

42. The idea of rule by domination does not mean that others, in fact, make the choice about how each of us live our lives, but simply that as a conceptual and structural matter we are subject to their will to do so. *See, e.g.*, PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (1999).

43. *See*, *e.g.*, Thorburn, *Constitutionalism*, *supra* note 13, at 97–99; Thorburn, *Punishment*, *supra* note 41, at 9; *see also* WEINRIB, *supra* note 39, at 16, 48–51. On this view, the state is not simply necessary in an instrumental sense; rather it is constitutive of the structure of our relationship as free and equal. This is not to say that every contemporary state in fact fulfils this role, but that a state is conceptually necessary for the possibility of equal freedom.

44. *See* WEINRIB, *supra* note 39, at 47–57. This in turn brings with it constraints on how public authority over persons ought to be exercised. *Id.* at 57–65. Such a theory does not serve as an apology for state power; rather it gives us an account of how states ought to function and gives us critical resources to evaluate how actual states function.

45. Thorburn, *Punishment*, *supra* note 41, at 9; *cf.* WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND bk. IV, at 336 (George Sharswood ed., 1893) (1753) ("[B]esides the injury done to individuals, [crimes] strike at the very being of society, which cannot possibly subsist, where actions of [that] sort are suffered to escape with impunity.").

context, where the state's law can be disregarded at will, it would be impossible for a public legal order to persist among us.[46] Criminal punishment acts to reaffirm the state's status as a public authority in the face of criminal conduct. It ensures that the rule of law can remain the final word between us; it sets the terms under which we might interact as equals, so that it is not permissible for an individual's might alone to determine how we can treat one another.[47] Criminal law is clearly only one piece of the sort of system necessary to secure a framework of equal freedom.[48] But, for the Public Authority Theorists, it is the role criminal law plays in constituting such a system where we find its justification.

Another camp, which we might call the "Practical Precondition Theorists," view a system of criminal law as a practical condition prior to any civic project we believe the state ought to pursue. This approach is epitomized in the work of Vincent Chiao, who views the state as a key structure in facilitating social cooperation among persons.[49] Criminal law, for Chiao, is best understood as a "generically coercive rule-enforcing institution" that sanctions non-compliance with the state's laws.[50] In this respect, criminal law serves the fundamental function of "support[ing] the possibility of the rule of law – a collective life under stable public institutions – by providing crucial support to shared attitudes of reciprocity."[51] It creates the necessary practical conditions of stability which make the pursuit of other civic goals possible. Criminal law, on such accounts, "is an integral component of society's basic structure" and ought to be justified on those terms rather than on terms of interpersonal wrongdoing.[52] While the Public Authority Theorists offer a

46. Again, this is not an empirical claim but a conceptual one. *See, e.g.*, WEINRIB, *supra* note 39, at 54–55; RIPSTEIN, *supra* note 34, at 164.

47. Thorburn, *Punishment*, *supra* note 41, at 30–31; *see also* RIPSTEIN, *supra* note 34, at 317

48. *See, e.g.*, Thorburn, *Constitutionalism*, *supra* note 13, at 100 (noting that criminal law must function alongside private law as well as programs of progressive taxation, public education, public health care, etc.).

49. While Chiao is partial to public ordering through the state, he acknowledges that there are possible contexts where a state, strictly speaking, might not be necessary to facilitate cooperation. However, his argument "assume[s] … that there is an important range of cases in which there is a need for centralized, law-governed institutions to facilitate valuable social cooperation." CHIAO, *supra* note 5, at 42–44.

50. Chiao, *supra* note 35, at 139, 144–46; CHIAO, *supra* note 5, at 45.

51. Chiao, *supra* note 35, at 138; CHIAO, *supra* note 5, ch. 2; *see also* Alice Ristroph, *Hobbes on "Diffidence" and the Criminal Law*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW (Markus D. Dubber ed., 2014) (discussing the role and limits of reciprocity in justifying criminal law).

52. In other words, a political community's institutions—including criminal law—ought to be justified on terms of political theory all the way down. Chiao, *supra* note 35, at 139; CHIAO, *supra* note 5, at 51–57. With an understanding of the general stabilizing role that criminal law plays, we can use this framework to develop an account of the specific political theory of society's structure we favor. For instance, Chiao proposes an account of a "society of equals"

conceptual claim about the necessity of the state in making rightful relations among its members possible, the Practical Precondition Theorists offer a *practical* argument about the necessity of the state in creating the conditions for any given political project we may support.[53]

A further camp, the "Republican Theorists," also view the state as an essential structure. There is a spectrum of accounts drawing on republican ideals,[54] but they share several core commonalities. Channeling republican principles, Ekow Yankah explains that "because human beings are deeply social and political animals, there is a sense in which one's innate worth cannot be fully expressed without a functioning polity."[55] Law, for Yankah, makes it possible to live in a community as civic equals, with a shared set of civic values aimed at common flourishing.[56]

Criminal law, Yankah observes, delineates those acts that amount to "'civic' or 'public' wrongdoing," as they threaten the very ability "to continue the necessary project of living together and protecting the values that we as a civic society have designated as most important."[57] As Duff explains in his most recent account, which emphasizes its republican leanings, such wrongdoing can threaten the state's civil order "both instrumentally and intrinsically."[58] On the one hand, such wrongdoing might represent a practical disruption to the civil peace or the polity's institutions; on the other, some crimes (such as a murder or a rape) "contradict[] a basic condition of our civic lives, and of the individual's standing as a citizen."[59] For Republican Theorists, the state is necessary to realize our civic flourishing, and criminal law is essential—on both a practical and intrinsic level—to ensure the state can function as a civic community.

These accounts draw on an array of influences and offer a variety of visions of the role that the state and criminal law ought to play. Indeed, this survey is itself far from an exhaustive accounting of the contributions within

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governed by the principle of non-deference—the idea that true equality means each citizen need not defer to any other. *See id.* at 74.

53. While the Practical Precondition Theorists' claim is instrumental and practical, the Public Authority Theorists' claim is deontological and conceptual. *See, e.g.*, CHIAO, *supra* note 5, at 31, 50. The Practical Precondition Theorists, thus, follows in the tradition of Locke, Hobbes, and others. *See, e.g.*, *supra* note 2 and accompanying text. The Public Authority Theorists follow in the tradition of Kant, Hegel, and others. As an instrumental theory of punishment, the Practical Precondition approach could be subject to the indiscriminacy critique applied to the utilitarians above. *See supra* notes 15–16 and accompanying text. On Chiao's reply to this critique, *see* CHIAO, *supra* note 5, at 66–68, 101–03.

54. *See*, *e.g.*, Yankah, *supra* note 34; DUFF, *supra* note 3; BRAITHWAITE & PETTIT, *supra* note 17. In important respects, Chiao's full account could be placed here too. *See generally* CHIAO, *supra* note 5, chs. 3–7 (setting out his egalitarian account of criminal's role).

55. Yankah, *supra* note 34, at 462. As Yankah stresses, his account tracks Aristotelian republican principles, which he distinguishes from Roman-informed accounts. *Id.*

56. *Id.* at 458, 462–63.

57. *Id.* at 464.

58. DUFF, *supra* note 3, at 205.

59. *Id. See also* Yankah, *supra* note 34, at 470.

the political theory approach to criminal law[60]—though it provides a sense of the general trend. Yet, despite the differences among these accounts, they are all connected by the basic premise that *the state* is necessary to facilitate just or rightful interactions between persons, and that *criminal law* is necessary to facilitate their favored conception of the state.

II. CRIMINAL LAW AND THE CONDITIONS BEYOND THE STATE

This state-centric shift in thinking about the justifications of criminal law addresses core shortcomings of the utilitarian and legal moralist approaches; however, it gives rise to two significant challenges of its own when we turn our gaze outwards, beyond the state. First, when we recognize that the state does not exist in isolation, we begin to see that there might be conditions external to the state that undermine the very possibility of the conception of the state on which the political theories of criminal law rely. Second, the centrality of the state on the political theory accounts presents a serious challenge for the legitimacy of criminal law untethered from the state—the defining quality of international criminal law on the standard picture of the field.

A. *The Challenge of Conditions Beyond the State*

The political theory accounts of criminal law take the state and the political community as their starting point. They seek to understand what might justify the authority of a state, and what role something like criminal law ought to play (if any) in this framework.[61] However, the leading accounts seem to place the state in a vacuum—considering it as an isolated political community. When we recognize that the space beyond the borders of the state is populated by other states and private actors, questions arise about the viability of the conception of the state on which the various political theory accounts of criminal law rely.

This challenge has both a conceptual and a practical element.[62] It is a *conceptual* problem for the Public Authority Theorists, who make a transcendental claim about the state's role in constituting rightful relations among equal persons under the law.[63] Unilateral force, after all, can emanate from those outside the state (for instance, through interstate war), just as it can from those inside it. And in a world where such external force is possible, individuals in the state still remain subject to the possibility of unilateral force. In such a world, the state cannot constitute—as a conceptual matter—a framework of equal freedom among its members. There are, in other words, factors *external* to the state that are relevant to its claim to secure the conditions

60. *See supra* note 34 and accompanying text.

61. *See supra* Part I.

62. On this distinction, see *supra* note 53 and accompanying text.

63. *See supra* note 43 and accompanying text.

necessary for life among free and equal persons *internally*.[64] In Part IV, I consider in greater depth the factors beyond the state that might be relevant; but for the moment we can see that the Public Authority Theorists' internal focus misses an important element of the equation.[65]

In addition, this challenge is a *practical* problem for the Practical Precondition Theorists, who make an instrumental claim about the criminal law's role in securing stable reciprocity for the state's political project. Focusing on conditions within a given political community alone is not enough to ensure that such a context of stable reciprocity is, in fact, likely to obtain.[66] After all, the stability of the conditions within the state itself and the rights of its members could be challenged by actors beyond that state. Without speaking to such external factors, the state is unable to assure its members that their rights will be respected, leaving the state's members with reasons to defect from the common set of rules.

The Republican Theorists make both conceptual and empirical claims about the state's necessary role in realizing our civic flourishing as equal citizens.[67] Again it seems that such a vision of the state is not possible (on a conceptual or practical level) where the framework of civic equality might be subject to external threats. As Philip Pettit puts the point with respect to Republican accounts of the state: "What we now see is that this actually leaves something out. For those individuals will not be fully free if their state is dominated by other states."[68]

In light of the conditions beyond the state, a vision of the state's role and the justification for its authority cannot be posited in isolation. As Ronald Dworkin has stressed, "the modern question—what justifies coercive political power?—arises not just *within* each of the sovereign states who are members of the Westphalian system but also *about* the system itself."[69] Notably, many of the Enlightenment scholars on which the modern proponents of the political theory approach to criminal law ground their accounts recognized this very fact. As Rousseau observed, for instance:

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64. There, of course, may be other factors *internal* to the state (beyond criminal law) that must be in place to constitute equal freedom. Indeed, the very point for proponents of this theory (and the other camps among the political theory accounts) is that criminal law is only one piece of a broader theory of legitimate state authority. *See supra* note 48 and accompanying text. What such accounts fail to address sufficiently, however, is that a theory of the state alone (and the factors internal to it) is not enough.

65. On the traditional focus of such accounts on domestic conditions, *see* Christian Rostbøll, *Freedom in External Relations of All Human Beings: On Kant's Cosmopolitanism*, 25 KANTIAN REV. 243, 243 (2020). On the explanation for this focus, to which Rostbøll offers a compelling rebuttal, *see* RIPSTEIN, *supra* note 34, at 225–30.

66. A similar point concerning factors *internal* to the state (as noted above) could, of course, be raised here too. *See supra* note 64 and accompanying text.

67. *See supra* note 59 and accompanying text.

68. Philip Pettit, *A Republican Law of Peoples*, 9 EUR. J. POL. THEORY 70, 77 (2010)

69. Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFFS. 2, 16 (2013).

> The first thing I notice as I consider the situation of humankind, is a manifest contradiction in its constitution which causes it to be forever unstable. Man to man we live in the civil state and subject to the laws. People to people, everyone enjoys natural freedom: which at bottom makes our situation worse than if these distinctions were unknown. For by living both in the social order and in the state of nature, we are subject to the inconveniences of both without finding security in either.[70]

Recognizing that the state does not exist in a vacuum requires that we consider what global conditions must be met to ensure the existence of the state (as conceived by the political theories of criminal law), in order to "find security" in both the domestic and international sphere.

And, conversely, if the state is the condition in which any given person (or group of people) ought to find themselves, as the political theory accounts of criminal law suggest, this raises questions about the status of individuals outside the state. If any group of people ought to structure their relations through a state, the same would seem to be true for *all people*. As one individual ought to be located within a state to constitute equal relations, ensure stable reciprocity, or realize civic flourishing, the entirety of the world's population would seem to have a right to be located in and protected by *some* state.[71] Thus, the premises that underpin the political theory accounts ought not exclusively address relationships between persons in a particular state under consideration, but ought to be consistent with the ability of all other political communities to organize themselves in a similar manner.

These observations about conditions beyond the state raise two questions for the political theory accounts of criminal law. First, to be viable as a theory of state authority and criminal punishment, such accounts would have to offer a set of principles that define the place of the *state in the world* (in relation to both persons beyond the state and to other states) that would make its internal status as conceived of by the various theories possible. These might be described as the "external conditions" necessary for the state. And second, such theories would have to offer a set of principles making a *system of such states* for all peoples possible, each serving as the sort of state that the political theory accounts embrace for a given community. These might be described as the "global conditions" necessary for a world of states. Without such

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70. Jean-Jacques Rousseau, *Principles of the Right of War*, *in* ROUSSEAU: THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 167 (Victor Gourevitch ed. & trans., 2d ed. 2019) (describing this as the "mixed condition in which we find ourselves" and "the genuine origin of public calamities"); *see also, e.g.*, Immanuel Kant, *The Metaphysics of Morals, in* IMMANUEL KANT, PRACTICAL PHILOSOPHY 362, 455, §43 (Mary J. Gregor trans. & ed., 1996) (1797).

71. *See, e.g.*, Pettit, *supra* note 68, at 77; Rostbøll, *supra* note 65, at 255; Louis-Philippe Hodgson, *Realizing External Freedom: The Kantian Argument for a World State*, *in* KANT'S POLITICAL THEORY: INTERPRETATIONS AND APPLICATIONS 101, 108 (Elisabeth Ellies ed., 2012); EVAN CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 165 (2016).

principles, the basic premise of the political theory accounts of criminal law—the justificatory force of the distinct role of the state—seems untenable when the state is contextualized in the world beyond its borders.

B. *The Challenge of Criminal Law Beyond the State*

Another problem arises when we situate the political theory accounts of criminal law in the world beyond the state. Namely, the centrality of the state on this way of thinking about criminal law theory poses a serious challenge for the legitimacy of criminal law untethered from the state—the defining quality of international criminal law on the standard picture of the field.[72]

On the mainstream view of the field, international crimes (such as crimes against humanity, war crimes, and genocide) are seen as *universal* wrongs, unrelated to a particular state.[73] An international criminal prohibition applies to an individual even if such conduct is not prohibited by the law of the state where the act takes place or by the accused's state of nationality.[74] As one leading scholar stresses, international criminal law "trumps any conflicting national laws."[75] And an international criminal offense—unlike an ordinary criminal offense—can be prosecuted and punished by an international tribunal or the courts of a state *without any* territorial-based connection to the crime or nationality-based connection to the accused.[76] In other words, the ordinary rules of criminal jurisdiction, pursuant to which jurisdiction to prosecute and punish is largely limited to the courts of states with a factual connection to the offense or the accused, do not apply in the context of international criminal law. Such crimes, the prevailing wisdom holds, are not acts of concern to a particular political community, but rather are "the most serious crimes of concern to the international community as a whole"; and they do

72. Other areas of criminal law seem untethered from the state in some respect, most notably transnational criminal law. *See, e.g.*, NEIL BOISTER, AN INTRODUCTION TO TRANSNATIONAL CRIMINAL LAW 3 (2012). These areas also raise important questions. However, I focus on international criminal law, which seems most at odds with this new line of criminal law theory.

73. *See*, *e.g.*, Luban, *supra* note 9, at 571 (observing that such crimes "offend not against state interests but human interests"); GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE, at xxv (3d ed. 2006); M. CHERIF BASSIOUNI, 1 INTERNATIONAL CRIMINAL LAW 175 (3d ed. 2008); David S. Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT'L L. & POL. 1019, 1058 (2008).

74. *See, e.g.*, Charter of the International Military Tribunal, art. 6(c), *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945, 82 U.N.T.S. 280 [hereinafter Nuremburg Charter]; *see also* Alejandro Chehtman, *A Theory of International Crimes: Conceptual and Normative Issues*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 317, 320 (Kevin Jon Heller, et al. eds., 2020).

75. Claus Kreβ, *International Criminal Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶16 (March 2009).

76. Liss, *supra* note 9, at 730–32 (discussing the unusual scope of international criminal jurisdiction). In practice, however, the jurisdiction of international tribunals has not been grounded in universal jurisdiction, but something akin to delegation of domestic jurisdiction. On this point and the need to justify such jurisdiction, nonetheless, see id. at 735–37.

not offend the values of a particular polity, but rather "shock the conscience of humanity."[77]

Indeed, to the extent that it is viewed as relevant at all, the "sovereign state" is ordinarily cast as the "enemy of international criminal law": an entity that jealously protects its territorial jurisdiction and is skeptical of international criminal justice as a form of international interference with its traditional domain of territorial governance.[78] International criminal law and the state are perceived to be fundamentally at odds with one another.

Nevertheless, international criminal law still purports to be criminal law. Most significantly, it entails prohibitions, prosecutions, punishments, and denunciations aimed at an individual accused.[79] Indeed, perhaps the most famous refrain in the international criminal law jurisprudence—a lodestar for the field—is the Nuremberg Tribunal's assertion that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[80] Relying on this penal structure, however, demands a justification for the coercive practice that international criminal law (like domestic criminal law) entails.[81] It requires an explanation as to what gives the institutions of international criminal law the authority to delineate limits on our conduct and to deny our liberty when we fail to abide by those limits.

A justification of this sort that could account for the global scope of international criminal law (one seemingly untethered from the state) seems strikingly straightforward on the traditional accounts of criminal law theory. If criminal law is justified as a utilitarian framework pursuing the deterrence of harm, or as a moral retributivist structure ensuring deserved punishment for moral wrongs, then there seems to be no reason why *any* entity able to serve these roles should not be entitled to do so. In fact, as I noted above, these justifying aims seem to offer no principled reason why jurisdiction over

77. Rome Statute of the International Criminal Court prmbl., July 17, 1998, 2187 U.N.T.S. 90. [hereinafter Rome Statute].

78. *See* Cryer, *supra* note 10, at 979; STEVEN C. ROACH, POLITICIZING THE INTERNATIONAL CRIMINAL COURT 19 (2006) ("[S]tate sovereignty has provided one of the most enduring obstacles for advancing international criminal law."); *see also* Liss, *supra* note 9, at 735 (discussing "interstate" justifications of international criminal law). Some scholars writing against the standard account have started to connect international criminal law to the political community. *See, e.g.*, ALEJANDRO CHEHTMAN, THE PHILOSOPHICAL FOUNDATIONS OF EXTRATERRITORIAL PUNISHMENT (2010); David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85 (2004). While aspects of Luban's account foreground the political community (*id.* at 112–17), when it comes to explaining authority to punish international crimes, Luban moves in line with the standard pictures. *Id.* at 124–42.

79. On the aborted project of a form of international criminal law addressing the state directly, see generally EUR. U. INST., INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (Joseph H. Weiler et al. eds., 1988) (discussing "crimes of state").

80. International Military Tribunal at Nuremberg, *Trial of the Major War Criminals, Judgment (Oct. 1, 1946)*, *in* 1 TRIAL MAJOR WAR CRIMINALS 171, 223 (1947).

81. *See* FLETCHER, *supra* note 16, at xix; BRUDNER, *supra* note 21, at ix–xi.

criminal law *generally*—not simply in the international criminal law context—ought to be limited to one state or another (or why it ought to be limited to states at all, versus private parties).[82] In a sense, what seems hard to explain on these accounts is not why international criminal law has a global scope, but why all of criminal law does not.[83] And this premise tends to be at the heart of justifications of authority to punish offered by proponents of the standard picture of international criminal law. Indeed, the global coercive scope of international criminal law is frequently justified on the simple basis that *any entity* that can deter serious harms should be permitted to,[84] or on the basis that—as the justified response to moral wrongs against humanity as a whole—*any member of humanity* ought to have a right to punish international crimes.[85]

However, the shift to a state-centered political theory of criminal law, and the increasing rejection of justifications based on utility and legal moralism in the abstract, poses a significant challenge for the common justifications offered for international criminal law's authority and scope. After all, if a proper understanding of the justifications for criminal law requires anchoring the field in a political theory of state authority,[86] how can we justify a framework of criminal law that is premised on the state's *absence*? And if criminal law is ordinarily justified by its contribution to the state's function, how can we justify a domain of criminal law that is viewed as the *adversary* of the state?

Thus, if we take this new (and increasingly prevalent) approach to criminal law theory seriously, it seems to raise a serious challenge for any effort to justify the global coercive scope of international criminal law.[87] At the very least, it suggests that international criminal law cannot be justified on the same basis as ordinary domestic criminal law (or as a simple extension of such justifications as ordinarily proposed). Recognizing this challenge requires that we either develop a novel political theory of international criminal punishment, or that we accept that perhaps international criminal law is not

82. *See supra* notes 25–33 and accompanying text.

83. *See supra* note 25 and accompanying text.

84. *See, e.g.*, Win-chiat Lee, *International Crimes and Universal Jurisdiction*, *in* INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY 15, 29–30 (Larry May & Zach Hoskins eds., 2009); Reeves, *supra* note 26; *see also* Liss, *supra* note 9, at 749–54 (discussing this shortcoming in Lee's account).

85. *See, e.g.*, Luban, *supra* note 78, at 137–46 (offering a theory of "vigilante jurisdiction"). Even criminal law theorists, such as Duff, who see criminal law as deeply tied to the state, view international criminal law through the lens of moral wrongs against humanity. *See* Antony Duff, *Authority and Responsibility in International Criminal Law, in* THE PHILOSOPHY OF INTERNATIONAL LAW 589 (Samantha Besson & John Tasioulas eds., 2010). For a revised account moving closer to what I propose in this article, see Antony Duff, *Crimes Against Humanity and Hostes Generis Humani*, 47 NETH. J. LEG. PHIL. 138, 145 (2018) (shifting from "talking of a community of humanity . . . to talking of a community of nations").

86. *See supra* Part I.

87. *See supra* notes 79–81 and accompanying text.

criminal law properly so called and therefore cannot justifiably rely on the ordinary coercive trappings of criminal law.

III. FINDING THE STATE IN INTERNATIONAL CRIMINAL LAW

These two challenges—concerning the viability of the standard picture of international criminal law on the political theory accounts, and the viability of the political theory accounts themselves in the context of the conditions beyond the state—initially seem unrelated. However, in the remainder of this article, I offer a common resolution to these challenges. As a starting point, in this Part I explain that there is a flaw in the standard picture of international criminal law, and that recognizing this flaw may help us make sense of international criminal law's place in a political theory of criminal law.

Contrary to the standard picture of the field, international criminal law is not untethered from the state; rather, it is deeply anchored in the system of states. And far from being an adversary of state sovereignty, international criminal law has served to uphold and maintain the system of sovereign states. As I have argued at greater length elsewhere, this becomes clear when we turn to the history of the field.[88] This history reveals that, through international criminal law, legal actors have criminalized conduct that attacks the organizing principles of the international system of sovereign states.

Today, the category of international crime is generally thought to refer to the offenses subject to the jurisdiction of the International Criminal Court: crimes against humanity, war crimes, and genocide.[89] But the category of international crime has not been static over time. Over the course of modern history, legal actors (including lawyers, judges, state officials, and scholars) operating in different eras have viewed entirely different sorts of offenses as the archetypal international crime. Since the late eighteenth century, there have been three distinct periods of international criminal law. During each era, influential legal actors embraced a different conception of what constituted an international crime. Here I provide only a sketch of these developments. Important nuances of this history are, of course, lost from such a high-level account—including the degree to which these changes often reflected the interests of powerful or imperial states (a point I return to in Part V)[90] and the degree of overlap between the proposed periods. Notwithstanding these important caveats, we can discern distinct eras in the different ways in which the prevailing conception of international criminal law has been understood and enforced.

The first such period spanned the late eighteenth century to the early twentieth century—the "Long Nineteenth Century." During this era, the

88. This discussion draws on Liss, *supra* note 9. I develop this account further in RYAN LISS, CRIMES AGAINST THE SOVEREIGN ORDER (forthcoming).

89. Rome Statute, *supra* note 77, arts. 5–8. On the Court's fourth offense, the crime of aggression, *see infra* note 96 and accompanying text.

90. *See infra* notes 162–167.

paradigmatic international crime was piracy. For the legal actors of the time, piracy was unlike any other crime. It was not just an international offense, but *the* international offense: As Judge John Bassett Moore put the point at the time, "[p]iracy by law of nations, in its jurisdictional aspects, is *sui generis*."[91]

The second era spans the decades immediately leading up to and following World War II (the "Interwar" or "Nuremberg Era"). During this period, the international criminal law paradigm was reoriented around outlawing crimes against peace (i.e. waging illegal war). This approach to the field is demonstrated most vividly in the trials at Nuremberg and Tokyo. For the legal actors involved in these cases, the alleged international criminality of German and Japanese officials was rooted in the fact that they had waged an illegal war, rather than the fact that they violated the rights of individuals.[92] What distinguished a crime as *international* during the Nuremburg Era was that it entailed a breach of interstate peace.[93]

The third period of international criminal law spans the final decades of the twentieth century (the "Contemporary Era"). During this era, the paradigm of international crime shifted away from war toward a focus on "human security" crimes: war crimes, crimes against humanity, and genocide.[94] This conception is reflected in the creation of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda and the International Criminal Court, whose jurisdiction focuses on these new human security crimes.[95] In the Contemporary Era, what makes a crime *international* is not its connection to a violation of borders but its connection to a violation of rights.[96]

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91. S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, ¶249 (Sept. 7) (Moore, J., dissenting); U.S. v. Klintock, 18 U.S. (5 Wheat.) 144, 152 (1820) (describing piracy as the "proper object[] for the penal code of all nations").

92. *See, e.g.*, ROBERT H. JACKSON, REPORT OF U.S. REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 330–31 (1949); *see also* Nuremberg Charter, *supra* note 74, art. 6(c) (restricting jurisdiction over crimes against humanity to those committed in connection with another crime within the Tribunal's jurisdiction, often referred to as the "war nexus").

93. *See* Liss, *supra* note 9, at 761; *see also* DAVID LUBAN, LEGAL MODERNISM: LAW, MEANING, AND VIOLENCE 336 (1997); Samuel Moyn, *From Aggression to Atrocity: Rethinking the History of International Criminal Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW, supra note 74, at 341.

94. Liss, *supra* note 9, at 762–63.

95. *See* Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶97 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995). More specifically, the defining quality is the violation of a law securing rights, rather than the violation of a law securing borders; *see also* Rome Statute, *supra* note 77, arts. 5–8; S.C. Res. 955, arts. 2–4, Statute of the International Criminal Tribunal for Rwanda (Nov. 8, 1994).

96. The International Criminal Court's ("ICC") jurisdiction over Nuremberg's supreme crime of waging war (now defined as "the crime of aggression") has been controversial. The Court's jurisdiction over the crime was activated in December 2017—a decade and a half after the court's jurisdiction over its other three crimes began. *See* ICC ASP, *Activation of the Jurisdiction of the Court over the Crime of Aggression*, ICC Doc. ICC-ASP/16/Res.5 (Dec. 14, 2017). Those opposed to criminal jurisdiction over aggression argue it is a distraction from the Court's primary work of addressing human security crimes. *See, e.g.*, Harold Hongju Koh &

These dramatic shifts in the nature of international criminal law are best understood through the context in which these changes occurred. Throughout the three eras of international criminal law, international society has been structured as a legal order of states, each imbued with sovereign legal authority. But the organizing principle of this "sovereign order" embraced by dominant legal actors has undergone a series of important transitions.[97] First, over the Long Nineteenth Century, sovereign authority under international law was consolidated in the modern territorial state. This entailed the recognition of the territorial state as the sole entity with legitimate authority on the international plane and consequently prohibited *private, non-state* force.[98] Second, through the adoption of the 1928 Kellogg-Briand Pact and a series of related legal and political developments, the sovereign order was reoriented around the requirement of interstate peace. At the heart of this shift, legal actors worked to prohibit the use of *interstate* force to settle disputes and acquire territory, which had been long viewed as a legal right of sovereignty.[99] Third, in the final decades of the twentieth century, state officials and scholars embraced the premise that a grant of sovereign authority under international law obligated the state to protect certain basic rights of individuals within its territory. This new conception of the state's role in the international system rose to prominence in the 1990s as "sovereignty as responsibility." As officials eventually defined the concept, it requires that the state neither engage in nor permit others to engage in war crimes, crimes against humanity, and genocide.[100]

The changes in international criminal law related to these changes in the concept of state sovereignty in a significant way: Each of the three paradigmatic international offenses violated the organizing principle of the sovereign order of its period. The pirate's exercise of unauthorized non-state force,

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Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L L. 257, 261–62 (2015); Erin Creegan, *Justified Uses of Force and the Crime of Aggression*, 10 J. INT'L CRIM. JUST. 59, 59, 63 (2012). Even advocates of international jurisdiction over the crime have sought to reframe the crime's significance within the new paradigm of human security. *See, e.g.*, Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 YALE L.J. 1242 (2017).

97. On whether we should understand these changes as cumulative or successive, see *infra* note 136 and accompanying text.

98. *See, e.g.*, David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 127–28 (1998); *see also* Liss, *supra* note 9, at 770.

99. *See* Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 94 L.N.T.S, 57; *see also* Liss, *supra* note 9, at 759–60; OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017).

100. *See, e.g.*, FRANCIS M. DENG, PROTECTING THE DISPOSSESSED: A CHALLENGE FOR THE INTERNATIONAL COMMUNITY (1993); GA Res. 60/1, 2005 World Summit Outcome Document, ¶ 138 (Oct. 24, 2005); *see also* Liss, *supra* note 9, at 770. This legal premise reflected centuries' old debates in political theory. *See* LUKE GLANVILLE, SOVEREIGNTY & THE RESPONSIBILITY TO PROTECT: A NEW HISTORY (2014). On the shift in international law generally to focus on human security, see, e.g., RUTI G. TEITEL, HUMANITY'S LAW 4 (2011).

outside of and in denial of state authority,[101] challenged the consolidation of sovereign authority in the modern territorial state; the general's illegal war challenged the order of interstate peace called for in the Interwar Era; and the genocidaire challenged a sovereign order premised on sovereign states' role in protecting basic rights within their territory.

Recognizing this connection between state sovereignty and international criminal law allows us to develop a new understanding of the role that international criminal law plays: It serves to define, prosecute, and punish what we might call "crimes against the sovereign order."[102] The defining characteristic of an international crime is that it undermines the way in which we have structured international society into a system of sovereign states.

As discussed above, the standard view of international criminal law sees state sovereignty as the enemy of international criminal law. On the refined conception of international criminal law that I have sketched out, however, the prosecution of such crimes is not at odds with sovereignty but rather helps to *secure* the international regime of sovereign states itself.

IV. A POLITICAL THEORY OF INTERNATIONAL CRIMINAL LAW

This refined account of the role that international criminal law has played in the international legal system suggests an entirely new way of understanding the relationship between the state and international criminal law. And with this new understanding in hand, we can begin to see where international criminal law might fit into a political theory of criminal law.

For the leading political theories of criminal law, the state and its legal order play an essential function in ordering relations among persons in a rightful manner.[103] As we have seen, however, these accounts seem to place the state in a vacuum, raising the question of what global conditions must be met to ensure that the existence of the state (as conceived by the political theories of criminal law) is possible.[104] As I will explain in this Part, by maintaining a particular version of the system of sovereign states, international criminal law secures the global conditions necessary for the state, as the political theorists of criminal law conceive of it, to function. From this perspective, international criminal law no longer seems like an outlier to a political theory of criminal law, but rather a necessary precondition for it. And the vision of the state upon which this new line of criminal law theory is grounded no longer seems detached from the world beyond its borders, but a constituent part of a global system.

Each of the political theories of criminal law differs in important ways, making it necessary to narrow our focus to one of them to provide a

101. *See* WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW §81, at 231 (2d ed. 1884).

102. Liss, *supra* note 9, at 729.

103. *See* discussion *supra* Part I.

104. *See* discussion *supra* Part II.

comprehensive explanation of this argument. Here, I concentrate on the Public Authority Account for two reasons. First, in many ways it offers the toughest challenge for a justification of international criminal law (and thus the account most in need of a response), as it insists that the coercive authority that criminal law entails can *only* be exercised by the state. While the other accounts view the state as important in securing their desired conception of order among persons, they are less definitive in their rejection of other forms of authority.[105] Second, a core premise of the Public Authority Account is that, since we are all equal, no single vision of the good life ought to be coercively enforced by public institutions; rather, that choice ought to be left for each person.[106] An account of authority consistent with plural conceptions of the good seems to be a promising basis for the sort of universal framework of coercive authority that would ultimately be necessary for a viable account of international criminal law.

However, the point I make here is not exclusive to the Public Authority Account. As I explain at the end of this Part, international criminal law could be understood as serving this same role for the other leading political theories of criminal law. For each theory's favored conception of the role of the state, the system of international criminal law secures the global conditions necessary to make the state possible.

A. *A World of Public Authorities*

Criminal law, on the Public Authority Account, is concerned with ensuring the state's ability to secure the requisite conditions for "a life in community with others as free and equal moral agents."[107] However, when we turn our focus from the state to the world beyond it, it becomes clear that there may be factors external to the state that undermine its ability to secure the conditions for life among free and equal persons internally.[108] And, conversely, it becomes evident that we need to consider the status of those beyond the state themselves: The same right that animates one person's claim to structure her interactions with others through the legal order of the state,[109] animates a claim for *all individuals*. As one individual has a right to be located within a state, the entirety of the world's population likewise has the right to be located in and protected by *some* state.[110] This gives rise to a need to identify the *external* and *global* principles that make the state acting as a public

105. *See, e.g.*, CHIAO, *supra* note 5, at 42–44.

106. *See, e.g.*, Thorburn, *Constitutionalism*, *supra* note 13, at 97–99.

107. *See, e.g.*, Thorburn, *Criminal Law*, *supra* note 41, at 43.

108. On the role of factors internal to the state, *see supra* note 62 and accompanying text.

109. *See, e.g.*, Thorburn, *Punishment*, *supra* note 41, at 30; WEINRIB, *supra* note 39, at 51.

110. *See, e.g.*, Rostbøll, *supra* note 65, at 255 ("[T]he right to live in a legitimate state … is not a purely domestic matter but entails a distinctly cosmopolitan perspective. It is a universal or cosmopolitan right pertaining to all human beings in virtue of their humanity."); Hodgson, *supra* note 71, at 108.

authority and a system of states—with each acting as a public authority—possible.

The new way of thinking about the relationship between international criminal law and the system of states set out in Part III offers a novel starting point from which to consider these questions. As I will explain, the three historic organizing principles of the legal order of sovereign states provide the resources to complete the Public Authority Account, making its underlying conception of the state possible in an international context. To recall, these principles call for organizing sovereign authority: (1) exclusively into territorially-bounded states; (2) among whom interstate force is prohibited; and (3) which are obliged to meet the standards of sovereignty as responsibility.[111] These principles collectively set out the necessary external conditions to secure the state's internal status as a public authority, and the necessary global conditions to structure the world into a system of public authorities, each securing a relationship of free and equal persons within its own jurisdiction.[112] Here, I explain how these principles serve this role. In the sections that follow, I explain how this helps us understand where international criminal law ought to fit into the Public Authority Account's conception of criminal law.

1. Territorially-Bounded Sovereigns

Let's start with the organizing principle of the Long Nineteenth Century: the consolidation of sovereign authority into territorially-bounded states. The Public Authority Account relies on the premise that the state possesses ultimate authority within some territorially-bounded space. The coordinating role the state plays in securing our equal status presumes this condition: The state must be the ultimate arbiter within its territory to ensure the supremacy of the common body of law, common structures of adjudication, and common means of enforcement which make the rule of law among equals possible.[113] If the state's claim of authority were not supreme within its territory, the state as a system of public authority would not be possible.[114] On this way of thinking, the territorial state is unique in its ability to constitute free and equal relations among persons; the state's public authority (and its public authority alone) offer a structure that mediates our equal claims to have our rights respected by others.

Thus, the principle that sovereign authority can be consolidated in territorially-bounded states constitutes a global condition necessary to ensure that

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111. *See* discussion *supra* Part III.

112. As these principles serve this role collectively, they must all be present to realize this condition. *See infra* note 136 and accompanying text.

113. *See, e.g.*, Thorburn, *Punishment*, *supra* note 41, at 9; *see also* Arthur Ripstein, *Just War, Regular War, and Perpetual Peace*, 107 KANT-STUDIEN 179, 186–87 (2016) (discussing the importance of the state's exclusive authority within its jurisdiction).

114. Shared sovereign authority (e.g., between Indigenous peoples and settler states) might be permissible and perhaps obligatory in some contexts. However, I rely on a consolidated conception of sovereignty for simplicity.

all individuals of the world live in a context consistent with their status as equal persons. Securing the equal status of all persons on a global scale requires not simply that a *particular group* of people are located in a state, but that *all people* of the world are located within *some* state. This necessitates not only that a given state exists as a territorially-bounded sovereign authority, but that the world as a whole is divided into such territorially-bounded sovereigns.[115] In short it requires that there is no space governed by private force; rather, that the world's surface is governed by a patchwork of public authority.

The assertion of coercive authority throughout the globe by any actors other than territorially-bounded states (such as pirates on the sea),[116] would represent a challenge to the status of others as equal persons.[117] Such an exercise of non-state authority would amount to the very sort of arbitrary and unilateral force (deciding matters by domination or might) that the Public Authority Account sought to exclude. Thus, the organizing principle of the Long Nineteenth Century—structuring the world into territorially-bounded states—provides the sort of international principle required to make the Public Authority Account possible. It addresses the global conditions necessary to structure the world in a manner consistent with the free and equal status of people on a global scale.

2. Peaceful Sovereigns

The organizing principle of the Interwar Era—involving a sovereign order structured around the prohibition of war among states—represents another international principle necessary to facilitate the status of the state as a public authority. As noted above, the state's status as a public authority depends fundamentally on the rejection of unilateral force by all other actors within its territory. Notably, such unilateral force can come from *beyond* a state's borders as well from within them—a fact not addressed by the Public Authority Account (and other political theory accounts). The most significant form of such externally-originating force is interstate war: War represents the denial of law's monopoly in deciding matters between individuals; it is

115. *See* Hodgson, *supra* note 71, at 108. This claim is consistent with diverse modes of political ordering. Nevertheless, it *has* been invoked to reject certain forms of political organization and, indeed, was relied upon to justify colonization. On how we account for such historical realties, see discussion *infra* Part V; *see also* CRIDDLE & FOX-DECENT, *supra* note 71, at 45–46.

116. On this characteristic of piracy, see *infra* note 140 and accompanying text.

117. *But see* Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 376 (2009) (arguing that such acts do not affect the state-subject relationship).

inherently a condition in which an outcome is determined by might rather than right.[118]

Even if sovereign authority were distributed exclusively among territorial states, in a condition where one state was permitted to impose its will upon another by war, a global framework consistent with the status of individuals as free and equal persons would be impossible.[119] The possibility that State A could engage in forceful action in State B undermines State B's status as the public authority and ultimate arbiter of rights within its territory. If it is possible for a foreign-originating force (rather than State B's laws) to determine the state of affairs in State B's territory, the population cannot rely on the public law alone to structure relations among them.

The possibility of interstate war, in other words, undermines State B's ability to order relations among equal persons under the law internally. We may, of course, identify exceptions to this general rule (for instance, interstate force in self-defense).[120] However, the basic principle remains: Where interstate force is generally legal, the state as conceived of by the Public Authority Account cannot exist.[121] In this way, the organizing principle of the Interwar Era, prohibiting war between states, represents an external condition required to secure the state's internal status as a public authority.[122]

3. Sovereignty as Responsibility

Finally, the organizing principle of the Contemporary Era, sovereignty as responsibility, also constitutes a necessary global condition. The concept of sovereignty as responsibility provides that the state's status as sovereign entails obligations under international law to protect those in its territory from violations of their human security. The precise threshold for what conduct represents a failure of sovereign responsibility has been a matter of debate.[123] Several formulations of the appropriate threshold conditions were mooted throughout the 1990s, including: "human rights . . . massively or

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118. *See, e.g.*, Ripstein, *supra* note 113; Rostbøll, *supra* note 65, at 256–57; *see also* HATHAWAY & SHAPIRO, *supra* note 99, ch.1 (describing the period when war was legal, as one in which "might makes right").

119. Some proponents of the Public Authority Account, following Kant, argue that states acting as true public authorities would never engage in aggressive war as doing so would be to act for a non-public purpose. *See* RIPSTEIN, *supra* note 34, at 228–29. On the need for a legal prohibition on war in any event, see Hodgson, *supra* note 71, at 109–10.

120. We might also include those authorized by the United Nations Security Council. On this point, see CRIDDLE & FOX-DECENT, *supra* note 71, ch. 5.

121. For a similar view grounded in a republican account, see Pettit, *supra* note 68, at 76–77.

122. *See* Ariel Zylberman, *Kant's Juridical Idea of Human Rights*, *in* KANTIAN THEORY AND HUMAN RIGHTS 28, 39 (Andreas Follesdal & Reidar Maliks eds., 2014).

123. *See* discussion *supra* Part III; *see also* Ryan Liss, Crime at the Limits of Sovereignty (Sept. 2018) (J.S.D. dissertation, Yale University) (on file with author).

systematically violated with impunity,"[124] "gross violations of the rights of masses of people,"[125] and conditions where "the failure of states to protect rights becomes egregious,"[126] among others.[127] Eventually, international officials and state representatives adopted a standard that drew on the emerging category of international crime: human security crimes, such as war crimes, crimes against humanity, and genocide.[128] The resulting standard for sovereign responsibility requires both that the state not perpetuate such acts and that it protect individuals and groups from the commission of such crimes on its territory through prevention, cessation, and prosecution.

The principle of sovereignty as responsibility seems quite different from the two other international organizing principles discussed above. While the other principles address conditions external to the state, sovereignty as responsibility seems concerned with conditions within the state itself. In fact, rather than an international principle that facilitates the Public Authority Account (or the other political theory accounts of criminal law), sovereignty as responsibility seems more like a restatement of such an account itself. Crimes against humanity and war crimes seem like the sort of conduct that the state as a public authority was meant to regulate in the first place. Thus, it is not immediately clear how sovereignty as responsibility represents a global or external condition for the state's status as a public authority; rather, it seems to simply reaffirm the Public Authority Account's conception of the state's role in constituting free and equal relations under the law on an internal basis.

A response to this characterization of sovereignty as responsibility can be found in the justification for international jurisdiction over the conduct it was meant to address offered by one of the pioneers of the principle, Sudanese diplomat Francis Deng. The acts with which sovereignty as responsibility is concerned, Deng argued, were of the sort that "signify the breakdown" of the very conditions of order that the state was "created to ensure and preserve."[129] This, he explained, was what set such conduct apart from ordinary, isolated violations of the law amounting to domestic crimes. Isolated violations are the sort of thing the state's legal order was intended to respond to and should be left to address. In contrast, he argued, the *breakdown* of the conditions of order that the state was created to ensure and preserve justified international engagement.

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124. U.N. Secretary-General, Rep. of the Secretary-General on the Work of the Organization, U.N. DOC. A/46/1, at 5 (Sept. 13, 1991).

125. DENG, supra note 100, at 13.

126. HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 174–75 (2d ed. 1996) ("Sovereignty should be conditional upon performance . . . *judged by minimal international standards, including the provision of protection for basic rights*.") (emphasis in original).

127. *See* INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT ¶¶ 4.19, 4.20 (2001).

128. G.A. Res. 60/1, *supra* note 100, ¶¶ 138–39.

129. Francis M. Deng, *Frontiers of Sovereignty*, 8 LEIDEN J. INT'L L. 249, 265–73 (1995).

Deng's argument provides insight into the distinction between domestic crimes on the one hand, and the sort of conduct that violates the principle of sovereignty as responsibility on the other. An ordinary crime according to the Public Authority Account represents a challenge to the premise that the state secures our equality under the law.[130] The murderer replaces the state's rule for how we ought to treat one another with her own rule. However, this challenge to the state's public authority is addressed (and the legal order upheld) through domestic criminal law.[131]

In contrast, in light of Deng's comment, the conduct that violates the principle of sovereignty as responsibility might be seen to involve a failure of a particular state to act as a public authority *at all*. Crimes against humanity and war crimes, Deng suggests, involve the sort of conditions where the state's law fails to regulate relations among individuals in its jurisdiction altogether.[132]

This indicates why sovereignty as responsibility represents a global condition for the possibility of the state and for a world of states. It represents a minimum condition that an entity standing in the position of a state must meet to secure equal freedom among persons within its jurisdiction.[133] And thus, it represents a global condition necessary to ensure that *all people* in the world are located within the jurisdiction of *some* public authority securing their status as equal under law. A violation of this condition would be inconsistent with requirement that we all fall within the jurisdiction of a public authority; it would be a threat, in other words, to the universality of the system of states.[134]

As noted above, the logic of the Public Authority Account demands that the principles that animate how we structure relations in a state are consistent

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130. RIPSTEIN, *supra* note 34, at 308; Thorburn, *Criminal Punishment*, *supra* note 13.

131. *See supra* notes 38–47 and accompanying text.

132. *See, e.g.*, CRIDDLE & FOX-DECENT, *supra* note 71, at 37–38 (discussing sovereignty securing equal freedom as an aspirational goal, but one that suggests a minimum floor of obligation); Hodgson, *supra* note 71, at 125–26; Ariel Zylberman, *Human Rights and the Rights of States: A Relational Account*, 46 CAN. J. PHIL. 291, 309–10 (2016); *see also* WEINRIB, *supra* note 39, ch. 3 (discussing the minimum conditions of authority); RIPSTEIN, *supra* note 34, at 28 ("[T]he most egregious of these [regimes] are not even candidates for a united will, because their founding principles, such as slavery or genocide, do not create a rightful condition in which all can be secure in their rights."); Julius Ebbinghaus, *The Law of Humanity and the Limits of State Power*, 4 PHIL. Q. 14, 18–22 (1953).

133. Securing equal freedom in the state, however, is consistent with an expansive pluralism of political forms. *See* WEINRIB, *supra* note 39, at 16 & ch. 3. The concept of sovereignty as responsibility prescribes minimum obligations for all states. Nevertheless, these bare conditions are not a full response to the questions of how a just order ought to be structured. *See id.* chs. 2–3 (distinguishing authority and justice).

134. *Cf.* Zylberman, *supra* note 122, at 40 (arguing foreign states' concern with "flagrant and systematic violations of [human] rights" arises as "a necessary element of the state's generic duty to leave the international state of nature and establish an international rightful condition"). For a similar logic from a Republican perspective, *see, e.g.*, Pettit, *supra* note 68, at 71–72, 88–90.

with the free and equal status of *all* people, not simply those within a given political community.[135] Thus, the universality of the system of states represents a prerequisite for the conception of the state upon which the Public Authority Account relies.

B. *Conditions Precedent for the State*

We can now see that, when we recognize that the state does not exist in a vacuum, there are certain international conditions that must be in place to make the conception of the state upon which the Public Authority Theorists rely possible. As I have suggested, these conditions entail: (1) the consolidation of internationally recognized sovereign authority in territorial states; (2) the prohibition of war between states; and (3) that those entities claiming to be states meet the bare conditions of a legal order.

The Public Authority Account provides that the state functioning as a public authority is necessary to structure life among individuals in a way that respects our mutual status as equal persons. And the three organizing principles of the sovereign order offer the international conditions precedent required to make the state as a public authority, and a world of such states, possible.

Importantly, as the discussion above suggests, these principles serve this role *cumulatively*—each principle builds on the last, and each would be insufficient to constitute such a global framework without the others.[136] Together, these organizing principles offer the international legal conditions necessary to constitute free and equal relations within a given state and on a global scale.[137] This is true even of the organizing principles that initially seem deeply statist, such as the consolidation of sovereign authority in territorial states and the prohibition of war between states. States, based on this understanding, are not valuable unto themselves, but because of the conditions they create to secure the rights of individuals.

C. *International Criminal Law as Criminal Law*

We now have a sense of how the conception of the state on which the Public Authority Account relies might be possible, even accounting for the world beyond the state's borders. This provides a response to one of the two international challenges for the political theory accounts of criminal law.

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135. *See supra* notes 109–110 and accompanying text.

136. Here, I break with, and address ambiguity in, the extant law. There is some debate as to whether all three principles remain in force. For instance, some suggest that the prohibition on force has been *displaced* (rather than joined) by international human rights obligations. To the extent that the law is uncertain, the proposed theory gives us reasons to embrace a legal framework where all three principles remain in effect.

137. *Cf.* Dworkin, *supra* note 69, at 15–19 (suggesting the principles governing a legitimate international system of states ("the true moral basis of international law") involve the background conditions for the legitimate exercise of authority within those states).

However, we still lack an answer to the other international challenge: whether these accounts can make sense of instances of criminal law that are not anchored in a given state, such as international criminal law. Here, I take up this second question. As I explain, international criminal law might be understood as the legal framework through which we *uphold* the three international conditions necessary for the state and the system of states to function. It is this unique role that justifies the unusual breadth of authority to punish international crimes that is possessed by all states. With this argument in view, we can see that international criminal law is not only consistent with, but in fact is necessary for, the Public Authority Account of criminal law.

This becomes clear when we return to the connection between the system of states and each of the paradigmatic international crimes—piracy, waging interstate war, and human security crimes (genocide, crimes against humanity, and war crimes).[138] As we have seen, a system of sovereign states with each functioning as public authorities first requires that there are no legal "black holes" where individuals are subject to the private force of another unmediated by the legal order of a state.[139] This is precisely the phenomenon to which criminalizing piracy responds. What is distinctly wrongful about the pirate's conduct is that it entails coercive force over another person by a *non-state actor* who is acting outside of, and in denial of, the exclusive sovereign authority of states.[140] The pirate's actions deny international law's claim to determine how authority among persons of the world is distributed.[141]

Second, the system of sovereign states functioning as public authorities requires that states do not displace the legal order of other states by engaging in interstate force against one another.[142] This is where the crime of waging war comes in. What is distinctly wrongful about the general's illegal war is that it undermines the status of the targeted state as a public authority within its territory. The general's actions deny the premise that the world is organized among public authorities, each acting to secure the law among free and equal persons.

Finally, the system of sovereign states functioning as public authorities requires that each entity standing in the position of a state secure the minimum conditions of legal order.[143] This is what human security crimes address. What is distinctly wrongful about crimes against humanity or genocide is that

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138. *See supra* Part III.

139. *See supra* notes 113–117 and accompanying text.

140. *See*, *e.g.*, HALL, *supra* note 101, at 231. *See also* Liss, *supra* note 9, at 758–59.

141. One might then question why rebels and revolutionaries are not considered international criminals. Pirates and rebels differ in an essential way: Pirates deny the premise that authority is possessed exclusively by territorial sovereign states; rebels, on the other hand, want to be the sovereign state. Rebels do not challenge the premise that authority ought to be divided among territorial states, but claim to be the proper representative of one of those states. In this sense, rebels are not a challenge to the system of sovereign states, but a challenge within a sovereign state.

142. *See supra* notes 118–122 and accompanying text.

143. *See supra* notes 122–135 and accompanying text.

they deny the sovereign state's claim to function as a public authority securing legal order among equal persons at all.[144] Whether carried out by a state official or non-state actor, the accused challenges the state's legal order altogether. These actions, in short, amount to private force supplanting the sovereignty of the state.[145] It may seem odd to suggest that the wrongfulness of war crimes or genocide (or even illegal war[146]) is related to state authority rather than to the rights of individuals. In this respect, however, it's important to recall the nature of public authority on such accounts. Public authority is fundamentally about individuals; namely, it's about creating the conditions necessary for individuals to mutually realize their rights. An afront to the possibility of such authority, then, is not simply an attack on rights, but on the very possibility of rights.

International crimes are thus those actions that violate the international conditions precedent for public authority. Understanding international criminal law in this way can help us see why international criminal law might still be understood as criminal law even though it is not anchored in a single political community. In particular, it might explain why all states possess the authority to prohibit such conduct and to punish those individuals who commit international crimes. Here I provide only a sketch of what an explanation of this sort might entail. Yet this brief sketch helps us see where international criminal law might fit into a political theory of criminal law.

The Public Authority Account is grounded on the premise that individuals have a right and an obligation to structure their interactions with others through the state's public authority to ensure that their mutual equal status is respected. As individuals cannot otherwise act in a manner consistent with the equality of others, they are obliged to join together in a state. The conceptual necessity of the state's role mediating relations among equals is what justifies the existence of the state's authority, including the authority to punish.[147] This right and duty to secure relations among equal persons under law within a given state, however, could be understood as a particularized version of a cosmopolitan right and duty of the same sort.[148] Such a cosmopolitan

144. This character is demonstrated by the *mens rea* of these crimes. Establishing fault for war crimes and crimes against humanity requires proving that accused had *knowledge* of the very background conditions of lawlessness that render the conduct so problematic (the conditions amounting to an armed conflict or an attack on the civilian population) and intended to engage in the prohibited conduct under such conditions. Genocide requires that the accused *intend* to destroy a group as such, and thus entails an assertion that the state's legal order does not secure the status of members of an entire group of people.

145. This distinct character might be absent where the nexus state acts to prevent or punish the conduct. In such circumstances, the conduct might be better understood as a domestic crime rather than an international crime. *See infra* note 155 and accompanying text.

146. On increasing tendency to justify the criminalization of war on the basis of its negative affects on individuals (rather than states), see Liss, *supra* note 9, at 763.

147. *See supra* notes 38–47 and accompanying text. *See also* WEINRIB, *supra* note 39, ch. 2.

148. *See supra* note 110 and accompanying text.

duty would require that *all* persons (and *all* states) act in a manner that ensures that all individuals in the world are in a condition consistent with their status as free and equal persons. Just as one group of people have a right and duty to organize themselves in a state, so too do all persons have a right and duty to organize themselves into states and a system of states—as this is the only way we can interact with others on terms consistent with our mutual equality.[149]

This duty is ordinarily fulfilled by all persons living under a public authority, which possesses the right to reassert the rule of domestic law through criminal punishment within that particular community. However, when the system of public authorities itself is challenged, each public authority (or group of public authorities acting together in an international tribunal)[150] has a right to reassert the law on which each state is, and all states are, premised.[151] International crimes are those acts through which a person substitutes her own private rules for international law's public rules on how all people of the world can interact justly, and international criminal punishment offers the means through which the rule of law among people and public authorities is reasserted.[152]

The state's coercive authority over a given political community is justified as the only framework under which we can interact with others in a manner consistent with our equal status within the community.[153] And so too is the coercive authority of each public authority over all members of the global system justified in the narrow set of cases necessary to ensure that we can all interact in a manner consistent with our equal status on a global scale.[154] As

149. CRIDDLE & FOX-DECENT, *supra* note 71, at 114–15, 171–73.

150. *But see supra* note 76 and accompanying text (discussing the jurisdiction of such tribunals in practice).

151. Scholars have offered similar arguments to justify humanitarian intervention. *See, e.g.*, Zylberman, *supra* note 122, at 308–10; Hodgson, *supra* note 71. However, international criminal law provides a framework more consistent with global equal freedom under public authorities. While international criminal law subjects all individuals equally to the authority of public authorities (their own and all others), humanitarian intervention (especially unilateral humanitarian intervention) necessarily undermines the horizontal equality of public authorities, subjecting one state to the authority of another. On the uncertain legality of humanitarian intervention and distinction with UN-authorized intervention, see Oona Hathaway, Julia Brower, Ryan Liss, Tina Thomas & Jacob Victor, *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign,* 46 CORNELL INT'L L.J. 499 (2013).

152. *Cf.* Duff, *Crimes*, *supra* note 85, 143–44.

153. *See* Thorburn, *Criminal Punishment*, *supra* note 13, at 30.

154. This authority could be conceptualized in different ways. It could be conceived of akin to self-defense, wherein private actors take up public means where the state is absent. *Cf.* Thorburn, *Justifications*, *supra* note 31. On this view, we could think of individual states acting on behalf of some potential global public body that fails to act in the particular instance. Alternatively, we could think of the authority possessed by all states to secure these legal standards as conceptually necessary for a world among free and equal persons. On this latter account, states are not stepping in for an absentee global public body, but exercising the authority inherent in what it means to be a state in a world of states. *Cf.* Duff, *Crimes*, *supra* note 85, at 146 (discussing an "international public order" of a "community of nations").

Evan Criddle and Evan Fox-Decent have observed in a similar context, "not only are states commissioned to serve as fiduciaries for their own people, but they are also entrusted with authority to serve as joint fiduciaries of international legal order generally for the purpose of establishing a regime of secure and equal freedom for humanity as a whole."[155]

D. *International Criminal Law and the Political Theories of Criminal Law*

I have aimed to show how the conception of the state at the heart of the political theory accounts of criminal law might fit into a global context, using the Public Authority Account as an example. Through this example, I have also suggested how international criminal law might fit into a political theory of criminal law anchored in the state. While I cannot offer a full explanation here, a parallel argument could be made on the other leading political theory accounts of criminal law. These accounts are premised on the distinct role the state and its legal order play in organizing relations among persons. And such theories also necessitate the three organizing principles of the international order beyond the state's borders.

Let's very briefly consider this point. The Practical Precondition Theorists suggest that the state is necessary in a practical sense to facilitate terms of stable reciprocity. This premise seems to hold true when we consider not simply one political community, but all people of the world. It seems plausible that global interpersonal cooperation is best facilitated by a framework in which *all* persons are organized into law-enforcing political communities, rather than a condition where private, non-state force is permitted. If each political community is simply a reflection of this basic premise, the members of all states ought to see it as necessary to prohibit the sort of private force that denies the primacy of state authority—namely, piracy and human security crimes.[156] Moreover, it would seem difficult for the state to facilitate stable

155. CRIDDLE & FOX-DECENT, *supra* note 71, at 171–73. Thus, when non-nexus states (and their courts) prosecute international crimes pursuant to universal jurisdiction we should think of them as acting as public authorities of the international community of persons as a whole rather than as public authorities of their own polity alone. *Cf.* Miriam Gur-Arye & Alon Harel, *Taking Internationalism Seriously: Why International Criminal Law Matters, in* THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 215, 219, 226–36 (Kevin Jon Heller, et al. eds., 2020). Prosecuting international crimes where the state has a nexus to the crime might thus be understood as categorically different from universal jurisdiction. *See id.* at 229–30. Indeed, we might think of the prosecution of international crimes by foreign states or international tribunals as a second best alternative to the ordinary functioning of the nexus state itself. *See*, *e.g.*, Duff, *Crimes*, *supra* note 85, at 143–44.

156. If the state fails to protect certain groups under the law or is unable to enforce the law because of conditions such as armed conflict, its members do not have a basis to rely on its laws for stable reciprocity. Moreover, all political communities would seem to have an interest in ensuring that all individuals are organized among authoritative legal systems through which the people of the world all interact. Such a structure offers a degree of certainty about the rules that governs us all interpersonally.

terms of cooperation internally if foreign states could permissibly intervene using interstate force. In such a context, the state's laws and enforcement would no longer provide a reliable sense of what goes on within the state's territory. Thus, it would seem essential for all states to enforce a system of law that prohibits war. Such propositions represent practical claims about the conditions necessary to facilitate stable reciprocity among all individuals of the world.

The Republican Scholars suggest that the state offers a distinct framework to actualize our innate political selves and secure our civic equality. Again, this principle seems to pertain not simply to how a given group of people organize their relations, but how all individuals of the world ought to organize their relationships with others. For such conditions to obtain on a global scale, we must ensure that all individuals are located within *some* state and not subject to the private force of non-state actors (through piracy); that each state is subject only to the decisions of its members and not subject to arbitrary external force (through war);[157] and that all political entities of the world meet some absolute minimum standard for a legal system among equals—not engaging in or permitting mass rights abuses of their subjects (through human security crimes).[158] In this context, the enforcement of international criminal law might be understood to secure equal respect for all as persons, each with the right to live in a Republican polity realizing their status as equal citizens of that state.[159]

For each political theory account of criminal law, the state and its legal order play a unique role in organizing relations among persons, a role that is facilitated by domestic criminal law. And for each account, international criminal law offers a framework to secure the international conditions precedent for the conception of the state each account proposes.

V. THE LIMITS OF (INTERNATIONAL) CRIMINAL LAW

An important objection may have come to mind for readers about the account of international criminal law and the vision of the world I have sketched out thus far. This account seems, in no uncertain terms, to reify the state and our existing system of states. But what of the injustice that seems to permeate the function of the system of states on a practical level? And relatedly, how can the system of states and international criminal law offer a

157. *See, e.g.*, Pettit, *supra* note 68.

158. *Cf.* Yankah, *supra* note 34, at 470 (describing hate crimes as "the denial of another citizen's equal standing as a member of our civic community"). We could understand international crimes as denying citizens' equal standing on mass. A state that fails to respond to such acts would seem to fail to create a civic community of equals at all. *See also* Ekow N. Yankah, *Legal Vices and Civic Virtues: Vice Crimes, Republicanism and the Corruption of Lawlessness*, 7 CRIM. L. & PHIL. 61 (2012).

159. *See* Duff, *Crimes*, *supra* note 85; DUFF, *supra* note 3, at 156; *see also supra* note 85 and accompanying text.

framework necessary for global equal relations, reciprocity between persons, or equal civic flourishing, when the very creation of the system of state seems to have tracked the interests of, and domination by, powerful states.[160] The hegemonic origins of international law are manifestly evident in both the principles around which the system of sovereign states has been organized,[161] and the standards of international criminal law itself.[162] There is, thus, an important worry that, in endorsing a conception of international criminal law that aims to uphold the system of states, we might be entrenching these conditions.[163]

Two related responses to these concerns follow from situating international criminal law within the political theory accounts of criminal law. First, doing so helps us see that international criminal law itself is not able to address such structural injustice and historic wrongdoing. As is evident from accounts discussed in Part I, criminal law is best understood as aimed at the justice of *maintaining* society (maintaining a framework for equal freedom under the law, stable reciprocity, or conditions of civic flourishing), rather than the justice of *changing* society. We ought to see a framework of international criminal law as a necessary global condition to maintain the conception of justice each political theory account adopts, but we must look elsewhere when it comes to seeking to change the conditions of the global status quo.

On the other hand, however, criminal law is only justifiable (as the political theorists of criminal law make clear) on terms consistent with a broader theory of political authority—defined in accordance with the various theorists' favored view of the state's role. Consequently, within the state, the ultimate justifiability of criminal law rises and falls on the larger project of justice[164] and, with international criminal law, on a larger project of global justice.

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160. *See* discussion *supra* Part III.

161. I explore this point in depth elsewhere. *See* Liss, *supra* note 123*; see also* Kennedy, *supra* note 98, at 128 (regarding sovereignty in the Long Nineteenth Century); Phillip Marshall Brown, *The Geneva Protocol*, 19 AM. J. INT'L L. 338, 338–39 (1925) (regarding sovereignty in the Interwar Era); DENG, supra note 100, at 145–46 (regarding sovereignty as responsibility).

162. *See* Liss, *supra* note 123; *see also* ALFRED RUBIN, THE LAW OF PIRACY (2d ed. 1998) (discussing criminalization of non-Western powers via piracy); United States. v. ARAKI, Sadao, Judgment of The Hon'ble Mr. Justice Pal, Member from India (Nov. 1, 1948), *in* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL 809, 910 (Neil Boister & Robert Cryer eds., 2008) (critiquing the imperial nature of crimes against peace) [hereinafter "*Pal Dissent*"]. *See, e.g.*, Tor Krever, *Dispensing Global Justice*, 85 NEW LEFT REV. 67 (2014) (discussing contemporary international crimes).

163. A related concern arises from the selectivity and inequality built into the very structures of international criminal law. *See* Sarah Nouwen, *Legal Equality on Trial: Sovereigns and Individuals Before the International Criminal Court*, 43 NETH. Y.B. INT'L L. 151 (2012). As such selectivity reflects the inequality of the international legal order more broadly, the response proposed in this Part applies equally to this concern. Indeed, the account I have proposed gives us further reasons to find such selectivity deeply problematic for the legitimacy of international criminal law insofar as it is counter to the very justifying aims of the system.

164. *See, e.g.*, Chiao, *supra* note 35, at 153; CHIAO, *supra* note 5, at 32.

Thus, while international criminal law offers a necessary framework to *maintain* rightful conditions among persons around the world, it must be imbedded in a more radical project of global justice to address the injustice that got us here. Several scholars have argued that we should be wary of the tendency of scholars and officials to focus on international criminal law to the detriment of debate about larger questions of global justice.[165] The more pressing argument, however—as the political theory turn in criminal law makes clear—is not that international criminal law distracts from other "forms" of justice, but that it ought to be viewed *as part of* a broader project of justice.

Notably, the foundational injustice of the international legal order seems to flow in part from the historic *absence* of standards of international criminal law, rather than their presence. The account of international criminal law's role I have offered takes a world in which the three international organizing principles are all present as our starting point. But as noted in Part III, these principles emerged in a piecemeal fashion.[166] And their previous absence resulted in global injustice that permeates through international relations today.

This is seen most vividly with the prohibition on interstate war. It was the historic legality of interstate force and conquest, among other conditions,[167] that legitimated the colonial international legal order of the nineteenth and early twentieth century. Indeed, when the crime of waging war was first introduced in the wake of the Second World War, it was the prior legality of war that led critics to argue that this new crime aimed to entrench the interests of the powerful. This was famously expressed in the dissent of Judge Radha Binod Pal, the Indian judge on the post-war Tokyo Tribunal trying Japanese leaders for wartime criminality. As he stressed, in criminalizing war, the powers of the day sought to prohibit the very act that they had embraced to achieve their status as the leading (and often colonial) powers:

> Certainly, dominated nations of the present day *status quo* cannot be made to submit to eternal domination only in the name of peace. International law must be prepared to face the problem of bringing within juridical limits the politico-historical evolution of mankind which up to now has been accomplished chiefly through war. War and other methods of self-help by force can be effectively excluded

165. Frédéric Mégret, *International Criminal Justice: A Critical Research Agenda*, *in* CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW 17, 43 (Christine Schwöbel ed., 2014) ("[I]nternational criminal justice arguably has a role in the marginalization of other non-criminal forms of *international* justice."). A related critique concerns how international criminal prosecutions distract us from the structural violence that leads to criminal wrongdoing. *See, e.g.*, Tor Krever, *International Criminal Law: An Ideology Critique*, 26 LEIDEN J. INT'L L. 701 (2013); Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1120 (2015).

166. *See supra* notes 91–101 and accompanying text.

167. The terms of international legal order were also defined and applied in fundamentally exclusionary and unequal ways, facilitating colonial conditions. *See, e.g.*, ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

> only when this problem is solved, and it is only then that we can think of introducing criminal responsibility for efforts at adjustment by means other than peaceful.[168]

As Pal stressed, the conditions of colonization achieved through the prior legality of force remained in place. By prohibiting and criminalizing war, the leading powers were effectively locking in the status quo territorial division of the day.[169]

International criminal law was not able to remedy the harms of colonization that flowed from the prior absence of a prohibition on interstate force. Doing so required a parallel remedial project of global justice. And the absence of such a project, as Pal's dissent emphasizes, led to the potential injustice of enforcing a criminal prohibition on war in the interim. However, with the deeper global reform that resulted in formal decolonization,[170] the valence around the crime of waging war (now defined as the "crime of aggression") has shifted: It is now superpowers that chafe at its status as criminal, while independent former colonies and middle powers see the potential it provides to protect against domination.[171]

A comprehensive answer as to what a remedial project of global justice addressing the persisting harms of past injustice might entail is well beyond the purview of this article. However, one place to look might be international human rights law broadly defined. Patrick Macklem, for instance, has proposed a theory of international human rights law that is instructive for this context. As Macklem argues, the international human rights law framework—including not only traditional civil and political rights, but also economic, social, and cultural rights, labor rights, minority rights, Indigenous rights, the right to self-determination, and the right to development—offers tools to potentially remedy the wrongs resulting from the manner in which the world was divided into sovereign states historically.[172] If international criminal law is best understood as a framework that upholds and maintains the system of sovereign states, perhaps what is necessary is to imbed it within a project of justice that remedies the wrongs that instituting that system of

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168. *Pal Dissent*, *supra* note 162, at 910 (emphasis in original); *see also* Int'l Law Comm'n, Draft Code of Offenses against Peace and Security of Mankind, U.N. DOC. A/CN.4/SR.276, ¶ 27 (July 24, 1954).

169. *See* Brown, *supra* note 161.

170. *See* Liss, *supra* note 123. Decolonization, of course, did not remedy all of the harms of colonization. However, this example provides a sense of how international criminal law might fit into broader projects of global justice.

171. *See, e.g.*, Koh & Buchwald, *supra* note 96. Notably, the definition of aggression specifically excludes the actions of colonial freedom fighters and of those fighting other forms of foreign domination, with which Pal was concerned: G.A. Res. 3314 (XXIX), Definition of Aggression, Annex, art. 7 (Dec. 14, 1974).

172. *See, e.g.*, PATRICK MACKLEM, THE SOVEREIGNTY OF HUMAN RIGHTS (2015). The scholarship on global justice is vast; here I focus on Macklem's account because of the explicit connections he draws to the establishment of the system of sovereign states.

sovereign states involved.[173] International criminal law on the account I have proposed seems a necessary, but not sufficient, condition for a just world of states.

CONCLUSION

The recent shift in criminal law theory constitutes a key contribution to a centuries-old debate. The move to anchor questions of criminal law's legitimacy in broader debates concerning the justification of the state's political authority resolves many of the core shortcomings of the traditional moralist and utilitarian accounts of the past century. However, the tendency of proponents of this new line of criminal law theory to focus narrowly on the state raises new problems of its own. When we turn our attention outwards, it becomes clear that this line of thinking is deeply at odds with the standard picture of international criminal law, and that the conception of the state that the political theorists of criminal law propose may not be viable in a world of states and persons beyond its borders.

In this article, I have suggested that the resolution to both of these challenges lies in recognizing the problems with the standard picture of international criminal law. Contrary to what the standard picture suggests, international criminal law is neither untethered from the state nor at odds with state sovereignty. Rather, international criminal law, over the last two centuries, has served to secure and maintain the system of states. With this refined understanding of the role of international criminal law in hand, we can begin to see that international criminal law secures the global conditions necessary for the state (as conceived by this new line of criminal law theorists) to function. International criminal law, on this account, no longer seems to be at odds with a political theory of criminal law, but rather to be a necessary precondition for it. And the vision of the state on which this new line of criminal law theory is grounded no longer seems to be detached from the world beyond its borders, but rather it starts to look like a constituent part of a broader global system.

Nevertheless, I have suggested that the political theorists of criminal law offer an important lesson for our thinking about international criminal law. If criminal law is simply one aspect of a broader project of justice—the justice of the state's authority in the domestic sphere and the justice of the system of states' authority in the international—we ought to better situate debate regarding international criminal law's legitimacy within this broader project. We ought to recognize the limits of (international) criminal law and the need to pursue remedial projects of justice alongside the enforcement of the penal law.

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173. On a just international system as a historically contingent, but possible, aspiration, *see* KANT, *supra* note 70, at 491.