Introduction

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I

Are there really such things as "war crimes"? Certainly, terrible things are done in wars, things which, if done in any other context, would be crimes. But, done in the context of war, are they really crimes?

The question spans two different sorts of skepticism. One is a moral skepticism: the laws of morality, it may be said, do not apply to war, and so nothing that is done in pursuit of war aims can be immoral. Such a view is often, rightly or wrongly, attributed to Machiavelli, and is often known as Political Realism. But on reflection there seems little to be said for such a view. What, after all, is so special about war, that it should offer moral legitimation to anything that one does in pursuit of one's war aims?

One thought would perhaps be that morality applies only to the behavior of individuals, not to the behavior of states. But states perform actions only to the extent that individuals do, so what are we to make of the alleged contrast? Perhaps this: that when individuals act as representatives of states then they are not bound by moral considerations. But now, again, there seems little to be said for this view. It seems to be either an arbitrary linguistic stipulation, restricting the word "moral" to purely personal interactions, or a moral view whose unpleasantness is clear but whose motivation is obscure.

Another thought might be that of General Sherman: "War is cruelty, and you cannot refine it."[1] But going to war need not be an act of cruelty, nor need everything that is done in pursuit of a war. Nor is it true that war imposes circumstances in which it is impossible to constrain one's actions, at least to some degree, to what is morally required. Of course, moral atrocities are routinely carried out in wars, and that is not a coincidence. But it is dishonesty to think that this somehow legitimates one's own immoralities.

Perhaps there is nothing more to the thought than a confusion between two different claims. When Cicero said that laws are silent in a war[2] this could be taken to mean simply that, as a matter of fact, no-one does in fact obey moral rules during a war. But even if this were true, it should not be confused with the quite different claim that moral rules do not apply during a war; the fact that a rule is widely disobeyed does not mean that it does not apply. In any case, the first claim, though often asserted, is clearly false. People often obey moral rules during warfare, often to their, and their country's, detriment. Contrary to General Sherman, war has been "refined" considerably over the centuries by, for instance, codes of honor, standards of morality, self-interest, and international law.

The idea, for instance, that captured enemy soldiers may not be ill-treated is, in various forms, very ancient, and can be found in a number of different civilizations before the Christian era.[3] This is no surprise; like many moral rules, its general observance works to the benefit of all of those who partake in the activity that it governs. Its source in the notion of chivalry seems natural too: to take pride in one's profession is a natural human tendency, shared by soldiers as much as by others, and there seems little to take pride in in killing or mistreating the helpless.

In the Christian tradition St. Augustine and St. Thomas both addressed the issue of war, particularly the question of when it is morally permissible to go to war, and they were in no doubt that the decision to go to war is governed by stringent moral requirements. By the seventeenth century there was a substantial literature on this question, and, increasingly, on the question of what conduct is permissible in war. This literature is generally referred to as the "Just War" tradition, and the most notable part of it is Hugo Grotius's treatise *De Jure Belli ac Pacis*.[4] Grotius's writings did not seem to have much influence on the conduct of war for 300 years or so, but many of his basic ideas eventually found their way into international law and the military academies.[5]

The restrictions that were thought to govern the conduct of war (they are often referred to as the *jus in bello*) were not arbitrary; they derive in part from restrictions governing when it is permissible to go to war in the first place (the *jus ad bellum*, as it is known). Given that the death and destruction that war involves are terrible things, they need a strong justification; that justification must be that they are absolutely imperative for the achievement of a morally justified end. What morally justified end can war serve? The Just War tradition converged on the view that that end must relate to the defense of oneself or others against unjust aggression, the rectification of wrongs done by unjust aggression, or the punishment of aggressors in order

to reform and deter. Grotius, for instance, says, "It has been shown before, and it is a truth founded upon historical fact, that wars are undertaken, as acts of punishment, and this motive, added to that of redress for injuries, is the source from which the duties of nations, relating to war, take their rise. . . . All punishment . . . must have in view either security against future aggressions, reparation for the injury done to national or private honour, or it must be used as an example of awful severity."[6] As for the conduct of war, justifying his view that rape "should not go unpunished in war any more than in peace," Grotius refers to "the fact that such acts do not contribute to safety or to punishment."[7]

We thus have two sets of moral rules, one set governing when it is justified for a nation to go to war, the other governing what it may do in the course of a justified war. The former correspond to the accusation, made against the Nazi leadership at Nuremberg, of "crimes against peace": "planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties."[8] The latter correspond to the accusation of "War Crimes": "Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or person on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

So there are moral rules, and those who break them act wrongly. And when we learn about particularly horrible war crimes, our natural attitude is one not simply of horror at what was done to the victims, but of condemnation, and not just condemnation of the actions but of the people who carried them out. Here, the Augustinian injunction to hate the sin but love the sinner is peculiarly hard to comply with. What our attitude should be to such people is the subject of Peter French's contribution.

It would perhaps be comforting to think that such people, when they commit appalling crimes, think that what they are doing is morally right. At least we could then attribute to them the virtue of conscientiousness.[9] It would also help us to retain the sense that a knowledge of morality is somehow an obstacle to doing what is wrong. French, however, suggests that there is little reason to think this. Bosnian war criminals who raped, tortured, multilated, and murdered defenseless women knew perfectly well in general what it is to believe that actions are morally right and wrong. And they knew that they were raping, torturing, multilating, and murdering. And "one cannot both know what it means to believe that some action is morally wrong and also believe that raping, torturing, multilating, and

murdering defenseless women are not morally wrong" (pp. 36–7), because to know what such things are involves knowing that they are indeed wrong. We are then left with the alternative that such people knew that what they did was wrong, but did it anyway. A tradition of philosophy from Socrates onwards has denied that this is possible. French argues, on the contrary, that it is indeed possible, that it is just a fact that one can think that something is wrong, but care too little about that to refrain from doing it. "The average Bosnian war criminal . . . is the living moral monster, the possibility of whose existence has been denied by a legion of moral philosophers from ancient times to the present" (p. 39).

This having been said, there remains another question: should such people be held morally responsible? One answer, relying upon a certain interpretation of the principle that one can be morally responsible only for what one freely chooses, holds that they should not. Because they have been so enculturated with attitudes of hatred and contempt, they have no real capacity to control the actions in question and so no real choice about them. French rejects this view. He holds that we judge people morally responsible as part of the practice, amongst others, of blaming and praising, and that this practice has a point: morality is in large part our attempt to prevent evil, and one way in which we do that is by evaluating characters with the thought in mind that certain sorts of characters are ones that we ought not to have, and that we ought not to associate with others who do have them; for the purpose of such an evaluation it makes no difference how a character has been formed. We may thus say that war criminals are indeed morally responsible for what they do.

This is a moral judgment and, of itself, tells us nothing about whether it is appropriate to punish such people. That is a question that French does not take up. It takes us naturally into the second of the two sorts of skepticism that I mentioned at the beginning. When people speak of war crimes, the word "crimes" is usually intended to imply that, in some sense, the actions in question are offenses against the law, and therefore merit punishment. This skepticism has more substance than the first, the skepticism about whether actions taken in pursuit of war aims are subject to moral evaluation. It takes as its basis the maxim, *Nullum crimen sine leges*: without laws there is no crime. Where, it might be asked, is the law that defines what war crimes are?

Of course, nations have their own laws governing what their citizens may or may not do during wartime, and these laws typically include the behavior of soldiers during hostilities, occupation, and so on. There is little doubt that these laws are indeed law, and when people express dissatisfaction with the

idea of war crimes, and their punishment, they are, of course, usually speaking of the "crimes" defined by international law. They may particularly have in mind the Nuremberg and Tokyo trials that were carried out after the Second World War. Those trials were found objectionable by many people for different, though connected, reasons: they were simply "victors' justice," they were revenge, or political policy, dressed up in legal garb, they exercised *ex post facto* lawmaking, and so on. But even the trials currently going on in The Hague and Arusha following the recent wars in the former republic of Yugoslavia and Rwanda have not met with universal approval. The inability to put on trial more than a handful of indicted individuals has been thought to show that, whatever the rhetoric of the United Nations, and whatever noble aspirations the trials may embody, there is really nothing of sufficient substance to suggest that, in this area at least, there is such a thing as international criminal law. One might think, adapting Maréchal Bosquet's famous remark about the charge of the Light Brigade at Crimea: "C'est magnifique, mais ce n'est pas le droit."

The conditions under which it can be said that a law exists are, of course, a matter of some dispute. And whether those conditions, whatever they may be, obtain in the case of international relations is a further matter of dispute. Gewirth, in his contribution to the volume, has no doubt that there is valid law covering the conduct of war. Like Grotius, he wishes to steer a middle course between those, on the one hand, who hold that all war is a crime, so that nothing one does in pursuit of a war is legitimate, and those, on the other hand, who hold that war is not governed by rules at all. The wrongs that are typically referred to as war crimes are violations of basic human rights. As such, according to Gewirth, they "can be appropriately classified as crimes regardless of whether they are encoded in positive laws" (p. 51). Some purpose is served by codifying crimes in positive law, for this serves to reduce uncertainty; but the wrongs in question are crimes whether or not a positive law says so. How can that be? How can something be a crime if no law has established it as such? Gewirth's reply is that "the ultimate criterion of criminality is moral rather than legal" (p. 51). If an action violates basic human rights then it is a crime, and what basic human rights there are "can be ascertained by objective rational methods of ethical analysis" (p. 51).[10]

On such a view, war crimes are, in a sense, just ordinary crimes, though they have an added dimension in that, as well as directly violating rights, they tend to destroy the respect for prohibitions which themselves are intended to mitigate the evils of war.

As to the content of the rules of war, Gewirth holds that they prohibit both aggressive war, war whose aim is the violation of basic human rights,

and any conduct in a justified war which inflicts injury but is not justified by military necessity. Putting the latter point like this may suggest that the restrictions are nugatory, for, in the history of warfare the most horrendous actions have been regarded as militarily necessary. Gewirth, however, suggests that the qualification imposes a severe restriction: the means adopted to pursue an end must not themselves be antithetical to the end. In terms of warfare this means that, since war is justified only so long as it is the necessary means to protect human rights, it cannot use means which themselves violate human rights.[11]

Gewirth takes the view, a not uncontroversial one, that valid law must be grounded in morality. Jovan Babic, in his contribution, takes a view that sounds similar but is crucially different. In his view, law is not about what *ought* to be permissible but about what has been *decided to be* permissible. This means, according to Babic, that there can be no law without the state. And in that case there can be no such thing as "international law," at least not in "the fundamental sense of the word" (p. 63). This has important consequences for present practice, for the United Nations has long claimed the authority to put on trial those it alleges to have committed war crimes as defined by international law. As far as *jus in bello* is concerned, this could be accommodated, for, like Gewirth, Babic thinks that what the Nuremberg Tribunal called "War Crimes" – the ill-treatment of prisoners of war, and the like – are really just ordinary crimes that happen to take place within the context of war, and nations have the authority themselves to define and punish such crimes, an authority which they could also transmit to the international sphere on the basis of conventions and treaties. "Crimes against Peace," however, are a different matter. Once we say that "aggressive" war is a crime then it is determined in advance, so to speak, who is in the right and who is in the wrong. The group that is in the right is performing something similar to a police action. The group that is in the wrong, on the other hand, has no right to fight, even to defend itself. This might be acceptable if there were a world state, for then we could say that there is genuine law here. But in its absence there is no law, and war crimes trials, in Babic's view, are really only political actions masquerading as legal ones.

II

It may seem that nationalist aspirations have been the cause of many of the most awful conflicts of the latter half of the twentieth century. And some of

the most awful aspects of them have been the atrocities – in particular the so-called "ethnic cleansing" – whose alleged perpetrators the United Nations is attempting to put on trial in the Hague and in Arusha.

And yet nationalism, and indeed various forms of particularism, have had growing support amongst influential philosophers and political theorists in the past 20 years or so.[12] In part this has no doubt reflected the dominance of conservative politics in Europe and the US in that period. But it has also been the result of a disenchantment with a conception of morality, found both in Kant and in utilitarianism, in which what is right and wrong is ultimately a matter of how things are when seen from an "impartial" point of view, whether the point of view of the Kantian rational agent, whose one imperative is to treat others, all others, as rational, autonomous agents rather than as means to his own ends, or the point of view of the utilitarian, a point of view in which persons are merely the bearers of utility, which is to be maximized without reference to which bearers are bearing it. From such perspectives, nationalism will not easily seem alluring. The utilitarian can, of course, have a provisional commitment to the values that nationalism espouses, for he can say that utility will be maximized by fostering a commitment to such values, and to the ways of life in which they are expressed. He can *say* this; but proving it is another matter, and in the light of the history of the latter half of the twentieth century, many would be skeptical. And, in any case, those who espouse nationalism do not normally do so because their doing so will be best for the world in general. Kantianism too will not find it easy to accommodate nationalist values. The Kantian, of course, need have no more objection to nationalism in itself than he need have to snooker, if we think of nationalism as merely a desire that some people have to live in certain cultural and governmental relations. But nationalists, those who think about such things anyway, typically think of their aspirations in a different way, as embodying values which ought to be respected. Thus it is much more difficult for the Kantian to accommodate; in the Kingdom of Ends, it may seem, there is but one Kingdom.

Despite its many excesses, nationalism – unlike some political movements – can be cast in a more attractive light than that thrown by the recent events in Rwanda and the former Yugoslavia. Many, probably most, of those whose political aspirations are for an independent Scotland in a European Union see this as desire for a state of affairs in which people will flourish "on both sides of the Tweed," and similar things could be said about most Irish nationalists, Quebecois nationalists, and many others. They regard their political aspirations as very important, but they would not be tempted to

pursue them by means of the bullet or the bomb, let alone ethnic cleansing. And yet why not? What foundational ethical theory makes such a position possible? If the demand for, say, self-government is an important one that any reasonable person should accede to – presumably what most nationalists think – why should not deadly force be an acceptable strategy? One answer might be that deadly force is unlikely to be effective. Unhappily, that seems not to be true. Anyway, those who do accept such limits mostly think that there is a moral reason to do so, and not just a reason of expediency.

Richard Miller, in his contribution, outlines one ethical theory which can support nationalist sentiments whilst eschewing its worst excesses. It is a theory according to which whether an action is right or wrong is a matter of whether it would be part of an acceptable set of rules to govern society; and a set would be acceptable if any rational person choosing such a set could accept each rule as expressing his full and equal respect for all persons. Such a theory, Miller argues, supports nationalist aspirations. "[A] morality of respect for persons will accord great value to success in any life-project that is someone's intelligent way of pursuing what is of central importance to everyone who has full and equal respect for all. And all such people have a deep desire to participate in some collective process begun in past generations and handed on as the task to generations to come, in which their contributions express their identity and are valued by other participants in a way that confirms their sense of self-worth" (p. 149). And, "for many people, the collective affirmation of the self is, in large measure, a matter of joining with fellow-nationals in cultivating their nationality" (p. 149). A government, then, committed to equal respect for all will offer some support, if it is needed, to nationalist aspirations, even at some cost to those who do not support them. On the other hand, such a theory severely limits the nationalist aspirations which it thus supports, for it cannot require that those who do not support them make a sacrifice to promote that which is inconsistent with their own self-respect.

The theory is universalist, and its inspiration is Kantian. So the value of nationalist aspirations is not independent, but is simply a resultant of, on the one hand, a very general conception of what is right and wrong and, on the other, certain deep facts about human nature. Is it possible to have an acceptable nationalism which is not derivative in that way? Many humane nationalists seem to have an adequate basis for condemning such horrors as ethnic cleansing even though they reject the universal, impartial perspective at the heart of Miller's theory. While acknowledging the fundamental importance of full and equal respect for all, they hold that the very foundations of morality also include an independent principle of group loyalty. The

question is whether such a hybrid theory can "tame the beast of particularism" (p. 144), whether it is a satisfactory means of establishing acceptable limits to the use of coercion in the interest of promoting nationalist goals. The proponents of such a theory can certainly lay down such limits, but they will be arbitrary, according to Miller, in need of a justification that the humane opponent of universalism cannot provide. Nationalist goals substantial enough to ground political duties will, he argues, conflict with equal respect for all in some cases. The importance that the humane, non-universalist nationalist does accord to equal respect makes it incumbent on him to explain why some departures from such treatment (for example, ethnic cleansing) are absolutely prohibited, while some are permissible. He cannot discharge this obligation by appealing to nationalist projects whose obvious moral stature cannot be derived from a requirement of equal respect for all – for this requirement does sustain all nationalist projects with obvious moral stature (or so Miller has argued.) By contrast, someone who accepts a nationalism based upon a universalist principle has a compelling justification of the extent and the limits of his nationalism. When those outside the favored nationality are required to make sacrifices for nationalist goals, this can be justified by reference to an argument which they can accept with self-respect; and when nationalists are denied the means, such as ethnic cleansing, without which they cannot wholly satisfy their nationalist longings, the same thing is true.

Miller takes it as given that "ethnic cleansing" is indeed morally unacceptable and, as that phrase is normally used, he is surely right to do so. The end to which it is an unacceptable means, however, need not be in itself unacceptable, or so many would think. James Nickel, in his contribution, points out that "getting rid of groups" in order to avoid having to live with them can have many different motivations; he lists six: "(1) to 'rectify' historic grievances; (2) to avoid living with a group that is believed to be inferior or depraved; (3) to acquire the territory or property occupied by another group; (4) to realize the nationalist ideal that every large ethnic group should have its own country in which it forms the overwhelming majority of the population; (5) to avoid ethnic conflict and civil war with another group by getting most of them out of the country; and (6) to create a strong military situation in light of actual or feared attacks by another group" (p. 164). In some circumstances, at least, some of these aims will be perfectly reasonable, and this raises the question whether there are any acceptable means to realizing them.

One way of eliminating a group of people with whom one does not want to live is by means of genocide. It needs little argument that genocide is

morally illegitimate. The word was coined by Raphaël Lemkin in 1944 to describe the destruction of a nation or ethnic group.[13] When the UN in 1948 adopted a convention on genocide, which committed member countries to undertake "to prevent and to punish" it, it defined genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

It is hard to imagine realistic circumstances in which any of these acts would be morally permissible if carried out with the specified intention.

"Ethnic cleansing" might seem different, for the bare words import no particular motive and no particular means. If we are merely referring to the forcible relocation of a population then, as Nickel points out, it is possible in principle to carry this out in such a way that harm and violations of rights are minimized; in such a case, it may be that a powerful goal – "creating ethnic boundaries conducive to stable peace in an area plagued by ethnic wars," for instance (p. 168) – might be sufficient to justify it. But, obviously, the word "cleansing" reflects the cynicism with which the phrase was coined, and it will in future always refer to the killing, terrorizing, and expelling of citizens which characterized the civil war in the former Yugoslavia. It is hard to imagine what could possibly justify that.

A third way in which one could eliminate a group is by what Nickel calls "forced assimilation": harsh measures may be used to force a community to give up the features of its life that give it its identity as a separate community. Here, no one need be killed or expelled; the people remain, though their character is changed. But this too is difficult to justify. We know that destroying established ways of life typically causes great harm: as religions, traditional ways of life, and traditional occupations disappear, many people find that they cannot cope, cannot adjust to new patterns of life with which they cannot adequately identify, and perhaps cannot even properly understand. Mental illness, suicide, crime, and drug-dependence are often the result. And, in any case, many people would think that we have a basic right to live our way of life in much the way that we have a basic right to practice our religion. That right may not normally be infringed even if it does not

cause any independently specifiable harm. The upshot, according to Nickel, is that whilst a blanket prohibition on forced assimilation is not justified, the international community should prohibit, more specifically, the harshest means of achieving this.

A fourth way in which one could avoid living with a group does not involve moving the group in any way; instead one can move one's national boundaries so as to exclude the group: this is what Nickel calls "expulsive secession." This seems to be less objectionable than ethnic cleansing or forced relocation; those who have been expelled lose their citizenship, but they do not lose their land or their property. On the other hand, it is not without its problems. By definition, the expulsion is not desired by both sides, and this already brings in a moral dimension. In addition, there is not necessarily any guarantee that the expelled community can organize itself satisfactorily, either politically or economically. And, in addition to that, the expelled community may take up arms to resist the expulsion, causing yet further harm. Again, though there is no need for a blanket prohibition, expulsive secession should be bound by "substantial constraints that require careful evaluation of each particular case" (p. 174).

A more common way to avoid having to live with another group is, of course, ordinary secession. For whatever reason, a body of people may wish to leave an existing state and set up their own. Nationalist sentiment has been, on the surface at least, the most common reason, though often the desire to control important natural resources has gone along with this. If a body of people does desire to secede, do they have the right to do so? There are a number of different questions here, and Alfred Rubin distinguishes them in his contribution.

There is, first, a legal question: is there a legal right, in international law, to secede? Perhaps the most important source of international law lies in international conventions and treaties, and Article 1(2) of the United Nations Charter speaks of a "respect for . . . the self-determination of peoples"; this might suggest that there is indeed a legal right to secession.[14] But there is considerable agreement that this Article does not in fact give to minority populations the right to secede from a state to which they object. Decisions of the International Court of Justice are binding on members of the United Nations; could a population that desired to secede then take its dispute to the ICJ and get a legal right to secede? But, as Rubin points out, there is considerable legal dispute about the interpretation of the Articles that govern the ICJ. Consequently, he concludes, "arguments as to a 'legal' right to secession must be based on an interpretation of 'law' that is disputed," and so "there is no legal 'right' to secession" (p. 179).

(Conversely, of course, neither is secession *illegal* in international law; it is legally indeterminate.)

International custom may also be a source of legal rights, but the secessionist would not be well-advised to base his claim to a legal right here, for, as Rubin points out, it has not been the custom of the international community to support secessionist movements.

International law may also be based on "the general principles of law recognized by civilized nations."[15] If this phrase is intended to refer to what is traditionally called "the law of peoples" – a set of principles of justice underlying all systems of municipal law – then Rubin thinks that we should be skeptical about the existence of such a thing. If, on the other hand, it refers to "precedents and statements of government officials in the international arena as establishing 'general principles' that evidence a view of 'law' to be worked out in detail by the ICJ" (p. 181) then this is hard to distinguish from the preceding source, and thus gives no more sustenance to the idea of a right to secede.

If there is no legal right to secession, is there nonetheless a *moral* right? According to Rubin, this question must be settled separately in each case, by weighing the costs and the benefits of seceding; and since circumstances are so variable, there is no general rule that can be applied. Nor would we expect to find any great consensus about how to weight the costs and the benefits in a particular case, since there are numerous competing values that different agents will bring to bear upon the situation to be judged.

In Rubin's view, the only resolution possible when a population wishes to secede, and the state of which it is a part resists this, is a *political* resolution. And when a population successfully secedes "the international legal order must sooner or later accommodate itself to the new situation, with or without formal 'recognition'" (p. 186).

III

Wars invariably bring with them war crimes; what should be done about them when the conflict is over?

David Crocker, in his contribution, points out that our legitimate goals will be many and various. One thing we shall want to do is to prevent such crimes from occurring in the future, as far as possible. This may need changes in the law, and in the various arms of the government. We shall also want to do whatever we can towards reconciling the conflicting parties. Then too we shall need to take account of victims: they are entitled to a

platform to tell their stories publicly, to a public acknowledgment that they have been wronged, and to compensation. But there are also the perpetrators; what is to be done about them?

One answer would be that summary justice should be meted out, by the victorious nation or others, to those who can be caught. Another would be that nothing should be done.

As is well known, many allied leaders in the Second World War, including Winston Churchill, initially favored a policy of arresting such Axis leaders as could be apprehended, and shooting them out of hand. But if "summary justice" is indeed supposed to be a form of justice then this idea is surely without merit. If someone is to be punished for his crimes, then it has to be determined that he actually committed those crimes; it also has to be determined what his level of culpability is. That is as important in the aftermath of a war as in more normal times – indeed it may be more important, since it can be very difficult to know much about what is going on within a country with which one is at war. That is particularly true, of course, of those relatively low in the chain of political and military command, but it can also be true of those who hold high office. Those who doubt this should consider the difficulties that the Nuremberg prosecutors had in understanding the structure of German political and military authority when they came to prosecute so-called criminal organizations;[16] they should also remember that not all of those who were put on trial at Nuremberg were found guilty, and that not all of those who were found guilty were sentenced to the executions that were generally expected.

The other alternative I mentioned was that nothing should be done. But this too is unappealing. As Rubin remarks, "[A]s a practical matter, to expect a person to resume normal intercourse with a neighbor who has tortured or killed relatives of the first is probably unrealistic" (p. 189). Rubin's view is that only time will solve this problem, and only full exposure and isolation of those who have committed atrocities will enable time to do this. This does not require criminal trials. The process of exposure can be institutionalized in "truth and reconciliation" commissions, for instance, as has been done in South Africa. Or it need not be institutionalized at all, but left to the news media and other informal channels.

Some will feel that more than this is sometimes required. In some cases, those who have committed awful crimes need to be prevented from doing so again, and informal exposure and isolation may not seem sufficient. This does not, of course, in itself require a judicial proceeding: the top Nazi leaders could have been caught and exiled in the way that Napoleon was. But we are still left with the imperative that those who are treated in this

way had better be the people who actually present some future danger, and this will require some method of determining exactly who these people are, and there seems no acceptable alternative to something which will have the form of a judicial proceeding. We could, of course, simply ignore the imperative, but it is unclear why that imperative, which is an imperative of justice, should be ignored here when we do not ignore it in municipal law.

Even for the very limited goal of taking dangerous war criminals out of circulation, then, trials seem to be called for. But war crimes trials are usually not justified simply on this very restricted ground; reference is usually made to retribution and deterrence.

Gewirth appeals to retribution. Criminal "punishment, to be justified, must have as its end the restoration of an occurrent equality of human rights which has been disrupted by the criminal. . . . This requirement justifies a retributive basis for criminal punishment whereby only wrongdoers are punished, and in a way that is proportionate to their crimes. . . . [T]he human right to proportional distributive justice is violated by terrorist actions perpetrated against military personnel or innocent civilians. Human rights can thus be invoked to justify the punishment of such criminal agents" (p. 53). The notion of retribution is not a simple one, and can be articulated in a number of different ways, some of them very different from the way adopted by Gewirth. However, the idea that those who commit the most awful crimes deserve to suffer for them would strike a sympathetic chord with many people, and they would see punishment as appropriately serving this end.

Michael Slote, on the other hand, suggests in his contribution that the notion of desert is not the crucial one for deciding whether war criminals should be punished. He derives this view from a more general ethical framework, one which treats evaluations of *character* as the fundamental ethical judgments and derives judgments about whether *actions* are right or wrong from them. It is a framework often referred to as "virtue ethics," but Slote finds his closest historical antecedents not in Aristotle and his followers, but in the work of such eighteenth- and nineteenth-century thinkers as Hutcheson, Hume, and Martineau. They based their ethics not on the abstract notion of *eudaimonia* – the good life for man – as Aristotle did, but on the moral goodness of certain natural dispositions, benevolence in particular. On this view, whether an act is morally good is a matter of whether it is motivated by benevolence. Translated into the political realm, we have the view that whether laws are just is a matter of whether they express or display sufficiently good motives on the part of the legislators. "If

so, then the justice of legislation governing or refusing to deal with war crimes will depend on what a legislature is trying to do" (p. 81). If their desire is for the common good, then the legislation will be just; if not, it will not. And the demands of the common good will vary; sometimes, the need for reconciliation will best be served by prosecuting war criminals; in other circumstances it may be served by granting them amnesty.

Surprisingly, it may seem, Slote suggests that Nietzsche also provides grounds for thinking that the notion of desert is not the appropriate one for thinking about war criminals. Nietzsche held that it would be a mark of the genuinely powerful individual not to feel resentment towards those who unsuccessfully attack him, for such resentment is a sign of insecurity. Slote approves of such "inner strength,"[17] and thinks that "[a]pplied to war crimes, this implies that a society that tolerates, or at least that doesn't act angrily or punitively toward those who have committed such crimes may be in a sense nobler and more ethically attractive than one that displays the opposite attitude through its collective actions" (p. 83).

Burleigh Wilkins and Anthony Ellis in their contributions also make no reference to retributive aims. They think of punishment "as an institution . . . designed to protect us from harm at the hands of others, and in this respect it is forward-looking" (p. 86). If punishment is forward-looking then the focus must be on reform, deterrence, and direct prevention. There seems little reason to think that punishment for war crimes is likely to have significant reformative effect, any more than for more ordinary crimes. In the case of top leaders, direct prevention is surely a consideration. The fact that they have indulged in aggressive attacks on their neighbors is surely some reason to think that they are likely to do so in the future; there is thus some reason, after due process, to remove them from harm's way. This leaves the remainder – ordinary soldiers, low-ranking bureaucrats, for instance – for whom such a course would be quite unrealistic. In their case, we are left with considerations of deterrence.

Wilkins, for his part, is skeptical about the deterrent effect of war crimes trials: "[I]t is, I think, abundantly clear that trials for war crimes have not had any effect whatsoever on the waging of wars or the manner in which wars have been conducted. So-called aggressive wars continue to be fought, often with great barbarity on both sides of the conflict" (p. 87).[18] The barbarity of the recent wars in Rwanda and the former Yugoslavia may seem to support this. Ellis, however, is more optimistic about the deterrent effect of punishment for war crimes – not in the sense that we should expect it to have considerable deterrent effect, for even punishment in municipal law cannot be shown to be so effective, but in the sense that it probably has

sufficient deterrent effect to justify whatever costs it imposes. If punishment had no deterrent effect whatever, then it would be hard to understand human action at all. But we need not think that punishment must work by deterring the offender completely; it is enough, assuming that the costs of punishment are not incommensurate, that it should simply reduce somewhat the level of offenses by making it more difficult for the rational offender to commit them. There seems every reason to think that punishment has this effect in municipal law, and no reason to think that this effect is not reproduced in the case of international criminal law.

If we are to have war crimes trials, who should conduct them?

As Burleigh Wilkins points out in his contribution, there are three broad possibilities: "trials within a state jurisdiction in accordance with provisions of penal codes, military or civilian, which are already in place; trials conducted by ad hoc international tribunals; and trials conducted by [a] permanent international court" (p. 86). The Nuremberg Tribunal was an *ad hoc* tribunal, but it was not genuinely international because the judges were, not coincidentally, from only the four main allied powers. The tribunals responsible for trying indicted criminals from the wars in Rwanda and the former Yugoslavia, on the other hand, are genuinely international; they are also *ad hoc* tribunals for the UN has no permanent criminal court corresponding to the International Court of Justice.

In the flush of excitement following the Nuremberg and Tokyo trials – and embarrassment at the sense that there was something wrong with the allied powers trying axis leaders – there was a ground swell of opinion in favor of establishing a permanent, international criminal court. Despite support for this from many quarters, however, the international community did not have the will to bring it about. Perhaps, as Falk suggests in his contribution, it was always naïve to expect that "the Nuremberg precedent would bind states in the future, including the victorious parties" (p. 117). In part, he suggests, this is because there has continued to be no real alternative to self-help when a state's security is threatened except in those cases where upholding the norm of nonaggression has been anyway in the interest of the main political actors. He adds that a prevailing political realism which, if not as crude as the political realism I mentioned earlier, nonetheless gives priority to state interests and sees international law and morality as little more than propaganda instruments, has also made it hard for a conception of international justice to get a secure foothold. So powerful nations have thought that they had little to gain from an international criminal court – and much face to lose if their own leaders should be indicted and they then had to refuse to recognize the court (as the US did when its intervention in

Nicaragua in the 1980s was found in violation of international law by the International Court of Justice).

Recently, however, there has been renewed interest in the idea of an international criminal court, and in July of 1998, 120 nations signed a treaty agreeing to establish an international criminal court having jurisdiction over crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. (The United States, having emasculated the treaty, then did not sign it.) As Falk points out, this renewed interest had a number of sources. One was undoubtedly the horrors that the world witnessed in the two major civil wars of the 1990s. There was also a general desire to deal more effectively with such threats to international order as international terrorism. There has also been pressure from "morally engaged sectors of civil society" (p. 123). And the end of the cold war has made it easier for allegations of criminality to be seen to be impartially grounded rather than cynical propaganda maneuvers. Falk, however, warns us that "the realist orientation toward the practice of geopolitics' is still dominant" (p. 118), and that "the realist gatekeepers of the international legal order will not accept comprehensive legal and moral restraints on the exercise of force as an instrument of foreign policy" (p. 131). Those who favor the establishment of an international criminal court, and all that it symbolizes for world order, should perhaps not yet be too optimistic.

As we saw earlier, Jovan Babic is skeptical about the idea of an international law governing war crimes; and this leads to a dissatisfaction with international war crimes trials. Burleigh Wilkins, in his contribution, is also skeptical about international war crimes trials. Unlike Babic, however, he is not skeptical about the notion of international law *per se*. His skepticism is rooted in what he thinks are deep facts about nations and international society, facts which, he thinks, will ensure that war crimes trials are problematic unless they are carried out voluntarily by a nation in regard to its own nationals. The Nuremberg trials already illustrate the problem, he thinks: despite the rhetoric of the Allies, what happened at Nuremberg was that the victors put the vanquished on trial. Allied forces, and indeed allied leaders, had done things which, prima facie seemed like war crimes – the bombing of Dresden, for instance – but none of them were put on trial; there was thus some justice in Hermann Goering's dismissive remark that the trials were merely "victors' justice."

The Nuremberg Tribunal was not, as I have said, a genuinely international body. But the situation is not likely to be better, according to Wilkins, if, as is the case with the present UN war crimes tribunals, the court can make out a claim to be genuinely international. In such cases, he argues,

what we shall find is that only vanquished nations' alleged criminals will be put on trial, for victorious nations will refuse to hand over those of their own citizens – high-ranking ones especially – who are accused of war crimes.[19] That is because, however much we may wish that citizens should have a more cosmopolitan set of ideals, the ideal of the sovereignty of states, and nationalist sentiment, have been deeply rooted phenomena with which advocates of internationalism must compromise. International trials will thus be characterized by a pattern of discrimination, and so will violate the principle of equality before the law: "like cases have not been treated alike if losers in a war are solely or disproportionately singled out for trial" (p. 88).

Wilkins is not determinedly against war crimes trials, but thinks that, if they are to take place, then nations should try their own war criminals. This is for a number of reasons. For one thing, such trials are less likely, he thinks, to violate the principle of equality before the law. For another, the idea respects the sovereignty of states. But also, such trials are more likely to serve the end of reconciliation. For this end, it is important that a nation must face up to its past wrongs, to "internalize" the wrongness of them, and this is more likely to happen if the history of those wrongs be written by its own courts.

There are, on the other hand, those who think that the establishment of an international criminal court would be a significant step toward a fuller realization of a world order subject to law. That is the view of Ellis in his contribution. He thinks it doubtful, given the historical evidence, that national courts would do a good job of prosecuting their own war criminals. And whilst it is true that a nation must "internalize" the wrongs it has committed in a war, it is equally important, if there is to be any real reconciliation, that their opponents, and the rest of world, have access to a just and reliable accounting of those wrongs, an accounting which, within the bounds of human error, convicts the guilty and acquits the innocent with no partiality, nor the appearance of it. Ellis thinks that this is much more likely to be served by an international court.

David Crocker is also more sympathetic to the role of the international community, and in his contribution he explores the role that civil society, both national and international, may play in achieving the various goals that present themselves in the aftermath of a war. Despite some limitations, he believes, that "a nation's civil society is often well suited to prioritize the ends and implement the means of transitional justice" (p. 283), and that the role of international civil society, which includes, he suggests, the United Nations, can be indispensable.

IV

When a war is over, the nations involved need to live in peace and security again; and war crimes will make it harder to achieve the reconciliation that is necessary for this, for the memory of them may linger and fester. Particularly in the case of civil wars, those memories may become part of the stereotypes which the parties possess of each other, stereotypes which will be available to fan the flames of potential conflict. The civil war in the former Republic of Yugoslavia provides perhaps the most chilling modern example. But it is not confined to civil war; negative images of Germany were nourished in many quarters long after the end even of the Second World War by stories having their origin in the "Rape of Belgium" in 1914. Many people see punishment for war crimes as a necessary part of the antidote to this tendency. But punishment, by itself, will not achieve much. What is needed is that each nation must forgive the other any wrongs that it has committed.

The idea of forgiving a nation is not an easy one to understand. The most obvious problem is that not everyone in the nation to be forgiven will have committed the acts that require forgiveness, nor indeed been implicated in them in any significant way. This, of course, raises the problem of collective responsibility. But the problems go deeper; the bare notion of forgiveness itself is a difficult notion to understand. After all, recognizing that an act is wrong, how *can* we forgive it? But even if this question can be answered satisfactorily, a yet deeper problem remains, a problem that philosophers in recent years have called the problem of "moral luck."[20] We choose the actions that we do because of our characters; but we do not, and could not, wholly choose our characters, for this would involve a vicious infinite regress. We are, for the most part, the people that we are because of our genetic heritage and the circumstances of our upbringings. These things are, from our point of view, a matter of luck. Furthermore, it is a matter of luck what moral choices we have to face. Ordinary Americans or Britons did not have to face the agonizing dilemmas that confronted many ordinary, decent Germans who knew about, for instance, the Nazi death camps; had they done so, they would certainly have acted no differently. And yet we condemn those who failed the test we know that we ourselves would have failed. How can that be rational? But if it is not rational, then neither is forgiveness, for we can forgive only what we can condemn. These problems are the focus of David Cooper's contribution.

Cooper suggests that their solution is to be found in the reality of collective responsibility, an idea whose importance is confirmed by the phenomenon of moral luck. Collective responsibility "is not . . . the responsibility of each and every member of some collective. . . . Rather it is a responsibility ascribed to the collective itself, as when, say, the tennis club *itself* is blamed for its closure or bankruptcy – irrespective of the blame, *if any*, attaching to individual members" (p. 206). Given this, we may condemn a group for wrongful actions whilst at the same time withholding condemnation of any of its members.

But if the phenomenon of moral luck leads us to withhold moral assessment of those who have done wrong, we do not expect the same detached attitude from the wrongdoers themselves. We expect that they should accept responsibility for what they have done. But accepting responsibility could not be a matter of simply accepting a judgment about themselves, for how could we consistently expect them to endorse a judgment that we ourselves withhold? What it requires is "an *act* – an apology, an expression of remorse, an owning to the harm they have done, an acknowledgement" (p. 213). And without this, there will be no possibility of them manifesting "a readiness to engage, once more, in a fellowship of human beings" (p. 214).

Cooper speaks of condemning the nation but withholding that attitude from many of its members. But we may want to speak of forgiving the nation too (which is not, of course, inconsistent with condemning it). Now the notion of forgiveness goes hand in hand with that of remorse, for, normally at least, we cannot forgive someone a wrong unless they feel remorse for what they have done. So if one nation is to forgive another for crimes it has committed in a war, then the guilty nation must feel remorse. But this may seem problematic. What can it mean to speak of a nation, or indeed of a group of people at all, as being remorseful? To be remorseful is surely to *feel* remorse, and it is by no means clear just what it would mean to speak of a group as *feeling* something. Margaret Gilbert, in her contribution, tries to explicate this idea.

One's first thought might be that it is for each of the members of the group in question to feel remorse for what he himself has done. No doubt such feelings would be appropriate; if particular individuals have committed war crimes, then they should feel remorse for what they have done. But such feelings, even if they were quite widespread, would seem to be a far cry from the *group's* feeling remorse. For one thing, it may be that most people in a war will themselves have done nothing to feel remorse about, and will know that; so it will make no sense to speak of them as feeling remorse for what they have done. The guilty minority, on the other hand, may feel

remorse, but it seems odd to speak of a nation as feeling remorse if all that is true is that a minority of its members feel remorse. Secondly, war crimes need not be the isolated acts of individuals from which the rest of the nation can wholly distance itself. It was, for instance, Germany that invaded Poland in 1939, not just some individual soldiers ordered by politicians acting as private individuals (indeed, it is arguably a conceptual truth that invading a country is not something that ordinary individuals, as individuals, can do). This – of course – does not mean that every German was individually responsible for the invasion. What it means is that *Germany* was responsible for it. So it is Germany that should have felt remorse. Or so many people think. But it would not be true to say that Germany felt remorse if all that were true were that the Nazi leadership, those who were mainly responsible for the invasion, felt remorse for their individual parts in the invasion. Conversely, if most of them did not feel remorse, as seems to have been the case, this would not obviously prevent *Germany* from feeling remorse, and this suggests again that for a group to feel remorse is not a matter of its members feeling remorse for what they individually have done.

What is needed, it might seem, is that the members of the nation, or some sufficiently large and significant proportion of them, should feel remorse not for what they have done personally but for what their nation has done. But how is that possible? How would it have been possible, for instance, for a significant proportion of Germans after the war to feel remorse for the invasion of Poland when they played no significant role in it?

Gilbert sketches an account which, it is hoped, will explain how it is possible for a nation to feel remorse. At its center is the idea that group remorse requires that the group in question be "jointly committed to feeling remorse as a body." Conformity to this commitment will naturally lead the group to undertake certain actions, actions of the type which we think of as typically expressing remorse. So, for instance, a nation that has committed war crimes, and can correctly be said to feel remorse for them, would be expected to do things like offering compensation to victims, and undertaking any institutional or constitutional reforms that would make it difficult for such things to happen again.[21]

This account, of course, trades upon the idea of group action. For sure, this idea must, in some sense, be an acceptable one, for we speak in terms of group action all the time. It is, however, not an easy matter to explain in just what sense a group, as such, can act. According to Gilbert, a group performs an action, as a group, if the members are jointly committed to accepting the action's goal as a body, and act in the light of that commitment. Two people, for instance, acting as a group "must attempt as best they can to

constitute as far as they can a four-handed, two-bodied person who (single-mindedly) has that goal" (p. 224). Importantly, members of a group "may be jointly committed to accepting a certain goal as a body without all knowing or even conceiving of the content of the commitment" (p. 225), for there may be a joint commitment to delegate to one member of the group the authority to make decisions for them. Thus, a government in offering compensation to victims may act for and on behalf of the nation as a whole, insofar as the relevant members of the nation have jointly committed themselves to regarding what their government does in their name as done by them.

Certainly, offering compensation would be a natural expression of remorse. But it will normally be required anyway, as part of the more general requirement of justice that any wrongs that may have been committed should, as far as possible, be put right. These wrongs will typically be of many different kinds, and rectifying them will normally be a difficult task. For instance, many people, particularly in a civil war, will have been imprisoned or otherwise interned; after the war, it may be no easy matter to distinguish those who have been wrongfully imprisoned from ordinary felons; it might be further difficult to distinguish those who were justifiably interned for security reasons from those whose internment was unjustified by any substantial concern for security and who are therefore owed compensation.[22] Again, those who have been wrongfully expelled from their homes should be allowed to return, with due compensation. This may not be easy to accomplish in the turmoil that usually follows a war. Yet again, those people who have had land, other resources, or private wealth more generally stolen from them, must have it returned. And, again, it can be difficult to determine the rights and wrongs here.

The last two sorts of case raise problems additional to the practical ones just mentioned. When property has been expropriated it may not be returned to its original owners, nor to their immediate descendants, but passed on down to the descendants of those who stole it. In such cases, an acute moral and legal problem can arise. Those now in possession of the land, let us say, may have had nothing to do with its expropriation, and may have only the dimmest sense – and perhaps no real sense at all – of how it came about that they are now in possession of it. What should be done if the descendants of the original owners can be found? On the one hand, it seems that it should be "returned" to them, on the principle that they would have possessed it if it had not been wrongfully taken from their ancestors. But things may not be so simple. For one thing, there is often little reason to believe the conditional embodied in the principle just stated.[23] If, for

instance, people are driven from their land then it seems almost certain that this will have some effect on just which people are later born – eggs and sperm cells that would have come together had those lives not been disrupted will now, almost certainly, not come together, and different eggs and cells will come together to form different people. In that case, it may well be false for someone to say that if his great-grandparents had not been driven from their land then he would have inherited it; for if they had not been driven from their land it is unlikely that he would ever have come into existence.

There is also a further problem. Those who are now in possession of the land did not come by it through any of their own wrongdoing; and it may be disastrous for them if it is taken away (financially disastrous, primarily, though that is not the only consideration). Those to whom it is "returned," on the other hand, may have no serious need of it. In such circumstances, it seems likely that different moral and political principles will have different implications. Some will tell us simply to "return" the land to its "rightful" owners.[24] Others will tell us to determine the distribution on some quite different ground. Act-utilitarianism, for instance, will tell us to do what will produce the most utility now and in the future; what that is will depend upon the circumstances of the case, but it will not, save indirectly, depend upon whether the present distribution is the result of injustice. Other theories will have other results.

Angelo Corlett takes up some of these issues in connection with the question of reparations to Native Americans. The massive injustices done to Native Americans are a matter of historical record, and there is no serious dispute about them. What, if anything, should now be done about those injustices is another matter. There are those who think that, since the injustices were long in the past nothing need be done, for any claims that Native Americans had to land that was taken from them by early immigrants have now lapsed. Corlett, however, argues that rights cannot lapse simply with the passage of time, and that nothing has happened to take away the rights to land that Native Americans originally occupied. He therefore takes seriously the idea that Native Americans should be given adequate reparation. This would involve, he argues, complete restitution of lands that were taken from them by force or fraud, and compensation for personal injuries. In strict justice, this would involve a massive redistribution of land and resources, a distribution which, in fact, would spell economic ruin for the United States and indeed for a number of other countries. Less radically, a large tax (Corlett suggests a tax of 25% of each non-Native American's annual gross income plus a 5% state sales tax) could be levied for the purpose of making reparations

and paying compensation. Even this, however, would require a considerable sacrifice on the part of those who themselves have, knowingly at any rate, done no wrong to Native Americans. Can they justifiably be required to make this sacrifice? They cannot mount any compliant, Corlett argues: they are occupying someone else's land, land to which they have no right. [25]

That judgment is, of course, highly controversial. But little is clear here, and all of the issues that I have touched on cry out urgently for clarification. There will, I assume, always be war and its attendant horrors, and the international community must try to hammer out a set of procedures for dealing with them, one which embodies a sound theoretical understanding of the moral and legal issues that they raise, and a sensitive appreciation of what it is practically possible to do about them. The papers that follow are a contribution to that endeavor.

Notes

1 Sherman, in reply to the Mayor of Atlanta, who had written to him protesting his intention to evacuate the city, wrote that "the hardships of war" are "inevitable." "War is cruelty and you cannot refine it." In fact, his earlier behavior in the war showed that war can indeed be "refined."
2 "Silent enim leges inter arma" (*Pro Milone*, iv. xi).
3 For some examples, see Leon Friedman, ed., *The Law of War. A Documentary History* (New York: Random House, 1972), vol. 1, pp. 3–6.
4 *De Jure Belli ac Pacis*, edited by A. C. Campbell (London: Dunne, 1901). For an assessment of the influence and contemporary importance of Grotius, see Hedley Bull, Benedict Kingsbury, and Adam Roberts, eds., *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1990).
5 This is not to say, of course, that Grotius's views are in keeping with modern international law; his account reflected, and was explicitly intended to do so, the practices of nations up to his own time.
6 *De Jure Belli ac Pacis*, Bk. II, Ch. 20, § § xxxviii and xxxix. Cf. Samuel Pufendorf: "The just causes of engaging in war come down to the preservation and protection of our lives and property against unjust attack, or the collection of what is due to us from others but has been denied, or the procurement of reparations for wrong inflicted and of assurance for the future" (*De officio hominis et civis juxta legem naturalem libri duo* (1673), Bk. II, Ch. 16, § 2, ed. and trans. James Tully (Cambridge: Cambridge University Press, 1991)).
7 *De Jure Belli ac Pacis*, Bk. III, Ch. 4, § xix.
8 The Charter of the International Military Tribunal, Article VI(a).
9 However, from another perspective this might seem to make their behavior all the more chilling.

10 Gewirth has argued in detail for this view in *Reason and Morality* (Chicago: Chicago University Press, 1978), and elsewhere.
11 Consequentialists about ethics deny this, of course. On this issue see Samuel Scheffler, *The Rejection of Consequentialism* (Oxford: Oxford University Press, 1982).
12 Cf., for instance, Alasdair MacIntyre, *After Virtue* (London: Duckworth, 1981) and subsequent writings; Charles Taylor, "Atomism," in Taylor, *Philosophical Papers* vol. 2, pp. 187-210, and, more generally, *Sources of the Self* (Cambridge: Cambridge University Press, 1989); Michael Walzer, *Spheres of Justice*: A *Defence of Pluralism and Equality* (Oxford: Blackwell, 1983) and *On Toleration* (New Haven: Yale University Press, 1997); Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982—but Sandel seems to distance himself from the particularist understanding of his work in the second edition of the book (1998)).
13 Raphaël Lemkin, *Axis Rule in Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944).
14 Both the UN Covenant on Social and Political Rights and the UN Covenant on Economic, Social and Cultural Rights say: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status . . ." (Article 1(1) in both cases). For a discussion of the idea of the self-determination of peoples, see Antonio Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995).
15 Statute of the International Court of Justice, Article 38(1)(c).
16 See, for instance, Ann Tusa and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1984), ch. 16; and Telford Taylor, *The Anatomy of the Nuremberg Trials. A Personal Memoir* (New York: Alfred A. Knopf, 1992), ch. 16.
17 For a contrasting view, see Michael Moore, "The Moral Worth of Retribution," in Ferdinand Schoeman, ed., *Responsibility, Character and the Emotions* (Cambridge: Cambridge University Press, 1987), pp. 179–219.
18 Skepticism about the deterrent effect of war crimes trials is common. Cf., for instance, J. L. Brierly, "Do We Need an International Criminal Court?" *The British Yearbook of International Law*, vol. 8 (1927): 84; Richard, A. Falk, Gabriel Kolko, and Robert Jay Lifton, eds., *Crimes of War: A Legal, political-documentary, and psychological inquiry into the responsibility of leaders, citizens, and soldiers for criminal acts in war* (New York: Random House, 1971), p. 9.
19 This has perhaps been illustrated to some degree in the former Yugoslavia, where high-ranking leaders who have been indicated have, at the time of writing, so far eluded capture and prosecution.
20 See Bernard Williams and Thomas Nagel, "Moral Luck," *Proceedings of the Aristotelian Society, Supplementary Volume 50* (1976).
21 When British war veterans were offered an apology by Japan in January, 1998, they quickly responded that it wasn't enough; this could be taken for the

thought that, without adequate compensation, expressions of apology are not genuine expressions of remorse.

22 Japanese Americans were interned by the US government in the Second World War, as were, for a few months, German and Austrian Jews in the UK. The legality of the former internment was upheld by the US Supreme Court in *Korematsu v. U.S.* (1944). Later, however, the US government recognized that the internment had been unjustified and offered an apology and compensation.

23 Cf. Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), ch. 16.

24 Cf., perhaps, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 152–3; however, Nozick does not commit himself to any precise theory of rectification. For a discussion of Nozick and Native American claims to the return of tribal lands, see David Lyons, "The New Indian Claims and Original Rights to Land," *Social Theory and Practice* 4 (1977): 249–72.

25 In his book *Responsibility and Punishment* (Kluwer 2000) Corlett remarks that most US citizens would balk at even the hint of a *minimal* reparations tax (he suggests 1% of a US Citizen's gross national income) to cover the costs of arguably the worst evils perpetrated by a modern government. He regards this as the result of moral ineptitude.