International Crimes and the Right to Punish

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Abstract. What can international courts say when criminals ask, by what right do you try me? Some authors attempt to draw a connection between humanity’s responsibility to call offenders to account and the harm humanity has suffered as a consequence of the offender’s crimes. Others have argued that there need not be a special connection between those calling to account and the offenders, as the right to punish offenders is a general right each and every person has. Both lines of argument are ultimately unconvincing. Instead, I argue for a modified version of the second position, which proposes a democratically based theory of responsibility for punishment held by international criminal law institutions.

1. Introduction

What can international courts respond when criminals ask, by what right do you try me? One of the main points of contention in the philosophical debate about international criminal law is the question what gives other states or international courts the right to call offenders to account. The question I discuss in this paper is what kind of relation constitutes a court’s right to punish offenders. While some argue that a special connection needs to exist for criminals to be even answerable for their crime before a specific court, others argue that the right to punish criminals is a general right each and every court—be it domestic or international—has in the first place. I am thus asking about the authority of legal-political agents who punish. The question of authority and punishment has become more acute recently, as international and transnational institutions gain more power and influence, forcing scholars to widen the focus of their research on legitimate authority to include nonstate

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1 In this sense, the scope of this paper is narrow, as I ignore other aspects of punishment, such as the justification of punishment and under what circumstances a person is liable to punishment. See Hill 1999 for a number of helpful distinctions. I thank an anonymous reviewer for pressing me to clarify this.
institutions. In this paper, I identify and discuss two main positions in the literature. Not only will this help us understand institutions’ authority to punish in general, but we will be able to see more clearly the justification for any nonstate institution’s right to punish. The first position argues that what gives persons or institutions the right to punish is a special relation constituted by harm. Call this the “special right hypothesis”: It derives the right to punish from the idea that those who suffered harm by the criminal are conferred a special right. The second position argues that no prior relation is necessary to allocate the authority to punish. Call this the “general right hypothesis”: It derives the right to punish from the idea that each person is permitted to punish offenders.

Both positions can be traced back to John Locke’s discussion of punishment. Locke is ambiguous on whether the right to punish is a general or a special right, and Locke scholars disagree about what type of right best characterises Locke’s “natural executive right.” Locke claims that persons are free in the state of nature, but they are not free to do whatever they please; the law of nature prohibits persons from committing suicide or killing others. Indeed, they must “preserve” themselves and others, unless they have “to do justice to an offender” (Locke 1963, bk. 2, § 7). Punishment is justified by the duty to defend one’s fellow humans against offenders that are dangerous to humanity. When a person transgresses the law of nature, she declares herself as living by rules other than the law of nature (which is the law of reason and equality) and thereby she becomes dangerous to others. Because every person has a duty to preserve humanity, transgressions of the law must be prevented, or at least minimised. Locke thinks that this can be done by punishing the offender, thereby deterring further danger to humanity (ibid., § 8). The nature of Locke’s argument is consequentialist, alluding to the defence of others for the justification of punishment: It is justified not in reference to self-preservation, but in reference to the preservation of all humanity (ibid., § 11). Simmons (1991, 330), however, notes that at other times, Locke seems to follow a different path to the justification of punishment. In those instances, Locke sounds as if the right to punish is not a general right possessed by all, but a special right created by the criminal himself, by having committed the crime. On this interpretation, the criminal’s right is “forfeited to or with respect to a particular party—namely, the victim of the crime. The victim is the only person with the right to punish, though he may, of course, enlist the aid of willing assistants” (ibid., 332).

The aim of this paper is not to show which interpretation of the natural executive right is correct. Instead, I show that both the special right hypothesis and the general

2 Wellman (2009, 420) notes that the question of authority and punishment—who may do the punishing—has been relatively neglected because “we tend to be unreflective statists”; that is, we simply assume that the normative reference for all political authority is the institution of the state.

3 A. John Simmons (1992, 87ff.) argues that the natural executive right can be interpreted either as a general right or as a special right.

4 Simmons emphasises that Locke’s main point is that one must preserve humanity (“mankind as a whole”) rather than primarily oneself. This means that not each and every person must be preserved in all circumstances, but that we are allowed to harm (or kill) others if humanity is thereby preserved (Simmons 1992, 48). This reconciles Locke’s idea of the fundamental law of nature—the preservation of persons—with his arguments on punishment.
right hypothesis encounter systematic problems when applied to international criminal law. I offer a democracy-based solution toward the end of the paper.

2. The Special Right Hypothesis

The special right hypothesis connects the right to punish to some kind of special relation between victim and criminal. There are two versions of the special right hypothesis: The first supposes that the person who suffered the harm by the criminal obtains the right to punish the criminal for her crime. The second version supposes that the crime harms not only (or foremostly) the victim but also the community that victim and criminal belong to. I begin with the first version and discuss the second version afterward.

According to the first version of the special right hypothesis, the special relation between victim and criminal is constituted by the harm the victim has suffered by the hands of the criminal. The right created this way gives the victim the standing, or the privilege, to retribute for the harm suffered. Murray N. Rothbard (1998, 85) defends such a view: He argues that there are only two parties to a dispute, the victim and the criminal. It is the victim’s special status as the one being harmed that gives her the exclusive right to press charges in the institutions of the state, like a court; but neither society nor some kind of prosecutor would have any right to do that in her place. As this is a matter between the victim and the criminal, why would any third party have the right to insert itself into this special relationship, depriving the victim of her prerogative to punish her tormentor?

The special right hypothesis has a number of problems that ultimately render it implausible. Wellman (2009, 425) points out that it creates the perverse incentive that a criminal can murder all of her victims to escape punishment. Rothbard replies that this problem can be solved by a provision that allows any person to state in his or her will “what punishment they should like to inflict on their possible murderers” (Rothbard 1998, 86). But such a provision is only a solution in a small number of cases, and does not fit many other cases. Take the example of a mass murderer: How do we mediate between the different wills of the victims? To be sure, the case of a mass murderer is unusual in the domestic criminal context. However, recall that the ultimate aim of this paper is to understand the right to punish beyond the state: In this context, mass murder or genocide is in fact an important issue to consider. By the very nature of international crimes, a large number of persons are victimised, and divergent wills about the proper punishment is more than likely.

Another problem is this: When the victim possesses the exclusive (special) right to punish, it must also possess the exclusive right to pardon and exempt criminals from punishment. This may lead to the fact that some criminals are never punished. This is unacceptable from a perspective of deterrence. What is more, it may allow irrelevant considerations to influence the outcome of the decision of whether a criminal is punished or not, and what her punishment will be. Those criminals with more bargaining power—in the form of money, for example, or threats—are less likely to face the consequences for their crimes, as they can influence the decision of the victims in their favour by bribing or blackmailing them. In some cases, then, economic advantages or unfair power balances are translated unfairly into liberty advantages. In both cases, this seems like the exact opposite of “doing justice”: Rather, it piles one injustice on top of another.
Lastly, granting the victims complete discretion about the punishment of criminals can also lead to unfairness vis-à-vis the criminals. Criminals have no idea what to expect for what crime because their punishment depends on the will of the victim, and punishments may be highly disproportional or vary widely. This problem could be alleviated by determining uniform punishments for specific crimes, so as to keep application consistent. But this leads to an awkward asymmetry, as it is unclear why victims shall not have discretion in deciding on the amount of punishment given to the criminal, but still retain discretion in their decision whether to punish the criminal at all. It seems that the more discretion a victim has toward the criminal, the more unfair can the criminal’s treatment be in relation to other criminals.

The last two problems I discussed go against the grain of what many see as two big achievements of modern law: equality before the law and legal certainty. But beyond this, many people share the intuition that something in the deeds of criminals concerns not just the victims, but everyone. This intuition lies at the core of the second version of the special right hypothesis. Notice that the harm relationship can be conceptualised not only between two persons—victim and criminal—but also between a person and a collectivity. According to this view, the right to punish is constituted by the harm that the community to which the criminal belongs has suffered in virtue of her crime. This version of the special right hypothesis is particularly fitting for explaining an international court’s right to punish. Larry May (2005) proposes a version of this hypothesis when he argues that some crimes “cross borders” and “harm the whole of humanity.” It follows that humanity (in the form of the international community) possesses the right to punish and is therefore permitted to pierce the sovereignty of states and punish criminals irrespective of their citizenship. Just as in the special right hypothesis version discussed earlier, the special standing required to have the right to punish is created by the harm done to the victim—only that, on this view, the victim is the whole of humanity.5

May argues that there are two principles that can normatively justify international criminal law. The “security principle” shows that state sovereignty has its limit where the security of the persons living in the state is threatened. If that is the case, the state has no claim to absolute sovereignty, and international bodies may in principle pierce the state’s sovereignty in order to protect the subjects. The security principle is a necessary, but not a sufficient, condition: Only the additional “international harm principle” can show why international bodies have jurisdiction over certain crimes. It does so by claiming that certain crimes are so egregious that they not only harm the victims, but are a harm to humanity as a whole. Here is a formulation of the harm principle:

To determine if harm to humanity has occurred, there will have to be one of two (and ideally both) of the following conditions met, either the individual is harmed because of that person’s group membership or other non-individualised characteristic, or the harm occurs due to the involvement of a group such as a state. [...] Only when there is serious harm to the international

5 It might be tempting to classify May’s view under the general right hypothesis, as he argues that the whole of humanity—in other words, everyone—has the right to punish perpetrators. But this would be a systematic mistake: It is not the scope of people who are permitted to punish that ultimately matters, but what originally constitutes the relationship between punisher and punished. In May’s case, this is the harm done to the whole of humanity; in the case of the general right hypothesis, no special relationship is needed—at least not originally.
community, should international prosecutions against individual perpetrators be conducted, where normally this will require a showing of harm to the victims that is based on non-individualised characteristics of the individual, such as the individual’s group membership, or is perpetrated by, or involves, a State or other collective entity. (May 2005, 83)

The argument is that prosecution is only justified when harm is done not only to the victims but to the international community (or humanity, as May sometimes also calls it); and crimes against humanity harm all of humanity and are therefore punishable by all of humanity. May defines harm as a setback of interests (ibid., 67), so he needs to explain under what circumstances humanity’s interests are being set back. According to May, there are two ways we can know whether the international community is harmed by a crime: The crime is either committed against an individual because that individual is a member of a specific group (e.g., Bosnian or Jewish), or it is committed by a state or collective entity. The harm principle can thus be satisfied either from the victim’s side or from the perpetrator’s side; there must always be a group standing behind the individual. May thinks that, ideally, both the victim’s and the perpetrator’s side exhibit this group characteristic, but he permits cases in the category of crimes against humanity even if only one of the sides fulfils the group condition (ibid., 83).

May (ibid., 85) claims that “[i]f an individual person is treated according to group-characteristics that are out of that person’s control, there is a straightforward assault on that person’s humanity. It is as if the individuality of the person were being ignored, and the person were being treated as a mere representative of a group that the person has not chosen to join in.” Massimo Renzo points out that it is unclear why only assaults because of nonvoluntary group membership—group-characteristics that are out of that person’s control—should constitute a crime against humanity. He argues that in a situation where a person who has voluntarily become a member of a group—like a church—and is butchered because of that, it is arbitrary to deny that this is also a crime against humanity (Renzo 2010, 273). Renzo’s point is a valid one, but may be averted by dropping the part about involuntary group membership in the definition. As far as I understand May’s position, nothing systematic hinges on it. But even so, the question is: Why should we, as members of humanity, be harmed by crimes committed out of group-based hatred, and not be harmed by crimes committed out of other motivations, for example, greed? Imagine a village that is located close to some site of exploitable natural resources. A paramilitary group wants to control and exploit this site of natural resources (to keep a steady influx of financial means within the group), and therefore massacres all the inhabitants of the village; killing them makes it easier to control the natural resource. The victims of the massacre are not targeted because of their group identity; rather, they are simply in the way. I find it hard to see how this can make a categorial difference to them being targeted because of their group affiliation.6

To better understand this difference, let us look a bit closer at the idea that a person’s humanity can be assaulted in the way May claims. His argument has the following structure: If a person is harmed because of her group-based characteristics, the perpetrator ignores her individuality. Not taking a person’s individuality

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6 Also note that the international harm principle would also apply to domestic hate crimes, as such a crime, on May’s principle, is clearly also an assault on their humanity.
seriously constitutes a harm to her humanity because the perpetrator attacks a characteristic that she shares with all, or many, others (May 2005, 83). Humanity, as a community, has an interest that its members not be harmed, so if one them is harmed, it constitutes a setback to their interests (ibid.). May is right in saying that a person's individuality is ignored when assaulted because of a group membership, but how does that translate into “an assault on her humanity”? It seems that what is primarily assaulted is the specific person, and in other cases the group that the person belongs to, because it can be perceived as a threat to that group. It is not clear what “assaulting someone’s humanity” analytically means. Moreover, non-group-based attacks also ignore a person's individuality, as it is not clear how a person's individuality is respected if she is randomly tortured or arbitrarily murdered. In both cases, the person has not been treated with the dignity and respect that she possesses in virtue of being a human—she is dehumanised. So why are humanity’s interests set back only when the victim is targeted as a member of a particular group?

Next, let us look at how the international harm principle can be satisfied from the perpetrator’s side. A crime can still be a crime against humanity even if the victims are attacked not because of their group membership, but because the perpetrators act as a group or on behalf of a group that is a state or a state-like entity. When justifying this part of the principle, May certainly cannot rely on the rationale he gives for the victim's group-based membership principle. It is unconvincing to argue that a victim's individuality is denied or that humanity is assaulted because the perpetrator acts on behalf of a group. So what is his argument? May argues that the involvement of the state (or a similar group) makes crimes systematic and invidious in their nature (ibid., 88). If a state is a perpetrator of violence, but at the same time is also the party that should punish its own violence, it is improbable that the crimes will be punished fairly. Also, if a group is involved as the perpetrator, the actions are not merely between two persons, but involve parts of the larger society acting as the criminal party.

While both arguments are plausible as they stand, they do not contribute to an explanation how the fact that a crime was committed by or on behalf of a group harms humanity. Both arguments may in fact speak in favour of conceptualising the right to punish not as a special right that only victims have, but as a general right everyone has. Notice that the first argument draws its force from the unacceptable consequences of giving the perpetrators the right to punish their own crimes. Quite rightly, May assumes that their punishment would not be fair, presumably because they would be underpunished. But giving the right to punish to their victims may very well result in an opposite problem, namely, that they will be overpunished. Viewed from this angle, the right to punish ought to belong to a disinterested or impartial party. Similarly, the second argument may also speak in favour of conceptualising the right to punish as a general right. When a group is involved as a perpetrator, and when this transforms the crimes from being between two persons into a matter between parts of the larger society, then it seems that not only the victims—however large that group may be conceived as being—have a right to be involved, but all of society.7

7 Massimo Renzo (2010) distinguishes another interpretation of May’s international harm principle, a consequentialist reading. I will not rehearse his arguments here, but he concludes that the consequentialist interpretation of the international harm principle is an equally implausible justification for the triggering of international criminal tribunals.
To conclude this section on the special right hypothesis, we can see that both in its individual and in its community application the special right hypothesis is problematic. In its individual application, it has a number of awkward application problems. In its community application, the special right hypothesis is problematic because it is unclear in what sense the whole of humanity is harmed.

3. The General Right Hypothesis

Recall Locke’s second argument, namely, that the natural executive right is justified because it preserves humankind. In that sense it seems that it is a general right, as opposed to a special right, that is granted in response to the harm inflicted. To put it more systematically, the general right hypothesis argues that in order for a right to punish to exist, no special relationship between the punishing agent and the criminal must exist. That is, the fact that a criminal has committed a crime is both a necessary and sufficient condition for any person to punish him or her. The general right hypothesis may sound odd at first, and many people find it implausible. Since my own argument in Section 4 rests on it, I discuss a few principled objections against it, before I go on and discuss Wellman’s and Luban’s version of it.8

David Lyons articulates the principled worry about the general right hypothesis in an article critical of Robert Nozick: He argues that it is simply “not generally accepted that I have the right simply to hurt another who has done something wrong, just because he has done it, where there is no special relation between us” (Lyons 1976, 210). He thinks that Nozick provides no argument that would get such a general right to punish “off the ground.” Of course, what he negates is precisely what the general right hypothesis is proposing; and for an argument to be true it is not a necessary condition that it be “generally accepted.” Even if he is correct in saying that Nozick fails to show why the general right hypothesis is plausible, we have seen above that Locke makes a powerful argument for it when he argues that it follows from everyone’s duty to preserve humanity in the state of nature. Avihay Dorfman and Alon Harel elaborate a similar point in a more complex manner. They argue that some goods—inherently public goods, as they call them—can only be produced by certain agents, and that punishment is just such an inherently public good. These goods hinge on the public nature of their provision and therefore must be provided by public officials (Dorfman and Harel 2013, 90). Because punishment has an expressive function, it can only be inflicted by an appropriate agent; otherwise it is merely and simply an act of violence, and not punishment:

[...] the private provision of “punishment” amounts to the mere imposition of pain and suffering by one private person on another and necessarily fails to convey condemnation for public wrongs. Instead, the person inflicting the sanction conveys his own judgement concerning the act, not that of the state, but his own judgement deserves no greater attention than that of the person who is subjected to the sanction. (ibid., 94)

I find no issue with their substantial verdict, but they seem to confuse two issues. It is true that the expressive function is constitutive of punishment, but it follows from

8 I am grateful to an anonymous reviewer for pressing me to consider these objections and for directing me toward the relevant literature.
nothing they say that, for that reason, private sanctioning cannot be punishment. Dorfman and Harel fail to show that the expressive function of punishment can only be satisfied when served by the state.\(^9\) To be sure, one can argue that private punishment is unfair, as one person’s judgement enjoys no epistemic superiority over another’s—a point I come back to in Section 4—but this argument is distinct from the question what conceptually counts as punishment.

Kit Wellman and David Luban defend a version of the general right hypothesis. In his “Rights and State Punishment,” Wellman (2009, 425) argues that he is inclined to think that in the state of nature, anyone may punish a criminal, and that the victim probably does not have a special standing to punish, although she is entitled to reparation. This means that the victim does have a right to punish, but only because everyone else has that right, too: In the state of nature, the victim has no exclusive right to punish. In fact, nobody does. But can the general right hypothesis explain the state’s (exclusive) right to punish? Locke solves the problem in the following way: Due to various problems of applicability, one of which is the problem of overpunishment,\(^10\) people in the state of nature have reason to consent to a state that possesses the exclusive authority to mete out punishment. This is one way to explain the transition from the state of nature, in which all may punish, to a condition in which the state has the exclusive right to punish.

Wellman chooses a different path to explain the state’s right to punish. In contrast to A. John Simmons (1992), Wellman thinks that institutions that punish are authorised not by the consent of the rule’s addressees, but by the institutions’ extraordinary capacity to realise the aims of punishment, combined with the importance of the aims of punishment. In his view, the primary aim of punishment is deterrence: Not only is this the most important aim,\(^11\) but the capacity to deter future crimes is also sufficient in terms of justification (Wellman 2009, 428 n. 10). His justification of the authority of state punishment thus consists of one normative claim—that the aims of punishment are of utmost importance because they protect the rights of innocents—and one empirical claim—that the political institution of the state is uniquely capable of realising the aims of punishment. In analogy to Locke, Wellman argues that the reason for this is that “only in a system with an authoritative body which makes, enforces, and impartially adjudicates promulgated rules” (ibid., 428) can the important aims of punishment be realised. Taken together, these two claims yield the result that the state has the exclusive right to punish. Note how the authority of institutions that punish is justified by their instrumental value: They are only justified in punishing if it is in fact true that they are better capable of realising the aims of punishment—better than, for example, a private system of 

\(^9\) I agree with their point about the violation of dignity of the criminal if private persons are permitted to punish, although I am more worried about relational equality than dignity (see Section 4).

\(^10\) The problem of overpunishment is the problem that a criminal would potentially be punished endlessly if everyone had the right to punish her (see, for example, Lyons 1976, 210).

\(^11\) Nevertheless, he thinks there are other aims of punishment that we might want to include in the justification: Punishment “(1) serves justice by giving criminals the hard treatment they deserve, […] (3) helps to morally educate both the criminal and society at large, (4) allows society to express its moral values, (5) helps restore the victims along with their friends and families, and, finally (6) provides an effective, peaceful outlet for socially disruptive tension” (Wellman 2009, 427ff.).
punishment. What makes political institutions better at serving the aims of punishment? They have an institutionalised distribution of role obligations and a systematic procedure for processing claims; they are more impartial, and thus more fair, than any uncoordinated system of punishment. This is why “the state violates no rights in assuming executive control over the punitive process only because it is uniquely capable of adequately realizing the morally significant aims that a system of punishment can achieve” (ibid., 439).

But the fact alone that political institutions are better at realising the aims of punishment does not suffice to show that they also have authority: Just because someone is better at doing a job does not mean that that person has authority over it. Wellman (ibid., 429) illustrates the objection with the following example:

The fact that others could do a decidedly better job of tending my garden or decorating my house does not give them the right to push me aside and take over these projects [...]; we recognize that each person’s moral dominion over her own life gives her the right to manage her affairs even when others might do so better.

But, he argues, tending a garden and securing innocent people’s rights differ because the former is relatively unimportant, whereas the latter is of profound importance. If the aims of punishment were not executed by a political institution, the consequences of a system of private punishment would accumulate and finally result in everyone’s fundamental human rights going virtually unprotected. The gravity of the consequences and the fact that not only my human rights go unprotected, but yours too, gives states the permission to rule authoritatively over matters of punishment. Compare Wellman’s justification of punishment with Simmons’s. Wellman adopts Simmons’s argument from Locke, but he diverges from it when it comes to the standard of why a political institution has authority. While Simmons sticks to his “Lockean guns” (Wellman 2009, 427) and argues that only the consent of the governed can generate a legitimate political authority, Wellman believes that the importance of the aims of punishment, in combination with the precariousness of a situation without political authority, can functionally substitute consent as the normative principle that closes the normative gap between the fundamental liberty of persons (expressed as the prohibition on interfering with their actions) and the coerciveness of political authority. It is important to understand how Simmons and Wellman differ here: Simmons chooses a voluntaristic path, one that explains how a particular institution gains authority, but also one on which he ends up concluding that no existing state has the exclusive right to punish that it claims to have, because there is no state in which citizens have consented to it. Wellman wants to avoid this conclusion and therefore leaves the voluntaristic path, invoking considerations that refer to the dangerous consequences of leaving punishment in the hands of private individuals, and justifying a liberty right of the state to coerce its constituents to do what is necessary to save others from those dangerous consequences.

Wellman’s argument about state punishment extends naturally to international institutions that punish. Wellman combines his view about punishment with a specific, “post-Westphalian” view about the legitimacy of states: States are only legitimate when they reach a certain threshold of human rights protection. When they fail to achieve this threshold—they fail to do a good enough job—they lose the right to govern their internal affairs exclusively (Altman and Wellman 2009). If one accepts
this post-Westphalian view, one might wonder whether once a state loses its right to govern its internal affairs, the right to punish would fall back into the hands of the citizens (who are then permitted to execute the punishment of those who are guilty of international crimes). But the same reasoning that justifies states to be the exclusive punisher applies to international institutions. Wellman’s argument is that they are more effective and fairer than private individuals—in terms of distributing the burdens justly—in punishing those criminals. Only when an authoritative body makes, enforces, and adjudicates the rules, can the danger of chaos and of descending into a “horribly dangerous mess” (Wellman 2009, 428) be averted. Because authoritative institutions are uniquely capable of realizing the aims of punishment, and because these aims are so important for the cumulative security and rights-protection of persons, those institutions may coercively impose their authority on everyone. In fact, they may even help themselves to private property to fund their “Samaritan” punitive activities. Notice how Wellman counters the objection he pointed out earlier: It is the extreme importance of the aims of punishment that gives international institutions exclusive authority to punish, even though, normally, authority cannot simply be given to any institution without consent. Because things could go so terribly wrong if the right to punish remained general and thereby competitive, the authority of institutions that punish without consent is justified.

But even the importance of the aims of punishment cannot, I argue, explain the authority of international institutions. By arguing merely from the importance of the aims of punishment, Wellman leaves open a normative gap that Locke, Simmons, and Nozick notice, namely, how we explain that a particular international institution obtains the exclusive right to punish. In Wellman’s argument, it seems that the institution (or institutions, since there could be several legitimate institutions) most capable of realizing the aims of punishment gain the right to punish. This leads to two problems. First, Wellman ignores that there is likely to be deep disagreement about how best to realize the aims of punishment, and that more than one institution might claim the exclusive authority to prosecute in a particular case. This may lead to conflicting authority claims, thereby defying the very aim of assessments of legitimate authority, namely, to guide and coordinate the behaviour of those who are subject to it—even if they disagree about the particular directives in some cases (or, in Joseph Raz’s words, giving the authority’s subjects content-independent reasons to comply with the authority). And even if there are no competing authority claims, the idea of assessing authority claims based on the capability of institutions leads to a second, practical problem: If each subject evaluates the actions of the institution from his or her standpoint, complying only when the actions are perceived to be effective, the point of having authoritative institutions is largely defeated. As I argued above, having authority means that subjects comply for content-independent reasons. In other words: In the face of disagreement (either because authority claims conflict between different institutions, or because subjective assessments about the institution’s capacity to deter vary), we need some kind of meta-argument that

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12 Wellman’s argument fits in with his Samaritan approach to political legitimacy in general: See Wellman 1996, 2001.
13 I thank an anonymous reviewer for pressing me to clarify this matter.
indicates which institution is ultimately authoritative, even if we disagree about its particular actions.14

One way for Wellman to respond to this challenge is to argue that the institution that is already established or which has de facto authority should then be one that has normative authority. But such a reply confuses normative authority with empirical authority. Wellman would make a category mistake if he said that the institution that has the power to coerce subjects under its authority is the one that subjects should obey. Such an argument seems to be of the wrong kind if we want to know what gives an institution a normative claim to authority. This is not to say that the effectiveness of an institution—its factual capacity to coordinate action—plays no role at all in the assessment of its right to punish. But relative power cannot be the only relevant criterion for choosing which institution has the right to punish. This argument is particularly problematic when applied to international institutions. Given that international institutions are relatively powerless vis-à-vis states—they depend on states’ political and financial goodwill to exercise their given function—such a power-based argument would mean that institutions beyond the state would never acquire any legitimate right to punish.

David Luban’s (2010) fairness argument may be seen as a viable alternative to Wellman’s view. He argues that the authority of international criminal law institutions is based upon the fairness of the procedures and the punishment that they deliver. When tribunals strictly adhere to high standards of what Luban calls “natural justice”—among them the right to a speedy trial, the right to offer a defence, to be informed of the charges, and to confront witnesses, and the ban on double jeopardy15—then a particular institution gains (or self-generates) the right to punish. Vigilantes, the Rolling Stones, and the World Chess Federation may in theory have a right to punish international crimes, but the practical issues that arise for institutions under such stringent procedural fairness requirements will ultimately exclude all but internationally authorised tribunals (ibid., 580).

But the objection I levelled against Wellman’s argument applies to Luban, too. The point of having an institution is that it coordinates action in the face of disagreement: While fairness indeed seems to be a necessary condition for having a right to punish, it does not suffice as an indicator if we want to know which institution has criminal jurisdiction when we disagree about the quality and criteria of fairness. I believe this objection underlies the point that Antony Duff makes in response to Luban. He argues that “the legitimacy of that process depends both on its procedural fairness, and on the court’s authority to call the defendant to answer; a deficiency in one of these dimensions cannot be compensated by adequacy, or even perfection, in the other” (Duff 2010, 592). Grounding an institution’s right to punish in its capacity for procedural fairness gives us one criterion for evaluating an institution’s authority, but Luban’s proposal fails to supply us with a connection between the general right to punish and a particular institution’s right to punish.16

14 I say “ultimately authoritative” because, of course, there could be several institutions that punish; however, there needs to be one ultimate authority which decides in case of conflicts and disagreements between those institutions.
15 For the full list, see Luban 2010, 579.
16 For an argument critical of Duff’s insistence on the relational authority of courts, see Gardner 2011.
To summarise what I have argued so far: The general right hypothesis, as it is put forward by Wellman and Luban, leaves open a normative gap between the general right to punish and the particular institution that has the right to punish. In the next section, I discuss how this normative gap in the general right hypothesis can be filled by a democratic decision-making principle.

4. The Democratic Extension of the General Right Hypothesis

How do we fill the normative gap I described above? In this section, I present and discuss a democratic extension of the general right hypothesis. Taking note of all the practical issues that the general right hypothesis results in, Robert Nozick (1974, 139) concludes that there “seems to be no neat way to understand how the right to punish would operate within a state of nature.” One way to solve the practical issues is to interpret the general right to punish not as a general right each individual holds, but as “a right (the right to determine the punishment) possessed by people jointly rather than individually” (ibid., 139). The claim I defend in this section is that the most straightforward way to realise such a collectively held right is by constituting a common international institution that enables states to seek to mediate their disagreements about the institution's design and the specification of its competence; and further, that it ought to do this by establishing procedures of democratic institutional decision-making. Such a proposal differs from the idea that authority is based on consent: A right to punish, collectively held by all, means that no consent is necessary for an institution to claim authority. Rather, the idea is that we can vindicate our collectively held right to punish in the form of an authoritative international

Thomas Christiano (2012) defends a consent principle for the legitimacy of international institutions. Democratic states, so Christiano’s argument goes, possess democratic legitimacy and are in that sense accountable to their citizens. International institutions obtain authority over a given field of policy when democratic states have consented to them. Christiano defends a complex notion of consent that alleviates many of the problems a simple notion of consent encounters. In Christiano’s theory, state consent is heavily bounded: States cannot withhold consent without good reason, and they are morally required to cooperate when it comes to dealing with what Christiano calls “morally mandatory aims” (which, for now, can be assumed to include the prosecution of international crimes and the realisation of the aims of punishment). Refusal to enter into an agreement can only be justified when it comes with an adequate explanation, for example that some alternative arrangement is superior. Such an explanation ought not to be irrational (going against the vast majority of scientific opinions), unscrupulous (refusing to do one’s part in realising morally mandatory aims), or morally self-defeating (defeating a coordination solution that would advance everyone’s aims by insisting on a different coordination solution) (Christiano 2012, 389). States that cannot produce an adequate explanation for their refusal to tackle morally mandatory aims cooperatively may be subjected to sanctions (ibid., 389). Besides all of this, complex consent is also bounded by jus cogens (ibid., 387ff.). Notice that when we follow the consent model we are not morally required to follow one particular institution’s directives. The complex consent principles ensure that states that disagree about how best to realise morally mandatory aims can consent to and follow different institutions. This leaves room for some experimentation, in different regional forums, for example. But it does not entail the same problems that Wellman’s argument did, as once an institution is consented to, it has authority, even in the face of disagreement about any particular course of action.
criminal court, provided that all that hold the right are democratically integrated into the institution.\textsuperscript{18}

This might sound surprising at first: It seems counterintuitive to defend a democratic principle for the authority of a court, of all things. But consider this: Courts operate under the circumstances of disagreement, and they not only apply law, but necessarily make law. Armin von Bogdandy and Ingo Venzke (von Bogdandy and Venzke 2014) have convincingly shown that international courts are mischaracterised when their function is merely viewed as the discovery of predetermined law, rather than the making of law. Applying the law necessarily requires interpretation and further development of the law. That is why judges, too, inevitably contribute to developing the law. The cognitive paradigm—that is, the view that law is discovered by courts, rather than made or developed by them—is an untenable position, not least because the vagueness of much international law compels judges to evaluate and interpret, rather than merely apply, a norm. This is specifically observable in cases where courts have to interpret terms like adequate, necessary, proportional, or appropriate. But beyond the often extensive scope of interpretation of those standards, judicial judgements themselves can be utilised as an argument within the legal argumentation of another case. Earlier judgements shape the future development of law significantly, and even more so when there is no legislative body that develops statutes. Past judgements generate legal normativity—and hence make or develop, rather than “discover law” (ibid., 136ff.).\textsuperscript{19} Whatever one thinks of the desirability of this kind of generation of legal normativity, von Bogdandy and Venzke make it clear that judicial lawmaking is inevitable.

Accepting this point as an empirical fact, I argue that where judicial lawmaking is indeed inevitable, we should encourage mechanisms that facilitate its democratic accountability. But on the other hand, judicial lawmaking can be constrained by empowering political lawmaking. One of the reasons why this kind of judicial lawmaking is especially prominent in international law is that international courts are only loosely connected to legislative bodies, and sometimes not at all. Instead of embracing judicial lawmaking fully, we ought to encourage a closer relation of international courts to legislative bodies. In line with these observations, I propose a two-pronged approach. Legislative assemblies specify the laws of international criminal law and thereby reduce the need for judicial lawmaking. Additionally, principles of democratic accountability can make what happens in court more accessible to interested individuals in the public. Both mechanisms ensure and deepen the democratic authority of international institutions that punish international crimes.

\textsuperscript{18} Effectively, this amounts to an institution with authority over all states—irrespective of whether they have consented to the authority or not—but only under the condition that all states in turn have an equal say in the setup and running of that institution.

\textsuperscript{19} Judicial lawmaking is best described with the term “legal development” because it continually has to refer to past legal and judicial decisions, and has to consider that their judgement in turn will be used for future judgements (von Bogdandy and Venzke 2014, 147ff.; Schauer 1987). Von Bogdandy and Venzke argue that unlike political lawmaking, judicial lawmaking depends not solely on voluntas, but also on ratio (ibid.): While legislative assemblies enjoy a much greater scope of liberty and creativity when it comes to law, judicial lawmaking is more limited.
Why is democratic decision-making valuable? Recall that the reason I am discussing this is that we require procedures that help us make decisions in the face of disagreement about authority. So the question is: What kinds of principles should these procedures embody? What values are important when we are trying to find procedures that help us decide on a course of action when we disagree about questions of criminal justice? The argument I am advancing is that if there is disagreement about what constitutes justice, the only way in which institutions that apply to us are also binding on us is by placing them under the equal control of their subjects, thereby preventing unequal power relations that allow more powerful actors to treat less powerful actors unfairly. Political structures that realise this interpretation of equality are marked by an egalitarian distribution of political power and the absence of the permanent threat of subjection. Nonsubjection requires not only that parties have roughly equal power, but that the parties be committed to having equal power—for example, that parties not rely on unequally distributed power advantages and exploit those who are at a disadvantage (Viehoff 2014, 356). The idea that the parties are committed to having equal power naturally explains why the parties have reason to “play by the rules”: Being committed to distributing control over institutional relations equally presupposes that other parties are being taken seriously as equals—and that their decisions are as much a reason for action for oneself as are one’s own decisions. The idea of nonsubjection, or equal control, does imply that the autonomy of states—understood as the freedom to act—can be diminished, specifically when others make a collective decision that the individual state then has to accept, as is the case with majority voting. Those in the minority have to act against their judgement or interest, and are thereby restricted in their autonomy.

How can we translate the value of equal control into the institutionalisation of international criminal law? Political representation is likely the most important avenue for ensuring equal control over an institution. This mode has been extraordinarily successful in establishing stable and reasonably democratic institutions. Beyond the state there are two avenues to political representation: The first is direct parliamentary representation of individuals, and the second is indirect representation of individuals through representatives of their states. Direct parliamentary representation has the advantage of circumventing the problem of having to treat states as one agent with one representative: What conditions need to apply so that the state’s representatives really are representative of individuals within the state? That is why at first glance, direct parliamentary representation of individuals seems obviously better in terms of its democratic credentials. But there are two reasons that speak against individual parliamentary representation. The first one is mentioned by Philip Pettit. He argues that criminal law legislation is regularly driven by an “outrage dynamic” that explains, for example, why heavy sentencing is so resilient (Pettit 2002). To be “tough on crime” pays well with voters, but might often not lead to reasonable criminal law. The main reason he identifies as working in favour of this dynamic is the combination of a sensationalist media and the occurrence of terrible crimes. How far is this dynamic at work in the context of international criminal law? This is inevitably speculative, but it is certainly true that international crimes are particularly outrageous; this point needs no labouring. It is also true that indignation about crimes seems to be amplified when the defendant is not perceived as “one of us”—and this does not even have to be an “us” that operates in terms of nationality, but simply “us, the moral people.” Pettit argues that “few of us would
want the criminal justice system to be shaped by the outrage dynamic” because the only thing it surely does is to satiate those who think of criminal law mainly as an avenger. Those who are concerned about the degree and kind of punishment, or about the relative levels of punishment that are allocated across crimes, or about the effects of punishment on defendant and victim—and here we can add concerns about reconciliation and democratisation in war-torn regions—have a good reason to avoid the outrage dynamic that leads to unreasonable legislation (ibid., 440ff).

So it is possible that the outrage dynamic is reproduced internationally within an institution that features representatives that are directly elected by individuals. This is a problem caused by the specific features of the kind of wrongdoing that criminal law is supposed to regulate. But there are other, more general problems of representation of individuals that presumably apply to legislation in international courts, too. One of them is a problem of representation that Christiano (2008, 288ff.) calls the problem of persistent minorities. The problem of persistent minorities is that “the minority rarely gets its way on any of the properties of the common world it shares with the majority” (ibid., 290). It is important to understand that the problem of persistent minorities does not arise out of dysfunctional democratic institutions, but may well appear within democratic institutions that function reasonably or even very well. It simply is a structural problem that comes with democratic decision-making procedures, and especially majority voting. There is reason to believe that the problem of persistent minorities is acute for international criminal law: There could be, for example, a group that is spread out among two or more states and whose interests are therefore nowhere substantially represented.

We must take all of those problems into account, and try to mitigate them institutionally where we can. I propose tying supranational democratic procedures in with national democratic procedures by creating a legislative assembly, where representatives of states deliberate and decide on matters of international criminal law and its application, as well as on the institutional design of the court.20 Such a law-making institution does not necessarily have to take the form of a world parliament. Rather, the legislative assembly can be formed with the limited assignment of making law only for the policy area of international crimes and punishment.21 To ameliorate the persistent minority problem, one may introduce a system that includes representatives of such minority interests into the legislative assembly. In response to the outrage dynamic problem, Pettit makes a proposal for the domestic sphere that might be interesting for international institutions, too. His solution is to create a democratic body that operates “at arm’s length” from parliament, but stands under

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20 Reidar Maliks (2014) argues for such a legislative assembly for international human rights courts on the basis of Kantian theory. He claims that courts themselves do not have to be democratic, because judges are supposed to apply the law, not make it. However, because international human rights law is ambiguous and needs to be dynamically developed, the “solution, on the Kantian view is to develop international lawmaking institutions to match the courts, thereby decreasing the likelihood of a situation where courts faced with entrenched law cross the line from application to legislation” (ibid., 168).

21 Notice that such a legislative assembly exists in the form of the assembly of state parties that is part of the International Criminal Court. Meeting once a year, the Rome Statute gives them, among other functions, the function of considering and adopting the recommendations of the preparatory commission concerning rules and procedures, elements of crime, and financial regulations.
their control, consisting of parliament-appointed experts. Such a penal board or commission helps keep in check the consequences of the outrage dynamic, since it does not face the same pressures as democratically elected representatives—who might have to seek re-election—and can therefore operate more independently. It can be entrusted with representing states or other entities that might require special representation within the legislative assembly of the international body. To worries that such a penal board or committee is democratically unacceptable Pettit replies that there are two desiderata, of which only one is desirable in the name of democracy. This is the desideratum that the electorate should be the ultimate arbiter of policy and thereby have ultimate power. The second—questionable—desideratum is that the electorate should be the proximate source of policy (Pettit 2002, 448). It would be nothing short of “rank populism,” Pettit argues, to think that democracy is only satisfied when the electorate is the proximate source of policy. A penal board that operates close to and is controlled by an elected parliament fulfils the reasonable desideratum that the electorate should be the ultimate arbiter of policy.

Now we have an idea how to connect national parliaments through a penal commission to the legislative assembly, but von Bogdandy and Venzke (2014, 210) argue that political representation is not the whole of the democratic idea. Instead, they argue that courts can “earn” their own democratic legitimacy by using strategies like transparency, victim participation, and dialogue (ibid.). In principle I agree with their line of thought, although I think that the democratic potential of a politicised court as they propose it is more limited than they seem to think. Moreover, as von Bogdandy and Venzke concede, politicising what happens in the courtroom cannot replace political lawmaking by a legislative assembly. In that sense, what von Bogdandy and Venzke prescribe is better described as democratic accountability. The main function of principles of accountability is not to make courts more democratic in the representative sense, but to prevent courts from overstepping the boundaries of their judicial function, make sure they function properly, and take everyone’s interests into account as best as they can.

There are several means that can increase the courts’ democratic accountability vis-à-vis individuals. The key to these means is transparency, publicity, and deliberation and dialogue (ibid., 210). A prior condition for activating these three modes of accountability is thus increased politicisation (ibid., 154). *Politicisation* is a term that describes the transposition of a previously unpolitical matter into the field of politics. The facilitation of social awareness of international institutions, its discussion within a political context, and the mobilisation of demands, judgements, and interests relating to the institution, often through transnational interest and pressure groups or NGOs, are indicators of politicisation (Zürn, Binder, and Ecker-Ehrhardt 2012, 77). Although an increase in politicisation ultimately has to come from the global public itself, courts can facilitate such processes institutionally. This would make the process of politicisation a process of mutual reinforcement: The stronger the facilitation of the politicisation process by means of institutional increase of accountability, the stronger the politicisation, which in turn then reinforces the need for democratic accountability.

Here are some examples how: Transparency in the courts’ legal reasoning—the clear presentation of assumptions, principles, and objections—allows for increased public engagement with the courts and its decisions. Beyond that, the principle of collective judicial responsibility (*Kollegialprinzip*) requires that judicial decisions be
justified to the collegium, that is, to the other judges on the bench. This requirement ensures mutual control and accountability (von Bogdandy and Venzke 2014, 268). Dialogue and inclusion of affected and interested individuals—for example, victims or their families—can also make courts more accountable to individuals. A paradigmatic example of this is the calling of victims and kin of victims as witnesses who are given space to share their story. The inclusion of nongovernmental advocacy groups, for example in the role of an amicus curiae, can also help to increase accountability to the general public. NGOs can and do act as intermediaries between international courts and interested persons in civil society. Besides enabling individuals or groups to participate in the court, they pool expertise and information, and can represent the interests of minorities or groups that are not sufficiently represented through their state (ibid., 211). Additionally, outreach programmes, such as the ones maintained by the International Criminal Tribunal for Rwanda and the International Criminal Court help to make the court’s proceedings more accessible to interested and affected parties (Glasius 2012, 50). Lastly, the publicity of trials, their physical accessibility to individuals and their radio and Internet broadcasting can connect individuals with what happens in the courts, increasing interest from and accountability to the public. Especially in regard to this last mechanism it is important to take great care to make sure that the mechanisms are accessible to everyone. Those who have a special interest in these procedures are often those who have been victimised, and those who have been victimised sometimes have been victimised because they have been an “easy target” and especially vulnerable. So it is important that participatory mechanisms reach those individuals, too; their exclusion would be particularly tragic.\footnote{Many of these suggestions are already incorporated in the operations of the International Criminal Court and of international criminal tribunals: Victims are called as witnesses, outreach programmes are maintained, and civil society is (cautiously) involved in the form of \textit{amicus curiae}.}

Von Bogdandy and Venzke also propose a politicised appointment procedure for judges. Although they reject the idea that judges should run for office and stand for public election, they argue that a democracy-based approach to selecting judges is possible when aligned with parliamentary deliberation. The parliamentary selection of domestic high court judges could serve as a model here, as this avoids betting solely on the wisdom of governments in the selection of judges. This proposal aligns well with Pettit’s parliament-appointed penal board proposal I argued for in the previous section. Recall that such a board can be independent, but still be under parliamentary control. Additionally, international institutions can contribute to the procedure by publicly specifying the criteria for judges and “promoting a discursive engagement” about the candidates (von Bogdandy and Venzke 2014, 170). While these measures cannot replace political representation and lawmaking, they can deepen democratic legitimacy.

5. Conclusion

My aim in this paper has been to show that some kind of democratic connection is necessary if we want to argue that a particular international institution—and political institutions in general—have a right to punish. Given the problems that
arise from the general right and special right hypothesis, I have argued for a democratic extension of the general right hypothesis. An institution gains the right to punish when it gives its subjects some sort of equal political control over the institution, thereby vindicating their collectively held general right to punish. I have proposed a two-pronged approach to ensure the realisation of equal control: First, I suggest supplementing the court with a legislative assembly that represents states and, if applicable, minority groups that have no national representation. The second suggestion I make is to increase democratic accountability to individuals from within the court. Because some degree of judicial lawmaking is inevitable, democratic control requires a variety of mechanisms that ensure that judges and court officials are accountable to the public.

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