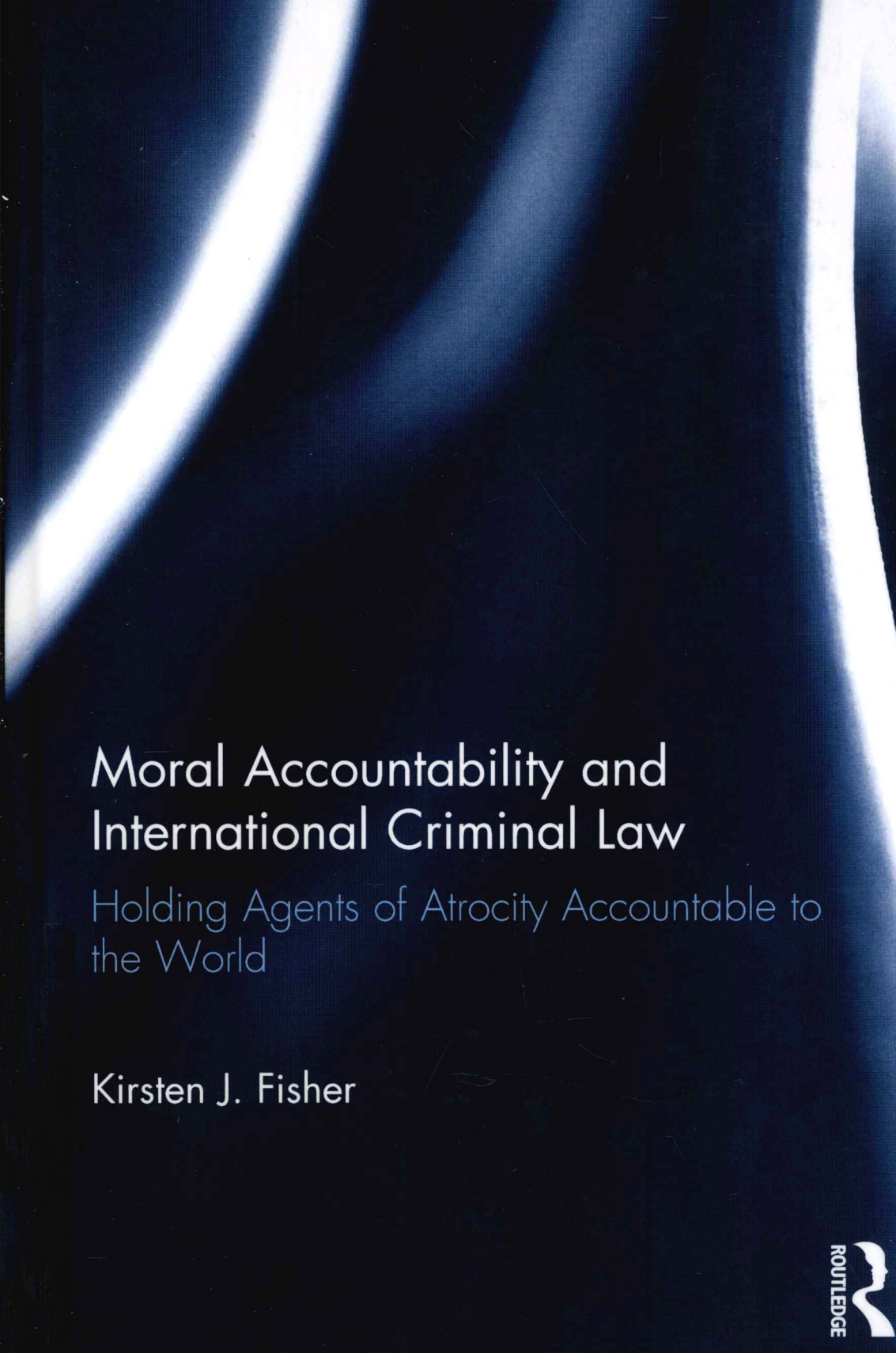
Moral Accountability and International Criminal Law
Holding Agents of Atrocity Accountable to the World
Kirsten J. Fisher
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Moral Accountability and International Criminal Law

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.

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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

Contents

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 First 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.