

ANNEX 7

There will occasionally be harms that assault the victim's individuality, and hence are likely to be widespread, and yet are not strictly group-based. Think of a case such as the bombing of Hiroshima.¹¹ This bombing of civilians with widespread horrible casualties was arguably not group-based. While all of the victims were of the same nationality and most of the same ethnicity, the bombing was not aimed at these features of the group assaulted. Rather, the assault was politically motivated in the sense that it was designed to bring Japan to its knees, and to end World War II more quickly. But it could be argued nonetheless that the bombing of Hiroshima was an international crime, indeed a crime against humanity. The argument would be similar to what we just saw – namely, that the individuals killed were treated not according to their unique characteristics, and the sheer scope of the harm threatened to spill over borders. Of course, those who argue that the bombing of Hiroshima was not a crime against humanity usually do so by reference to the fact that the bombing actually diminished rather than increased the risk of further harms (by Japan) across its borders. While not attempting to resolve this dispute here, I am willing to admit that it is not necessary that harms be group-based for them to rise to the level of international crimes. Nonetheless, I think the examples in which the victims suffer non-group-based harms will be very few in number, and have been so historically, and when these cases have occurred, there has been another sort of group-based harm – namely, that the perpetrator was connected to a State or other group.

Consider the short list of practices thought to violate international *jus cogens* norms, or obligations *erga omnes*¹² – namely, genocide, apartheid, slavery, and torture. At the top of that list is genocide, where clearly the emphasis is on the group, the destruction of a people, not merely the individual victim. Apartheid can be easily seen in the same light, as clearly directed against a racial group. Slavery is the mistreatment of a people, including the denial of a people's right to self-determination. Torture is the only practice currently seen as condemned by *jus cogens* norms that does not readily have a group orientation. But the form of torture condemned by *jus cogens* norms is that practiced by the State, or a State-like actor, and it is this element of State action that makes torture also group-based when it is prosecuted at the international level.¹³ Although it is now in the domain of a different form of group-based harm, torture is still group-based, as I will show in the next section.

III. Group-Based Actions and Systematic Harm

Let us now discuss the second prong of the international harm principle – namely, when the actor or perpetrator is also somehow group-based. In this section, I will begin to discuss particular practices that might satisfy the criteria of international harm. I will continue this discussion in more detail in the next chapter, where I focus on various kinds of rape and sexual violence as putative international crimes. In this second way that harms are group-based, it is not

that the victim is experiencing group-based harm but rather that there is State involvement, or similar group involvement, in the harmful acts, thereby making these acts systematic rather than random. As the Yugoslav Trial Chamber recognized, implicit in some of the *jus cogens* justifications of international crimes "is the fact that the conduct in question is the product of state-action or state-favoring action."¹⁴

If rapes are part of a State-sponsored plan to eliminate an ethnic group within that State's borders, or as a State-accepted way for some individuals to intimidate a sub-group of women in a given community, then that individual crime rises to the level of an international crime because of its systematic and invidious nature. The actions of States, or State-like actors, have given the international community its clearest rationale for entry into what would otherwise be a domestic legal matter. And this is true in two senses of the term "domestic": The actions are not merely between two individuals, but involve the larger society, and the actions are no longer merely appropriately prosecuted at the domestic level, since the domestic State is itself a party to the violence, as we will see later in the chapter.

In our earlier discussions of *jus cogens* norms, the conceptual basis for these norms was identified as the demand for security that can be lodged against States. When it is the State that is assaulting a person, either through an official representative of the State (such as a member of the army or the police), or because of some State-sponsored plan, then there is a very clear violation of a *jus cogens* norm since security of the individual is so clearly not being protected by the State. According to my earlier Hobbesian analysis, State sovereignty is linked to the provision of protection for the State's subjects. So when the State is involved in the assault on individuals, there is an opening for prosecution by an international tribunal. In addition, when it is the State that is the victimizer, and not merely that the State allowed the attacks to occur, then it normally makes little sense to argue that a domestic tribunal should prosecute the crime since it is so unlikely that the State could impartially prosecute itself.

Certain kinds of State action can mark a crime as international in that there is coordinated systematic harm, which then assaults people for reasons not based on their individual characteristics. We could treat the notion of a government plan of rape – for instance, as a part of an ethnic cleansing campaign – the way that we treat a corporation or university in terms of its policy of sexual harassment. Here, the chief question is whether the plan has been formulated by the collective entity or whether there is knowledge of the illicit practice, and whether any efforts have been made to stop it. When harm is systematic in that it is carried out by a State or State-like entity, there are likely to be other people who will be victimized on the basis of the characteristics picked out by the plan since the harms being planned are aimed at more than a single individual. The international community then would have a legitimate basis for intervention so as to protect the larger community also likely to be harmed by the plan.¹⁵

I wish now to modify my proposal that if either the target of the act is group-based (in the sense that the victim is chosen for harm as a result of having common characteristics), or the perpetrator is group-based (in the sense that the perpetrator is an agent of a State or State-like entity, or is attempting to advance a plan of the State), then international prosecution is appropriate. My modification is that, ideally, both of these conditions should be satisfied – that is, the harm should be both widespread *and* systematic. I will call this the “ideal model.” The ideal model of international crime will best secure the rights of the defendants, the importance of which I will explore in later chapters. In some cases, though, it may be justifiable for prosecutions to go forward even with only one of these two factors present. For example, if the group-based harm is very widespread, then it may be sufficient for international prosecution even without direct State involvement, because of fears that the harm will spill over borders.

In international criminal law, acts are inhumane and humanity is implicated when the intentions of individual perpetrators or the harms of individual victims are connected to group-based characteristics rather than to the unique characteristics of the individual perpetrators and victims. Humanity is implicated when the individual actor or sufferer merely stands in for larger segments of the population, who attempt to deny individual differences among fellow humans and look only at group characteristics. This is the specific purview of international criminal law and where prosecutions by international tribunals can be most easily justified. In the next chapter, I provide additional arguments to this effect by discussing in detail various ways that some forms of rape can be considered an international crime, as well as why it is not legitimate to see other forms of rape as prosecutable before international tribunals.

In this and the last chapter, I have argued that international criminal prosecutions can be justified by reference to two principles – the security principle and the international harm principle. The security principle provides a reason why State sovereignty may be abridged – namely, when the physical security or subsistence rights of an individual are jeopardized by that State’s action or inaction. But this initial basis for international criminal law should be limited to rights abuses that are especially egregious because of a parallel concern that the risk of punishment to the individual perpetrators of these crimes is also important and can only be justified if the harm to the victim is equally serious. In addition, though, the international harm principle also must be violated in order for prosecutions by international tribunals to be justified. The international harm principle calls for a showing that the crime in question is group-based either in terms of the nature of the victim’s harm or the character of the perpetrator of the harm. This additional principle is necessary because individualized harm to victims that violates their physical security or subsistence is still not sufficiently the subject of international interest to warrant prosecuting individuals in international tribunals. Justified international prosecutions require either that

the harm must be widespread in that there is a violation of individuality of a certain sort epitomized by group-based harmful treatment that ignores the unique features of the individual victim, or the harm must be systematic in that it is perpetrated in pursuance of a plan by an agent of a State or with active involvement from a State or State-like entity. These group-based considerations provide a basis for thinking that the international community has a special interest in these cases that would warrant prosecution by an international rather than a domestic tribunal.

In explaining the idea behind the international harm principle, I have distinguished two considerations – the nature of the victim's harm, and the character of the perpetrator of that harm. I initially argued that either of these considerations could provide a sufficient basis for international interest to warrant prosecution by an international tribunal. The group-based nature of the harm provides a basis for the widespreadness of the harm in that there is a tendency of the assaults to spread throughout a population because they are aimed at group characteristics rather than individual ones. Group-based harm fails to treat the victim in terms of his or her individuality in a way that is owed to all human agents. I also argued that if the character of the perpetrator is group-based, in the sense that the harm is based on a systematic plan carried out by an agent of the State or with active involvement by a State or State-like entity, then international prosecutions could also be justified. In addition, I suggested that ideally we should look for both a group-based harm to a victim and also State or State-like involvement in that harm – what I called the ideal model of justification. As we will see in the next chapter in a detailed consideration of the case of rape, international tribunals normally should prosecute mass rape and sexual violence when humanity is harmed or when the harm is State-based, and ideally when both of these factors are present.

IV. Objections to the International Harm Principle

In this final section, I consider various objections to the international harm principle that I set out in this chapter. The first objection is that the two types of group-based harm that I identify in this chapter – the group-based nature of the victims and the group-based nature of the perpetrator – are so different from one another as to call for two different analyses rather than the confusing attempt to provide a single analysis of two so different phenomena. Simply because the term "group" features in the description of both of these conditions does not mean that they are significantly related to each other. Indeed, so much