The Common Core between Human Rights Law and International Criminal Law: A Structural Account

Abstract

Legal scholars and theorists have recently drawn a more sustained attention to the link between international human rights law (hereafter, IRHL) and international criminal law (hereafter, ICL). This concerns both positive and more normative accounts of the link. Whether positive or normative, however, the predominant approach to constructing the link is *substantive*. This approach identifies some human rights violations as constituting potential international crimes. This overlap is normatively justified in similar terms by reference to a sub-set of moral human rights. As such, the substantive approach concentrates on the right-holders and the harm committed to the victims of the violations to build the common core between IRHL and ICL.

In this paper, I offer an alternative to the substantive approach. After having identified two flaws in the substantive approach (the problem of *threshold* and the problem of *ethical neutrality*), I defend what I call a *structural* account by focusing on the duty-holders of IHRL and ICL. Instead of focusing on the limited overlap between ICL and IRHL provisions (as positive legal scholars tend to), and instead of using substantive moral reasoning to specify this overlap (as normative theorists tend to), I start by reconstructing two structural characteristics that are common to IRHL and ICL *qua* international legal regimes: *who* has the authority to address violations of IRHL and ICL, and *who* can be liable for those violations. I then infer that *public authority* (functionally construed) constitutes the common core of IRHL and ICL. I rely on the extra-territorial application of IRHL and on the collective dimension of ICL violations to further support the argument. I finally offer an argument explaining the normative point of those structural features. I hold that IRHL and ICL (their adjudicative and liability regimes) are both necessary (but clearly not sufficient) to render this exercise of public authority legitimate to its subjects.

1. Introduction

Legal scholars have recently drawn a more sustained attention to the link between human rights law (hereafter, IRHL) and international criminal law (hereafter, ICL). One predominant approach to this link is to identify the overlap that may exist between international crimes and human rights violations – in particular, when and why certain human rights violations may constitute international crimes. This is the case for instance of crimes against humanity; Andrew Clapham argues that "systematic violations of human rights are associated with the prospect of prosecuting the perpetrators for crimes against humanity" (Clapham 2015: 17). In the case of genocide, Robert Cryer holds that "these types of acts can amount to a violation of civil and political rights" (Cryer 2011: 499).

A similar trend can be found in the normative theory of IHRL and ICL. In this literature, Massimo Renzo for instance identifies "dignity" as the common core protected by both IRHL and ICL (with specific reference to crimes against humanity): "crimes against humanity are those which deny their victims the status of human being, i.e. those crimes that violate basic human rights of their victims" (Renzo 2011: 453). Numerous contributions to the normative theory of ICL more implicitly rely on a notion of IRHL when they explain, for instance, in what sense crimes against humanity concern humanity at large. David Luban for instance contends that "all humankind has an interest in repressing crimes against humanity presupposes at the very least a universal human right not to be subjected to these crimes" (Luban 2004: 44). This unifying approach is substantive in postulating a substantive and universal status or value – one that justifies the extra-territorial regimes associated with IRHL and ICL

In this paper, I offer an alternative to the substantive approach. I defend what I call a "structural" account of the link between IRHL and ICL. Instead of focusing on the limited overlap between the two types of violations, I start by reconstructing two structural characteristics that are intriguingly common to the international regimes of IRHL and ICL: *who* has the authority to adjudicate violations of IRHL and ICL, and *who* can be liable for these violations. In other words, I suggest concentrating on the *duty-holders* of IRHL and ICL to build their common core. The conventional notion used to address those questions is *jurisdiction* (to legislate, to adjudicate, and to enforce). But jurisdiction is simply another word to signify that some legal official is conferred authority over the creation, adjudication and/or the enforcement of international legal norms, as I shall explain.

More importantly, opting for the structural approach supposes that the substantive approach is deficient. First, it faces a *threshold* problem. Once one postulates that IRHL and ICL protect a substantive moral status or value (such as "dignity"), it quickly appears that a vast range of rights and criminal prohibitions may also protect that status without forming parting of the conventional corpus of IRHL and ICL. The

criterion to distinguish ICL and IRHL from their domestic analogues (constitutional law and criminal law, respectively) thereby collapses. Second, adopting the substantive approach risks conveying a comprehensive moral view of what the violations norms indeed attack – call it the problem of *ethical neutrality*. This problem is even more acute in the context of international law since imposing a comprehensive moral view would ultimately conflict with the state's basic moral right to self-determination (and its legal counterpart in Article 1(2) UN Charter). This in no way diminishes the idea that ICL violations "shock the conscience of humanity" (Preamble to the Rome Statute). It rather places a normative constraint on the specification of what exactly those violations attack.

Once the limits of the substantive approach are established, it remains to see what the structural approach can deliver. This approach asks two questions: *who* is entitled to adjudicate IRHL and ICL violations? And *who* is liable for those violations? I suggest that these criteria should inform the normative elucidation of the common core between IRHL and ICL. The fact that they are structural – they form part of the basic legal architecture of these regimes – further invites us to explore their normative significance. Yet, this emphasis on structure does not dismiss substance. What matters is the *extent* to which substance and structure respectively matters– and how they interdepend – in theorizing the common core between IRHL and ICL.

I understand the first structural criterion in the conventional sense of who has been conferred the competence or responsibility to adjudicate an alleged violation of IRHL or ICL. How intriguingly common are IRHL and ICL in this matter? The commonality here pertains to domestic authorities holding primary jurisdiction, while international authorities (IRHL courts and ICL tribunals) enter the scene only secondarily (in IRHL) or thirdly (in ICL). Only when internal remedies are exhausted (called "procedural subsidiarity" in IRHL) and when public authorities are "unable or unwilling" to adjudicate those violations (called "complementarity" in ICL). I shall illustrate this first point by referring alternatively to the regimes of the ECtHR and the IACtHR in the case of IRHL and to the ICC in the case of ICL.

The second question pertains to the liability for IRHL and ICL violations and therefore to the overlapping criteria for a situation to fall within the jurisdictional regimes outlined above. Here, IRHL and ICL seem irremediably distinct: in principle, IRHL applies to all or public authorities within their territorial jurisdiction, whereas ICL (in particular, the Rome Statute) enjoys universal jurisdiction but applies only to the "most responsible" individuals. I purport to show, however, that liability remains intriguingly similar across those regimes in that it targets what I call the exercise of *public authority functionally construed.* It is functional under the IRHL regime to the extent that state authority needs not be within its official territorial jurisdiction to be liable for violations. I take the extra-territorial application of the ECHR by the ECtHR to illustrate the point that the exercise of state (public) authority is central to trigger the applicability of the ECHR. And it is functional under ICL in that alleged

perpetrators need not be officials of state authorities. Yet, the structure of international crimes displays some core characteristics akin to public authority, I shall argue. More precisely, what distinguishes Rome Statute crimes from domestic crimes is that the physical perpetrators and the planners of the crimes are often distant from each other. The specialized literature on international criminal liability sheds light on the institutional structure that connects them and over which the planner enjoys control – a control that forms the *subjective element* of the crimes. I contend that the activation of this structure or apparatus, which enables the reprehensible acts (Zysset 2016), amounts to exercising functional public authority. One caveat is in order here; for the sake of concision, I shall focus here on the category of crimes against humanity as it best illustrates this part of the argument. I do however outline the implications for the other categories of international crimes, such as war crimes, in the last section of the paper.

What, then, is the normative point and consequences of my structural account of the common core? There are two main steps in this final section. First, from the right-holders' standpoint, establishing a public authority over the protection of rights and the prohibition of crimes is necessary to avoid the classical problem of *unilateralism*. It is clear that both IRHL and ICL protect (to a variable extent) the most basic forms of freedom and equality of individuals. But only a public authority can avoid authority being abused or perverted by other (private) agents. Importantly, this argument implies that there should not be a categorical distinction between international and domestic law. Rather, IRHL and ICL form *necessary* conditions because they concern the threats that public authorities *themselves* pose to the basic freedom and equality of individuals they are supposed to protect. The strength of this argument, I shall argue, is that it allows for the inclusion of non-state actors (e.g. war lords, guerilla groups, corporations, etc.) within the scope of the IHRL and ICL.

Second, I return to the duty-holders, namely sovereign states, to assess the consequences of my account. I submit that this account deepens the notion of sovereignty as bedrock principle of the international legal order. Traditionally, international law has recognized and protected – e.g. through the UN collective security system – the external sovereignty of the state (or *non-interference*). IRHL and ICL now contribute to realizing the other side of the sovereignty coin, namely *internal* sovereignty, and this applies equally to state or non-state entities as both can threaten the formation of the so-called *pouvoir constituant*. From this perspective, international law contributes – alongside domestic law, when such law fails – to building or consolidating the *pouvoir constituant*, which, ultimately, is the only one that can legitimately exercise sovereignty vis-à-vis outsiders.

2. The substantive approach: from positive to normative perspectives

In this first section, I conduct a critical review of the growing literature (both positive and normative) that specifically explores the link between IRHL and ICL. When one

intuitively reflects on the link between IRHL and ICL there is, of course, the widely shared historical narrative that IRHL and ICL form part of the same paradigm shift in the transformation of the international legal order. The consolidation of the IRHL and ICL regimes places the individual at the center of an order that was classically premised on the exclusive prerogatives of sovereign states. The state "is losing its traditional status of primacy in the legal ordering that governs matters that occur beyond the level of the individual state. Sovereignty is no longer a self-evident foundation for international law" (Teitel 2011: 9-10). Some are keen to claim that IRHL and ICL but also IHL constitute "humanity's law" (Teitel 2011).

But saying this is not saying much. *How* the various fields of post-45 international law serve *which* distinctively human trait, value, status or interest requires a more specific and elaborate answer. This implies delving into the particular norms, both substantive and procedural, that are particular to each field and carefully scrutinize their interplay. This article focuses on the nature, content, and justification of the link between IRHL and ICL *specifically*. Beyond the broad idea that IRHL and ICL are inter-state arrangements protecting individual interests against state authorities (or "self-binding" (Alter 2014)), is there something more elaborate, either positively or normatively, to sustain the thesis of a common core? Or is any such claim superficial or rhetorical? IRHL and ICL lawyers and theorists have been articulating this link with more and more precision in recent years. Two predominant perspectives on this link may be observed in the positive legal literature to date. The first points to the developing "quasi-criminal competences" of IRHL courts, in particular the practice of ordering state parties to trigger criminal procedures. The second pertains to the interpretive interplay between IRHL and ICL in the case law of international criminal tribunals, in particular the role of interpretive aid that IRHL has played for ICL. Let me offer an overview of each in the next sub-sections.

2.1. The positive perspective

Conventionally, IRHL courts are established to conduct an independent review of a catalogue of individual rights enshrined in an international convention.[1] Importantly, those courts cannot strike down domestic laws. Only state parties can implement the judgments to which they are parties. In principle, those courts merely *declare* whether those state laws and practices conform to the convention in question, and leave it to their state subjects to determine how to execute the judgment and/or conduct appropriate reforms of their legal in order to avoid future violations. However, the

[1] The only potential exception is the recently established African Court on Human and Peoples' Rights and its prospect of being granted conferred jurisdiction over international crimes. The draft protocol that would do so, which is currently being reviewed by the by the African Union (hereafter, AU)'s Policy Organs according to the website of the court, mentions the prospective of a special unit, would establish an International Criminal Law Section (ICLS) to address international crimes specifically. Jurisdiction would cover genocide, war crimes and crimes against humanity, as well as several transnational crimes such as, terrorism, piracy, and corruption. See http://www.african-court.org/en/

precise boundaries of those courts' judicial powers have become more difficult to identify in recent years. One stable distinction between the European and Inter-American regimes nevertheless remains: while the ECtHR has tended to remain within its declaratory competence (with the exception of "pilot judgments"[2], which comprises indications on how to reform the domestic legal order following repetitive judgments), the IACtHR has largely ordered its subjects to take specific actions for states to conform to its judgments and avoid future violations of the provision in question.

It is in this latter Inter-American context that the quasi-criminal competence of IRHL courts can be most clearly observed. It is crucial, however, to specify what is meant by "quasi-criminal" competence. There is no mention in the ACHR (or in the ECHR for that matter) of international crimes. And the IACtHR has never performed the distinctively criminal functions of investigating, judging and punishing for crimes. Rather, it has ordered domestic courts to investigate, judge and punish crimes committed by the state. In the famous case of *Myrna Mack Chang v. Guatemela* (2003), in which a Guatemalan anthropologist (studying the mistreatment of the Maya community in the country) was murdered by a military death squad, the Court concluded that:

> "the State must effectively investigate the facts of the instant case, with the aim of identifying, trying, and punishing all the direct perpetrators and accessories, and all others responsible for the extra-legal execution of Myrna Mack Chang, and for the cover-up of the extra-legal execution and other facts of the instant case, aside from the person who has already been punished for those facts" (para. 134).

The court understands those obligations as falling within the doctrine of the "state's duty to investigate and punish", which in its view derives from the broader duty to protect the rights guaranteed by the ACHR (Article 1(1)). In addition to the "ordering" function, the IACtHR has also supervised these trials. As Huneuus explains, "to this end, it has ordered states to enhance victim participation in the criminal proceedings, to continue the search for victims of forced disappearance, to apologize officially to victims and their relatives, and to construct memorials, among other remedies" (Huneeus 2013: 23). Moreover, as already indicated, these functions do not necessarily apply to *international* crimes specifically but crimes involving the state authorities more generally. In that sense, this perspective does not capture the specific link between IHRL and ICL; it only indicates one modality for the criminal realm to intersect with the human rights realm. The "state's duty to investigate and punish" suggests that the criminal law can provide an alternative avenue for the

[2] As the Court explains, "in a pilot judgment, the Court's task is not only to decide whether a violation of the European Convention on Human Rights occurred in the specific case but also to identify the systemic problem and to give the Government clear indications of the type of remedial measures needed to resolve it". Cf.. https://www.echr.coe.int/Documents/FSPilotjudgmentsENG.pdf

respect and enforcement of IHRL. This instrumental link is more widely found in the literature comparing the IRHL and ICL regimes: "international criminal law should thus be viewed as but one of the alternative along a continuum to enforce international human rights or humanitarism" (Ratner, Abrams & Bischoff 2009: 13)

If IRHL and ICL share a common end, how does it manifest itself in practice? As outlined in the introduction, the substantive approach provides one kind of answer by capturing the interplay between IRHL and ICL violations. In fact, this interplay is unidirectional: the acts constitutive of ICL prohibitions may imply violations of basic IRHL violations (e.g. the right to life and the right against torture in the ICCPR). This nexus also explains why the common core has been explored from an ICL perspective, as it is clear that human rights violations routinely occur without constituting international crimes. In addition, it is crucial to note that, as a matter of positive law, international crimes can occur without IHRL violations – e.g. when the conduct is not attributable to a state agent. This explains the importance of examining particular instances of the nexus first.

For instance, in order to establish the more precise content of the crime of rape within the definition of crimes against humanity in *Prosecutor v. Furundžija*, the Trial Chamber of the International Criminal Tribunal of the ex-Yugoslavia (hereafter, ICTY) conducted a survey of domestic legislation and interpretation of IRHL and reached the following conclusion:

> "The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law" (…) (para 183).

In that case, this underlying principle justified extending the notion of rape to forced oral sex. The notion of "inhumane act" within the definition of crimes against humanity is another illustrative example. The Trial Chamber of the ICTY appealed to the UDHR and the ICCPR "to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity" (*Prosecutor v. Kupreškić*, para. 566). In these two examples, IRHL operates as an interpretive aid for some indeterminate ICL provision. There is, however, significant disagreement among scholars about which IRHL provisions are involved. This is particularly the case of economic, social and economic rights. As Schmid explains, "the crime of other inhumane acts remains open-ended, and the same is true for the eventual defence claim that the interpretation of the crime is in violation of the principle of strict construction. This is true whether a case mostly relates to civil and political rights or to ESCR violations" (Schmid 2015: 159). This leads positive legal scholars to conclude that IRHL and ICL "are not identical, but nor are they utterly separate" (Cryer 2011: 498) or that "both areas

maintain their distinguished reserved realms" (Pinto Soares 2012: 171).

2.2. The normative perspective

While the positive perspective sheds further light on the (limited) overlap between IRHL and ICL, it remains positivistic. As such, it cannot explain why the common core is located at one particular intersection rather than another. The dispute concerning the inclusion of economic, social and culture rights (their violation) within the definition of crimes of against humanity also suggests that such overlap may change over time. In any case, in order to explain why this common core is so circumscribed or why it should be circumscribed at all, turning normative theorizing is necessary. Interestingly, the emerging literature in the normative theory of IRHL and ICL has, to some significant extent at least, endorsed the substantive approach. It aims to provide with a sophisticated account of the normative realm common to IRHL and ICL violations through moral reasoning. In this section, I illustrate such substantive approach and identify two main shortcomings. One is that it fails to clearly determine the threshold that closes off the overlapping domain of IRHL and ICL vis-à-vis their domestic analogues. The other is that it faces the problem of *ethical neutrality*, which, I shall then argue, has a particular resonance in international law.

While the field of normative theory of international law is already rich, only a few contributions have specifically addressed the common core between IRHL and ICL. As for positive approaches surveyed earlier, the problem lies in the lack of specificity. Many accounts of ICL in fact depend on account of IRHL – often by arguing that ICL responds to "severe" violations of IRHL – without elaborating on the distinctive foundations of those rights. This is also because the normative theory of IRHL is lead by scholars who often do not specialize in ICL. As a result, they often do not consider potential implications for theorizing ICL (e.g. the most recent anthologies (Cruft, Liao and Renzo 2015, Etinson 2018) are illustrative in this respect). Similarly, anthologies in the normative theory of ICL do not address the link specifically either (May and Hoskins 2009). There are, however, a few exceptions. Renzo (2011) and Fisher (2012) quite unique in bridging the two strands of normative literature, which then can offer support to the substantive link established at the level of positive law.

Both Renzo and Fisher argue that international crimes distinctively consist of certain human rights violations. In a nutshell, Renzo suggests that ICL violations are IRHL violations to the extent that both attack the dignity of human beings. "Dignity" therefore constitutes the normative realm that is common to both. What, then, does dignity consist of? Renzo's central thesis is that "that these crimes deny their victims' status of human being because they violate some basic human rights of their victims" (Renzo 2012: 405). It is important to note that for Renzo only some IRHL provisions are violated when an international crime occurs. Renzo builds the distinction between *basic* and *non-basic* rights by relying on Henry Shue's seminal idea that basic rights

are necessary to enjoy all other rights (Shue 1996). Dignity – and the common core shared with ICL – applies to this sub-group of basic rights. Renzo also understands the notion of "dignity" as reflective of a broader family of conceptions in the normative theory of IRHL whose basic tenet is that those rights are rights held only in virtue of being human (Griffin 2008) – they are and must be pre-institutional.

Now, Renzo readily admits that "there is some disagreement as to how we should understand both the concept of 'dignity' and the concept of 'human' in this context (not to mention the disagreement over what these rights and their implications are); still human dignity is the notion that this conception typically appeals to" (Renzo 2011: 450). Renzo does, nonetheless, posit a more tangible criterion to circumscribe the domain of dignity, namely that those rights are necessary to a minimally decent life: "only when the rights to the conditions necessary for a minimally decent life are violated is the human status of the victim in the sense I have specified above. The constituent acts listed in international criminal statutes are those that involve violations of these rights" (Renzo 2011: 453).

Fisher (2009) pursues a similar line of argument is circumscribing the domain of international crimes to violations of particularly basic human rights. She establishes the threshold of "serious physical security violation" (61) to define that distinctive domain. This threshold consists of two conditions. First, the attack must concern a "physical security human right" (58) that Fisher also depicts as basic in Shue's sense as the preconditions to the enjoyment of all the other rights. Second, "the way in which the physical security human right is violated involves political organization, usually a state" (59). While Renzo only relies on the threshold of basic rights and hence defends an entire reform of ICL, Fisher adds an "agency threshold" (59) that distinguishes the realm of international law. I hope this helps illustrate the continuity between the positive and the normative approaches to the substantive common core between IRHL and ICL. It is continuous in focusing first on the harm inflicted on the right-holder – depriving them of the basic rights to enjoy all the other rights – before turning to the nature of the violator (in Fisher's case).

Let me now turn to my two criticisms of this substantive approach at the normative level. I call the first problem the problem of *threshold*: if basic human rights (their violations) constitute the common core between IRHL and ICL, and thereby responds to the *under-determination* problem diagnosed at the level of positive law, it also then suffers from *over-determination* at the level of normative theorizing. Indeed, on Renzo's view, an isolated act of murder or rape falls within the scope of ICL: "any case of rape, torture, forced prostitution and so on is a crime against humanity, no matter whether committed as part of wider or systematic attack or not" (Renzo 2011: 261). This is not a problem for Renzo's own project, which is precisely to expand ICL. Yet, the substantive approach fails to even match the expansion of IRHL within the law, which, as we have seen, does not apply to similar offences committed in isolation, but potentially to other (in particular, social and economic rights) rights

within the same criminal category. If that is correct, the distinction between *basic* and *non-basic* rights, which is supposed to circumscribe the common normative core, collapses. The same point applies to Fisher's first threshold of "physical security human rights" (58).

This illustrates the serious difficulty of the substantive approach to successfully close off the common core. The second problem, the problem of *neutrality*, is not particular to IRHL or ICL, and should be counted in addition to the first. It is a core attribute of liberalism that public norms should not build upon a comprehensive conception of the good and should be justifiable from within a wide range of ethical views (Rawls 1971). Now, it goes without saying that violations of IRHL and ICL attack this basic freedom and equality – and in particularly atrocious ways – and therefore that those norms are justifiable. It might be well true that the common core of IRHL and ICL has to do with violations of particularly basic human rights. Yet, the requirement of neutrality still applies to the project of building a full-fledged account of what those norms precisely attack as there may be deep disagreement on which rights are indeed basic.

The issue has been more broadly addressed in the normative theory of IRHL, but it logically extends to the common core with ICL. In this literature, Rainer Forst forcefully explains the constraint that ethical neutrality poses: "a conception of human rights needs to have an independent and sufficient moral substance and justification, though not one of an ethical kind that relies on a conception of the good" (Forst 2010: 713). Forst is here critically assessing a number of "ethical" accounts of IRHL, such as Griffin's seminal account according to which those rights are distinctive in that they protect the conditions for normative agency (Griffin 2008). As Griffin explains, "anyone who has the capacity to identify the good, whatever the extent of the capacity and whatever its sources, has what I mean by "a conception of a worthwhile life; they have ideas, some of them reliable, about what makes a life better or worse" (Griffin 2008: 46). Forst correctly points to the *teleological* character of Griffin's account: "an ethical justification rests on a notion of the good life, even if it is a very general one, while a moral justification is supposed to be neutral as to the question of the good or worthwhile life" (Forst 2010: 718-19). Now, the defenders of the substantive approach could object that IRHL and ICL need not be subject to the neutrality constraint precisely because those norms are pre-institutional and not political or public. They simply belong to a distinct normative realm – one that would explain why other agents than the state in which violations were committed can trigger jurisdiction (such as those agents that respect "natural justice" (Luban 2004)). In the next section of the paper, I suggest exactly the opposite by showing that the primary addressee of IRHL and ICL is public authority. This strengthens the case for a neutral approach to the substantive foundations of those norms.

Moreover, the international nature of these norms already poses a constraint on their justification. I submit that assigning IRHL and ICL (their common core) a substantive

ethical content conflicts with the bedrock principle of the international legal order, namely self-determination (Article 1(2) UN Charter), which expresses respect for the autonomy of the particular community of the state. It is important, however, to explain exactly to what extent the conflict applies. Again, that those treaties should be ratified and duly implemented in the domestic legal order cannot be doubted. The conflict appears when one switches from the *recognition* and *implementation* of those norms to the *justification* of their (overlapping) normative foundations. I argue in the last part of the paper that the function of IRHL and ICL is to form and/or preserver a community of equals (internal sovereignty) that can ultimately (but not only) exercise its autonomy vis-à-vis outsiders (external sovereignty). It follows that the conflict with sovereignty and self-determination arises only when the very foundations of IRHL and ICL omit the exclusive right of a community to collectively assign – ideally, through collective democratic procedures – substantive foundations to those norms. The conflict does not arise, however, if one views IRHL and ICL as contributing to *constitute* the community itself.

If the constitution of a political community is necessary to the exercise of sovereignty (both internal and external), and if IRHL and ICL are necessary conditions for this community to emerge, it follows that one ought to leave it to the community to determine for itself what the ultimate foundations of IRHL and ICL could be. If the category of community does not constrain our reasoning here, it follows that sovereignty *qua* self-determination is normatively inert. As we shall see later in more details, the practice of IRHL and ICL also indicates the normative force of the community constraint on the rights' corresponding obligations and their justification. Different mechanisms organizing adjudicative jurisdiction, such as "subsidiarity" in IRHL, precisely aim to defer the specification of IRHL obligations to the respondent state (whether those are culturally shaped or democratically obtained).

To conclude this section, I hope to have shown that the substantive approach (both positive and normative) to the common core suffers from serious limitations, both internal (the *threshold* problem) and external (the *neutrality* problem). Yet, one should not reject it *en bloc*. What matters is whether substantive moral reasoning is the appropriate way of developing this common core. In the next sections of the paper, I suggest apprehending this common core from a different angle, a structural one. Taking this angle not only sheds light on another, neglected facet of the common core between IRHL and ICL. I also purport to show that exploring the structural commonalities can help construct a more cogent normative account.

3. A fresh start: the structural approach

As indicated above, the transition between the substantive and the structural approach amounts to switching from one side (*right-holders)* to the other side (*duty-holders*) of the same coin. I believe that the structural approach can offer a more cogent account of the common core. In this section, I lay down the methodological basis of my

argument and argue that the duty-holder of IRHL and ICL should be prioritized in the normative elucidation of the common core of IRHL and ICL. By "duty-holder", I imply two structural characteristics in the IRHL and ICL *qua* international legal regimes: *who* is conferred authority to adjudicate violations of IRHL and ICL, and *who* can be liable for those violations. Those two questions conventionally fall under the rubric of *jurisdiction* (to adjudicate and/to prosecute, respectively), yet jurisdiction is simply another word to convey that some legal official is conferred authority to perform those functions.

Concretely, the answer to the first question determines the allocation of adjudicative authority between the national and the international levels. The common premise, I argue, is that IRHL and ICL are norms whose adjudication and/or enforcement are not exclusively reserved to the state in which those norms were allegedly violated. But how is extra-territorial adjudicative jurisdiction precisely organized? The second question, the one of liability, applies to the criteria that need to be fulfilled for a violation to fall within the adjudicative regime in question. Once adjudicative authority is determined, over which kind of case can it principally exercise authority? Those questions are specific to international law and the principles regulating the answer to these questions are – I shall argue – distinctively common to IRHL and ICL. Of course, the assumption here is that those questions can be answered without using the substantive approach. Finally, I argue that *public authority* – understood functionally, not formally – is the unifying duty-holder of IRHL and ICL. This common core, I shall then argue, in turn limits the extent to which one can engage with the substantive justification of those norms.

3.1. Who is entitled to adjudicate IRHL and ICL violations, and when?

At the level of adjudicative jurisdiction, IRHL and ICL are not primarily international. Surely, those norms are distinctively international in origin (*legislative* jurisdiction), but this does not pair with *adjudicative* jurisdiction in any necessary sense. In both the IRHL and ICL regimes, domestic authorities hold primary responsibility to adjudicate and/or enforce those norms. Even when there are not only two but three levels of possible adjudicative jurisdiction, such as in ICL (under the ICC regime), the international level applies only after i) the state where the crimes occurred and ii) after the state of which the victims or perpetrators are nationals. This structural feature, I suggest, reinforces the normative idea that IRHL and ICL courts do not exercise their authority and "speak in the name" of another normative community than the one of the state (or the community of states (Zysset 2016)). Of course, it remains that it is international courts and tribunals that effectively exercise sovereignty functions then, but it does not necessarily follow that, normatively, sovereignty is lost.

Let me specify how this occurs in IRHL and in ICL. In IRHL, the principle of *exhaustion of domestic remedies* strictly governs the allocation of adjudicative

jurisdiction. This principle determines whether an application brought before a IRHL court (or an international body, such as a UN treaty body) is admissible at the international level. In the specialized IRHL literature, scholars have used the notion of "procedural subsidiarity" (Besson 2016) to refer to this requirement. State parties to a IRHL treaty/convention hold primary responsibility to adjudicate IRHL claims within their jurisdiction. This subsidiarity is explicitly enshrined for instance in the European Convention of Human Rights (hereafter ECHR, Article 35). Moreover, even when this condition is met, it does not follow that the Court directly turns to its own review and assesses the substantive merits of an application. The Court's review can debut only after the Court has rigorously assessed the domestic review process and established a *potential* violation of the ECHR. Besson explains that "it is only when the assessment of facts and law by domestic courts may itself amount to a breach of the ECHR that the Court's review will extend into these areas" (Besson 2016: 80). This is also because there must be a remedial avenue for the applicant to invoke the ECHR in domestic judicial proceedings. Individuals must be able to invoke the ECHR in those proceedings – "the right for an effective remedy before national authorities for violations of rights under the Convention" (Article 13).

One should note that the procedural type of subsidiarity that concerns us here is just one among other dimensions of subsidiarity. It should be distinguished from "substantive subsidiarity", which applies to the level of scrutiny of the IRHL court or body applies once an application is admissible. The "margin of appreciation" (at the case law of the ECtHR specifically) is the archetypical example of substantive subsidiarity – when the court defers to the respondent state party a portion of the review (e.g. proportionality). This type of subsidiarity refers to "the intensity and content of the review the international human rights court or body may exercise once the conditions imposed by procedural subsidiarity are fulfilled and it is allowed to exercise its review power" (Besson 2016: 80). Finally, "remedial subsidiarity" applies to how the respondent state party should execute an adverse judgment – including which broader reform(s) of the domestic legal order may be necessary to avoid future violations. However, since both the substantive and remedial forms of subsidiarity are more contingent features of the IRHL regime (the "margin of appreciation", for instance, is a judicial creation and may vary from case to case), my structural argument primarily relies on procedural subsidiarity.

In ICL, the allocation of adjudicative jurisdiction is identical to IRHL to the extent that international adjudicative jurisdiction is *not* primary. Under the Rome Statute instituting the International Criminal Court (hereafter, the ICC), for instance, the governing principle of complementarity is that extra-territorial jurisdiction can be triggered only when the state in which the crimes were committed are "unable or unwilling" to address the violations (Article 17). The specialized literature mentions two kinds of reasons: "the principle is based on respect for the primary jurisdiction of States and on practical considerations of effectiveness since the ICC is a single institution with limited resources, removed from the territorial States affected by mass

atrocity" (Webb & Bergsmo 2015). This being said, the jurisdictional regime of the ICC has other peculiarities that the IRHL regime simply does not have: the state in which the ICL violation was committed loses its exclusive right not only to international courts, but also to third-party states based on the principle of "universal jurisdiction" (Webb & Bergsmo 2015). The specialized literature refers to this as the "absence of a nexus" between the offence, the victim or the perpetrator. In the words of Chehtman, "crucially, tribunals can hold individuals accountable even in the absence of any traditional link or nexus with the perpetrator, the victim, or the offence. This means that a given state can punish an individual for an international crime even if the offence was not committed on its territory, against its sovereignty, or by or against one of its nationals" (Chehtman 2010: 88). In IRHL, in contrast, extra-territorial jurisdiction cannot be claimed by a third-party state. In contrast, as far as the Rome Statute in concerned, it is enough to be recognized as a sovereign state to claim adjudicative jurisdiction over international crimes. This proposition should not obscure the fact that the normative pull of universal jurisdiction is contested – in particular, whether it is *mandatory* or only *permissible* (it is generally mandatory for universal jurisdiction established by treaty law). Further, it must be clear that by far not all international crimes benefit from universal jurisdiction. I am here referring specifically to the regime implemented by the Rome Statute.

More precisely, the ICC regime places primacy upon the state in which the crime was committed (*territorial jurisdiction*), followed by the state from which the alleged perpetrator(s)/the victims are nationals (*principle of nationality*). Here the ICC is applying two core principles of domestic criminal law that are taken to be constitutive of sovereignty. In its more abstract form, the principle of territorial jurisdiction implies that "a state has the normative power to prescribe criminal prohibitions which are binding on every person who is, for whatever reason, on its territory" (Chehtman 2014: 5). The principle of nationality, in turn, implies that "a State can prosecute an offence perpetrated extraterritorially on the grounds that it has been perpetrated against one of its nationals" (Chehtman 2014: 8). The ICC claims jurisdiction and initiates proceedings only then. Third state parties may claim jurisdiction in the last instance.

I derive two propositions from this overview. First, the structural primacy placed upon domestic public authorities to adjudicate IRHL (through the principle of "procedural subsidiarity") and ICL (through the principle of "territorial jurisdiction") is intriguingly common. From a normative standpoint, this suggests that although IRHL and ICL are regional, international or global in origin, they principally concern the relation between public authority and its subjects – a relation that is already regulated by domestic constitutional and criminal law. I infer from this the preliminary proposition that the function of IRHL and ICL is not to create an additional (normative) community above the domestic one. Second, I have noted that both literatures make a (timid) connection to the notion of sovereignty. The allocation of authority upon the domestic level is taken to define the sovereignty of

the state. Hoe how do IRHL and ICL contribute to sovereignty? That is the normative question that the common jurisdictional core logically requires to answer. Before tackling this challenge, I turn to the second structural feature that I take to be common to IRHL and ICL, namely liability.

3.2. Who is liable for IRHL and ICL violations?

To recall, the methodological argument of this paper is that the extent to which one can adopt a substantive approach to the common core between IRHL and ICL depends *on who is competent* to adjudicate claims, and *who is liable* for IRHL and ICL violations. The two variables combined should guide normative theorizing and place a constraint on how one can engage with substantive moral reasoning in that respect. Until now, I have defined and illustrated the primary responsibility of state authority, and the secondary and supplementary (or subsidiary) role of IRHL and ICL courts and tribunals, as the first structural variable. This variable is however not sufficient for my argument to hold. This is because one could simply object that the ground for conferring jurisdictional primacy on state authority is *practical* (e.g. less costly domestically than internationally) or *epistemic* (e.g. that domestic authorities are "better placed" to adjudicate claims). I believe that the practical reasons need not be discarded. They peacefully co-exist the normative reasons that I advance next.

This becomes clear when one turns from *jurisdiction* to *liability*. I understand liability as the criteria that an alleged violation – beyond the reprehensible acts themselves – must meet in order to fall within the adjudicative regime reviewed above. In this section, I build up an account of liability for violations of IRHL and ICL based on the exercise of public authority. This implies that, as a matter of structure, IRHL and ICL obligations principally fall upon agents and entities that exercise public authority upon individual subjects. As a matter of definition, *state* authority is claimed and is expected to be public authority, but public authority need not be state authority. What matters here is the *function* of the authority being exercised, not its formal characteristics (whether the authority is itself *official* and/or whether authority is exercised within *official* jurisdiction). For the sake of this specific claim, I simply understand "authority" as an agent having the capacity to coerce a subjected agent, and "public" as defining the level and scope (geographical and/or numerical) of this coercion being exercised. This has important implications for on-going and potential developments of IHRL and ICL. If what ultimately matters is the function and the effects of authority, both the location (within territorial jurisdiction or not) and the specific nature of the violator (state or non-state) do not matter.

In what follows, I use two liability features – *extra-territoriality* for IRHL and *collective crimes* for ICL – to illustrate the functional dimension of those regimes. In the practice of IRHL, it the standard norm that only state, therefore public authorities (legislative, executive, judicial) can be held liable for alleged violations. Yet, one important development of the practice of IRHL is its *extra-territorial* application.

This is a crucial development for my argument, because it indicates that the relation between the right-holder and the duty-holder need not be formal (e.g. *nationality* or *residence*). This was clear for violations within official jurisdiction, but not yet for violations committed outside official territorial jurisdiction. In ICL, the burden of proof is much higher. Indeed, unlike IRHL, ICL obligations primarily apply to individuals.

This *prima facie* dichotomy counts against identifying public authority as the structural common core between IRHL and ICL. I purport to show, however, that the individuals prosecuted in the practice of ICL exercise a role akin to public authority. I rely for that matter on recent attempts to provide a theory of individual liability for collective crimes. By defining the role of each participant within an existing institutional apparatus, and by identifying criminal responsibility of the most responsible, this literature usefully sheds light on the distinctively public character of those offences.

3.2.1 IRHL and extra-territoriality

We saw in the second section of the article that the IRHL regime places primary responsibility upon state authorities to adjudicate (but also to implement in the case of ICL). The notion of "procedural subsidiarity" captures the strict requirement that an application cannot be admissible without the exhaustion of domestic remedies. The IRHL regime is also premised on the application of obligations to any individual within the state's territorial jurisdiction, and therefore that the conventional nexus between *state* and *nationality* or between *state* and *residency* no longer applies. I also remarked that in contrast to ICL, the IRHL regime does not benefit from universal jurisdiction. This means that only delegated IRHL courts can subsidiarily exercise adjudicative jurisdiction over alleged violations. To that extent, it seems rather straightforward that the principal addressee of those norms is public authority in a formal and conventional sense, namely the official, territorial jurisdiction of the state. Unlike in ICL, the question of *who is liable* for IRHL violations does not seem controversial at all.

Yet, an intriguing development has been observed in recent years: the extra-territorial application of IRHL. For instance, Article 1 of the ECHR reads as follows: "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". Conventionally, the right-holders must be located within the state's official territory for the ECtHR to claim jurisdiction over an alleged violations. In the last fifteen years, however, the ECtHR has come recognize the ECHR as applicable outside official territory. This practice is worth exploring as it signals the functional dimension of IRHL violations. While the Court did not apply the ECHR to NATO's air strike on a radio station in the former Federal Republic of Yugoslavia (FRY) during the Kosovo campaign (1999) in *Banković v. Belgium* (2001), it did in the later cases of the United Kingdom's prisons and

operations in Iraq (2003) in *Al-Saadoon and Mufdhi v. United Kingdom* (2010) and *Al-Skeini and Others v. the United Kingdom* (2011).

To explain this extension of the regime, recent scholarship precisely suggests exploring the relation between the right-holder and the duty-holder. As Samantha Besson forcefully puts it, the ground for extending jurisdiction extra-territorially can only be relational: "the relational nature of jurisdiction between a subject and the authority needs to be stressed, as it corresponds to the relation between a right-holder and a duty-bearer" (Besson 2012: 863). Besson's insight is here crucial. If what determines jurisdiction under IRHL is not territorial, it has to be assessed specifically between state authority and individual subjects. In what sense is this relation distinctive? Besson explains:

> "Qua de facto authority, jurisdiction consists in effective, overall and normative power or control (…). What matters indeed is that state agents exercise some kind of normative power with a claim to legitimacy, even if that claim ends up not being justified. Nor, conversely, does it mean that all state agents necessarily exercise jurisdiction: some are merely using coercion and their acts lack the required normative dimension" (Besson 2012: 865).

In other words, the criterion for triggering jurisdiction extra-territorially has to do with the kind of control – "effective, overall and normative" – exercised by the state agent. This transpires from the ECtHR's own wording in *Al-Skeini*: "the United Kingdom (together with the United States) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government" (*Al-Skeini and Others v. United Kingdom*, para. 149-150). Similarly, in *Issa and Others v. Turkey* (2004), which concerned the deaths of Iraqi shepherds allegedly killed by Turkish soldiers in northern Iraq, the Court found the application admissible precisely because the applicant could not demonstrate that Turkey exercised effective overall control over the victim:

> "had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them" (…). "What is decisive in such cases is the exercise of physical power and control over the person in question" (*Al-Skeini and Others v. United Kingdom*, para. 137).

What matters for the argument is that it is irrelevant *where* authority is exercised as long as it is a state party (its agents) that exercises it upon individuals. Of course, I have not yet explained what ultimately makes this criterion relevant from a normative standpoint – I leave this task to the last section of the paper. What matters for now is

that one cannot account for the liability regime in IRHL without appealing to the kind of control exercised upon individuals. Moreover, as I already mentioned in the last section on adjudicative jurisdiction in ICL, IRHL courts connect this function to a notion of (state) sovereignty. It appears that, from a normative standpoint, the very fact of exercising authority in this particular domain (IRHL) makes this authority sovereign. The question that appears is how exactly IRHL and sovereignty are connected.

3.2.2. ICL and individual liability

Let me now turn to liability under ICL. Here, my argument immediately faces a significant hurdle. Under the ICC regime, for instance, only individuals can be held criminally responsible. The principle of *individual culpability*, which requires exactly determining criminal liability, fully applies (Article 25 of the Rome Statute). It goes together with the *nulla poena sine culpa* principle, according no one should be held responsible (and hence have her freedoms severely limited) without having committed, contributed to or furthered a criminal act. It follows that, in principle, any individual can commit, contribute to or further an international crime (Article 27 of the Rome Statute). At first sight, therefore, criminal liability conflicts with my claim that agents must exercise public authority to commit Rome Statute crimes.

While one cannot gloss over this basic liability principle, one cannot evade the fact that ICL violations – in particular, the Rome Statute crimes – are *collective* crimes either, in two senses: not only are the perpetrators multiple and collective organized to enable the crimes, but the criminal acts are also systematically committed and the victims are massive. As a result, the specialized literature on international criminal liability has attempted to conceptualize the attribution of criminal responsibility in this peculiar configuration – when the "most responsible"[3], as the ICC prosecutor puts it, are almost always removed from the physical perpetration of the acts. As the ICC holds in its most recent decision on sentence in *Prosecutor v. Jean Pierre Bemba Combo*: "although once or several times physically removed from the acts of his or her subordinates, the culpability of a superior and his or her degree of moral blameworthiness might, depending on the concrete circumstances, be greater than that of his or her subordinates" (para. 17).

I suggest that this inquiry – necessary for the prosecution to proceed – in turn helps identify the distinctively public character of the Rome Statute crimes. In reconstructing the *objective* and *subjective* elements of perpetration, this literature sheds light on the institutional structure that must be activated (but not necessarily created to that end) to enable the prohibited acts. Concentrating on the agent exercising control over this institutional structure, rather than on the individual acts committed, is crucial. Neha Jain forcefully puts the point:

[3] https://www.icc-cpi.int/about/otp

> "The immediate physical participant plays a significant role in the common of the individual crimes which constitutes an essential part of the collective offence. Indeed, it is difficult to imagine a person more in the center of an act that someone who physically commits it. However, this applies only to the individual offence, such as torture and killing, which may by itself form a tiny part of the widespread and systematic planned attacks that constitute international crimes. It is the person who occupies the central position in this collective part of the offence who is most interest to us, rather than the one who controls the individual micro offence" (Jain 2014: 141).

Further, individual liability requires distinguishing the *objective* and the *subjective* elements of the crimes. Here again, I rely on Jain's account in two central respects. First, she argues that perpetration under ICL implies having "control over the sequence of events leads to the results of the elements of the offence" (Jain 2014: 143). Central to this control is what Jain calls an "apparatus" (I prefer the term "institutional structure") being activated. Importantly, the apparatus has not necessarily been established for the purpose of committing the offence: "rather, there must be a high degree of certainty, greater than present in ordinary cases of institution, that the crimes intended will occur" (Ibid., 143). Second, it follows that this agent is able to use the resources of the apparatus: "the perpetrator must occupy a position within, or in relation to, this apparatus, which enables him to harness its potential to achieve the criminal result" (Ibid., 144). Those two elements are salient in the ICC's sentence decision in *Bemba:*

> "over the course of approximately four and a half months, Mr Bemba had consistent information of crimes committed by MLC soldiers in the CAR, over which he had ultimate, effective authority and control. Such authority extended to logistics, communications, military operations and strategy, and discipline" (para. 62).

Importantly, according to Jain not all immediate physical perpetrators necessarily belong to this apparatus. Those elements in turn shape the *subjective* element of perpetration – in particular, the distinction between the agent and the apparatus over which the agent exercises control. Indeed, the perpetrator must have a double intent: "he must have intent with respect to the elements of the offence in question, as well as in relation to the elements that enable him to establish control over the act" (Ibid., 144). Again, the evidence put forward by the ICC in the *Bemba* sentence decision is illustrative: "Mr Bemba's failure to take action (i) was deliberately aimed at encouraging the attack directed against the civilian population of which the crimes formed part, and (ii) directly contributed to the continuation and further commission of crimes" (para. 66).

I submit that public authority is being exercised whenever an institutional structure is (intentionally) used and controlled to atrociously and systematically attack a wide number of civilians. On this view, the end pursued by the attackers does not necessarily imply attacking civilians for *who they are*. The *mens rea* requirement above does not mention any particular end. This goes against a certain strand of the theory of international crimes. For instance, in the context of crimes against humanity, Larry May suggests that group identity is a necessary condition of those crimes:

> "if 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." (May 2005: 85).

But as critics of May point out, it is unclear why this criterion is strictly necessary. Müller for instance builds a powerful counter-example:

> "Imagine a village that is located close to some site of exploitable natural resource. Now, imagine a rebel or paramilitary group that wants to control and exploit this site of natural resource to keep a steady influx of financial means into the group, and therefore massacres all inhabitants of the village, because killing them makes it easier to control the natural resource" (Müller 2018: 8).

On my account, this scenario amounts to committing an international crime. Similarly, David Luban famously argued (in the context of crimes against humanity too) that those crimes' distinctive trait is a perversion of politics and the political animal – more precisely, the human need to live in groups: "for a state to attack individuals and their groups solely because the groups exists and the individuals belong to them transforms politics from the art of managing our unsociable sociability into a lethal threat" (Luban 2004: 117). Rather, building on the objective and subjective elements of perpetration outlined above, I suggest that an authority is public only to the extent that a wide number of agents coordinate their efforts (not necessarily all efforts) orchestrated by a (or several) superior agent(s) enjoying control over those efforts (not necessarily over all efforts) to intentionally and atrociously attack a significant portion of civilians. The establishment of individual liability helps identify the systematic coordinative efforts (e.g. the allocation of tasks, the threat of sanctions) between the lower-level physical perpetrators and the leading agents exercising control over them. Such institutional structure (its activation) is indispensable to the perpetration of international crimes listed in the Rome Statute.

Two normative questions result from this incursion into the liability regime of ICL, and those are very similar to my conclusion on IRHL. On the one hand, what difference does it make (for individuals *qua* right-holders) that jurisdiction and

liability fall upon public authority (functionally construed)? On the other hand, why is ICL structurally engineered to address crimes that involve this element, rather than atrocious acts only? I tentatively answer those questions in the next, final section.

4. Public authority, sovereignty and the common core

I am now in a position to bridge the two structural variables (jurisdiction and liability) explored above. What is the common *normative* core involved here? To answer this question, the first core step is to take the standpoint of individuals *qua* right-holders: what does it change that IRHL and ICL apply to public authority specifically (jurisdiction and liability)? I argue that this common core contributes (but clearly is not sufficient) to render the exercise of authority legitimate to its subjects.

Let me specify two main components of the claim. On the one hand, the claim takes us back to the generic question of why establishing any public authority at all when it comes to protect our basic freedom and equality. Here, the premise is that only a public authority can avoid the right to adjudicate/enforce being used, abused or perverted by private agents that act on their own moral or instrumental reasons – including on a comprehensive account of what IRHL and ICL exactly attack substantive approach reviewed earlier. This is the problem of *unilateralism*. It concerns both the content of the norms and the authority to adjudicate and enforce them. Malcolm Thorburn for instance defends such account with regard to the authority to punish in domestic criminal law:

> "when I decide unilaterally to act according to the demands of morality, I find myself in a situation vis-à-vis others that is deeply unequal. I am committed to acting according to moral principles but I have no assurance that anyone else will. (…) (Thorburn 2011: 41).

This premise differs from the classical accounts (e.g. Hobbesian) calling for institutional authorities based on coordinative, therefore practical, grounds. Here, public authority is constitutive – in a normative sense – of the freedom and equality of its subjects. Consequently, IRHL and ICL do not only protect the basic freedom of and equality of subjects but the allocation adjudicative authority itself is respectful of these basic values.

At this point, one might object that this applies to all public law. In what sense, then, is a specific examination of IRHL and ICL necessary? Unlike the proponents of the substantive approach, I believe there should not be a categorical distinction between domestic and international law. Rather, IRHL and ICL constitute necessary conditions of public authority's legitimacy because they concern the threats that public authorities themselves pose – given their unique coercive resources – to the basic freedom and equality of their subjects. Therefore, the argument can readily apply other Rome Statute categories where the involvement of the state or state-like

dimension is patent, such as war crimes (Article 8). Like crimes against humanity, war crimes (e.g. the extensive destruction of private property) can be perpetrated only by state authorities or state-like entities that are highly organized and resourceful. The recent case of *Al-Mahdi v. Prosecutor* is illustrative in that respect; certainly, while Mr. Al-Mahdi was individually accused of intentionally directing attacks against historical monuments (under Article 8(2)(e)(iv) of the Rome Statute), the territorial control of the city of Timbuktu (Mali) by the two groups of Ansar Dine and Al-Qaeda in the Islamic Maghreb ('AQIM'), the establishment of a local government in general and the creation of a "moral brigade" – led by Mr Al-Mahdi, among others – in particular together form the enabling conditions of the crime (see in particular para. 32-33). As my argument is functional, any non-state actor – a warlord, a guerilla group or a corporation – can count as a public authority.

This also resonates well with an increasing consensus in the IHRL literature that state authorities can be held accountable for IHRL violations committed i) outside of territorial jurisdiction and ii) by non-state agents, such as corporations. As illustrated in the case of *Fadeyeva v Russia* (2005) at the ECtHR, which pertained to a environmental pollution generated by a private corporation, these IHRL obligations are not directly imposed on corporations; rather, states may be required to take positive steps to prevent and redress harm committed by them. Whether this imposition is direct or indirect, it clear that it is the function that corporations play that may erode "the substance of public authority that states wield over their territory" (Augenstein & Kinley 2015: 4). What ultimately matters of my argument is that these norms ought to be upheld by a public authority (hence the additional responsibility to prevent and redress abuses committed by non-state actors) to avoid the problem of unilateralism. Without those norms being upheld by a public authority, one cannot in any relevant sense treated *publicly* as free and equal. The boundaries of that community cannot be determined otherwise than by the exercise of public authority – hence the *functional*, rather than *formal* criteria of liability identified earlier.

This basic proposition has one premise and one implication that still need to be unpacked. On the one hand, it is shaped by the premise of the *ethical neutrality* constraint. As we saw in the first section of the article, defining the substantive foundations of those norms are left to the community. My account suggests that IRHL and ICL both *permit* the constitution of a political community of free and equal agents, but also *empower* those to exercise their political agency in the determination of those ethical foundations (e.g. ideally through collective, democratic deliberative procedures). On the other hand, as already outlined my proposition does not categorically distinguish domestic and international law. Since the account is not contingent upon the (specification of) substantive content of those norms, determining the distinct domain of the international vs. the domestic becomes secondary. There is, as it stands, a vast number of domains of public authority (e.g. the list of petty crimes in domestic criminal law, e.g. the precise catalogue of rights in domestic constitutional law) that international law is not concerned with. This is precisely

because IRHL and ICL concern necessary conditions for legitimacy, not sufficient ones. In addition, IRHL's substantive scope extends far beyond ICL's.

The third step of my account is to return to the duty-bearers and examine its impact from the standpoint of the main makers and subjects of IRHL and ICL, namely sovereign states and state-like entities. Why are IRHL and ICL engineered to address violations committed by public authorities specifically? In the second section of the paper, we saw that the literature and/or case law of IRHL and ICL (courts) do connect the primary adjudicative role of public authority to a notion of sovereignty. It was unclear, however, how exactly this notion should be understood. The third and final step of this section is to clarify this point. As argued above, the common core of IRHL and ICL is to create basic conditions for individuals to be recognized and treated as free and equal agents in a political community whose boundaries are determined by the exercise of public authority. Given the constraint of ethical neutrality, it also leaves those agents the freedom to collectively determine those norms' ultimate foundations and thereby respects the autonomy of this community.

Now, I suggest taking this dual function of the common core to re-visit the notion of sovereignty as the overarching principle of the international legal order. Historically, the notion of sovereignty has been limited to the idea of non-interference or *external* sovereignty. This original notion is reflected in conventional definitions of "statehood" in international law (e.g. Montevideo Convention of 1923 listing attributes such as i) permanent population, ii) territorial control, iii) administration and iv) capacity to enter in relations with other states). My account of the common core fits this historical notion in leaving to the state institutions the right to determine the ultimate foundations of IRHL and ICL. But my account also and primarily recognizes the freedom and equality of individuals subject to these authorities. IRHL and ICL contribute to realizing the other side of the sovereignty coin, namely *internal* sovereignty. More precisely, the establishment and consolidation of the IRHL and ICL regimes signal that external sovereignty is contingent upon internal sovereignty – thereby rebutting the long-standing idea of incompatibility between the two. Cristina Lafont makes precisely this point in examining the R2P doctrine:

> "If sovereignty does not belong to a governmental apparatus or given constitutional order (*pouvoir constitué*) but rather to the underlying constituency itself (*pouvoir constituant*), that is, to the permanent population within a state's territory, then it seems plausible to suppose that an essential mandate of the state apparatus is to protect its population" (Lafont 2016: 424).

This argument is further strengthened by my examination of adjudicative jurisdiction and liability. It is one thing that IRHL and ICL form the necessary conditions for a people to constitute itself as community. It is another that public authority is the

primary adjudicator and duty-bearer of those norms. The core idea of sovereignty qua *pouvoir constituant* should apply to both.

5. Conclusion

While it is widely agreed that IRHL and ICL share commonalities, the extent to which these two fields of international law can be subsumed under the conceptual and normative umbrellas remains vastly unclear. The underlying aim of the investigation was therefore to examine both whether there could be more conceptual consistency that what the positive and normative literature suggests and whether this conceptual consistency could lead to a consistent normative reconstruction of the common core. It is important note that this examination did not question the normative function of IHRL and ICL. For instance, whether ICL should be understood in deterrence, retributive or expressive terms, was not addressed. Or whether the ECtHR should have jurisdiction over social, economic and cultural rights. Instead of building an overarching normative account and test it against the current legal landscape, I offered an immanent normative reconstruction of the current regimes of IHRL and ICL with particular reference to the ECtHR and IACtHR regimes for IHRL and the ICC regime for ICL.

I started this article with a distinction between the substantive and the structural approaches to the common core. I suggested that the two approaches are in fact explorations of two sides of the same coin, the right-holder and the duty-holder. As I see it, the deficit of the predominant literature is that it focuses on the former and neglects the latter. Moreover, focusing on the former itself comes at a price that its defenders have not fully measured. The first step of the paper was precisely to articulate the shortcomings of the substantive approach (the *threshold* problem and the problem of *ethical neutrality*) before offering an alternative.

The second step of the paper was to explore the structural features of the IRHL and ICL qua international regimes. Who has the authority to adjudicate alleged violations of IRHL and ICL, and who is liable for those violations, were the two structural questions I explored. I showed that exploring those two features reveals an intriguing common core. What brings those structural features together conceptually is the exercise of public authority *functionally construed*. I illustrated this functional aspect by examining the extra-territorial application of IRHL and the practice of establishing individual liability for violations of the Rome Statute crimes. Surely, many differences remain; human rights violations do not benefit from universal jurisdiction, from instance. And the catalogue of IHRL is much wider than the one of international crimes.

The third and last step of the paper was to draw the consequences of my examination for the normative theory of the common core between IRHL and ICL. At that point, I suggested that the two sides of the coin interact: the fact that the overarching

addressee of IRHL and ICL is public authority (functionally construed) limits the extent to which one can engage with the substantive justification of those norms. I therefore offered an argument that can both explain why public authority is the structural addressee of those norms, but also why public authority is the structural adjudicator. More precisely, they both establish some of the necessary conditions through which individuals can identify themselves as free and equal members of a community – a community that is precisely (and contingently) determined by the exercise of public authority.

Finally, why is international law primarily concerned by the exercise of public authority to start with? It can be traced back to the conventional role of international law to create and preserve the sovereignty of states. More precisely, IRHL and ICL both reinforce internal sovereignty, which is necessary for the state community to legitimately exercise sovereignty externally.

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