# PART A

# UNIVERSAL NORMS AND MORAL MINIMALISM

# 1

# Introduction

> Given the inherent costs of criminalization, when a particular legal prohibition oversteps the limit of moral legitimacy, it is itself a serious moral crime.
>
> Joel Feinberg, *Harm to Others*, p. 4

This book provides a philosophical analysis of some of the most difficult issues in international criminal law, most importantly how to justify international interference in one of the traditional prerogatives of a sovereign State – the decisions about whether to engage in criminal punishment of its citizens. International criminal law involves the prosecution of individuals according to international law, often in international tribunals, rather than according to domestic law. The problems of sovereignty that arise are said to be outweighed by the denial of impunity to State leaders and even minor players, who would not normally be prosecuted for serious human rights abuses. The defense of human rights is a powerful weapon used to curtail unbridled State action taken against individuals, thereby promoting global justice. But when we turn to the use of criminal law to protect human rights, we need to focus precisely on what some individuals did to others, and whether those actions met the elements of specific crimes.

Consider the charge of genocide, for example. Genocide is a powerful moral category of rebuke – indeed the most powerfully evocative of all of the current charges in international criminal law. Prosecutions for genocide, especially at the trials in The Hague and Arusha, were very important cultural markers that identified when grave injustice had been committed. But the moral outrage against genocide, despite how much I would otherwise support it, does not easily translate into the specific elements of a crime that must be proven in a court of law. We cannot prosecute on the basis of our moral outrage alone. This is especially true of cases in which a minor player is accused of genocide because his or her acts were part of a larger genocidal campaign, and yet the individual defendant did not personally have the intention to destroy, in whole or in part, an entire group of people.

This was driven home to me as I sat in the gallery of the Yugoslav Tribunal in mid-June of 2001. The prosecution had just completed its case in chief, and one of the judges asked the prosecutor what evidence had specifically been presented that proved the charge of genocide. The judge said that most of the evidence had actually established the elements of persecution, a crime against humanity. The prosecutor responded with a largely moral argument: The defendant had engaged in especially gruesome acts against Muslims, and the world expected that he would be prosecuted on the most serious of the charges – namely, genocide, not merely persecution. I went to lunch with several newspaper reporters who were unanimous in agreeing that the defendant must be convicted of genocide to mark his horrible acts. I disagreed, as did the judges, who dismissed the genocide charge against the defendant for the prosecutor's failure to present a prima facie case establishing the elements of genocide.

This book attempts to provide a broad philosophical defense of such trials in international criminal law. To be defensible, though, international criminal law must move beyond honoring the victims of horrific harms and embrace norms that support an international rule of law. Throughout this book, I argue that victims' rights should not be the overriding concern of international criminal law. If international law is to achieve the respect and fidelity to law that is the hallmark of most domestic law settings, defendants' rights must be given at least as much attention as victims' rights. Philosophically, we are justified in applying universal criminal norms in the international arena only when the scope of international crime is restricted to those crimes and criminals that are truly deserving of international sanctions. We need to pay much more attention than we have to the justification of international prosecutions, especially to the kind of in-principle justification that has been the hallmark of normative jurisprudence and philosophy of law. International moral outrage over atrocities must be tempered with international protection for the rights of defendants, so that the defendants in international criminal trials are not themselves subject to human rights abuse.

In this introductory chapter, I will discuss the idea of sovereignty, which has created such difficulties for discussions of international law, especially international criminal law. By the end of this chapter, I will offer a preliminary solution to the problem of sovereignty that will itself require much more supporting argumentation in later chapters to be fully plausible. The problem for international law is that States are sovereign by virtue of having exclusive legal authority over matters within their borders, whereas international law sweeps across the borders of States. In a world of absolute State sovereignty, international law would have no place. But this would be problematical, since there would then be no way to adjudicate disputes among States, especially those arising when one State's forces cross the borders of another and attempt to subjugate the other State's citizens.

There is a long history of debate about the philosophical and moral justification of international law. There are two main difficulties with justifying international law: one centered on sovereignty, and the other on toleration. First, is it ever justifiable for the international community to violate a State's sovereignty in order to protect that State's own subjects? Second, shouldn't the international community be willing to tolerate wide diversity in the way one State treats its subjects? In what follows, I present a Hobbesian answer to these philosophical problems, showing that Hobbes is not necessarily the great adversary of international law, contrary to what is often claimed by international law scholars today. Indeed, a Hobbesian position, or what I later call a moral minimalist position, can even support the concept of international criminal law. This is because a Hobbesian would be forced to admit that when a State sovereign cannot protect its subjects, that sovereign no longer has the right to exclusive control over the affairs of those subjects, nor a claim for the tolerance of other States. In this chapter, I provide a Hobbesian approach to sovereignty that supports some international criminal prosecutions.

In Section I, I provide a brief account of the types of international crime. In Section II, I provide an argument, largely drawn from the work of Hugo Grotius, as to why sovereignty is important and should be given a contingent moral presumption. In Section III, I discuss the value of sovereignty in more contemporary terms by relating it to the value of tolerance. In Section IV, I turn to the work of Thomas Hobbes in order to give us a more developed understanding of the problem of sovereignty. And in Section V, I turn (perhaps surprisingly) back to Hobbes to give us a solution to the problem of sovereignty. The Hobbesian solution I sketch opens the door to the legitimacy of international criminal trials, although the legitimacy is more limited than many contemporary natural law theorists would like it to be. In Section VI, I give a brief summary of the main arguments advanced in the rest of the book.

## I. Identifying International Crimes

Historically, international law was thought to concern the regulations of the interactions of States, which included one State's transgression of the borders of another sovereign State and the mistreatment of that State's civilian citizens. One of the few types of crimes involving individual human persons instead of States were so-called war crimes, crimes committed by soldiers against civilians and prisoners of war. Prosecutions for war crimes effectively involved intervention in the affairs of one State in order to punish the individual human persons as agents of a State for intervening in the affairs of another State. On the analogy of war crimes, other offenses against a State that did not involve a State's acting against another State, but nonetheless involved one State's suffering a harm, such as in piracy cases, were also thought to be subject to international

criminal sanctions. Since the Nuremberg Trials, the idea has been recognized, although not systematically defended, that the leader of, or even a minor player within, a State can commit international crimes by the State's abusive treatment of a fellow subject. In this book, I shall mainly focus my attention on crimes of this sort, especially what have come to be called "crimes against humanity," and the crime of genocide, crimes committed by individuals against other individuals that are so egregious as to harm all of humanity and hence to call for international prosecution.

The two most influential listings of international crimes were set out roughly fifty years apart. The 1945 Charter of the Military Tribunal at Nuremberg identified three classes of international crime:

Crimes Against Peace
War Crimes
Crimes Against Humanity[1]

The 1998 Rome Statute of the International Criminal Court (ICC) lists four categories of crime:

The Crime of Genocide
Crimes Against Humanity
War Crimes
The Crime of Aggression[2]

The Nuremberg Charter's "crimes against peace" are pretty much the same as the Rome Statute's "crime of aggression." "Crimes against peace" have never fared well in international law, since it has been so hard to figure out what counts as an *aggressive* war as opposed to a *defensive* war. At Nuremberg, genocide was treated as a crime against humanity, but the Rome Statute singles out genocide as a separate, and the most egregious, crime. Hence, the list of international crimes has been relatively constant over the fifty-year period from Nuremberg to the ICC.

It has been hard to figure out how to put into the dock whole States, which are principally the entities that violate the peace. War crimes and crimes against humanity are the main, although not the only, crimes prosecuted today. Traditionally, war crimes were crimes committed by soldiers of one State's army against the soldiers or the civilian subjects of another State. The classic examples of war crimes are the torture of prisoners of war or the slaughter of non-combatants. "Crimes against humanity" is a category of crime largely invented in the early twentieth century to capture a range of crimes that one person commits against another person, that are directed against a population, and are organized by a State or State-like entity, not necessarily during war.

For justificatory purposes, I will suggest that there are three bases for prosecuting international crimes:

Crimes that will not be prosecuted domestically because of a weak State
Crimes that are committed by the State or with significant State complicity
Crimes that target a whole group, not merely a solitary human person

These justificatory bases ground prosecutions for the main categories of international crime identified at Nuremberg and Rome. I will shortly say something brief to introduce each of these bases of prosecuting international crime. Before beginning that task, let me say something, also introductory, about a different category of crime that I will largely ignore.

There is a wide category of crimes that are amorphous, and are often highly contested.[3] I am thinking of those crimes that have occasionally been prosecuted as international crimes for convenience sake. Included in this category are:

Piracy
Hijacking
Trafficking (in drugs, women, or slaves)
Money-laundering

These crimes do not fit into the standard Nuremberg or Rome categories but have been, or might be, prosecuted because they are crimes that cross State borders[4] in their execution, or occur outside the confines of State borders altogether (such as on the high seas) and have been thought to be best dealt with as international crimes. These crimes are considered international crimes largely as a matter of convenience. It is notoriously hard to justify these crimes as deserving of international prosecution except on pragmatic grounds, and today such crimes are largely left off the list of international crimes.

My aim here is to provide an in-principle, morally minimalist, account of the justification of international prosecutions. I will largely ignore the amorphous category just described, and stick to the two main group-based categories of international crime identified at Rome – crimes against humanity and the crime of genocide – also devoting some time, but considerably less, to war crimes. According to the grouping I proposed earlier, I will not focus on those crimes that are justifiably prosecuted internationally because of a weak or non-existent State. Such prosecutions are not normally seen as controversial, even by those who are generally opposed to international criminal law. Instead, I will focus on those crimes that are deserving of international prosecution because they are directed at a group. These crimes, which are thought to harm humanity in some sense, are certainly the most controversial cases. I will also spend some time discussing crimes that are committed by or with State complicity. Both of the last two justificatory bases of international crime are related to what I will call the international harm principle.

Today, there are two types of crime that might harm humanity. One category is genocide, now treated as the most serious of all international crimes. The other is what is called "crimes against humanity," and includes such things as murder, torture, and rape that are aimed at a certain population and that are widespread or systematic. These crimes will be the primary focus of this book because they seem to be the hardest to justify and yet the crimes most often pointed to today as paradigmatic of international crimes. I will spend some time also discussing the category of war crimes, although mainly in considering what defense to these crimes should be allowed. There is little controversy about how to justify counting war crimes as international crimes, since there is often a literal crossing of borders by members of one State to harm members of another State, the earlier paradigmatic idea of truly "inter" national crimes. The harder thing to justify is crimes that are "intra" national crimes – that is, crimes that are committed by a State against its own subjects or allowed to occur by one subject's assaulting another. These crimes – that is, genocide and crimes against humanity – are especially hard to justify as deserving of international criminal prosecution because they so clearly violate State sovereignty.

International law achieves its first, and perhaps most plausible, justification by acting as a forum for adjudicating disputes arising from one State's crossing of another State's borders. For without such adjudication by peaceful and impartial means, States would be in a state of constant warfare among each other that would resemble Hobbes's "war of all against all." Grotius called this "a common law among nations, which is valid alike for war and in war."[5] Today, international criminal law is often seen as at least as great an assault on State sovereignty as that of outright war, since it involves the prosecution of a State's subjects by a legal authority that sits, in effect, as a higher authority than the State, and thereby seemingly infringes directly on the sovereignty of the State. In the next few sections of this chapter, I will explain the problem of sovereignty and how that problem might be solved so as to allow for prosecutions of international crimes.

## II. The Contingent Presumption Favoring Sovereignty

In this section, I will explain why sovereignty should count as a strong presumption that must be rebutted if international law, especially international criminal law, is to make any sense. I will here draw on the ideas of Hugo Grotius, ideas that will also begin to provide us with a way to justify legitimate restrictions on sovereignty if international law is to get off the ground. I draw on the work of Grotius (as well as that of Hobbes in later sections) in order to find inspiration from the first early modern discussions of international law, both because they are still good arguments and because it is important to find the historical roots of our debate that will mainly be located in quite recent literature and that might appear too focused on specific contemporary facts.

State sovereignty is important, and has been seen to be so, largely because there is no world State that can easily protect individuals from the attacks by enemy and competing States. In 1625, Grotius provided a very good definition of sovereignty that also makes reference to some of its initial plausibility:

> That power is called sovereign whose actions are not subject to the legal control of another so that they can be rendered void by the operation of another human will . . . [T]he State which we have defined above as a perfect association, is the common subject of sovereignty.[6]

For Grotius, States are "perfect associations" in that they are grounded in both natural justice and expediency. According to Grotius, "the law of nature has the reinforcement of expediency."[7] States have as their chief aim the offsetting of the natural inclination of humans to seek only after their own advantage. States are created with the aim of "maintenance of the social order."[8] The State is a perfect association in that it meets the needs of humans for peace, and also provides a just basis for the settlement of disputes by instituting systems of law in which disputes are adjudicated by those who are not themselves interested in the results.

Grotius is best known for the way that he links his conception of the law of nature to what he calls "the law of nations." Municipal or domestic law has its origin in the consent of the individuals to be bound, but the bindingness of what we have consented to is itself based in the law of nature, especially in our natural desire for peace and sociability. Similarly, international law is based in the consent of States, but again the bindingness of what States have consented to is based on the branch of the law of nature Grotius calls "the law of nations." Grotius envisions a "great society of states" that is bound by certain laws "between all States."[9] But Grotius is not a dreamer; he realizes that such an international society and its law is largely "without a sanction," and hence significantly different from municipal law. Nonetheless, he argues that a great society of States may be realized when people come to see that the concept of justice that governs *municipal* law also governs *international* law. In both legal settings, humans are bound by their natural desires and by their duties to God.

The obligations that States owe to each other according to the law of nations are most strongly binding in times of war, according to Grotius, especially concerning the enforcement of rights of those "too weak to resist."[10] Natural justice operates in such instances, even when the municipal laws of nations are silenced. The laws of nations are laws of "perpetual validity and suited to all times."[11] Grotius argues that the natural law applied to States is part of what he calls "the natural and unchangeable philosophy of law."[12] Grotius also then goes on to outline a new field of jurisprudence that will govern the rightful bases of nations going to war as well as in waging war. For Grotius, this jurisprudence is premised on a universal base, but such a base, contrary to

what is sometimes thought, is itself grounded in the two equally sufficient bases of human's sociable nature and God's divine commands. This dual grounding gives Grotius's views much more contemporary plausibility than earlier natural law views, such as those of Thomas Aquinas.

Grotius, anticipating Hobbes, also gives one of the best explanations for possible limitations on sovereignty:

> The kingdom is forfeited if a king sets out with a truly hostile intent to destroy a whole people . . . for the will to govern and the will to destroy cannot coexist in the same person.[13]

Grotius thought that such a condition would rarely arise, at least among kings who are possessed "of their right minds."[14] In any event, sovereignty for Grotius can be alienated when the aim for which that sovereignty was instituted is abrogated.

Drawing on Grotius's remarks, we begin to see why a presumption in favor of sovereignty should exist, at least contingent on there not being a world State, as a means to provide protection and support for individual subjects. Since States are constituted to aim at the social order and to maintain harmonious dealings among the citizens of the State, a kind of moral presumption is given to States: As long as they are conforming to this normative aim, they should not be interfered with by other States. Social stability requires exclusive legal control over a population. Such a presumption is contingent, since it might turn out that a world State might come into being that could better maintain social stability. But until such a time, States are to be given a moral presumption in favor of non-interference, for the sake of their subjects and for the overall peace and harmony of the world. Both justice and expediency require that States be afforded this presumption, but that remains a rebuttable presumption.

One can also begin to see why it would make sense to make the presumption a rebuttable one, since it is certainly possible that a sovereign ruler could attack rather than protect its subjects. It might also turn out that a given sovereign becomes incapable of protecting its subjects, as is increasingly true today in central Africa, especially in the Congo, where all of its neighbors have made incursions across its borders for their own gain. Grotius also said, again anticipating Hobbes, that sovereign rulers can never be so strong that they would not sometimes come to need the help of other States: "[T]here is no state so powerful that it may not sometime need the help of others outside itself, either for purposes of trade, or even to ward off the forces of many sovereign nations united against it."[15]

Contemporary writings on this topic often follow in a similar vein. One of the most common arguments in favor of sovereignty, or what some call intrastate autonomy, is that States do a reasonably good job of protecting the well-being and freedom of individual subjects. This argument is obviously based largely on an empirical claim that could be rebutted. I will not attempt to defend this

view, but in light of my moral minimalism that seeks the least controversial assumptions, I will simply assume that there is quite a bit of empirical support for thinking that many, if not most, States do a reasonable job of protecting the well-being and freedom of their subjects.

There is another, much more recent, argument that I wish to mention as well. Allen Buchanan argues that giving a kind of presumption to State sovereignty can also be defended by reference to group rights. Individual humans have chosen to associate together, or to remain associated together, in distinct nation-states. We owe a certain moral presumption to States out of respect for the rights of group self-governance that is embodied in respecting State sovereignty.[16] Of course, this is also a rebuttable presumption in that it can turn out not to be true that individuals or groups have chosen, or would choose, to form just the States that currently exist. But if we ignore, or violate, the sovereignty of States, we also risk violating the right of individuals and groups to decide what associations they wish to form, where one of the most important characteristics of such associations is that criminal prosecution and punishment be under the control of these associations, not under some foreign control.

So we begin with a general presumption in favor of sovereignty that must be rebutted if international law, especially international criminal law, is to be justifiable. For international law seems most especially to be concerned with the legality of what the individual agents and subjects of sovereign States do. And yet attempts to assign legality or illegality to what these individuals do is itself to subject them "to the legal control of another," and thereby to violate State sovereignty, at least according to Grotius's reasonable-sounding definition of sovereignty. But as we will see later in this chapter, there is also a plausible resolution of the problem of sovereignty for international criminal law, a solution that we have already seen anticipated by Grotius's remarks concerning those clear cases in which a State indicates that it will not protect the well-being of a group of subjects.

## III. Sovereignty and Toleration

Other than a concern about whether defendants will be treated well, there are two main reasons why one might be opposed to trials by international tribunals. First, one might say that such trials violate State sovereignty in that they violate the right of a State to the exclusive adjudication of matters that affect only its own citizens and that take place within its borders. Second, one might say that such trials fail to display tolerance toward the diverse practices of States and their members. These reasons are related in that tolerance is often the value appealed to when defending State sovereignty. In addition, tolerance and sovereignty are often both justified by reference to the value of reasonable restraint. Concern for the liberty of States and their subjects leads to the conclusion that one should not interfere unduly, if at all, in the internal affairs of a sovereign State. Such