

Criminal Responsibility, Municipal and International (Draft)

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In this paper I want to explore some of the implications of two ideas that, I believe, can cast new light on the normative structures and logic of criminal law. The first idea will not play a large role in what follows, but provides a necessary prelude to the paper's main discussion: it is that we should take more seriously than theorists have often taken the distinction between responsibility and liability, and pay more attention to the idea of responsibility as a matter of answerability. The second idea, which is central to this paper, is that we should also pay more serious attention than theorists have often paid to the relational dimensions of responsibility—in particular to the fact that we are responsible not just *for* something, but *to* some person or body.

In Section 1 I briefly discuss the distinction between responsibility and liability, which is also a matter of making clear (or stipulating) just how I am using the notion of responsibility. In Section 2 I discuss the relevant relational dimensions of responsibility, and the significance of the formula that we are responsible as Φ to S for X, before turning in Section 3 to what will be the central question for this paper: as what are we criminally responsible, to whom? I will suggest an answer to this question for criminal responsibility under ordinary municipal systems of law—that in a liberal democracy we are (which is to say we should be) criminally responsible as citizens, to our fellow citizens. That answer, banal though it might seem, has significant implications both for the vexed issue of criminalisation, and for issues concerning punishment and the criminal process; but I will not be able to explore those implications in this paper. Instead, in Section 4, I turn to a rather more difficult question about the basis and direction of criminal responsibility, which is raised by international criminal courts, and by claims to an international or universal jurisdiction by national courts: as what, and to whom, are defendants in such courts being held responsible? I explore two possible answers to that question: first, that such courts are acting on behalf of the more local political communities within which the crimes were committed, and are still holding the defendants responsible as citizens to their fellow citizens in those political communities; or second, that they claim to

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hold such defendants responsible as human beings to their fellow human beings. In at least some cases, I will argue, we need a version of the second answer, problematic though that might be.

1. Responsibility and Liability

My concern here is not with civil liability (to pay damages, or to be required to perform one's contract), but with criminal liability to conviction and punishment—and with its moral analogue of liability to blame and criticism.

Liability presupposes responsibility: I am liable only for that for which I am responsible. Criminal liability might be strict or vicarious, if it is imposed for what might have been done through non-culpable inadvertence or for the actions of others. It is then imposed without moral responsibility, but still presupposes criminal responsibility; I am strictly or vicariously liable only if the law holds me strictly or vicariously responsible.

However, responsibility does not entail liability: I can admit responsibility (criminal and moral) for an action, but avert liability by offering a defence. I might offer a justification: I deliberately broke your window, but that was the only way to bring help to your grandfather, who had collapsed inside the locked house. Or I might offer an excuse: I committed perjury, but only as a result of a kind of duress that, whilst it did not suffice to justify my action, was sufficiently frightening to render me non-culpable for giving in to it.² In both cases, I admit responsibility for my action, which is to say that I recognise it as something for which I must answer; but I offer an exculpatory answer that, if it is acceptable, blocks the transition from responsibility to liability, and thus averts moral blame or criminal conviction and punishment.

To be responsible is to be answerable. I may be called, and must be prepared, to answer for that for which I am responsible; I am then liable to moral criticism or criminal conviction if I cannot offer a suitably exculpatory answer.³ Responsibility often creates a presumption of

² What constitutes an excuse in moral contexts (mistake of fact for instance) might not constitute an 'excuse' in criminal law, since it negates *mens rea* rather than constituting a defence properly speaking; that is because, whereas criminal responsibility is (for crimes that require normal *mens rea*) typically non-strict, moral responsibility is typically strict. See Duff 2005a: 99-104.

³ On responsibility as answerability, see Lucas 1993, Watson 2001; contrast Tadros 2005: 24-31. My interest in this paper is in responsibility for actions or states of affairs that are untoward, for which we need to answer. We are also responsible of course for the good and the right that we do: but I cannot explore the significant asymmetries between these two types of responsibility here.

liability, but that presumption is defeasible: I am liable unless I can offer an exculpatory answer, but can avert liability by offering such an answer.

Once we attend to the distinction between responsibility and liability, we can distinguish more clearly two quite different types of question about the scope and content of the criminal law. The first concerns that for which we are, or should be, criminally responsible: for what kinds of conduct (or condition, or state of affairs) can or should we be held answerable, on pain of conviction and punishment, by the criminal law? The second concerns the transition from responsibility to liability: what kinds of plea can, or should, avert liability for that for which we admit responsibility? We can also, however (which is more germane to my present purposes) attend to the various relational aspects of responsibility as answerability.

2. Relational Aspects of Responsibility

There are of course non-relational notions of responsibility. We talk of responsible agency, or of what it is to be a responsible agent; we also talk, in commendatory terms, of responsible parents or responsible teachers or responsible citizens. Both these notions can be explained in terms of a relational conception of responsibility. Responsible agency is a matter of having the characteristics and capacities that are necessary if one is to be properly held responsible (i.e. answerable) for one's actions: hence the attractiveness of accounts of responsibility as a matter of reasons-responsiveness;⁴ a responsible agent is one who is capable of responding to the relevant reasons that bear on her actions, and of answering for those actions by reference to those reasons and to her reasons for acting as she did. A responsible parent or teacher is one who takes her responsibilities seriously and discharges them conscientiously: she pays due attention to, and takes due care for, those matters for which she is responsible, and is thus well placed to answer for her actions in relation to those matters.⁵

The relational conception of responsibility on which I want to focus here is not merely dyadic, but triadic: I am responsible *for* X, *to* S—to some person or body who has the right, the standing, to call me to answer for X. Furthermore, as we will see, I am responsible for X

⁴ For different versions of which see e.g. Wallace 1994; Fischer and Ravizza 1998; Morse 1998.

⁵ The responsibilities that she takes so seriously are her prospective responsibilities: my prospective responsibilities are those matters or affairs that it is up to me to attend to and take care of, and for my conduct in relation to which I am then retrospectively responsible (answerable). Compare Hart 1968: 212-4 on 'role-responsibility'; also Casey 1971.

to S as Φ —in virtue of falling under some normatively laden description, my satisfaction of which makes me both prospectively and retrospectively responsible for X to S.

The ‘for X’ dimension of this triadic relationship is familiar and obvious enough: I can be held responsible for a wide range of ‘objects of responsibility’, including actions, omissions, thoughts, feelings, conditions and states of affairs. One important question that I will not try to pursue here concerns the general conditions of responsibility: if I am to be properly held responsible for X, whatever X might be, must it for instance be true that X was in some sense within my control; must it be true that I knew or could have known that and how I could affect X?⁶ My concern here is not with such general conditions, but rather with the ways in which the objects, the directions and the grounds of responsibility differ between different contexts: with the ways in which I can be responsible as Φ for X, but not for Y (although the control and the epistemic condition are satisfied in relation to both X and Y); or responsible to S for X, but not for Y; or responsible for X to S, but not to T.

To illustrate. We can try to specify the responsibilities I have as a university teacher. That specification will consist in part in an account of my prospective responsibilities: as a teacher, it is my responsibility to, for instance, keep up to date with my subject, plan courses that will contribute appropriately to the curriculum, prepare and conduct my classes in pedagogically effective ways, mark my students’ work, play my part in my department’s collective affairs, and so on. We can disagree about just what does or should fall within my responsibilities as a teacher, but any account will set some limits to them: as a teacher in a secular institution, for instance, it is no part of my responsibility to attend church services; as a philosophy teacher it is no part of my responsibility to play football on Saturday for a local amateur team—though these may be among my responsibilities as a member of a church or as a member of that local football team. To say that these are my prospective responsibilities as a teacher is to say that I may be called, and must be ready, to answer as a teacher for my conduct in relation to these matters—for my discharge of (or my failure to discharge) these responsibilities.

Such a specification of my responsibilities must also, if it is to be complete, include a specification of the people or the bodies to whom I am responsible as a teacher—which will also by implication specify those to whom I am not responsible as a teacher. I am responsible as a teacher to my students, to my colleagues, to my employer: they have the right, the

⁶ On control see e.g. Fischer and Ravizza 1998, and (in relation to criminal responsibility) Husak 1998; on the epistemic condition see e.g. Zimmerman 1988: 74-91; Feinberg 1986: 269-315. On why the control condition is indeed a condition of responsibility, whereas the epistemic condition is a condition not of responsibility but of liability, see Duff 2005b: 452-6.

standing, to call me to account for the ways in which I discharge, or fail to discharge, my pedagogical responsibilities; they can, for instance, properly call me to answer for failing to turn up to a class, or for giving an ill-prepared lecture. However, first, I am not responsible as a teacher to a passing stranger, or to my aunt, or to other members of the football team, or to the Pope: which is to say that they have no right to call me to account for missing the class or for giving a bad lecture—if they challenged me about that, or demanded that I answer to them for it, I could properly reply that it was none of their business. Second, I am not responsible to my students, my colleagues (qua academic colleagues) or my employer for my conduct as a member of a church or a football team. There will be some person or some body to whom I am responsible as a member of a church, for my religious beliefs and practices: depending on the character of my religion, that might be my priest, fellow members of my congregation, or only God. There will also be people to whom I am responsible as a member of the football team—my fellow members, our supporters if we have any: depending on the kind of team it is, I might be responsible to them not just for how I play (and whether I turn up to play), but also for keeping fit, and for taking part in practice and training. But I am not responsible to my fellow footballers for my performance as a teacher; nor am I responsible to my academic colleagues or employer for my performance as a footballer.

The responsibility-laden descriptions (teacher, parent, friend, colleague, member of this church or of that sporting group ...) that help to structure our lives determine the content and the direction of our responsibilities: they determine what we are responsible for, to whom (or what). Such determinations extend our responsibilities: as a member of this football team I have responsibilities that I would not otherwise have, and am responsible to people to whom I would not otherwise be answerable. But they also limit our responsibilities: there are matters that fall within my control and knowledge, even matters that bear on my students' welfare, for which I might deny that I am responsible as a teacher (it is not my responsibility, I might insist, to offer them advice on their sexual relationships, or to ensure that they attend classes); and there is only a limited range of people or bodies to whom I am responsible as a teacher.⁷

John Gardner seems to deny this. Responsibility ('basic responsibility') does, he agrees, involve the ability to answer for ourselves, to 'assert ourselves as responsible beings', and such answering or asserting does require an interlocutor to whom I can offer my account of myself.

⁷ I should emphasise again that I do not deny that we may disagree about what I am responsible for, and to whom, as a teacher: nothing in my argument depends on claiming that the content and the direction of our responsibilities can be uncontroversially specified.

But why does it need a *particular* interlocutor? In respect of the same wrong or mistake, couldn't I assert my basic responsibility by offering the same account of myself to everyone I come across, from judges in the Old Bailey to friends in the pub to strangers on the bus? (Gardner, 2003: 165)

I could certainly *offer* my account of how I came to give such a bad lecture to 'everyone I come across', although I would be likely to receive some puzzled or dismissive responses if I did so: an Old Bailey judge and a stranger on the bus might naturally reply that I do not have to answer to them for my performance as a teacher. More to the point, however, they have no right to demand that I answer to them for my lecture: if they tried to call me to account for it, I could properly refuse, on the grounds that it is not their business.

Some might insist that whilst such limitations hold for those responsibilities that are tied to particular social or institutional roles, they do not hold for our moral responsibilities—our responsibilities as moral agents. Surely, they might say, as moral agents we are responsible to every other moral agent; to recognise ourselves and others as members of the Kingdom of Ends is to recognise not only that we have duties towards all other members, but also that we must be ready to answer to them for our moral conduct or misconduct.⁸ The first response to this claim is that even if it is true, it does not undercut the relational account of responsibility offered here: we can and must still ask, of any species of responsibility, not just what we are responsible for, but to whom we are responsible; the claim about universal moral jurisdiction is simply the claim that in the case of moral wrongdoing the answer to the second question is 'Every moral agent'. The second response, however, is that the claim is anyway false: even if there are some kinds of moral wrong for which we can be called to account by any other moral agent, there are many for which we are answerable only to a limited range of people. Many of our specific role-responsibilities, for our discharge of which we are, as we have just seen, responsible only to a limited range of people, are after all moral responsibilities: I have a moral as well as an institutional responsibility to my students to turn up for classes and to mark their work. The moral character of that responsibility does not, however, give my aunt, or a passing stranger, or indeed of an Old Bailey judge, the standing to hold me responsible for my discharge of that responsibility; it is still not their business. Similarly, if I treat a friend badly (I let her down, or fail to respond sympathetically when she calls on me for help), I am of course responsible to her, and to our other friends, for that moral failure; but, again, I am

⁸ Gardner's reference to the 'wrong' for which I offer an answer might suggest that he is thinking especially of our moral responsibilities—although he seems to be offering a broader account of responsibility than that.

not responsible to the passing stranger or to the Old Bailey judge. Moral responsibilities that we have simply as moral agents, or as human beings, might be owed to other moral agents, or to other human beings, as such, in which case I am in principle answerable to any other moral agent or to any other human being for my failures to discharge such responsibilities;⁹ but not all our moral responsibilities are of that kind.

(It is perhaps worth emphasising that to say that responsibility is in this way *relational*, as a matter of being answerable to a particular audience, is not to say that the acceptability of the answers that we might give is *relative* to that audience—that what counts as an acceptable or exculpatory answer is just whatever the particular audience will accept, or can be persuaded to accept, as exculpatory. Richard Rorty, who is Gardner’s direct target in the passage quoted above, does take the relativist view, and does seem to ground it partly in the relational view (Rorty 1995: 283), but there is no necessary connection between them: we can insist both that I am responsible only to my friends for my unsympathetic conduct towards a friend, and that the moral standards by which the morality of that conduct and the adequacy of my answer for it should be judged are non-relative, and independent of that particular group of friends.)

We are pedagogically responsible for our activities as teachers; parentally responsible for our activities as parents (and filially responsible for our activities as children of our parents); philosophically responsible (to our fellow philosophers if no one else) for our philosophical activities. We are also criminally responsible for any criminal activities in which we engage, just as we are morally responsible for our moral misdeeds: but as what, and to whom, are we or should we be criminally responsible? An answer to that question will also help to answer a more familiar question: for what are we or should we be criminally responsible? My concern here, however, is with the first, ‘as what and to whom?’, question.

3. Criminal Responsibility

If we ask as what, and to whom (or what) we are in fact criminally responsible, as a matter of existing positive law, the simplest answer is a territorial one: we are criminally responsible to a state as agents whose criminal conduct occurs within that state’s geographical territory. The

⁹ We can leave open the question of whether the class of ‘moral agents’ to whom I would be thus answerable extends beyond that of ‘human beings’—though I think it does not (see Gaita 1991: ch. 3). I am only ‘in principle’ responsible to other moral agents because there might be very good reasons why in many contexts others should nonetheless refrain from calling me to account.

basic jurisdiction of English criminal law is thus defined by the Principle of Territoriality (see Hirst 2003: ch. 1); similar provisions are found in, for instance, American law (see LaFave 2000: 123-43) and German law (StGB s. 3; see Ebert 1994: 8 on the *Territorialitätsprinzip*).¹⁰ To a greater or lesser extent, systems of criminal law also claim jurisdiction on the basis of a principle of citizenship (as to perpetrator or victim) rather than of territory. Under the French *Code Penal* (art. 113.6-7), French criminal law applies to all felonies committed either by or against French citizens abroad, and misdemeanours committed by French citizens anywhere where the relevant conduct is also criminal under the local criminal law (see Hirst 2003: 43). German criminal law claims jurisdiction over crimes committed either by or against German citizens abroad (StGB ss. 5, 7).¹¹ English criminal law covers a variety of offences committed abroad by British citizens or by UK residents, for instance various sexual offences committed against children.¹²

(The criminal law's claim to jurisdiction over conduct committed within the territory of the state whose law it is, or by citizens of that state, involves two claims: that it can define such conduct as criminal; and that its courts have jurisdiction to try the alleged perpetrator of such conduct. Some count the first as a matter of 'ambit', and only the second as a matter of 'jurisdiction' (see e.g. Hirst 2003: 9-10); but for present purposes we can capture both aspects under the idea of 'jurisdiction'.)

I will have more to say about citizenship as a basis for criminal responsibility shortly; the point to note here is that whilst a Principle of Territoriality is central to any specification of our actual criminal responsibilities under existing positive law, it cannot really help with the normative question about as what and to whom or what we *should* be criminally responsible. Such a principle might, subject to the qualifications noted above and others to be discussed in s. 4, capture the *extension* of criminal responsibility, but it does not do so in any normatively illuminating way: 'living (or acting) within a specified geographical area' does not by itself

¹⁰ There are of course plenty of complex questions, which need not detain us here, about what counts as the criminal conduct (or a suitable part of aspect of it) occurring within a specified territory: see Hirst 2003: ch. 4; Moore 1993: 293-8).

¹¹ See also Ebert 1994: 9, on the *Personalitätsprinzip* and the *Realprinzip*.

¹² Sex Offenders Act 1997, s 7; see generally Hirst 2003: ch. 5. For American law see LaFave 2000: 128-9. I discuss claims to a universal jurisdiction independent of either territory or citizenship in s. 4. I have left aside here claims to jurisdiction over conduct committed abroad that adversely affects the interests of the state itself (see e.g. Model Penal Code s. 1.03(1)(f); LaFave 2000: 129-30, and Hirst 2003: 48-9, on the 'protective principle'; and the German StGB s. 5): these can be seen as resting still on a version of the Principle of Territoriality.

have the normative significance that an answer to the ‘as what’ question requires. We are to be answerable under a system of criminal law: but a system of law, and a state within which a system of criminal law could exist, require something more than a collection of people who happen to live or act in the same geographical area; indeed, without a lot more than that, there would be nothing even recognisable as a human society, let alone a political or legal system (see Winch, 1960). That ‘more’ must involve an idea of community: not necessarily a richly normative communitarian idea of the sort that eschews liberal individualism (and that worries liberal individualists), but a metaphysical idea of the sort that even liberal individualists must presuppose;¹³ an idea of people living together (as distinct from merely beside each other) in a society defined by some set of shared values and understandings which might be implicit, inchoate or disputed,¹⁴ but without which society, politics and law would be impossible.

A minimalist idea of political and legal community is provided by the various versions of legal positivism, and offers a slightly more substantive—though still normatively inadequate—answer to the ‘as what and to whom’ question. According to classical legal positivism, of the Austinian-Benthamite variety, the relevant community consists of those who habitually obey an identifiable sovereign, and its criminal law consists of those authoritative commands from the sovereign that are backed up by the threat of sanctions. Members of that community are therefore criminally responsible to the sovereign as her (or its) subjects: their prospective responsibility is to obey those commands, and the sovereign is the person or body with the standing to call them to account for alleged acts of disobedience to those commands—which is why, such a positivist might say, criminal cases in England are entitled ‘*Regina v D*’.

Now this is no doubt how the criminal law is (quite reasonably) understood by many who now appear in our courts: as a set of peremptory demands, imposed by an alien power, which they are punished for disobeying. But it is not how the criminal law ought to present itself to members of what aspires to be a liberal democracy: it should not speak to them in the alien voice of a sovereign who claims authority over them, whose commands give them content-independent reasons for action (as if the criminal wrongfulness of rape or murder consisted in disobedience to the sovereign who prohibits them). We are, of course, subject to the law: we are, or so it claims, bound by its demands, and answerable in its courts for our crimes. But the

¹³ On the distinction between metaphysical and normative issues in this context (and some of its problems), see Rawls, 1985; Taylor, 1989; Mulhall and Swift, 1992: chs 5-6.

¹⁴ And that might have as much to do with the procedures by which collective decisions are made as with the substantive content of those decisions, if proceduralist versions of liberalism are plausible: see e.g. Waldron 1999; Archard 2006.

law by which we are bound should not be something imposed on us by a sovereign: it should be a ‘common law’—a law that is our law, which speaks to us in our collective voice in terms of the values by which we define ourselves as a polity; a law by which we bind ourselves.¹⁵

The beginning of a better answer to our question can be found if we turn from Positivism to Legal Moralism. A clear and simple version of Legal Moralism is found in Moore’s claim that the proper function of criminal law is ‘to attain retributive justice’ by ‘punish[ing] all and only those who are morally culpable in the doing of some morally wrongful act’ (1997: 33-35). The truth in such a Legal Moralism is that the criminal law is indeed properly concerned with moral wrongdoing: ‘moral wrongdoing’ provides the start of an answer to the question ‘For what should we be criminally responsible?’; the proper purpose of a system of criminal law is to identify and declare the public wrongfulness of certain kinds of moral wrongdoing, and to provide for an appropriate public response to them.¹⁶ The obvious objection to such a view is that it is radically over-inclusive. It implies that we have good reason to criminalise every kind of moral wrongdoing, even if other considerations will often then tip the balance against criminalisation (see Moore 1997: ch. 18): but it is surely implausible to say that we have any reason at all to criminalise, for instance, the cruelly hurtful breaking off of a sexual relationship, or the persistent and arrogant dismissal of a colleague’s ideas, wrongful though such conduct certainly is.¹⁷

What grounds that obvious objection is the answer (or lack of an answer) to the ‘as what, to whom’ question that the simple version of Legal Moralism offers us. As Moore formulates the view, it suggests that we are criminally (as we are morally) responsible simply as moral agents, since it is as moral agents that we engage in culpable moral wrongdoing; and this also suggests that we are criminally (as we are morally) answerable to other moral agents for such wrongdoing. Now I argued above that it is not even true of moral wrongdoing as such that we are responsible simply as moral agents, or simply to all other moral agents: but it seems even

¹⁵ On the idea of the common law to which I appeal here, see Postema 1986: chs. 1-2; also Cotterrell 1995: ch. 11.

¹⁶ In saying this I do not commit myself to Moore’s particular brand of metaphysical realism, which portrays criminal law as a ‘functional kind’.

¹⁷ It might also be objected that Legal Moralism is under-inclusive, because it offers no justifying account of *mala prohibita*. This objection can be met: once we identify *mala prohibita* as offences involving conduct that is not wrongful prior to its legal regulation, and distinguish the question of whether a type of conduct should be legally regulated from the question of whether breaches of such legal regulations should be criminalised, we can find a legitimate place in the criminal law for at least some *mala prohibita* (see Green 1997; Duff 2002; but see Husak 2005 for criticism).

more obvious that we neither are nor should be criminally responsible simply as moral agents and to other moral agents. The familiar liberal argument for this is that some types of moral wrongdoing, such as my ill treatment of my lover or my colleague (wrongful though it is), are not the concern of the criminal law: I must answer for them to my friends or to my colleagues (and to my conscience, or to God); but such wrongdoing 'is, in brief and crude terms, not the law's business'.¹⁸ But there is another argument, based on jurisdiction. If we are criminally responsible simply as moral agents, and if the function of criminal law is to provide for the retributive punishment of 'all and only those who are morally culpable in the doing of some morally wrongful act', English criminal law has reason to criminalise not merely theft (and other wrongs) committed in England (or by or against English citizens), but theft committed anywhere, by or against anyone: to make it a crime under English law for a German citizen to steal from a fellow German in Germany, for instance; and to give English courts the authority to try, convict and sentence such a thief should they get the opportunity to do so. The German thief would surely, however, have good reason to object that his wrongdoing, culpable though it no doubt is, is not and should not be the business of the English criminal law or the English criminal courts: he is responsible, answerable, for it in Germany, but not in England. This is a second way in which simple Legal Moralism seems radically over-inclusive: that it pays no attention to, and provides no normative basis for, such jurisdictional limits to the criminal law of a nation state.

A Legal Moralist might try to deal with this issue of jurisdiction, whilst maintaining what seems to be the central idea that a system of criminal law has good reason to claim, i.e. some plausible ground for claiming, jurisdiction over any culpable moral wrongdoing wherever and by and against whomever it is committed. First, there are obvious practical reasons for trying to operate with an explicit or implicit division of legislative, adjudicative and punitive labour: since we have a structure of nation states, it makes good practical sense for each of them to exercise criminal jurisdiction over wrongdoings within its reach—which means, primarily, wrongdoings committed within its territorial boundaries. Second, states should respect each other's sovereignty, and should therefore leave the prosecution and punishment of culpable wrongdoers to the state within whose territory they commit their wrongs.¹⁹ I have reason to intervene if I see a child misbehaving, to tell the child off, and to visit on her misconduct the censure it deserves; but out of respect for the child's parents and their authority, I should

¹⁸ The words in which the Wolfenden Committee famously expressed its view of consensual sexual activity between adult homosexuals (Wolfenden 1957: para 61).

¹⁹ See Hirst 2003: 10-11 on the 'unwarranted usurpation of [another state's] sovereignty'.

normally leave it to them to deal with the child. So too, a state should normally leave it to the other state to deal with crimes committed by its own citizens within its own territory, out of respect for its sovereignty.²⁰

On this view, a national legislature which takes its wrongdoing-punishing responsibilities seriously would properly begin with a provisional or tentative claim to universal jurisdiction, i.e. with the view that it should criminalise, and should seek to punish insofar as it lay within its power, culpable moral wrongdoing wherever, by and against whomever, it is committed; but then, as it began to move from the question of what it had in principle good reason to do to the question of what it should actually all things considered do, it would see better reasons to limit its jurisdictional claims. That seems to me an implausibly imperialistic view of the proper responsibilities of a national legislature. When I become aware of a stranger's moral misconduct towards her friend or her parents, I do not think it my business to intervene, or to call her to answer for what she has done: the logic of my view is not that I have some reason to call her to account, since she and I are both moral agents, but better reason not to interfere; it is *ab initio* that that is not my business. Analogously, I suggest, national legislatures should not begin with the idea that they have good reason to criminalise all moral wrongdoing, and then see reasons to limit their jurisdictional ambitions; they should, rather, begin with the idea that only a certain range of wrongdoings are even in principle their business.

How can we begin to identify that range? The obvious answer, for any liberal democrat, is that we should replace 'moral agent' by 'citizen' as the description under which we should be criminally responsible; to say that we are responsible *as* citizens, *to* our fellow citizens.

In a liberal democracy the legislature, and the whole apparatus of the state, supposedly speak and act in the name, and on behalf, of the citizens who make up the polity: they are not the organs of a separate sovereign whose subjects we are; they are, rather, the institutional manifestations and instruments of our shared political lives—of the civic enterprise in which we are collectively engaged (just as, in a properly functioning university, the institutional structures and authorities are manifestations or instruments of the shared academic enterprise in which the university's members are collectively engaged). That is what makes the law, and in particular the criminal law, a common law—a law that is our law as citizens: its voice is not (should not be) the voice of a sovereign who demands our obedience as subjects, but our own collective, civic voice; it is a voice in which we speak to ourselves, as citizens, about the

²⁰ The Legal Moralist might also cite the ways in which nation states do sometimes claim a universal jurisdiction over certain types of wrongdoing. I discuss such cases in s. 4 below: as we will see, they require a qualification rather than the abandonment of the argument I offer here.

shared values and goals by which our civic enterprise as a polity is constituted. That is also to say, however, that it is a voice in which we speak to ourselves, rather than to the whole world, or to moral agents at large.

The criminal law speaks of wrongs—of wrongs that are ‘public’ in the sense that they are of proper concern to the whole political community, and that require a formal public response of condemnation and punishment.²¹ The wrongs that properly concern a political community, as a political community, are those committed within it by its own members: our criminal law structures our lives as citizens; it is thus properly concerned with the wrongs that we commit within that civic enterprise. More precisely, the criminal law’s primary purpose is to specify and define those wrongs for which citizens must answer to the polity (which is to say, to their fellow citizens) through its courts: its concern is not with moral wrongdoing as such, but with those kinds of wrongdoing which properly concern the members of the polity in their role as members. As against the classical positivist, the liberal republican’s claim is therefore that we are criminally responsible not to a separate sovereign, but to ourselves, i.e. to each other.²² As against the ambitious Legal Moralist, the claim is that criminal law is the law of a particular polity, and is properly concerned with what is internal to that polity.

It is worth emphasising again that in thus relativising responsibility, I am not relativising wrongfulness. We can be as non-relativistically universalistic as we like about morality, and insist that what is wrongful in England is also wrongful in America, in France, in Japan or in Korea. The point at issue here concerns not what is or is not wrongful, but to whom or what we are responsible for the wrongs that we commit; and the claim is that when it is criminal responsibility that is at stake, we are responsible to our fellow citizens (whom we also have the collective standing to hold responsible). It is also of course true that different systems of criminal law differ in their content: what counts as a criminal wrong in one system might not count as a criminal wrong in another system. Such differences do not always reflect different underlying views of what is right or wrong: they might instead express different views about which wrongs are in the relevant sense ‘public’; or relatively minor differences in the precise interpretation and definition of such public wrongs; or different systems of regulation, which then generate different *mala prohibita*. But for English criminal law not to claim jurisdiction over a theft committed in France by a French citizen is not for it to imply that such a theft is not wrong; it is simply to remain properly silent about something that is not its business.

²¹ On the sense of ‘public’ in play here, as the proper sense in which crimes are ‘public’ wrongs (see Blackstone 1765-9: Bk IV ch 1 p 5), see Marshall and Duff 1998.

²² On the kind of republicanism that underpins this view, see Dagger 1997.

An understanding of criminal responsibility as grounded in citizenship has significant implications for criminal law theory. It helps to focus the question of criminalisation (though it does not directly generate any determinate answers to that question). In asking what kinds of conduct we have good reason to criminalise, we are trying to identify the kinds of wrong for which we should have to answer, as wrongs, to our fellow citizens; which kinds of wrong are so demandingly the business of citizens, qua citizens, that they must be publicly identified and condemned by the criminal law? It also bears directly on questions about the criminal process and about criminal punishment. If the criminal process is a process through which citizens are to be called to answer for their alleged criminal wrongdoings, we must ask what kind of process, what kind of criminal trial, can serve that purpose, and in particular how we can ensure that the process treats and addresses defendants as citizens. If criminal punishment is to be something imposed on citizens by their fellow citizens, as an appropriate response to the wrongs that they have committed, we must similarly ask how punishment could have that character: what kinds of punishment, for what purposes, could we with clear consciences impose on each other (on ourselves) as citizens? I will not pursue these implications here, however, since I want instead to discuss some possible problems for the claim that we should be criminally responsible as citizens of a particular polity, to our fellow citizens within that polity.²³

One immediate qualification is needed to this claim: the criminal law of any decent polity also covers visitors to, and temporary residents of, the polity as well as its citizens. We need not engage here with the arguments about the conditions under which or the criteria by which people should be able to become citizens of polities that they wish to join; the point rather concerns the standing of those who for whatever reason find themselves for a time within the territory of a polity of which they are not citizens. Such visitors should of course, as guests, be accorded many of the rights and protections of citizenship, as well as being expected to accept many of the duties and responsibilities of citizenship. In particular, they should be both bound and protected by the polity's laws, including its criminal law. If they commit what the local law defines as a public wrong, they must answer for that wrong to the polity whose law it is—just as anyone who commits such a wrong against them will have to answer for it as he would for a wrong committed against a fellow citizen. To say this is not to revert to a geographical or territorial account of jurisdiction, to the effect that the criminal law of a

²³ On criminalisation, see Marshall and Duff 1998 (Schonsheck 1994, and Husak 2002 and 2004, are very good starting points for further discussion). On punishment and the criminal process see Duff 2001.

given polity has jurisdiction over all crimes committed within its territory, by and against whomever they are committed: what makes normative sense of jurisdiction is still the law's character as the law of a particular polity, whose members are its primary addressees. But given such a polity, whose members are responsible to each other for what their law defines as public wrongs, its laws can also bind and protect visitors to the polity and its territory.

By grounding the criminal law's jurisdiction in citizenship rather than in territory, we can also make better sense of the ways in which a polity might claim jurisdiction over wrongs committed by or against its members abroad. Such claims might be quite general: thus French criminal law is applicable to any felony committed anywhere by or against a French citizen (*Code Penal* art. 113.6-7). They might instead be limited to conduct that is also criminal in the place where it is committed;²⁴ they might be limited to particular crimes committed by citizens abroad.²⁵ Whatever their scope, however, the claim is, in the case of crimes against citizens, that the perpetrator is answerable to this polity for wrongs against its members; and, in the case of crimes by citizens, that any member of the polity is responsible to the polity for any such wrongs that he commits. There is nothing puzzling about such claims. They might be controversial, since they rest on conceptions of the scope of the bonds of citizenship that might be disputed: but there is nothing puzzling in a claim that I am answerable to my fellow citizens for wrongs that I commit elsewhere, since I do not leave my status a citizen behind when I go abroad; or in a claim that as citizens we have a proper interest in any wrongs done to our fellow citizens, and the standing to call the wrongdoer to answer for them. This is not to say that a polity's criminal law *should* claim jurisdiction over all crimes committed either by or against its citizens wherever they are committed: one could instead quite plausibly hold that we are not answerable to our fellow citizens for wrongs that we commit abroad, and that while we might reasonably expect our fellow citizens to have some collective concern at least for serious wrongs that we suffer abroad, that concern does not properly extend to calling the wrongdoers to account. The point is simply that claims to extra-territorial jurisdiction over crimes committed by or against the polity's members make straightforward sense if we take citizenship to be the basis of criminal responsibility—whereas if we start with the territorial criterion of jurisdiction they will seem much more puzzling.

Such claims to extra-territorial jurisdiction mark an application, rather than an extension, of a citizenship-based conception of jurisdiction. That conception does, however, face a more

²⁴ This holds for misdemeanours under the French *Code Penal* (art. 113.6), and for crimes committed either by or against German citizens under German criminal law (StGB s. 7.1-2).

²⁵ As under English law: see e.g. Sex Offenders Act 1997 s. 7; Hirst 2003: ch. 5; Home Office 1996.

serious problem when we turn to the claims to universal jurisdiction that are sometimes made both by national legal systems and by international criminal courts.²⁶

4. International Criminal Responsibility

Under s. 134 of the Criminal Justice Act 1988, torture is an offence triable in English courts, wherever and against whomever it is committed.²⁷ English law thus claims a wholly universal jurisdiction over torture, independent of both citizenship and territory.²⁸ How can such claims be understood, if criminal jurisdiction is grounded in citizenship? If we are, paradigmatically, criminally responsible to our fellow citizens for wrongs that we commit against them; if the proper purpose of English criminal courts is thus to hold English citizens (and temporary visitors) responsible for wrongs that they have (allegedly) committed against their fellow citizens (or temporary visitors), how can it be part of their proper function to hold a foreign official criminally responsible for torture that he committed abroad, against foreign

²⁶ I cannot deal here with the distinct but related question of extradition. The question is distinct since to extradite an alleged offender to another country is precisely not to hold her responsible for her alleged offence under our law or before our courts. It is related, because we have to ask whether in extraditing an alleged offender the court is doing its bit (as ambitious Legal Moralists might claim) to make sure that culpable wrongdoers are punished as they deserve; or instead meeting the proper obligations that polities have to assist each other in bringing ‘their’ wrongdoers to account. (One central issue here concerns the doctrine of ‘double criminality’ (see Gupta 2000: s. II.B)—that the offence for which a person is to be extradited must also be an offence under the extraditing state’s law. This doctrine might suggest that the extraditing court’s concern is to ensure that it is assisting in the punishment of the truly culpable, but one could more plausibly see it as an illustration of the point that a relational account of criminal responsibility need not lead into a relativistic account of criminal wrongfulness: if I am to help you bring someone to answer to you for a piece of alleged moral wrongdoing, I can recognise that she is answerable to you and not to me, but also think that I should assist you only if what you are seeking to bring her to answer for is truly a moral wrong.

²⁷ The Act gave effect to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984); see *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* [2000] 1 AC 147. We should note that it covers only torture committed by, or at the instigation or with the consent of, a ‘public official or person acting in an official capacity’; see further below at nn. 34-5.

²⁸ For other examples, including piracy (one of the earliest crimes for which universal jurisdiction was claimed) and various terrorist offences and war crimes, see Hirst 2003: 54-5, ch. 5; Cassese 2003: 277-322. Such jurisdiction is typically based on international conventions and agreements, rather than being claimed unilaterally.

nationals?

One natural interpretation of such claims to universal jurisdiction sees them as precursors to or substitutes for a genuinely international criminal court. We have become used to ad hoc international criminal tribunals whose job it is to deal with some particular set of especially horrific wrongs, from the Nuremberg and Tokyo Tribunals through to the Tribunals set up to deal with war crimes and crimes against humanity perpetrated in what used to be Yugoslavia and in Rwanda (see Cassese 2003: 327-40). We now have the International Criminal Court (ICC), which has jurisdiction over ‘the most serious crimes of international concern’: these are ‘genocide’, ‘crimes against humanity’, ‘war crimes’ and ‘the crime of aggression’.²⁹ One could see those national claims to universal jurisdiction that are exemplified by s. 134 of the Criminal Justice Act 1988 as trying to fill the gap that was left by the absence of an effective international criminal law that could deal with such crimes, and the national courts which tried such crimes as trying to do the job that would more properly be done by an international criminal court—in which case the ICC, and the international criminal law that it administers, should make such national claims to universal jurisdiction unnecessary. But how should we understand the role and jurisdiction of the ICC?³⁰

The Preamble to the Rome Statute creating the ICC declared the determination of all the parties to the Statute ‘to put an end to impunity for the perpetrators of these crimes’—these ‘most serious crimes’. An ambitious Legal Moralist might argue that such a determination precisely expresses the criminal law’s proper (and universalistic) concern to punish ‘those who are morally culpable in the doing of some morally wrongful act’ (Moore 1997: 33-35). In most cases, of course, it can properly be left to individual nation states to discharge that responsibility through their local systems of criminal law and punishment: it would be neither practicable nor desirable to give states the right to intervene in each other’s affairs to punish wrongdoers. In two kinds of case, however, there is room (and need) for a truly international system of criminal law, and an international criminal court.

First, there are wrongs that are genuinely international, in the sense that their commission

²⁹ Rome Statute of the International Criminal Court, arts. 1, 5; later articles offer specifications of the content of these crimes. See Cassese 2003: 340-405.

³⁰ I have been talking as if criminal courts are either national or unrestrictedly international, which is of course a serious oversimplification: consider the relationship between federal and state law and courts in the United States, or between national and European criminal law in the EU. However, such federal courts can still best be understood as courts of what claims or aspires to be a polity, in which citizens of the polity (the USA, the EU) are called to answer to their fellows for wrongs that should concern that broader political community.

transcends any national boundaries: the obvious examples in this category are the crime of aggression, as committed by one state against another, and war crimes committed during international wars. These kinds of crime need not concern us here: not because the question of how they should be defined and prosecuted is not an important one, but because they do not highlight the issue that presently concerns us.

That issue is highlighted by the second kind of case, in which the wrongs are committed within a particular state, against its own members. This is true of torture under s. 134 of the Criminal Justice Act 1988; it is more generally true of ‘crimes against humanity’ as defined by the Charter creating the International Military Tribunal at Nuremberg,³¹ and by the Rome Statute creating the ICC: although under that Statute ‘crimes against humanity’ are limited to ‘acts committed as part of a widespread or systematic attack directed against any civilian population’, those acts can be directed against victims within, as well as outside, the state whose agents commit them (art. 7.1). For an ambitiously universalistic Legal Moralist, such cases can be dealt with relatively straightforwardly. We begin with the proposition that such wrongdoing must be punished: all culpable wrongdoing deserves to be, and therefore should be, punished; the more serious the wrongdoing, the more stringent and urgent is that demand for punishment. The next (and distinct) question is: who has the right or duty to punish such wrongdoing? The usual or default answer, for wrongdoing committed with state boundaries, is that it should be for the state in which the wrongdoing occurs to punish it. The principled basis for that answer is that it respects state sovereignty, and leaves the state to decide what resources to devote to the prosecution and punishment of wrongdoing, how best to organise such prosecution and punishment, and so on. The pragmatic basis for that answer is that this is normally the most efficient way to ensure that such wrongdoing is punished: the state is better placed than any international organisation to discharge that responsibility. However, that usual answer is defeasible: if the wrongdoing is serious and persistent enough, and if the state radically fails in its duty to prosecute and punish such wrongdoing,³² it may become in principle legitimate for others—an international criminal authority—to intervene, and may become practicable for them to do so; in which case the perpetrators can properly be tried by an international criminal court. Such a court, we might say, is acting not on behalf or in the name of a particular political community, but of the moral law itself, which is what demands

³¹ See Altman and Wellman 2004: 36; this was apparently the first occasion on which officials were prosecuted in an international tribunal for crimes committed against their own citizens, rather than only for war crimes committed against other states and their members.

³² As is most obviously likely to happen when the wrongs are committed by the state’s own officials.

that the perpetrators of such wrongs be punished.

What is important here is not the detail of just which kinds of intra-state wrong should be, in principle or in practice, eligible for international prosecution and punishment, but the logic of the argument. It starts with the claim that those who are responsible for such wrongs must be punished—a claim that is non-relational in the sense that it does not specify any particular group or body to whom these perpetrators are responsible or answerable, or by whom they should be called to account or punished. The question of who should punish them is a distinct and separate question, the answer to which will depend on factors independent of the nature and implications of the wrongdoing.³³

If this is the best way to make justifying sense of the ICC, and of its claimed jurisdiction over intra-state ‘crimes against humanity’, my argument that criminal responsibility is always responsibility *to* some group or body is seriously undermined. On my account, a justification of a criminal process of prosecution and punishment does not begin with an impersonal claim that the wrongdoers ‘must be punished’—a claim which leaves open, as a matter for separate determination, the question of who should prosecute and punish them; it begins with a claim that the wrongdoer is responsible or answerable—a claim which must be completed by some suitable specification of the person, group or body *to whom* she is responsible. For criminal liability depends on a prior attribution of criminal responsibility; and criminal responsibility, I have argued (like all species of responsibility) is responsibility for X to S. If that claim does not hold for the kinds of ‘crime against humanity’ over which an international criminal court could claim jurisdiction, it is hard to see how it could hold for all those more mundane kinds of crime over which national courts have sole jurisdiction: we should instead say that in these cases too the starting point is that the wrongdoer should be punished; and that the jurisdiction of the national courts is grounded in other principles or considerations concerning the ways in which it would be legitimate and efficient to bring it about that he is punished.

However, before we accept such an account of the ICC’s jurisdiction over ‘crimes against humanity’, we should consider two other accounts, both of which allow us to retain the idea

³³ I take this to be the logic of the argument in Altman and Wellman 2004, on which I have drawn in the last two paragraphs. They reject attempts to portray ‘crimes against humanity’ as crimes whose victim is ‘humanity’, and thus as crimes for which the perpetrators must answer to ‘humanity’ (see further at nn. 36-x below), and argue instead that an international criminal court should be allowed jurisdiction over ‘widespread’ or ‘systematic’ violations of human rights, when the state in which those violations occur does not take even minimally adequate steps to protect those rights against such violations (their definition of ‘crimes against humanity’ is thus avowedly broader than that provided in the Rome Statute).

that criminal responsibility is always responsibility *to* some specifiable political community.

The first account portrays the ICC as, in part, filling some of the gaps that national courts might leave—but doing so on behalf and in the name of the particular political communities which those courts are failing to represent as they should. An official who uses torture as one of the tools of an oppressive regime that he serves should ideally answer for that wrongdoing to the polity whose citizens he helps to oppress and torture; Senator Pinochet should properly answer to the Chilean people, in a Chilean court, for the wrongs that he committed against the Chilean polity and its members.³⁴ But there are obvious reasons why this might not happen or be impracticable, especially for crimes committed by or at the instigation of state officials: a regime is unlikely to put its own officials on trial; even when it falls, its successor might be reluctant to prosecute such crimes (from fear of civil unrest, or of having its own members' wrongdoings exposed, or of being seen as engaged in an over-partial 'victors' justice'). In such cases, at least when the crimes are serious enough to warrant the various costs that will be involved, it might be appropriate for an international court to claim jurisdiction or, absent such an international court, for the courts of other states to claim jurisdiction on behalf of the citizens whose own courts have let them down.³⁵

How plausible is such an account? One problem is that in just those cases in which there might be the strongest argument in favour of international jurisdiction, there is likely also to be serious doubt about whether there exists a political community to which the perpetrator could have answered, on whose behalf the international court could claim to act: if there are 'widespread or systematic attack[s]' on a 'civilian population', or 'widespread or systematic' violations of human rights that are committed or permitted by the state, there is unlikely to be a genuine political community of which perpetrators and victims are all members. Another problem is that unless representatives of the polity play some substantial role in the criminal process, it is not clear what could make a claim to be acting on behalf of that polity anything more than a piece of empty rhetoric. A third problem is: what gives an international court the standing to act on behalf of members of the local polity? There are of course various contexts

³⁴ See *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte* [2000] 1 AC 147; n. 27 above. The Chilean courts are moving gradually towards trying him, both for corruption and for some of the crimes of murder and torture committed during his regime; the process is summarised in *Guardian Unlimited*, <http://www.guardian.co.uk/pinochet/0,11993,179253,00.html>. It is also worth considering the trial of Saddam Hussein in this context.

³⁵ Could such a rationale also cover crimes not committed by or at the instigation of state officials, if the local criminal justice system fail to bring a serious wrongdoer to account? Probably not: such failures are more plausibly seen as a matter between the citizens and their government.

in which a person or body might claim to act on behalf and in the name of a person or group who cannot act for themselves: but in any such case there must be an answer to the question ‘What gives you the right to speak for them [or for me]?’. A plausible answer to that question will refer to some normative relationship between the actor and the person or group for whom she claims to act: ‘because he is my brother’—where ‘brother’ can be cashed out in any of a number of ways. This might lead us towards a version of the second account: an international criminal court should have jurisdiction over (and only over) those crimes whose perpetrators must answer not to this or that particular political community, but to humanity itself—to that broadest of human communities to which we all belong in virtue of our common humanity. For what could the normative relationship be that would allow an international criminal court to speak or act for members of the local polity other than a shared humanity? I will say more about this first kind of account later; but we should turn now to the second account, of crimes against humanity as those for which the perpetrator must answer to humanity.

The Preamble to the Rome Statute declares the signatories’ ‘Conscious[ness] that all peoples are united by common bonds, their cultures pieced together in a shared heritage’, and the need to punish ‘the most serious crimes of concern to the international community as a whole’,³⁶ and the very idea of a ‘crime against humanity’ might suggest this kind of picture: but can we make substantive sense of it?

One way to try to make sense of the idea of a ‘crime against humanity’ is to portray the crime as having an impact on, as harming or victimising, ‘humanity’ rather than (only) some more particular individual or group. Thus the Preamble to the Rome Statute talks of ‘grave crimes’ which ‘threaten the peace, security and well-being of the world’, and one can clearly portray the crime of aggression, and other crimes whose direct impact transcends particular national boundaries, in this way. But what of intra-state crimes whose direct impact is limited to victims who live (and die) within the state within which the crimes are perpetrated? Some would argue that these crimes too, if serious enough, can be seen as harmful to humanity: for instance that ‘the international order, and mankind in its entirety, [can be] grievously hurt and endangered’ by the attempt to exterminate a particular ethnic or religious group, even when it takes place solely within a particular state’s borders.³⁷ Such an argument is reminiscent of the ways in which theorists have sometimes tried to explain the idea of crime as a public wrong,

³⁶ See also art. 5: the Court’s jurisdiction is limited to ‘the most serious crimes of concern to the international community as a whole’.

³⁷ Arendt 1994: 269, quoted and criticised by Altman and Wellman 2004: 41-2. See also May 2005: ch. 5, on the ‘international harm principle’ (see Altman and Wellman 2004: 40).

by identifying some harm or wrong that crimes can be seen as doing to ‘the public’ as distinct from any individual victim: by talking, for instance, of the way in which crimes threaten the social by creating ‘social volatility’ (Becker 1974), or by undermining the conditions of trust (Dimock 1997); or of the way in which those who break the law thereby take an unfair advantage over all their law-abiding fellow citizens (Morris 1968; Murphy 1973). There is an obvious objection to such accounts of crime in general, that they turn our attention away from the wrong done to the direct victim of crime, and so distort our understanding of the criminal wrong that should be condemned and punished: the rapist or murderer should be convicted, condemned and punished not for the social volatility or loss of trust that he caused, or for the unfair advantage that he supposedly took over those who restrain their criminal inclinations, but for the wrong that he did to the person whom he raped or murdered.

In the context of domestic crime, to say that crimes are public wrongs is to say that they are kinds of wrong that properly concern the public, i.e. the polity as a whole and its members simply in virtue of their shared citizenship; they are wrongs in which citizens should share as fellow members with the victim (and the offender) of the political community.³⁸ To say that a crime is a ‘crime against humanity’ could analogously be to say that it is a kind of wrong that properly concerns humanity as such—i.e. every human being in virtue simply of their shared humanity. That, we could suggest, is why The Preamble to the Rome Statute talks not merely of ‘the most serious crimes’, but of ‘the most serious crimes *of concern to the international community as a whole*’ and of ‘unimaginable atrocities that deeply shock the conscience of humanity’.³⁹ Many kinds of wrongdoing, committed in communities far from our own, are not our business: we can be moved by them, we can regret them, we can wish that they were not committed; but we do not have the right or standing to call their perpetrators to answer for them. We do not have that right or standing as individuals; nor do we have it collectively, through our states or through whatever international institutions we create. But some kinds of wrong should concern us, are properly our business, simply in virtue of our shared humanity with their victims (and with their perpetrators): for such wrongs the perpetrators must answer

³⁸ See further Marshall and Duff 1998; Duff 2001: 56-64. It should be clear that this does not offer a criterion by which we can identify the kinds of conduct that should be criminal; it is intended only to suggest the perspective from which we should think about criminalisation.

³⁹ Emphasis added. Compare also Robertson 2000: 220, on a ‘crime against humanity’ as a crime that ‘diminishes every member of the human race’ (quoted, and criticised, by Altman and Wellman 2004: 42): this need not be read as requiring some material or psychological impact on all human beings; the point is rather that we should, as human beings, identify ourselves with the directly diminished victims.

not just to their local communities, but to humanity.

This idea of ‘humanity’ as a community within and by which perpetrators of atrocities can be called to answer for their crimes to their fellow human beings is deeply problematic, and it might be tempting to dismiss it as nothing more than overblown rhetoric—or as an arrogant claim to universal jurisdiction by bodies which actually speak only for some set of more local and particular interests. One question is whether it makes any sense to talk of ‘humanity’ as a community at all—whether we can really say that all human beings are united by some set of shared values or concerns, in something recognisable as a shared life, in virtue of which we can be expected to recognise any other human being as a fellow. A second question is, even if we can talk of such a community in some aspirational sense, how (and by whom) it could be given appropriate political or legal shape: can we see the United Nations and its multifarious agencies as speaking and acting for ‘humanity’—or only as a structure through which nation states can try, in a more individualistic way, to ward off a Hobbesian state of inter-national nature? A third question, if the first two can be answered satisfactorily, will then concern the proper scope of an international criminal law: for what kinds of crime should perpetrators have to answer to humanity?

I cannot hope to answer these questions in detail here, but should at least try to gesture in the direction in which answers may lie. On the first question, the idea of a common humanity is not so very strange: some might cash it out in Kantian terms of the kingdom of ends; others will look for less rationalistic, religious or humanistic ways of understanding it.⁴⁰ Integral to such an idea is a conception of what we owe to each other, by way of respect and concern, in virtue simply of our shared humanity; and such respect could plausibly be argued to include a readiness to answer to another human being, in terms of the values that I recognise as binding and protecting us both, for conduct that is properly her business. That is perhaps enough for us to be able to talk of the community of humanity, once we recognise that communities can be partial and relatively thin: that they need not involve sharing richly all-embracing forms of life.⁴¹ There are of course important differences between the idea of answering individually to other human beings as fellow human beings, and answering before an international criminal court to ‘humanity’, differences analogous to those between answering individually to fellow citizens for my civic failures and answering formally to the polity before a criminal

⁴⁰ Gaita 1991 and 2002 offer a rich and complex humanistic perspective on this.

⁴¹ This point is crucial to the possibility of a liberal political community (see Duff 2001: 42-56). It is also clearly relevant to ‘cosmopolitanism’—the question of whether we should cultivate a single ‘human community’ (see Kleingeld and Brown 2002); but I cannot pursue that topic here.

court for my criminal wrongdoings: these lead us to the other two questions.

As to the second question, the obstacles in the way of creating institutions that can truly claim to speak for humanity are clearly formidable, given the extreme differences in power and resources, and the deep differences in fundamental values, between the states that would be most directly involved in that process, and the scope that the creation of such an institution offers for ideological conflict and imperialism; we need not say more about those difficulties here. It is however worth suggesting—at least as a thought that might have force in our more optimistic moods—that the attempt to create and operate an International Criminal Court can itself help to create, as well as to express, the kind of community of humanity in whose name it is to act.

As to the third question, and focusing on crimes whose direct impact is intra- rather than inter-national (since it is these that are most problematic for present purposes), the orthodox account of the kinds of crime that should fall within the jurisdiction of an international court emphasises the collective or systematic character of the wrongs involved. So under the Rome Statute ‘crimes against humanity’ consist in a range of specified criminal acts ‘committed as part of a widespread or systematic attack directed against any civilian population’ (art. 7.1); such attacks have collective victims (a ‘civilian population’ rather than specific individuals), and, normally, plural agents (one person alone could not easily engage in such an attack) who are acting collectively in the sense that their individual actions must be identifiable not just as a set of distinct attacks, but as part of a single ‘widespread or systematic attack’. There is no formal requirement that the attackers be state officials, or be acting at the instigation of state officials: but such attacks could not usually be perpetrated without at least the connivance or tacit consent, if not the active participation or incitement, of the officials or official bodies (most obviously the police) whose responsibility it should be to prevent them.⁴²

A collective victim seems essential to the very idea of a crime against humanity: however terrible the wrong done to one or more individual victims as individuals, whoever perpetrated the wrong, it does not seem apt to count as a ‘crime against humanity’. But is it also essential

⁴² The same is true of genocide, which is defined in art. 6 of the Rome Statute as involving any of a range of specified acts ‘committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such’: such acts cannot usually be committed, with such an intent, by individuals acting alone. On earlier definitions of ‘crimes against humanity’, and the need for the actions to be part of or supported or condoned by state policy, see Cassese 2003: ch. 4. As I noted above (n. 33), Altman and Wellman 2004 advocate a more extensive account of ‘crimes against humanity’: but they still require involvement by the state or by state officials, as either committing or permitting the crimes.

that the perpetrators be acting in some kind of unison; and that they be acting at least with the connivance of the state? A lone individual, who sees himself as engaged in a solitary battle against evil, acquires a massively destructive weapon, and uses it to kill a very large number of people in his target population; we could imagine him evading detection for long enough to repeat the crime. Could that count as a ‘crime against humanity’, in virtue of its direct (and directed) impact on a whole group; or would the crime need to be committed by a group of perpetrators acting in unison—perhaps with the connivance of state officials? Suppose that the local law enforcement bodies manage to detect and arrest the lone perpetrator (or even the group of perpetrators), and bring them to trial in the national criminal courts: would we feel any inclination to say that the perpetrator(s) should instead be tried by an international court, on the grounds that the crime was a ‘crime against humanity’? I suspect that we would not.

Suppose now that the crimes fit the orthodox definition of crimes against humanity, and indeed that they are committed by state officials pursuing state policy; but that, perhaps after a regime change, the perpetrators are brought to trial in the national criminal courts. Would we still think that they should instead be tried by an international criminal court (assuming—which might of course be a large assumption—that there is no room for serious doubt about the fairness and adequacy of the local trial process)?⁴³ I suspect that we might not.

If these suspicions are right (and I am by no means confident that they are), this suggests that we see local or national jurisdiction as the default position (bearing in mind that we are focusing here only on crimes whose direct impact does not transcend national boundaries), and see an international court with universal jurisdiction as a safeguard or fallback for cases with which, for whatever reason, the national courts cannot be expected to deal adequately. This need not be to say, however, that we cannot understand ‘crimes against humanity’ as crimes whose perpetrators must answer not just to their more local polities, but to ‘humanity’ as a whole. We could instead say that whilst the polity to which the perpetrators and victims of such crimes belong has a special standing in the matter, as being best placed (morally as well as practically) to call the perpetrators to account, the international community (insofar as it exists) also has standing, and has a proper interest in the trial—that, in other words, in such cases the national courts are acting and speaking on behalf not merely of the local polity, but of the broader international community. Similarly, if such cases are tried by an international court, in the absence of effective national action, the court can claim to be acting on behalf

⁴³ We might think again of the trial of Saddam Hussein—and of why it seemed so important to many people, including many Iraqis, that he be tried by an Iraqi court in Iraq for crimes that included what would on any plausible definition count as ‘crimes against humanity’.

not only of the international community, but of the local polity.

I am painfully aware that in this section I have barely scratched the surface of a range of problematic issues. In particular, even if what I have tentatively suggested so far is along the right lines, much more needs to be said about the kinds of crime that could properly count as ‘crimes against humanity’, and about the significance of official or state involvement in the wrongdoing as an identifying criterion for such crimes. The most I hope to have achieved so far is to suggest a useful way of thinking about such problems, and to show that the question ‘To whom (or what) is the wrongdoer responsible or answerable?’ is central to them.

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