**CHAPTER 29**

**AUTHORITY AND RESPONSIBILITY IN**

**INTERNATIONAL CRIMINAL LAW**

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**I. INTRODUCTION**

Theft committed in Poland by one Polish citizen against another is not a crime under English criminal law, nor is it triable in an English court. The same is true of most crimes under most domestic criminal codes: the criminal law claims authority only over wrongs committed within the state’s territory (the Territoriality Principle) or impinging on its interests (the Protective Principle), or sometimes over wrongs committed abroad by, or against, its own citizens (the Nationality Principle and the Passive Personality Principle).1 A nation state’s criminal law generally takes no interest in wrongs committed abroad by and against foreigners: they are not its business. Sometimes, however, it claims a universal authority over wrongs committed anywhere in the world, by and against citizens of any state: an official anywhere in the world who uses torture ‘in the performance or purported performance of his official duties’ commits a crime under English law, and can be p.590 tried for it in an English court.2 But by what moral right can English law claim authority over a Chilean torturer; by what right can English courts try and convict him?

A similar question is raised by international criminal tribunals, and the International Criminal Court (ICC)—I’ll focus here on the ICC.3 The ICC’s jurisdiction over a case often depends on the agreement of the state within whose territory the crime was committed, or of which the alleged perpetrator is a citizen—an agreement given either by becoming a party to the Rome Statute, or by accepting the Court’s jurisdiction in the particular case;4 but it also claims an independent universal jurisdiction when alleged crimes are referred to it by the Security Council.5 In so far as the ICC’s jurisdiction depends on the agreement of the state that could claim jurisdiction on the basis of territoriality or nationality, it could be portrayed as a delegated jurisdiction grounded both legally and morally in the undisputed jurisdictional authority of the state: but on what moral ground could its claims to universal jurisdiction be founded?

In Section II of this chapter, I discuss and criticize David Luban’s answer to this question. In Section III, I lay the foundations for a somewhat different answer, which I then develop in Section IV.

**II. FAIRNESS TO RIGHTNESS**

If a criminal court is to be morally justified in convicting a defendant, it must be able to sustain three claims: that the conduct constituting the alleged crime was criminal under a system of law binding on the defendant; that the court has authority to try him; and that his guilt has been proved through a fair process which respected the demands of natural justice. In domestic courts, these claims are related but separable: a court might lack jurisdiction over some crimes; or its procedures might not be fair. But for international criminal courts, Luban argues, the second claim must be grounded in the third.

The legitimacy of international tribunals comes not from the shaky political authority that creates them, but from the manifested fairness of their procedures p.591 and punishments. Tribunals bootstrap themselves into legitimacy by the quality of the justice they deliver.6

Some version of the first claim is of course also crucial: however fair the courts’ procedures, they must be applied to alleged crimes that are their business. Luban suggests that the kinds of wrong that properly concern international criminal courts are those that offend against ‘human interests’, which human beings therefore have a shared interest in condemning and repressing.7 It might be tempting then to argue that, just as domestic courts act in the name and on behalf of the political community whose law they administer, and gain their authority from that source, international courts have authority in so far as they act in the name and on behalf of the community of ‘humanity’. Luban rejects that argument: humanity does not constitute a political community that could authorize such courts; our interest in the repression of such wrongs is one that we have not as members of a community, but as ‘a set of human individuals’.8 That is why the courts’ claim to legitimacy must rest on the fairness of their procedures rather than on their authorization by any appropriate political community.

But legitimacy cannot, I will argue, be bootstrapped in this way. A court’s procedures might be impeccable; the defendant might be guilty of wrongdoing that merits condemnation and punishment: but unless this court can claim jurisdiction over him, it cannot legitimately try him. Even if English courts delivered ‘champagne-quality due process’,9 and Polish courts did not, this would not give an English court the right to try the Polish thief for a theft committed in Poland; nor can such claims to procedural propriety give international courts an authority they would otherwise lack. A defendant’s challenge ‘By what right do you try me?’ must be answered if the trial is to be legitimate; the answer ‘our procedures respect the demands of natural justice’ is not an answer to that challenge.

This is an aspect of any practice of calling people to account for alleged wrongdoings: those who would do the calling must have the standing to do so. Suppose that a group of my neighbours, worried about the decline in marital fidelity, take it upon themselves to bring local adulterers to book, and turn their attention to me, as an alleged adulterer. I might not deny that adultery is wrong, or that I am an adulterer who must answer for his adultery to those whose business it is—to my wife and family, to our mutual friends. But I might reasonably insist that it is not my neighbours’ business: they have no right to call me to answer for my adultery; nor can the fairness of their procedure give them that right. Now a criminal trial, I will argue, should be understood as a process which calls alleged p.592 wrongdoers to answer charges of wrongdoing, and to answer for such wrongdoing if it is proved against them. The legitimacy of that process depends both on its procedural fairness, and on the court’s authority to call the defendant to answer; a deficiency in one of these dimensions cannot be compensated by adequacy, or even by perfection, in the other.

The significance of this point is concealed by some accounts of the proper aims of the criminal law, and of criminal trials. Consider, for instance, Michael Moore’s account of the purpose of criminal law as a ‘functional kind’: ‘to attain retributive justice’ by ‘punish[ing] all and only those who are morally culpable in the doing of some morally wrongful act’.10 To put the matter in this way is to begin with an impersonal demand of justice, that the guilty be punished, and then to identify a human practice whose purpose is to meet that demand. The Preamble to the Rome Statute can be read in a similar way: the parties affirm ‘that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured’, and declare their determination ‘to put an end to impunity for the perpetrators of these crimes’.11 They recognize, we could say, the force of the impersonal demand that such crimes must be punished, and accept a shared responsibility to ensure that that demand is satisfied. What concerns me here is not the content of such demands, but their form: we start with a demand that *X* be done, and then as a separate inquiry ask who can properly be charged with the responsibility of ensuring that *X* is done.

If we take this approach either to crime in general, as Moore does, or to ‘the most serious crimes’ that concern the ICC, we will see good reason to give national courts priority, and to accept the ICC’s ‘principle of complementarity’—that it can try only cases that have not been properly investigated by a state with jurisdiction.12 National courts are usually better placed to prosecute those who commit such wrongs within their territories; and a respect for state sovereignty requires that they normally be left to do so.13 However, there are serious crimes which the states within whose national jurisdiction they fall might well not prosecute, notably those committed systematically by or with the tacit support of officials of the state: their seriousness strengthens the demand that their perpetrators be punished, but they will probably not be punished by the state that has primary jurisdiction. In such cases, other states might intervene by claiming universal jurisdiction over such crimes:14 but justice is more likely to be done by a system of international criminal justice to fill the gap p.593 left by nation states, and that is the proper role of the international criminal court.15 Given the pragmatic and principled priority that should be accorded to national jurisdiction, however, an international court should have the right to act only when the nation state that has initial jurisdiction fails to take action: hence the principle of complementarity.

If we add to this line of thought about the role of international criminal courts the thought that the ‘foundational question about criminal law is what justifies punishment’,16 we might see international criminal trials in primarily instrumental terms: their function is to identify accurately (by procedures which respect the human rights of those involved) the perpetrators who are to be punished. To explain why in international criminal law ‘the emphasis shifts’, as Luban notes, ‘from punishments to trials’, we might appeal to other extra-legal purposes: ‘promoting social reconciliation, giving victims a voice, or making a historical record of mass atrocities’. Or we might appeal, as he appeals, to the ‘expressive’ role of trials ‘in *norm projection*: trials are expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes and not merely politics by other means’.17 Now he is surely right to identify a distinctive role for criminal trials, continuous with but not reducible to the purposes of criminal punishment: their role is not simply to identify those who are to be punished; they have an independent, non instrumental significance. But that distinctive role is not best captured by talking of ‘expressive’ acts, partly because that makes the defendant’s role in the trial an essentially passive one: he is the object of judgment (whose fate is to be determined), part of the vehicle through which the relevant norms are projected, and perhaps part of the audience to whom they are projected; but he has no essential active role in the proceedings. We should, I will argue, talk of communication rather than expression, since whereas expression is an essentially one-way activity that requires only an audience or object, communication is (at least in intention) a two-way process that seeks actively to engage the other. Criminal trials, I will suggest, should be seen as attempts not simply to identify the guilty, or to express norms, but to engage the defendant in a communicative enterprise.

This will suggest a different way of understanding international criminal law, which begins not with the impersonal thought ‘they ought to be punished’, but with the (collectively) personal thought ‘we ought to call them to account’: this will show why trials are so important; it will also, when we ask who ‘we’ are, p.594 highlight the issue of what gives international courts the authority that they claim.

**III. THE CRIMINAL TRIAL AS A CALLING**

**TO ACCOUNT**

To begin to develop this suggestion, I will sketch an account of domestic criminal trials. We should see them not merely in instrumental terms, as identifying those who, being guilty, are to be punished, but rather as the forum in which alleged wrongdoers are called to account by the polity whose laws they have allegedly flouted.18

A trial summons a defendant to answer a charge of criminal wrongdoing: though the prosecution must prove that she committed the offence, she is called to make an initial answer to the charge, by a plea of ‘guilty’ or ‘not guilty’; in giving that answer, she accepts the court’s authority to summon her, and to judge her. If the prosecution then proves (or she admits) that she committed the offence, she must answer not just *to* the charge, but *for* her commission of the offence. It has been proved that she is criminally responsible for that offence: whilst she can still avoid conviction (criminal liability), by offering a defence, the onus shifts to her to offer one. The trial does not simply treat the defendant as someone on whom judgment must be passed: it addresses her as a responsible agent, who should be called to answer in this way; it gives her a central, active role in the process. That process is in several ways communicative. The initial stage of charge and plea is communicative: that is why it matters that the defendant be fit to plead—able to understand and respond to the charge. The prosecution’s case is addressed not just to the fact-finder, but to the defendant, as a case that—the prosecutor claims—she must answer; the verdict is addressed both to a wider public and to the defendant. If she is convicted, the significance of the verdict is not merely that she is liable to punishment: the verdict condemns her wrongdoing, as a formal, public message of censure that she is expected to understand and accept.

Why should trials take this form? The simple answer is that this is what we owe both to victims and to alleged perpetrators of crimes. What is salient about crimes is their wrongful character: what matters is not just (if at all) that harm was done and must be repaired (as ‘restorative justice’ theorists urge), but that wrong was done. p.595 We owe it to victims to show that we take their wrongs seriously, by seeking to call the perpetrators to account. We owe it to perpetrators to respond in this way, by calling them to answer for the wrongs they committed, because that is to treat them as responsible agents—as agents who can and should be called to answer for their actions.19

If it is plausible to see criminal trials in this light, an obvious question arises: by and to whom is the defendant called to answer—and by what right? The labelling of English criminal cases, ‘*R v. D*’, might suggest an Austinian answer: defendants are called to account by the sovereign whose orders they have allegedly disobeyed, in virtue of the sovereign’s authority (or power) over them. A better answer for what purports to be a liberal democracy, self-governed by a genuinely common law, is that defendants are answerable to their fellow citizens (in whose name the courts act) for public wrongs that they commit, in virtue of their shared membership of the political community. Crimes are ‘public’ wrongs,20 not in the sense that they harm ‘the public’ as distinct from any individual victims, but in the sense that they are wrongs that concern the ‘public’, i.e. all members of the polity, in virtue of their shared membership; the criminal trial is the forum in which we formally call each other to account, as citizens, for such wrongs.21

That is why the theft committed by a Polish citizen against a fellow Pole in Poland is not morally, as it is not legally, within the jurisdiction of English courts. On Moore’s view, the English legislature and courts have reason to claim jurisdiction over such crimes, since they are wrongdoings that merit punishment, and it is the criminal law’s function to ensure that they receive it; the reasons against claiming jurisdiction (to do with respect for national sovereignty and with the efficient division of punitive labour) appear later in deliberation, as reasons not to pursue that in principle claim. But that is implausible. The point is rather that the Polish theft is not the business of the English legislature or courts: the thief is not answerable to them, or to members of that polity, for what he has done.

That is also why the trial’s legitimacy, as a matter of the court’s standing to call this defendant to account, is separate from the substantive issue of the defendant’s guilt, and from procedural issues of natural justice. One question concerns guilt: did the defendant commit the offence charged; if so, has he a defence? Another question concerns proof and procedure: can the defendant’s guilt be proved by a process that respects the presumption of innocence and the demands of natural justice? But a p.596 third and independent question concerns the court’s authority: does this court have the standing to call this person to answer this charge? Suppose that a defendant has been convicted by an impeccable process (perhaps he admits that he committed the crime), but shows on appeal that the court had no right to try him: he had been promised immunity by the prosecutor; or he had diplomatic immunity; or the crime was committed outside the court’s jurisdiction. He is entitled then to have his conviction overturned: not because he is entitled to an acquittal (that would imply that the court had the right to try him, but should have found him not guilty), but because he should not have been tried for that crime by that court; the court lacked legitimate authority to call him to answer.

It is always open to defendants in domestic courts to ask: ‘By what right do you try me?’ The court must be able to answer that question, and I have suggested that an adequate answer cannot just appeal to the justice of the court’s procedures, or to the wrongfulness of the alleged crime. It must show how that crime, as allegedly committed by this defendant, is the proper business of this court; and I have suggested this involves showing that it is the proper business of the political community to which the defendant belongs, and to whose members he must answer for his violations of their shared, public values.

It might be objected that such grounding in community is not a necessary condition of criminal jurisdiction. Some wrongs are of course private matters, not eligible for public trial or punishment: but once a wrong is a public wrong, justice demands that the perpetrator be brought to book. It might be desirable that criminal wrongdoers should be called to account in the courts of a political community to which they belong: for a wide range of crimes, we might therefore appropriately recognize that domestic law and domestic courts should have exclusive jurisdiction. Those courts still ultimately act, however, in the name not (only) of their local political community but of justice, whose demands are neither grounded in any such community nor addressed only to its members: especially in the case of serious and wide-reaching wrongs of the kind over which the ICC claims jurisdiction, we should see those demands of justice as being addressed to anyone who can fulfil them, and therefore recognize that another state’s courts, or an international court, can claim the standing to call the perpetrators to account in the name of justice, despite the absence of any nexus of community between perpetrators, victims, and the court, so long as the courts’ procedures can be shown to respect the demands of both retributive and natural justice.22

This objection can succeed only if we can plausibly explain the distinction between ‘private’ and ‘public’ wrongs without appealing to ideas of community: but I do not think that we can do so. What is ‘private’ in this context is what I can claim to be my, or our, business but not yours; what is ‘public’ is what I must admit to be your p.597 business as well as mine or ours. Now the identity of the ‘we’ and the ‘you’, and the determinations of what is whose business, are context-dependent.23 My adultery is a private matter in relation to the criminal law, but not in relation to my marriage, or to my church: that is, I must admit that it is my wife’s business, and the business of fellow members of my church (if that is the kind of church I belong to), that they have the right to call me to account for it; but I can deny that it is the business of the criminal law. A husband’s violence against his wife, by contrast, though it might take place ‘in the privacy of the home’, is a public wrong, in the sense that it properly concerns not just him and his wife, but ‘the public’—all of us; it is the business of the criminal law. A ‘public’ wrong is a wrong that is the proper business of some ‘public’; but we must therefore be able to specify the public whose business it is. In the case of adultery, it might be fellow members of my church—of my religious community; in the case of my misconduct as a teacher, the relevant public is my students and colleagues—the fellow members of the academic community to which we all belong; in the case of criminal wrongdoing it is . . . what? The answer suggested here, for domestic crimes, is that it is my fellow citizens—the fellow members of the polity to which I belong.24 But the key point is that if we are to identify a wrong as a public wrong, we must be able to identify the relevant public to whom the wrongdoer is answerable: we cannot simply appeal to some impersonal demand of justice that the wrongdoer be punished.

**IV. ANSWERING TO HUMANITY?**

If the criminal trial is seen as a process through which alleged wrongdoers are calledto account by those to whom they are answerable, we can both see more clearlywhy, as Luban notes, the trial should be so central to international criminal law,and highlight the importance of the question of who can call such perpetrators toaccount.

The parties to the ICC statute were determined ‘to put an end to impunityfor the perpetrators’ of these ‘most serious crimes of concern to the internationalcommunity as a whole’.25 Now the most obvious way to put an end to impunity isto punish, but calling to account can also end impunity: our recognition of suchcrimes is manifest in our efforts not (merely) to punish their perpetrators, but tohold their perpetrators to proper account.26 Of course we also demand that theyp.598 be punished, and see it as a failure of justice if they walk free after conviction: but the value of trying them in a criminal court is not just that this is the appropriate way to get them punished, or that this also projects the relevant norms; it is that in being tried they are held to account for their crimes. Suppose that a defendant dies shortly after conviction, or for some other reason cannot be punished: justice has still been done by his trial, since he has been held to account.

There are two important aspects to such processes of holding to account. The first has been noted: a calling to account must be not merely *of* someone who is accountable, but *by* some person or body to whom he is accountable. The second I will return to later: it concerns the status of the defendant as someone who is called to answer—that he is thereby treated as a responsible member of the normative community to which he must answer. For the moment, however, we must focus on the first aspect.

When an ICC defendant asks ‘By what right do you try me?’, what kind of answer could be given? An answer must show that the court acts in the name of some group to whom the defendant is answerable for his alleged crimes. It is not enough to argue that the wrongs he allegedly committed are terrible wrongs whose perpetrators ought to be punished: the trial’s legitimacy depends upon the acceptability of the court’s claim to act in the name of those who have the right to call the defendant to account. In whose name, then, can the ICC claim to act? To whom are the perpetrators of such crimes answerable? There are two obvious possible answers to these questions: each is problematic.

The first answer is that they are answerable to the particular political communities within and against which they committed their crimes: Augusto Pinochet was answerable to the Chilean people for the crimes he committed against them (individually and collectively), and should properly have been called to account in a Chilean court,27 Saddam Hussein was rightly tried in an Iraqi court for his crimes against the Iraqi people.28 Such a view still leaves two roles for an international criminal court. First, it can deal with crimes whose impact is genuinely international, especially when committed by states rather than individuals: only an international court could really try ‘the crime of aggression’.29 Second, however, it can fill some of the gaps that national courts might leave—acting on behalf of the political communities which those courts fail to represent as they should. An official who uses torture in the service of an oppressive regime should ideally answer for that wrongdoing to the polity whose citizens he helps to oppress. But this might not be likely, or practicable: a regime is unlikely to put its own officials on trial; even when it falls, its successor might be reluctant to prosecute such crimes. In such cases, if p.599 the crimes are serious enough to warrant the costs involved, it might be appropriate for an international court to claim jurisdiction or, absent such a court, for courts of other states to claim jurisdiction on behalf of the citizens whose own courts have let them down.

This view can readily explain why the ICC should respect the principle of complementarity:30 if its role is to discharge responsibilities that national courts are unable or unwilling to discharge, it can claim the right to act only when the national courts have failed to discharge their responsibilities. But it faces two problems.

The first is that just when the arguments for international jurisdiction seem strongest, there might be doubt about whether there exists a political community to which the perpetrator could answer, on whose behalf the international court could claim to act: if, for instance, the ‘widespread or systematic attack[s]’ on ‘civilian population[s]’ that constitute ‘crimes against humanity’31 are successful enough, there might be no surviving political community to which perpetrators and victims all belong. One answer to this problem is that the existence of a political community is as much a matter of normative aspiration as of empirical fact: we can say, for instance, that state officials’ crimes against members of the black majority in *apartheid* South Africa were committed against their fellow citizens, not because such fellow citizenship was given substantial reality, but because it should have been. Another answer is that calling such wrongdoers to account is one of the ways in which political community can begin to be (re)built—although national courts are better placed than international courts to do this. I am not sure that such answers are adequate: ‘crimes against humanity’ could surely involve such systematic, successful attacks that there really is no basis left on which to identify a political community to which their perpetrators ought to answer; but such perpetrators should not escape being called to account.

The second problem concerns the ICC’s authority to act on behalf of the political community in which the crimes were committed: by what right can it claim to act in their name? In so far as it deals with crimes over which parties to its statute have jurisdiction, or which are referred to it by a state with jurisdiction,32 it can claim authority, as a matter of delegated jurisdiction: but what of cases in which it claims a universal jurisdiction independent of any such authorisation?33 If such claims are to be sustained, they must appeal to some normative relationship between the court and those for whom it claims to act: but what can that relationship be? The obvious answer to this question leads us to a second account of the ICC’s authority—that it acts in the name of ‘humanity’: what gives it the right to intervene on behalf of members of more local polities whose national courts have let them down is our shared humanity; but that is not far from saying that the perpetrators should have p.600 to answer not merely to their polity, but to humanity. It is to that account that we must therefore turn.

There is no doubting the rhetorical resonance of the idea of answering to humanity. The Preamble to the Rome Statute declares the signatories’ ‘[c]onscious[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’; and must we not see ‘crimes against humanity’ as crimes for which the perpetrators must answer to humanity? But can we make any substantive sense of this idea, in particular of ‘humanity’ as a community to which wrongdoers could answer, or in whose name a court could act?

We need not try, implausibly,34 to portray humanity as a *political* community: the most we need is the idea of humanity as a moral community. Nor need we portray humanity as the victim of ‘crimes against humanity’, as if what gives humanity the standing to call their perpetrators to account is that the crimes somehow harm humanity as a whole. Some theorists make such claims: the Preamble to the Rome Statute talks about ‘grave crimes’ which ‘threaten the peace, security and well-being of the world’; Hannah Arendt argued that ‘mankind in its entirety [can be] grievously hurt and endangered’ by the attempt to exterminate a particular ethnic or religious group;35 and Larry May articulates the ‘international harm principle’.36 Such claims resemble those by which theorists sometimes explain the idea of crimes as public wrongs, by identifying harms that crimes do to ‘the public’ as distinct from individual victims—by creating ‘social volatility’, for instance, or by undermining the conditions of trust, or by taking unfair advantage of the law-abiding.37 Such accounts distort our understanding of the criminal wrong that should be punished: a rapist should be condemned and punished not for the social volatility or loss of trust that he caused, nor for the unfair advantage that he supposedly took over those who restrain their criminal impulses, but for the wrong that he did to the person whom he raped. Crimes are ‘public’ wrongs in the sense not that they harm ‘the public’, but that they properly concern ‘the public’—all members of the relevant community; they are wrongs that we share in virtue of our membership of that community.38 A crime against humanity should be one that properly concerns us all, in virtue simply of our shared humanity. p.601

The Rome Statute’s Preamble talks about ‘the most serious crimes of concern to the international community as a whole’, and ‘unimaginable atrocities that deeply shock the conscience of humanity’. Many kinds of wrongdoing, committed in communities far from ours, are not our business: we can be moved by them, and wish that they were not committed, but lack the standing to call their perpetrators to answer for them. We often lack that standing as individuals; nor do we have it collectively, through our states or whatever international institutions we create. But some kinds of wrong should concern us, are properly our business, in virtue of our shared humanity with their victims (and perpetrators): for such wrongs the perpetrators must answer not just to their local communities, but to humanity.

But is there such a ‘we’: a ‘we’ not of some local community, but of humanity as such? Is it not overblown rhetoric to say that all human beings are ‘united by common bonds, their cultures pieced together in a shared heritage’? Once we recognize that a community, in the sense relevant here, need not involve close ties or deep structures of richly shared interests, we will see that we can talk of the human community without espousing any radical, and controversial, form of cosmopolitanism. We recognize others (or, sometimes, recognize that we should recognize others) as fellow human beings which is to recognize that they have a claim on our respect and concern simply by virtue of our shared humanity:39 that recognition is displayed, for instance, in responses to disasters and desperate need in distant parts of the world, as well as to the kinds of atrocity that motivate calls for universal criminal jurisdiction. We can also talk, cautiously, of a shared life:40 of lives structured, albeit in profoundly different ways, by such central human concerns as birth, life, and death; of the needs that flow from our social or political nature;41 of sharing the earth as a natural (and fragile) environment. We can also see the creation of the ICC as one of the ways in which the moral ideal of a human community might be given more determinate and effective institutional form: the existence of a community is often a matter more of aspiration than of achieved fact, and a recognition of human community could be a recognition of what we should aspire to create.

Much more clearly needs to be said about answering to humanity, and about the kinds of wrong whose perpetrators should have to answer to humanity; but I want p.602 to turn to the second aspect of the conception of international trials as callings to account, concerning the defendant’s standing.

**V. HOSTIS HUMANI GENERIS?**

The idea that crimes against humanity are those whose perpetrators should answer to humanity expresses a sense of solidarity with the victims of such crimes: we share, or should share, collectively in the wrongs that they have suffered, and share a collective responsibility to respond to those wrongs by calling the perpetrators to account. But we must also note the status that this conception accords to the perpetrators themselves.

Luban insists that his account of crimes against humanity should not lead us to ‘demonize the perpetrators, to brand them as less than human, and hence to expel them from the circle of those who deserve human regard’: but he also insists that they are *hostes humani generis*, enemies of humanity; he talks of a ‘vigilante jurisdiction in which the criminal becomes anyone’s and everyone’s legitimate enemy’, and quotes with apparent approval Arendt’s imagined explanation to Adolf Eichmann that ‘no one, that is, no member of the human race, can be expected to want to share the earth with you’.42 The idea of *hostis humani generis*, however, implies something like the kind of ‘demonization’ that Luban is anxious to avoid: if we are to see international criminal trials as a way of calling those who commit such wrongs to account, we must be able still to see the perpetrators as full members, rather than as enemies, *humani generis*.

Consider Blackstone’s account of a pirate as *hostis humani generis*; ‘As he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him’.43 Blackstone went on to say that ‘every community hath a right, by the rule of self-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do’.44 But what ‘an enemy of mankind’ implies is not punishment, but one of two other, quite different ideas. The first is that of an outlaw—someone who has put himself, by his atrocious wrongdoing, outside the reach or protection of the law; the second is that of an enemy in war: in neither case is punishment appropriate. Outlaws are, if we take the idea literally, fair game for anyone (as far as the law is concerned): one commits no offence in killing them; one need not justify it, as one must justify p.603 killing a human being ‘under the King’s peace’;45 if we kill them or lock them up, this is a matter of defence against a threat, not of punishment. Enemy soldiers are not fair game in that way—they are protected by the laws of warfare: but their killing in the course of the war, or their imprisonment as prisoners of war, is again not a matter of punishment, but of wartime defence.

Taken literally, *hostis humani generis* describes an outlaw rather than an enemy soldier, since soldiers are still protected, as members *humani generis*, by the rules of war. But to put someone on trial, and to punish him for his wrongdoing, is to treat him as a member of the normative community under whose laws he is tried and punished. He is called to answer to the charge and, if the charge is proved, to answer for his crime: but thus to call someone to answer is to address him as a fellow member of a normative community whose values he can be expected to understand and accept; it is also to commit ourselves to listening to, and to taking seriously, any answer that he chooses to offer.46 To put those who perpetrate crimes against humanity on trial is thus to treat them with the respect that is still, on this account, due to them as responsible members of the normative community of humanity.

Part of the value of this conception of criminal trials is that it emphasizes the defendant’s status, not as an enemy or a dangerous threat who must be destroyed or rendered impotent, but as a fellow member of a normative community who is called to answer to his fellows for what he has done—and whose fellows must be ready to answer to him for their treatment of him. But this also highlights a challenge facing any attempt to build a system of international criminal justice: that of showing how we should, and can, recognize that status even in those who have committed the most terrible crimes. It is (relatively) easy to say, in the context of domestic criminal law, that however tempting it might be to portray offenders as outsiders, as a threatening ‘they’ against whom ‘we’ must protect ourselves, we must recognize them as fellow citizens—and to mean it; it is much harder to say that (other than as a piece of shallow rhetoric) of those whose crimes properly count as ‘crimes against humanity’, or to urge that on their victims. Gaita’s attempt to show what this perspective entails helps us to see what it involves, and to see why it is so hard to accept:

[Some] may say that even such people are owed unconditional respect, meaning not that they are deserving of esteem, but that they are owed a kind of respect which is not conditional p.604 upon what they have done and which cannot be forfeited. Some will say that even the most terrible evil-doers are owed this respect as human beings and that we owe it to them because we are human beings. That amounts to saying that they remain our fellow human beings whatever they do.47

Gaita’s concern is with the way in which recognizing another as a fellow human being involves recognizing him as ‘a certain kind of limit [an ‘absolute’ limit] on our will’; ‘no human being may be acted against as though we were ridding the world of vermin’.48 But such recognition of fellow humanity brings positive as well as negative demands: a demand, for instance, that we help the other if he is in desperate need; but also, I have suggested, that we respond to his wrongdoing, however terrible and ‘inhuman’ it was, not by simply destroying him, but by trying to bring him to answer for it.

International criminal trials, if understood as I have argued we should understand them, thus express an aspiration to do justice not only to the victims of the crimes with which they are to deal, but also to the perpetrators of those crimes; when we think about just what that aspiration involves, we must realize how morally demanding it is.