Moral Accountability and International Criminal Law

Holding Agents of Atrocity Accountable to the World

Kirsten J. Fisher

ROUTLEDGE

Moral Accountability and International Criminal Law

This book examines international criminal law from a normative perspective and lays out how responsible agents, individuals and the collectives they comprise, ought to be held accountable to the world for the commission of atrocity. The author provides criteria for determining the kinds of action that should be addressed through international criminal law. Additionally, she asks, and answers, how individual responsibility can be determined in the context of collectively perpetrated political crimes and whether an international criminal justice system can claim universality in a culturally plural world. The book also examines the function of international criminal law and finally considers how the goals and purposes of international law can best be institutionally supported.

This book is of particular interest to a multidisciplinary academic audience in political science, philosophy and law; however, the book is written in clear jargon-free prose that is intended to render the arguments accessible to the non-specialist reader interested in global justice, human rights and international criminal law.

Kirsten J. Fisher is a postdoctoral researcher at the Centre of Excellence in Global Governance Research at the University of Helsinki. Prior to this post, she held a post-doctoral research fellowship in the Department of Political Science at McGill University and a visiting research fellowship at the Centre of Human Rights and Legal Pluralism, Faculty of Law, McGill University. She writes on issues of global justice and international criminal law.

Moral Accountability and International Criminal Law

Holding Agents of Atrocity Accountable to the World

Kirsten J. Fisher

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2012
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
711 Third Avenue, New York, NY 10017

Routledge is an imprint of the Taylor & Francis Group, an informa business

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloguing in Publication Data
Fisher, Kirsten.
Moral issues and international criminal law : accountable to the world / Kirsten Fisher.
ISBN 978-0-415-67198-9 (hardback) – ISBN 978-0-203-80337-0 (e-book)
1. International criminal law. 2. Criminal liability (International law)
3. Criminal justice, Administration of. I. Title.
K5015.4.F57 2012
345'.04–dc22
2011011903

ISBN 978-0-415-67198-9 (hbk)
ISBN 978-0-203-80337-0 (ebk)

Typeset in Garamond
by Keystroke, Station Road, Codsall, Wolverhampton

Contents

Acknowledgements

I am grateful to many people whose help, both direct and indirect, made this work possible. I am lucky to have benefited from wonderful colleagues, friends and family who, through their own research, comments, questions, support and encouragement, made writing this book a stimulating and enjoyable process.

I would like to especially thank my doctoral supervisor, Richard Vernon, for his mentorship, invaluable insight, guidance, unfailing commitment, constructive criticism and, of course, for our many conversations that clarified my thinking on the issues addressed in the following pages.

Thanks to Valerie Oosterveld, Charles Jones and Catherine Lu for their support and critical eyes. Their attention to detail and advice helped me work through some difficult theoretical problems. I also owe a debt of thanks to Jens Kremer and, additionally, to Rain Liivoja. Of course, any mistakes are my own.

I need particularly to acknowledge the financial assistance of the Social Sciences and Humanities Research Council of Canada, the Canadian Consortium on Human Security and the Human Security Program of the Department of Foreign Affairs and International Trade. In addition, the support of the Groupe de Recherche en Philosophie Politique in Montreal and the Centre of Excellence in Global Governance Research at the University of Helsinki has been invaluable.

Finally, I want to express my appreciation to my family, my mother Alison and father Brian, and my siblings Dana, Shane and Jarad, who each in their own way supported and encouraged me, especially Jarad who tirelessly helped with citations for this book and to my grandmother, Jean Noble, who is always proud of me.

Earlier versions of portions of this book have been previously published elsewhere. I am grateful to the editors of these publications and to the anonymous reviewers for these publications and to the anonymous reviewers for Routledge who reviewed the manuscript in its entirety and whose comments were extremely helpful.

Chapter 1, reproduced with permission from Palgrave Macmillan, appeared as: "The Distinct Character of International Crime: Theorizing the Domain", *Contemporary Political Theory* 8: 1 (February 2009) 44–67.

Chapters 4 and 5 are an extended and revised version of another journal publication: "Identifying Liability: Ambiguous Charges in International Criminal Law", *Finnish Yearbook of International Law* (2008, published 2010) 127–155.

Chapter 8 appeared as: "Demanding Accountability: Judgment and Punishment in Ugandan 'Restorative' Mechanisms", in Anita Singh and David McDonough (eds) *Defence to Development: Resolving Threats to Global Security* (Halifax: Centre for Foreign Policy Studies, Dalhousie University, 2007) 163–196.

Table of cases

International courts

National courts

Canada

Israel

United States

Table of statutes

List of abbreviations

AFRC	Armed Forces Revolutionary Council (Sierra Leone)
ASPA	American Servicemembers' Protection Act (USA)
AU	African Union
CAR	Central African Republic
CDF	Civil Defense Force (Sierra Leone)
DOJ	Department of Justice (USA)
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
GA	General Assembly (United Nations)
GoU	Government of Uganda
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHP	International Harm Principle (Larry May)
LC	Local Council (Uganda)
LRA	Lord's Resistance Army (Uganda)
LRA/M	Lord's Resistance Army/Movement (Uganda)
NATO	North Atlantic Treaty Organization
NDJ	Natural Duty of Justice (Allen Buchanan)
NGO	Non-Governmental Organization
PCIJ	Permanent Court of International Justice
R2P	Responsibility to Protect
RLP	Refugee Law Project (Uganda)
RPF	Rwandan Patriotic Front
RUF	Revolutionary United Front (Sierra Leone)
SCSL	Special Court for Sierra Leone
SICT	Supreme Iraqi Criminal Tribunal
SP	Security Principle (Larry May)

STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UN	United Nations
UPDF	Uganda People's Defence Force

Introduction

The twentieth century was an era of great atrocity, and unprecedented awareness of distant acts of violence, around the world. The century witnessed two global wars. It saw the Armenian massacre during the First World War, the Holocaust during the Second, the brutal reign of the Khmer Rouge regime in Cambodia, the more than 20 years of violence in northern Uganda, the incredibly quick slaughter of at least 500,000 innocents in Rwanda over 100 days in 1994. It witnessed the indiscriminate use of force against civilian populations during the violent conflict in the former Yugoslavia and ethnic strife and civil war in the Democratic Republic of the Congo (DRC) and Sudan. The twentieth century also saw many, many other acts of brutal and unwarranted violence and gross human rights violations throughout the world. In the twentieth century lived Adolf Hitler, Joseph Stalin, Mao Zedong, Saloth Sar (Pol Pot), Augusto Pinochet, Slobodan Milošević, Joseph Kony, Charles Taylor, Saddam Hussein and many other architects of atrocity. The twentieth century also tolerated 'unexceptional political mass murderers', otherwise normal individuals whose deplorable actions contributed to the atrocity of which they found themselves to be a part (Simpson 2007: 75).

Twice during this century our vocabulary was expanded to better represent horrific mass violence in which the international community should be interested. In the aftermath of the Second World War, Raphael Lemkin struggled to formulate a word that would cover the Nazi atrocities committed against the Jewish people. Genocide, '[t]he word that Lemkin settled upon [,] was a hybrid that combined the Greek derivation *geno*, meaning "race" or "tribe", together with the Latin derivative *cide*, from *caedere*, meaning "killing"' (Power 2002: 42). Later that century, Rummel coined the term 'democide' to cover the various forms of 'murder of any person or people by a government, including genocide, politicide, and mass murder' (Rummel 1997). However, as Lemkin recognized, a word is merely a word and what is needed is law to provide force behind these words which represent the acts we condemn. To this end, the twentieth century also witnessed the political will to introduce international laws and institutions to deal with the perpetrators of atrocity. International criminal law (ICL) developed slowly, and came to a halt before

regaining momentum; it faced charges of partiality and injustice, but it is a bright light in a fight to end impunity for perpetrators of pervasive and purposeful mass political violence.[1]

ICL has developed as a response to atrocities that 'shock the conscience of humanity' (Rome Statute: Preamble). Prior to the end of the Second World War, only states were subjects of international law; international law was concerned only with the relationships between sovereign states and the laws reflected multilateral conventions or customs that regulated interactions between states and protected good relationships. However, by the end of the Second World War, events began to influence conceptions about what was needed to keep the world safe and what justice entailed. The Nuremberg trials set a remarkable precedent for the direction that international law was, in theory, to follow in the second half of the twentieth century. A dramatic shift in thinking about international law seemed necessary to adapt to the apparent demand to respond to shocking actions committed by governments against their own citizens and the ordinary citizens of other states. The move to hold individuals criminally accountable under ICL for international crimes was a radical departure from centuries of state-centric conduct.

What is considered the first application of ICL, the Nuremberg Tribunal, is a system of trials established by the Allies to prosecute Nazi leaders for war crimes and crimes against humanity. This approach was not initially presumed to be the best course of action by all Allied forces' decision-makers when weighed against the alternative suggested response, which was to summarily shoot the Nazi perpetrators (Bass 2000: Chapter 5). During the war, the Allies met to discuss post-war treatment of Nazi leaders; initially most of the Allies considered Nazi acts of violence to require a political rather than a legal response. The British, French and Russians originally supported summary execution, the traditional war response of the victors. The American Secretary of the Treasury, Henry Morgenthau, also desired a harsh and swift ending to the Nazis and their Germany. Other Americans, though, including Henry Stimson who opposed the Morgenthau Plan and submitted a proposal for a large international tribunal, pushed for a legal approach (Bass 2000: Chapter 5). In the end, the trials were established under the London Charter of the International Military Tribunal of 1945.

The Nuremberg trials were extraordinary in that they were the first instance in which individuals were held responsible to the world for their violations of international norms and natural, if not strictly positive, law. Nuremberg prosecuted crimes against humanity, a charge expressed for the very first time in 1915 by Britain, France and Russia against Turkey for the deliberate and systematic destruction of the Armenian population of the Ottoman Empire during (and just after) the First World War.[2] But the prosecution of perpetrators of atrocity at Nuremberg was not neutral or all-encompassing. The London Charter specified that only acts committed by European Axis Powers could be tried as war crimes, crimes against peace and crimes against humanity (London Charter: Article 6). As well, 'the court treated aggressive war ("crimes against

peace"), or the violation of another state's sovereignty, as the cardinal sin and prosecuted only those crimes against humanity and war crimes committed *after* Hitler crossed an internationally recognized border. Nazi defendants were thus tried for atrocities they committed during but not before World War II' (Power 2002: 49, emphasis in original).

After the adjournment of the Nuremberg and Tokyo trials before the mid-point of the century, however, ICL lay dormant for over 40 years. Senseless destruction and mass loss of life as the result of monstrous conflict was supposed to end with the conclusion of the Second World War and the words 'never again', and although the world's population has not been revisited by another world-encompassing battle, neither has it escaped mass atrocities the world over. Nevertheless, as William Schabas writes, 'A four-decade long hiatus interrupted the march of international justice,' and only very recently has ICL re-emerged in an effort to hold individuals accountable to the world for their most heinous offenses against humans (Schabas 2006: 422).

In recent decades this autonomous system of law has aggressively developed to deal with individual criminal responsibility for the most heinous of crimes. But the development and application of the international criminal system have been mired in criticism and concern. The International Criminal Tribunal for the former Yugoslavia (ICTY) prosecution of Slobodan Milošević, which began in 2002, was hailed as the 'trial of the century' at the same time as it was accused of being politicized and unfair. The employment of ICL in Uganda in 2004 has been criticized as being insensitive to the needs of the local society, and the International Criminal Court (ICC) has been accused of imposing Western conceptions of justice on the entire world.

Of significant note is that while ICL is playing an increasingly important role in global politics and issues of global security, normative theory has not kept pace with the advancements in this area of law. This book examines, from a normative perspective, ICL and lays out how responsible agents, individuals and the collectives they comprise, ought to be held accountable to the world for the commission of atrocity. This inquiry into ICL requires an examination of traditional questions in political philosophy in a new context. In examining the history of political thought, we find a notable literature defending state sovereignty and justifying holding individuals accountable to the state. We can also find a lot of work dedicated purely to war theory, addressing the justness of war and the justness of the manner in which the war is fought, but much less has been said about what happens after a conflict, especially one deemed unjust or fought unjustly (Bass 2004: 384). There is little literature to be found within the field of political philosophy regarding holding individuals accountable to the world. This book addresses this under-explored issue in the current legal, philosophical and political literature. It investigates the concepts of authority and obligation, domestically and internationally, and evaluates international prosecution as the right response to crimes such as crimes against humanity, war crimes and genocide. It questions the limits of state sovereignty, and if and under what conditions individuals ought to be able to enforce claims against

their own governments at the international level. Ultimately, this work aims to enhance our current understanding of ICL. It investigates what is special about criminal law and asks what the focus on crime adds to traditional debates about possible limits to sovereignty. It examines the function of ICL and finally considers how best the goals and purpose of international law can be institutionally supported.

Chapter 1 examines the conditions under which it is appropriate for states to lose, or delegate, sovereign authority to judge and deal with wrongdoing, and it examines the domain of ICL. It questions why it is that the objective of international law must be to prosecute specific international crimes, crimes that are not seen merely as domestic crimes that happen to be prosecuted internationally. This chapter explores the theoretical obstacles that make defining clearly the domain of ICL a serious challenge. Chapter 2 examines international crimes themselves and questions why it is that these particular acts are rightly considered the domain of the international community. It also investigates whether terrorist acts might rightly be considered to demonstrate the characteristics of an international crime. Chapter 3 questions the function of ICL, the prosecution and punishment of wrongdoers, as a response to these unique transgressions. It explores theories employed to justify punishment of domestic crimes and evaluates their suitability for justifying international prosecution and punishment, and offers a hybrid retributive-expressive theory. Chapter 4 explores the collective vs. individual responsibility debate and questions the rightness of holding individuals criminally accountable in certain social contexts. Chapter 5 examines environmental influences and collective responsibility contributing to atrocity contexts and asks whether the current list of criminal offenses available under ICL adequately reflects the crimes. Chapter 6 examines the effect this discussion of the domain of international law, and its conclusions, has on the state in terms of how crimes in its territory can be prosecuted. It explores the concepts of universal jurisdiction and complementarity. This chapter criticizes the international legal acceptance of universal jurisdiction that allows any state in the world to prosecute any person from anywhere in the world for crimes against humanity, genocide and war crimes, as long as the accused is present in the country that is prosecuting. Chapter 7 evaluates international judicial mechanisms based on their ability to overcome serious challenges that international prosecutions face: problems of authority, selectiveness, perceived legitimacy, and with the validity of *ex post facto* or retrospective law. Chapter 8 responds to the critique that ICL is not necessarily the right response for societies trying to deal with mass atrocity because it is culturally insensitive to non-Western societies. This chapter, focusing on the case of Uganda, argues that retributive justice is appropriate and relevant globally but that difficult decisions must be made in light of the context of the established peace. Finally, Chapter 9 deals with the concept of collective punishment for mass atrocity, arguing that some form of response that takes seriously the collective nature of the wrongdoing is necessary to complement individual prosecutions in transitional justice situations.

Framing the question of a normative understanding of ICL in the way this book does, by endorsing a legitimate basis for international criminal authority in human rights protection and promotion and then examining how this grounding suggests the shape the domain and institutions of ICL should take, limits this project to issues of formal legal responses to mass violence. Rightly, it does not consider the necessary reconstruction of societies transitioning from conflict to peace, except where the goals of reconstruction and legal justice overlap. It does not consider restitution to the victims of atrocity or other means by which the perpetrators, the state or international community could help individuals move forward with their lives, except where the issue of restitution overlaps with questions concerning the process of criminal prosecutions. The important note to take from the following pages is that ICL is justified as a global legal response capable of penetrating sovereign borders in so far as it is a reaction to genuine international crime, mass violence that assaults basic human rights and does so in a manner that is a travesty of political organization.[3]

Finally, before embarking on this project, one assumption that underlies much of the work of the following pages needs to be addressed: that there is an international community of sorts. Of course, 'international community' is a nebulous term. There is much debate over whether there can be an international community, a group of people or peoples who share an environment and who have common interests, risks, needs, preferences, etc. (Koskenniemi 2008). This is not the space in which to definitively resolve this question, but since these pages do engage the term 'international community', offered here is an explanation of what is meant by its use when employed in this work. Presumably, the term is used in these pages as it is used by many others, in a rather ambiguous way, referring both to an indefinite and elusive collection of actors and to a set of liberal values represented in collective action that has global reach.

The word 'community' is generally employed to refer to a group of individuals organized around common values, with social cohesion, operating within a shared geographical location (Oxford Dictionaries n.d.). While we can tease out common basic values – such as respect for one's own (and others') autonomy, life and physical security, and social relationships – attempting to tease out more higher-level values common to all community actors may prove a problem; think of religious views, values concerning political organization or social structures. However, it is difficult to characterize any group as a homogenous community of this sort. Social cohesion may also prove difficult to pin down. Social cohesion is in many ways an intangible; it is the glue that ties actors together, seen often against a background of diversity (Easterly, Ritzen and Woolcock 2006; Friedkin 2004). There is a sense, though, in which global actors do view themselves as operating as part of international institutions and tied to distant co-actors (sometimes more beneficially than others).[4] Whether these ties are seen as colonialist or friendly is immaterial to whether there is an emotional connection (if even only subtle; if even only related to certain factors

or events or concerns) that embodies a sense of social cohesion, no matter that it does not rival the social cohesiveness of smaller units.

The international community is not a coherent society in the sense that most states or smaller groups based on common identity in opposition to an other are. Neither, perhaps, can the interests and preferences of all agents be reconciled; but, neither can be all the interests and preferences of individual citizens of a smaller community. There is, however, an aggregate of commonly vulnerable and interrelating actors. This does not necessarily mean that there is a well-functioning and just global structure. And, although there may be certain institutions that claim to act on behalf of everyone, in actuality there seems to be no political institution that could legitimately claim to entirely fairly represent all of humankind. International community, rather, represents the fact that there are certain common threats and somewhat cooperative (loosely defined) interaction between global actors to deal with these threats. These threats include risks to personal and group security and political organization (as explained in Chapter 1), and the idea of 'international community' is based on these common concerns and attempts by agents working through international institutions and other cooperative endeavours aimed at minimizing these risks. ICL is one of these cooperative endeavours reflecting changing norms about sovereignty, the value of certain aspects of human nature and the protection of basic human needs.

This book is a project of distinctions: demarcating necessary spheres of criminal law (domestic and international); separating out distinct atrocity actors, their roles and responsibilities; drawing notice to discrete audiences to the expressive value of the prosecution and punishment of atrocity perpetrators and to their different need of and receptivity to dissimilar messages. In drawing these distinctions, this book shows the benefits and the limits of holding individuals accountable on the international stage for the 'the most serious crimes of concern to the international community as a whole' (Rome Statute: Preamble).

Notes

1 ICL most narrowly and precisely defined refers to criminal conduct that is international, constituting an offense against the global community. In its broadest interpretation, the category of ICL can also refer to any international law that deals with criminal activity, and includes law that is transnational, including, for example, extradition, transborder organized criminal activity, counterfeiting and treaties on drug trafficking or genocide. Transnational crime affects the interests of more than one state. The narrower construal, however, represents a unique category of activity and it is this narrower interpretation that is applied in this book.

2 This prior use of the term 'crime against humanity' was a charge emitting from states against another state and was not a charge against any particular individual, neither was it a legal charge. It was, in fact, a rhetorical expression of condemnation.

3 For a discussion on these two criteria, see Chapter 1.
4 See, for examples, news stories such as: 'Top UN Envoy to Iraq Urges International Community to Back Upcoming Polls 2010'; and, in his first speech, US President Obama proclaimed that the international community needed to work together to meet new challenges (Obama to the World: We Need to Unite 2009).

1 The distinct domain of international criminal law

As never before, issues with which many lawyers and contemporary political theorists grapple are international in nature. Events, decisions and human challenges that in the past might have been of little consequence or garnered little attention beyond national borders now have much wider repercussions and attract more widespread interest. To reflect these challenges to the convention of international realism, there has been a strong normative shift to cosmopolitan thinking in contemporary political and legal theory. In line with this change, cosmopolitan law has extended the rule of law to the international sphere. The ICC is an innovative form of cosmopolitanism, developing from, and enhancing, Kant's conception of cosmopolitan law (Kant 1785). This extension of the rule of law, however, produces difficulties for both international and domestic legal systems, demanding complex theoretical discussions concerning their respective roles, responsibilities and aims.

In some ways, we want to claim that ICL deals with actions that are beyond the sole grasp of domestic law; they are not only crimes that the state is unable or unwilling to prosecute, but crimes that illustrate a specific kind of evil (Vernon 2002: 234). The drafters of the Rome Statute captured this view when they wrote that there are 'unimaginable atrocities that deeply shock the conscience of humanity' (Rome Statute: Preamble). International crime, therefore, needs to be defined by its unique character. The distinction between domestic and international criminal law, based on the severity and manner of the criminal act, ought to rest with what actions should be censured by all states acting as a whole (or at least states parties to the ICC when it is acting under its state-referral or prosecutor-initiated jurisdiction). Mark Drumbl identifies them as atrocity crimes, 'acts of atrocity characterized as extraordinary international crimes' (Drumbl 2007: 4). The question must be: what actions are devastating enough to require the explicit condemnation of the international community in the form of classification as an international crime? To answer this question, two distinctions must be made: between domestic and international jurisdiction and between what ought to be considered a violation or a crime.

This first chapter attempts to present a reasonable theory defining the distinct domain of international crime. It examines why it is that the objective

of international law must be to prosecute specific international crimes, crimes that are not seen only as domestic crimes prosecuted internationally. We need to answer whether a strict distinction between international and domestic crimes is necessary and, if it is, as this chapter argues, where the distinction lies.

The domain of ICL must fall within limits that are neither so strict that they would render ICL virtually meaningless or neglect criminal behaviour that rightly invites international attention, nor so broad that they would include acts that can reasonably be left to domestic systems. Satisfaction of two thresholds is what distinguishes international crime. First, to be identified as international crime, an action must meet a particular threshold in terms of the type of human rights violation. Second, it must satisfy in the manner in which the rights are violated. This thresholds test, a revision and expansion of positions espoused by Richard Vernon and David Luban, demands that criminal activity be a violation of a physical security human right and that it demonstrates a travesty of political organization.[1] Beyond the substantive conceptual question, there are difficult political issues concerning procedure and who – which institutions – should prosecute international crimes. These issues are the focus of subsequent chapters. The aim of this chapter is to distinguish the content of ICL and provide critical boundaries for the domain.

The need for a distinct domain

As suggested in the introduction to this book, there has been a momentous move in the international realm to holding individuals accountable in global forums for harms against persons. While, at one point, international law was only concerned with relationships between states, the introduction of ICL reflects concern for the manner of harms individuals are subjected to suffer within the borders of their states. 'The very idea of a crime against humanity challenges the traditional understanding of a state's exclusive prerogative over crimes committed within its borders' (May 2006a: 349). This interest in harms to individuals within borders, though, is reasonably restricted to particularly defined harms. It aims to bring an end to impunity for acts identified by members of the international community as particularly egregious, 'a specific kind of evil', 'atrocities that deeply shock'. That the objective of international law must be to prosecute specific international crimes, crimes that are not seen merely as domestic crimes that happen to be prosecuted internationally, is desirable from both political and conceptual points of view.

Politically, state acceptance of international criminal institutions may hinge on the fact that international law has only limited capacity to interfere in the internal workings of states or to override sovereignty (Ayoob 2002). International law is often restricted in the name of sovereignty as many scholars consider respect for the sovereignty of states as the universal standard of international conduct (Jackson 2004). Sovereignty of states can also restrict the kind of law that forms international law:

> Importantly, because one or more of the elements of legalization can be relaxed, softer legalization is often easier to achieve than hard legalization. This is especially true when the actors are states that are jealous of their autonomy and when the issues at hand challenge state sovereignty. (Abbot and Snidal 2000: 423)

Since state sovereignty is so significant in the current global context, a distinction between international and domestic jurisdiction is liable to be necessary for states, as the primary decision-makers, to support a system of international law. This distinction is also important because international prosecution is costly;[2] and there is sometimes a need to create, often from nothing, an entire international judicial system. If there were no domain restriction, this international judicial system could easily become overloaded with a wide range of crimes. Limiting ICL to the domain of the most serious crimes helps to ensure financial feasibility for the international judicial system.

Conceptually, this distinction is morally salient. There are good reasons to believe that the basic well-being of individuals ought to be left to the institutions of the lands in which they reside. Similar to utilitarian arguments for familial preference, as long as the state functions well and safeguards the basic rights of its citizens, there are practical reasons to believe that the most efficient way to protect human rights globally and allow sufficient latitude for cultural differences to be explored and nurtured is through the conditional sovereignty of distinct geographical and cultural groups (Walzer 1977: 53–55). This does not, however, imply that violations of the rights of citizens should be of no concern to those outside a state's borders. It merely acknowledges a presumption in favour of group autonomy to live according to its cultural values and to preside over violations of its own community regulations, in favour of self-rule in the absence of a democratic world government. Of course, ICL presupposes limits to state sovereignty, but it is also grounded in a world that acknowledges the normative benefits of states, while at the same time positing that individuals ought to be able to enforce claims against their own governments at the international level.

There exists also a risk to the expressive value of international criminal prosecution in conflating domestic and international crime. If an international crime is nothing other than a domestic crime prosecuted at the international level, then there is little communicative significance to labelling something an international crime or to prosecuting it in an international forum. There is, therefore, an important line to be drawn between domestic and international jurisdiction in the interest of the potency of international moral condemnation. The expressive value of the criminal justice process is a central theme of this book and an issue to which it will return in following chapters.

Certainly, contrary to this position is a body of literature demanding that ICL be an overarching extension to domestic judiciaries, usually with the aim of prosecuting any human rights violations. One such position is offered by Andrew Altman and Christopher Heath Wellman who argue that there is no