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A Theory of Crimes Against Humanity

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A Theory of Crimes Against Humanity

David Luban[†]

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† Frederick Haas Professor of Law and Philosophy, Georgetown University Law Center. I wrote an earlier, by now almost unrecognizably different, version of this paper for a conference on crimes against humanity at Western Ontario University in January 2002. I wish to thank the participants in that conference for their comments, and the conveners, Charles Jones and Richard Vernon, for the initial invitation to think seriously about the subject. I have also received helpful responses to this paper from participants in Georgetown University's faculty research workshop, including written comments from Emma Coleman Jordan and Neal Katyal. My research assistant, Mike Garcia, helped with a detailed critique of an earlier version of the paper, and Kate Kerr provided essential research assistance in preparing the final draft. I presented a later incarnation of the paper at Yale Law School's Schell Center, and received valuable comments and suggestions from many participants, particularly Paul Kahn. Larry May gave me useful comments on a later draft, and I have benefited as well from the opportunity to read the manuscript of his forthcoming book, *Crimes Against Humanity: A Normative Account*. I also wish to thank participants in a workshop on the paper at the University of Maryland philosophy colloquium. Finally, I want to thank Julie O'Sullivan for encouragement and innumerable insights as we worked through this material for our International Criminal Law class.

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I. INTRODUCTION: CRIMES AGAINST HUMANNESS AND CRIMES AGAINST HUMANKIND

No record exists of how the term "crimes against humanity" came to be chosen by the framers of the Nuremberg Charter. The term was selected by U.S. Supreme Court Justice Robert Jackson, the chief U.S. prosecutor at Nuremberg and the head of the American delegation to the London Conference that framed the Charter. Jackson consulted with the great international law scholar Hersch Lauterpacht, but they decided to leave their deliberations unrecorded, apparently to avoid courting controversy. In 1915, the French, British, and Russian governments had denounced Turkey's Armenian genocide as "crimes against civilization and humanity," and the same phrase appeared in a 1919 proposal to conduct trials of the Turkish perpetrators. But the United States objected at that time that the so-called "laws of humanity" had no specific content, and the proposal to try the Turks was scuttled. Apparently, Jackson saw no reason to invoke a precedent to which his own government had earlier objected on rule of law grounds and concluded that the less said, the better.[1] Cherif Bassiouni, who chronicles these events, nevertheless finds the crimes-against-humanity terminology "most appropriate," and, aside from worries to be considered below that the term runs the danger of demonizing those who commit such crimes, it is hard to disagree.[2] The phrase "crimes against humanity" has acquired enormous resonance in the legal and moral imaginations of the post-World War II world. It suggests, in at least two distinct ways, the enormity of these offenses. First, the phrase "crimes against humanity" suggests offenses that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the phrase suggests that these offenses cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings.[3]

This double meaning gives the phrase potency, but also ambiguity—an ambiguity we may trace back to the double meaning of the word "humanity." "Humanity" means both the quality of being human—humanness—and the

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1. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 17-18 (2d ed. 1999). *See also* LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 44-46 (2001); KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 85-86 (2001). For further discussion of the origin of the legal notion of crimes against humanity, see ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 67-74 (2003). The term "crimes against humanity" appeared in some Latin American penal codes in the 1920s, and the states that employed it asserted universal jurisdiction over such crimes. *Harvard Research Project on Criminal Jurisdiction*, 29 AM. J. INT'L L. 435, 571 (Supp. 1935) (citing penal codes of Costa Rica and Venezuela).

2. BASSIOUNI, *supra* note 1, at 17, 62-63. The worry about demonization comes out with particular clarity in CARL SCHMITT, THE CONCEPT OF THE POLITICAL 54 (George Schwab trans., 1996) ("To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human . . . ."). See the illuminating discussion of Schmitt in MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 415-436 (2001). I discuss Schmitt's argument *infra* at Part V.

3. Here and elsewhere my argument overlaps with Richard Vernon, *What Is a Crime Against Humanity?*, 10 J. POL. PHIL. 231, 242-45 (2002). Vernon notes the distinction presented here. *Id.* at 238-40. I shall note other points of overlap (as well as disagreement) when they arise.

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aggregation of all human beings—humankind.[4] Taken in the former sense, "crimes against humanity" suggests that the defining feature of these offenses is the *value* they injure, namely humanness. The law traditionally distinguishes between crimes against persons, crimes against property, crimes against public order, crimes against morals, and the like. Here, the idea is to supplement the traditional taxonomy of legally protected values—property, persons, public order, morals—by adding that some offenses are crimes against humanness as such.

The terminology chosen by the framers of the Nuremberg Charter suggests that they were thinking of crimes against humanity in this sense. In Article 6, which enumerates the crimes under the Tribunal's jurisdiction, we find the traditional category of war crimes[5] supplemented by two new categories: *crimes against peace*[6] and *crimes against humanity*.[7] The parallel wording suggests that crimes against humanity offend against humanity in the same way that crimes against peace offend against peace. If this parallelism holds, then "humanity" denotes the value that the crimes violate, just as "peace" denotes the value that wars of aggression and wars in violation of treaties assault.

An argument of Hannah Arendt provides an illustration of how this sense of the phrase "crimes against humanity" figures in legal and moral argument. In the Epilogue to *Eichmann in Jerusalem*, Arendt describes the Holocaust as a "new crime, the crime against humanity—in the sense of a crime 'against the human status,' or against the very nature of mankind."[8] She borrows the phrase "crimes against the human status" from the French Nuremberg Prosecutor François de Menthon, and explains it thus: "[Genocide] is an attack upon human diversity as such, that is, upon a characteristic of the 'human status' without which the very words 'mankind' or 'humanity' would be devoid of meaning."[9] To attack diversity, in other words, is to attack humanness. This is an intriguing and important argument, to which I will return. For the moment, I wish merely to note that Menthon's phrase and Arendt's explication of it adopt the "crimes against humanness" reading of "crimes against humanity." The crime, for Menthon, is an attack on whatever it is that makes us human. "Humanity" refers to the quality of being

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4. This ambiguity is noted as well in CASSESE, *supra* note 1, at 67. The word has a third primary meaning as well, namely compassion—not *humanness* but *humaneness*—and that sense sometimes figures in discussions of crimes against humanity when we focus on the merciless, ruthless, cold-blooded aspects of the crimes. I propose to set this meaning to one side, however, because the absence of compassion, of humaneness, hardly distinguishes crimes against humanity from many other crimes.

5. Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(b), 59 Stat. 1544, 1547, 82 U.N.T.S. 279, 288 (1945) [hereinafter Nuremberg Charter], *reprinted in* 1 INT'L MILITARY TRIBUNAL, NUMREMBERG, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, at 10 (1947).

6. *Id.* art. 6(a), 59 Stat. at 1547, 82 U.N.T.S. at 288.

7. *Id.* art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288.

8. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 268 (rev. ed. 1965).

9. *Id.* at 257, 268-69.

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human, that is, to an abstract property, not to the human race or a set of individual humans.

Taken in the latter sense, "humanity" refers to humankind—the set of individuals—not humanness. Under this interpretation, "crimes against humanity" suggests that the defining feature of these offenses is the *party in interest.* In law, some wrongs—chiefly civil wrongs, like torts—are thought to affect only the victims and their dependents. Other wrongs, inflicted on equally determinate victims, violate important community norms as well, and the community will seek to vindicate those norms independently of the victim. These wrongs are crimes, not torts or other civil breaches, and the community, not just the victims, has a distinct interest in punishment. If, for example, you punch me in the nose, I may sue you for damages, and the civil case will be named after the parties in interest: *Me v. You.* But, in addition, you may be prosecuted for assault and battery, and the criminal case will be titled *State v. You*, *People v. You*, or *Crown v. You.* The former case name reflects the fact that you have injured me, and that I am seeking recompense; the latter case names connote that by injuring me, you have committed an offense against the community. In the former, the parties in interest are you and I. In the latter, the interested parties are you and the state, the people, or the Crown. I may decide to drop my civil lawsuit against you, perhaps because we have settled out of court. But that will not matter to the state, which remains free to proceed with the assault prosecution despite our settlement because the state's interest in punishing the wrong differs fundamentally from my own interest. Viewed along these lines, the term "crimes against humanity" signifies that all humanity is the interested party and that humanity's interest may differ from the interests of the victims.

Eichmann in Jerusalem illustrates this sense of the term as well. Arendt quotes Telford Taylor's observation that "a crime is not committed only against the victim, but primarily against the community whose law is violated,"[10] a fact that she observes distinguishes crimes from civil wrongs. She then argues:

> [T]he physical extermination of the Jewish people was a crime against humanity, perpetrated upon the body of the Jewish people. . . . Insofar as the victims were Jews, it was right and proper that a Jewish court should sit in judgment; but insofar as the crime was a crime against humanity, it needed an international tribunal to do justice to it.[11]

Notice that Arendt draws a jurisdictional conclusion from the distinction between crimes against the Jews and crimes against humanity perpetrated against the Jews. The question of who gets jurisdiction over international crimes is an important one and currently the subject of vigorous debate; we shall return to it later in this Article, where I will call Arendt's argument into

10. ARENDT, *supra* note 8, at 261 (quoting Telford Taylor, *Large Questions in Eichmann Case*, N.Y. TIMES, Jan. 22, 1961, § 6, at 22).

11. *Id.* at 269.

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question. Here, however, I cite Arendt's argument only to note that in it the word "humanity" refers to humankind, not to the quality of being human.[12]

Another illustration of this sense of "humanity" appears in Mary Ann Glendon's explication of the distinction drawn at Nuremberg between crimes against peace and crimes against humanity:

> [T]o wage a war of aggression was a crime against international society and . . . to

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12. Because Arendt's treatment of the *Eichmann* case will figure prominently in this Article's argument, some background may prove useful for readers unfamiliar with either Arendt's book or the case. Adolph Eichmann was a lieutenant colonel in the Schutzstaffel (S.S.) whose job consisted of organizing the roundup of European Jews and their deportation to the death camps in the East. Although he was by no means one of the instigators of the Final Solution, Eichmann was the highest-ranked Nazi whose duties consisted entirely of annihilating Jews. After the war, Eichmann escaped to Argentina, where he lived incognito until Israeli agents located and kidnapped him in 1960. He was brought to Jerusalem and tried for crimes against humanity and "crimes against the Jewish people," convicted, and hanged. For important accounts of the Eichmann trial (in addition to Arendt's), see DOUGLAS, *supra* note 1, at 97-182 and TOM SEGEV, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST 323-84 (Haim Watzman trans., 1993).

Hannah Arendt was commissioned by *The New Yorker* magazine to cover the Eichmann trial, and her articles were enlarged into the book *Eichmann in Jerusalem: A Report on the Banality of Evil*. It proved to be one of the most controversial books of its time, provoking an "inferno of insult, accusation, denunciation, and pure hatred" directed against Arendt that raged for three years and has smoldered ever since. DAVID LASKIN, PARTISANS: MARRIAGE, POLITICS, AND BETRAYAL AMONG THE NEW YORK INTELLECTUALS 238 (2000). Arendt took the Israeli government and the prosecution to task for attempting to politicize the trial, which she believed should consist solely of a quest for impartial justice. In addition, critics charged that Arendt whitewashed Eichmann through her idea of the "banality of evil," by which she meant that Eichmann was not motivated by antisemitism, psychopathology, sadism, or the desire to do something monstrous; instead, he regarded himself as nothing more than a responsible jobholder conscientiously performing a normal job. To make matters worse, she combined this idea with a few inflammatory pages taking to task the Jewish leadership in occupied Europe for cooperating in the roundup of Jews. "The Controversy," as the bitter debate over Arendt's work came to be known, ended decade-long friendships. For an extensive account of "The Controversy," see ELIZABETH YOUNG-BRUEHL, HANNAH ARENDT: FOR LOVE OF THE WORLD 328-78 (1982).

"The Controversy" flared up again, briefly, in the mid-1990s with the revelation of Arendt's youthful love affair with her professor, Martin Heidegger, who later became a Nazi, and with whom she reconciled and resumed her friendship in 1950. *See generally* ELZBIETA ETTINGER, HANNAH ARENDT-MARTIN HEIDEGGER (1995). The Heidegger connection seemed to Arendt's critics like outrageous further proof of her arrogance and skewed judgment, both amply demonstrated by her unwillingness to treat the enemies of the Jewish people as her own enemies. In my view, the critics are almost entirely wrong. *See* David Luban, When Hannah Met Martin (1997) (unpublished manuscript, on file with The Yale Journal of International Law); David Luban, What the Banality of Evil Is Not (1997) (unpublished manuscript, on file with The Yale Journal of International Law). In addition to polemics, scholarly interest in *Eichmann in Jerusalem* has remained lively. *See, e.g.*, DOUGLAS, *supra* note 1, at 110-13, 173-82; RICHARD J. BERNSTEIN, HANNAH ARENDT AND THE JEWISH QUESTION (1996); *The Special Issue: Hannah Arendt and* Eichmann in Jerusalem, 8 HISTORY AND MEMORY No. 2 (Fall/Winter 1996).

None of these issues will be my concern in the present Article. In the midst of the smoke and flames of "The Controversy," Arendt's *Epilogue* to *Eichmann in Jerusalem*, in which she takes up legal and theoretical issues that the case presents, has been largely, though not entirely, ignored. Seyla Benhabib has suggested that Arendt's analysis of crimes against humanity is the most important legacy of *Eichmann in Jerusalem*. Seyla Benhabib, *Arendt's* Eichmann in Jerusalem, *in* THE CAMBRIDGE COMPANION TO HANNAH ARENDT 76 (Dana Villa ed., 2000). And Mark Osiel has explored the significance of Arendt's work for international criminal law in two important books. *See* MARK OSIEL, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA'S DIRTY WAR (2001) [hereinafter OSIEL, MASS ATROCITY, ORDINARY EVIL]; MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE, AND THE LAW OF WAR (1999). I share Benhabib's and Osiel's belief that the *Epilogue*, which contains Arendt's ideas about the nature of crimes against humanity and genocide, is a work of major theoretical importance, although I do not share all of their other judgments of her argument. As will become clear in the course of this Article, I agree with Arendt on some points and disagree on others.

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> persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, was a crime against humanity.[13]

Here, the phrase "international society" refers to the traditional subject of international law, namely the society of states. "Humanity," Glendon is suggesting, refers to something different—not the society of states, nor even John Rawls's slightly different concept of the Society of Peoples[14]—but rather the Society of People: humankind in the aggregate. Glendon's argument, then, asserts that just as international society has an interest in repressing crimes against peace, humanity has an interest in repressing the various misdeeds that fall under the rubric "crimes against humanity."

I offer these examples to illustrate two simple points. First, discussions of crimes against humanity take the term seriously and at face value, treating "humanity" as an operative concept with intelligible, normative content, and not just a placeholder in a legal term of art. Second, discussions of crimes against humanity draw on both senses of the word "humanity"—humanity as humanness and humanity as humankind. The central questions for any theory of crimes against humanity are how these deeds violate humanness, and why they offend against all humankind.

Labeling something a crime against humanity may well imply both conclusions, but it is important to realize that violating humanness and offending against humankind are not equivalent. Arguably, all human beings share an interest in suppressing grave acts of environmental destruction—an interest that may well justify making such acts international crimes; but the value that is harmed is not, strictly speaking, human at all. Conversely, an especially sadistic rape or murder might degrade the humanity of its victim without implicating the interests of the entire human race. Crimes against humanity are simultaneously offenses against humankind and injuries to humanness. They are so universally odious that they make the criminal *hostis humani generis*—an enemy of all humankind, like the pirate on the high seas under traditional international law—and they are universally odious because they injure something fundamental to being human in a way that municipal legal systems fail to address. But what is that something?

The answer I offer in this Article is that crimes against humanity assault one particular aspect of human being, namely our character as political animals. We are creatures whose nature compels us to live socially, but who cannot do so without artificial political organization that inevitably poses threats to our well-being, and, at the limit, to our very survival. Crimes against humanity represent the worst of those threats; they are the limiting case of politics gone cancerous. Precisely because we cannot live without politics, we exist under the permanent threat that politics will turn cancerous and the

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13. MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 9 (2001).

14. JOHN RAWLS, THE LAW OF PEOPLES (1999). For Rawls, a people differs from a state because the term "state" refers principally to the government, whereas a "people" is a politically organized set of human beings. *See id.* at 23-27.

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indispensable institutions of organized political life will destroy us. That is why all humankind shares an interest in repressing these crimes. The theory that I aim to defend here consists of two propositions: (i) that "humanity" in the label "crimes against humanity" refers to our nature as political animals, and (ii) that these crimes pose a universal threat that all humankind shares an interest in repressing.

The argument proceeds as follows. In Part II, I extract from the various statutes and decisions a set of five features that, I claim, characterize the legal core of crimes against humanity. All the statutory definitions of crimes against humanity have in common that they criminalize atrocities and severe persecutions inflicted on civilian populations as part of an organized plan by a state or a state-like organization.[15] In other words, the target of these statutes consists of organized attacks of the gravest and most barbaric kind carried out by political entities against groups under their control. That having been established, I set out, in Part III, the conception of humanity as the political animal sketched above. Then, in Part IV, I verify that this conception of the political animal properly accounts for the five previously identified features of the law of crimes against humanity. This conclusion completes the argument that "humanity" in "crimes against humanity" refers to our character as political animals. Part V then turns to a question raised in the very first paragraph of this Article: whether the concept of a "crime against humanity" runs the risk of implicitly demonizing those who commit such crimes. Taking an argument to that effect by Carl Schmitt as my foil, I answer in the negative.[16]

The Article then turns to the question of why all humankind has an interest in repressing these crimes. Evidently, this question concerns jurisdiction over crimes against humanity, for jurisdiction is the study of the interests that create a legitimate stake in prescribing and enforcing law. I will defend the familiar proposal that crimes against humanity should be treated as universal jurisdiction offenses—that is, offenses that can be tried in any properly constituted court, national or international—but the defense I offer will be less familiar. In Parts VI and VII, I ground the claim of universal jurisdiction not in an argument that all states have an interest in repressing crimes against humanity, but in the claim that all individual persons do. I label this the *vigilante jurisdiction*, and, as the term suggests, it carries the implication that criminals against humanity are anyone's fair target. Clearly, that can be a fantastically dangerous proposition—one that raises the specter of lynch-mob justice. The solution to this problem, I suggest, is a delegation of the vigilante jurisdiction to any officially constituted tribunal, national or international, that satisfies the requirements of natural justice.[17] According to

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15. For convenient reference, the Appendix to this Article includes the text of five different statutory definitions of crimes against humanity—those of the Nuremberg Charter, Allied Control Council Law No. 10, the Statute of the International Criminal Tribunal for Former Yugoslavia, the Statute of the International Criminal Tribunal for Rwanda, and the Rome Statute for the International Criminal Court—along with the Rome Statute's definition of the crime of genocide.

16. *See* SCHMITT, *supra* note 2.

17. I borrow the term "natural justice" from John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971). Used in this sense, natural justice refers to the basic features of due process—"a process

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this argument, the basis for universal jurisdiction is not simply to expand the reach of prosecution, but also to expand the possibility of a fair forum protecting suspects against the rigors of vigilante justice. So I shall argue in Part VIII.

In February 2002, the International Court of Justice (ICJ) decided its most important case on international criminal law since the 1927 *Lotus* decision.[18] The case, between Belgium and the Democratic Republic of the Congo, held that incumbent foreign ministers are immune from prosecution for serious international crimes such as crimes against humanity.[19] In addition, several separate opinions handed down in the case addressed the validity of universal jurisdiction, an issue of great importance that the opinion of the Court did not reach, but which will soon be treated by the ICJ in the pending case *Congo v. France*.[20] In Part IX, I utilize *Congo v. Belgium* to illustrate points about the account of crimes against humanity developed here: first, that the possibility of a politicized prosecution may undermine the requirement of natural justice, and second, that the legal arguments about immunity and universal jurisdiction reflect the larger tension between the interests of states and the interests of humankind that permeates the law of crimes against humanity. Finally, the concluding section recapitulates the argument and

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reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances." *Id.* at 239. Rawls offers some examples of what natural justice requires:

> [A] legal system must make provisions for conducting orderly trials and hearings; it must contain rules of evidence that guarantee rational procedures of inquiry. . . . [J]udges must be independent and impartial, and no man may judge his own case. Trials must be fair and open, but not prejudiced by public clamor.

Id. I do not read Rawls as suggesting that these are the only requirements of natural justice; his list is suggestive, not exhaustive. In this Article, I use the term "natural justice" rather than "due process" because the latter misleadingly suggests that I am referring only to doctrines of American constitutional law, whereas I mean to refer to the basic minimum standards of fairness in tribunals anywhere and everywhere, not just in the United States. To forestall misunderstanding, let me emphasize that talk of natural justice makes no assumption, pro or con, about the existence or validity of natural law. A legal positivist can accept the moral need for fair and rational adjudicatory process, which is all I mean by natural justice.

18. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), *reprinted in* 2 WORLD COURT REPORTS 23 (Manley O. Hudson ed., 2000).

19. Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo v. Belg.), 41 I.L.M. 536 (2002) [hereinafter *Congo v. Belgium*]. The issue will be litigated before the ICJ again. In August 2003, Liberia instituted proceedings against Sierra Leone for issuing a warrant against former Liberian President Charles Taylor, arguing that the warrant violates Taylor's immunity. Press Release, Int'l Court of Justice, Liberia Applies to the International Court of Justice in a Dispute with Sierra Leone Concerning an International Arrest Warrant Issued by the Special Court for Sierra Leone Against the Liberian President (Aug. 5, 2003), http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-26_xx_20030805.htm.

20. *See Congo v. Belgium*, *supra* note 19. On *Certain Criminal Proceedings in France (Dem. Rep. of Congo v. Fr.)* [hereinafter *Congo v. France*], see Press Release, Int'l Court of Justice, The Republic of the Congo Seizes the International Court of Justice of a Dispute with France (Dec. 9, 2002), http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-37_xx_20021209.htm; Press Release, Int'l Court of Justice, The French Republic Consents to the Jurisdiction of the International Court of Justice to Entertain an Application Filed by the Republic of the Congo Against France: The Court Enters the New Case in its List and Sets a Date for the Hearings on the Request for the Indication of a Provisional Measure (Apr. 11, 2003), http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipress com2003-14_xx_20030411.htm. On June 17, 2003, the ICJ declined to enact provisional measures in this case on the basis that the Congo faces no immediate injury. Order of 17 June 2003, Request for the Indication of a Provisional Measure, *Congo v. France*, http://www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_iorder_20030617.pdf.

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defends it against a legal realist objection to the very idea of a theory of crimes against humanity.

II. CRIMES AGAINST HUMANITY: THE DISTINCTIVE LEGAL FEATURES

We begin by asking which crimes satisfy the two conditions of offending against humanness and implicating the interests of all humankind. The first step of the inquiry is to learn how the evolving law of crimes against humanity has attempted to answer this question. Let us begin with the familiar language of Article 6(c) of the Nuremberg Charter, which defines crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.[21]

I will focus on five features of Article 6(c) that characterize the law of crimes against humanity in all its subsequent embodiments. My aim is to develop what might be thought of as the "common law" of crimes against humanity—a single set of underlying ideas given varying specifications by different statutes and jurisdictions. Ronald Dworkin distinguishes between legal *concepts* and their varying *conceptions*,[22] and in his terminology I shall extract a *concept* of crimes against humanity from the differing *conceptions* given in various statutes and judicial decisions.

1. *Crimes against humanity are typically committed against fellow nationals as well as foreigners.* Reviewing the legislative history of Article 6(c), Cherif Bassiouni observes that the legal problem it was meant to solve arose from a lacuna in humanitarian law as it existed in 1945. Under prevailing law, the category of war crimes against civilian populations included only offenses against *foreign* populations, whereas the Nazis committed these crimes against their own Jewish nationals and those of annexed territories in Austria and Sudetenland as well.[23] Apparently, the idea that a government would use its resources to murder its own people had not been anticipated adequately by the laws of war, although Turkey had done precisely that to its Armenian subjects in 1915.[24] Article 6(c) would fill this gap. Crimes against humanity would include atrocities committed before as well as during the war, crimes committed by civilians as well as soldiers, and crimes committed by a government against its own people as well as against

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21. Nuremberg Charter, *supra* note 5, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288.

22. RONALD DWORKIN, LAW'S EMPIRE 70-71 (1986).

23. BASSIOUNI, *supra* note 1, at 72; KITTICHAISAREE, *supra* note 1, at 87.

24. For discussion of the Armenian genocide and the ineffectuality of legal responses, see Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YALE J. INT'L L. 221 (1989); Vahakn N. Dadrian, *The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, 23 YALE J. INT'L L. 503 (1998); Vahakn N. Dadrian, *The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series*, 11 HOLOCAUST AND GENOCIDE STUD. 28 (1997).

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an adversary's people.[25] In practice, the last of these three distinctions is the most fundamental. That is because crimes against humanity committed in peacetime and those committed by civilians (e.g., police forces or informal militias like the Rwandan *interahamwe*) will most likely be committed against one's own population. After all, a state has little opportunity to do violence to foreign nationals on foreign territory except in the course of war—international terrorism being the important exception. Violations against fellow nationals typify the "pure case" of crimes against humanity—that is, crimes against humanity that are not also war crimes.

In other words, the unique evil criminalized by Article 6(c) is the horrific novelty of the twentieth century: politically organized persecution and slaughter of people under one's own political control.[26] This is not to say that crimes against humanity can be committed only against one's fellow nationals. Nothing in the statutory language limits the category of crimes against humanity in this way, and the human rights that the law aims to defend apply with equal force at home and abroad.[27] However, since crimes against humanity committed by armed forces abroad will simultaneously be war crimes, the pure case of crimes against humanity—those that are *not* also war crimes—involve depredations against one's own people. What might be called "autopolemic" crimes are thus the most typical and characteristic crimes against humanity. For purposes of theorizing about crimes against humanity, I therefore focus specifically on crimes against humanity committed within rather than across borders.[28]

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25. There are some differences between the particular offenses that constitute war crimes and those that constitute crimes against humanity, but the most important offenses (murder, enslavement, mass deportation, torture, ill-treatment) are fundamentally the same.

26. *See* Nuremberg Charter, *supra* note 5, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288.

27. All of the principal statutory definitions of crimes against humanity describe the context as an "attack on a civilian population" without specifying whether the civilian population is domestic or foreign. *See infra* Appendix.

28. Richard Vernon believes that the term should be reserved exclusively for crimes committed by a state against its own subjects. Vernon, *supra* note 3, at 248-49. He has a powerful point: only autopolemic crimes exhibit the distinctive perversion of politics that on Vernon's account—and, as we shall see, on mine as well—characterizes crimes against humanity. However, reserving the label for autopolemic crimes does not represent the law as it is currently understood. Restricting the label to autopolemic crimes also proves to be unnecessary for a theory of crimes against humanity as political crimes, of the sort that both Vernon and I develop. Vernon implicitly assumes that political relations between a state (or any similar organization) and individuals exist only when the individuals reside in that state. He assumes, that is, that political relationships between individuals and states exist only within national, not transnational, politics. The clearest counterexample to this assumption is the relationship between a state and individuals in its colonies, satellites, or de facto dependencies—and an invading army creates, at least temporarily, a de facto dependency. I do not go as far as Lea Brilmayer, who argues in *Justifying International Acts* that the self-same political theory that justifies a state's behavior toward its own citizens (whatever theory that turns out to be) must be employed to justify behavior toward foreigners abroad. LEA BRILMAYER, JUSTIFYING INTERNATIONAL ACTS 28-29 (1989). Political relationships depend in large part on mutual expectations, and a state's own residents have different and higher reasonable expectations of their own government than they do of another state. But, to the extent that a state displaces another people's government, it assumes governmental responsibilities to protect the interests of those in its sphere of domination. This point of political theory is echoed in the Second Hague Convention, in Article 43 ("The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the community.") and Article 46 ("Family honours and rights, individual lives and private property, as

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2. *Crimes against humanity are international crimes.* Article 6(c) of the Nuremberg Charter, in bringing under international law crimes committed by a state against its own residents, represents an incursion against state sovereignty—a point emphasized by the criminalization of acts "whether or not in violation of the domestic law of the country where perpetrated."[29] For that matter, Articles 7 and 8 of the Nuremberg Charter (abolishing sovereign immunity and the superior orders defense) are also incursions against sovereignty, because they pierce the veil of domestic authority.[30] Most dramatic of all is the first clause of Article 6(c), criminalizing murders, exterminations, enslavements, deportations, and other inhumane acts *before the war* as well as during the war.[31] On its face, this clause criminalizes Nazi atrocities against German Jews before 1939, thereby brushing aside the prerogatives of a peacetime sovereign. This was a radical step; perhaps unsurprisingly, the Nuremberg Tribunal interpreted the phrase "before the war" out of the Nuremberg Charter.[32] However, it did so by arguing that it had no jurisdiction over offenses that predated the commission of crimes against peace and war crimes, not by arguing that German sovereignty barred prosecution.[33] Thus, even the Nuremberg Tribunal left intact what I take to be the second defining feature of crimes against humanity: their criminality overrides state sovereignty, turning them into international crimes.

3. *Crimes against humanity are committed by politically organized groups acting under color of policy.* The Nuremberg Charter presupposed that crimes against humanity were committed by agents of a state. Article 6(c) requires that crimes against humanity be committed "in execution of or in connection with" crimes against peace and war crimes,[34] both of which could be committed only by state actors, or by high-placed civilians embroiled with state actors. This state action requirement excludes, for example, "free lance"

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well as religious convictions and liberty, must be respected. Private property cannot be confiscated."). Convention with Respect to the Laws and Customs of War (Hague Convention II), Regulations Respecting the Laws and Customs of War on Land, July 29, 1899, arts. 43, 46, 32 Stat. 1803, 1821-22.

29. Nuremberg Charter, *supra* note 5, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288.

30. *Id.* arts. 7, 8, 59 Stat. at 1548, 82 U.N.T.S. at 288.

31. *Id.* art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288.

32. 22 INT'L MILITARY TRIBUNAL, NUREMBERG, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, at 498 (1948). *See* DOUGLAS, *supra* note 1, at 48-56 (discussing the deradicalization of Article 6(c) through interpretation of its language).

33. Allied Control Council Law No. 10 contained no such jurisdictional restriction. Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, *reprinted in* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 250 (1949) [hereinafter CCL No. 10]. Allied courts applying CCL No. 10 were divided on the issue of whether they had jurisdiction over crimes against humanity committed before 1939. The courts in the *Flick* and *Ministries* cases, following the Nuremberg Tribunal, refused to take jurisdiction over pre-1939 crimes against humanity, while the courts in the *Einsatzgruppen* and *Justice* cases stated in dicta that such jurisdiction would exist. See the discussion of this issue in Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 INT'L CONCILIATION 241, 342-44 (1949). At least the latter decisions give some support to the idea that German national sovereignty posed no obstacle to prosecution. Kai Ambos and Steffen Wirth demonstrate that the "war nexus" was always a jurisdictional requirement, not a substantive element of the law of crimes against humanities, and as such it has gradually disappeared from the law. Kai Ambos & Steffen Wirth, *The Current Law of Crimes Against Humanity*, 13 CRIM. L.F. 1, 3-13 (2002).

34. Nuremberg Charter, *supra* note 5, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288.

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anti-Semites who decided to piggyback on the Nazi lead and murder Jews on their own, as happened repeatedly in Romania, Latvia, and the Ukraine.[35] Their crimes could be prosecuted as murder under domestic law, but not as crimes against humanity under international law. Indeed, the nexus to state acts was deemed necessary to bring the crimes into the purview of international law.[36]

The Bosnian War led drafters to weaken the "state action" requirement because the Serb militias were unofficial and only loosely affiliated with the Yugoslav state. Thus, the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) requires only that crimes against humanity be committed "in armed conflict, whether international or internal in character."[37] However, the armed conflict requirement still presupposes armies and government-like entities. The *Tadic* judgment, for example, refers to "entities exercising *de facto* control over a particular territory but without international recognition of formal status of a *de jure* state, or by a terrorist group or organization."[38] Rwanda led to an additional weakening of the requirement because unaffiliated civilians committed much of the genocide, which had no direct connection with armed conflict, occurring as it did in areas of the country outside the battle zones of the civil war.[39] Here, the state action requirement—broadened in Yugoslavia to include non-state but state-like actors—was broadened again. In place of the "armed conflict" requirement, the Statute of the International Criminal Tribunal for Rwanda (ICTR) requires only "a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[40] Finally, the Rome Statute for the International Criminal Court adopts nearly identical language but eliminates the requirement that the attack be on national, political, ethnic, racial or religious grounds. Offenses are crimes against humanity "when committed as part of a widespread or systematic attack

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35. "[C]rimes against humanity . . . must be strictly construed to exclude isolated cases of atrocities or persecutions." United States v. Alstötter (U.S. Mil. Trib. 1947), *in* 6 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 47 (1948) [hereinafter *Justice* case]. Ambos and Wirth point out that German courts applying CCL No. 10 law reached the same conclusion. *See* Ambros and Wirth, *supra* note 33, at 6.

36. *See* Ambos & Wirth, *supra* note 33, at 7. *See also* CASSESE, *supra* note 1, at 73-74 (discussing the elimination of the war nexus from the definition of crimes against humanity).

37. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 5, U.N. Doc. S/RES/827 (1993), *amended by* S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998) [hereinafter ICTY Statute].

38. Prosecutor v. Tadic, Case No. IT-94-1-T (App. Chamber, Int'l Crim. Trib. for the Former Yugoslavia, May 7, 1997), http://www.un.org/icty/tadic/appeal/judgment.

39. MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 6-7 (2001).

40. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., art. 3, U.N. Doc. S/RES/955 (1994), *amended by* S.C. Res. 1165, U.N. SCOR, 53rd Sess., 3877th mtg., U.N. Doc. S/RES/1165 (1998) [hereinafter ICTR Statute].

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directed against any civilian population, with knowledge of the attack."[41] The Rome Statute also requires that the offenses flow from "a State or organizational policy."[42]

In this way, the state action requirement has metamorphosed into a broader "widespread or systematic attack" element, linked with a state or organizational policy. What all these requirements have in common seems to be that crimes against humanity are crimes committed through political organization. Although perpetrated by individuals, they are not individual crimes. To count as a crime against humanity, the perpetrator's decision to commit the crime must be mediated by his participation in, and knowledge of, a widespread or systematic attack.[43] We may summarize this feature as the requirement of *organizational responsibility.*

We may illustrate how central organizational responsibility is to crimes against humanity by contrasting the crime of genocide, as defined in the 1948 Genocide Convention, with the crime against humanity consisting of extermination of a civilian population on racial or ethnic grounds. In a practical and intuitive sense, genocide and ethnic extermination seem virtually indistinguishable. But the legal definitions differ in crucial respects. The Genocide Convention requires the prosecution to prove "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[44] The crime against humanity of group extermination requires no similar proof of intent to destroy. Thus, whereas genocide is a crime directed at groups viewed as collective entities, with a moral dignity of their own, crimes against humanity are assaults on civilian populations viewed not as unified metaphysical entities but simply as collections of individuals whose own human interests and dignity are at risk and whose vulnerability arises from their presence in the target population. More to the present point, however, is

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41. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, art. 7(1) U.N. Doc. A/CONF.183/9, http://www.un.org/law/icc/statute/romefra.htm [hereinafter Rome Statute].

42. Rome Statute, *supra* note 41, art. 7(2)(a).

43. The case law uniformly requires proof that the defendant knew that his crime was part of a widespread or systematic attack. *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 62 (2d ed. 2001).

44. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. This requirement is an onerous burden because intent is hard to prove, and prosecutors will typically charge crimes against humanity rather than genocide because of the practicalities of proving the case. There are two reasons for the specific intent requirement for genocide, both of which were central to the thinking of Raphael Lemkin, the Polish-Jewish lawyer who coined the word 'genocide' and lobbied for decades to have it incorporated as a crime under international law. First, Lemkin hoped (in vain, it seems) that future genocides would be halted in their early stages, before great loss of life ensued, in which case the bare intent would nevertheless suffice to convict perpetrators. Thus, Lemkin saw the intent requirement as easing the prosecutor's burden rather than making it more onerous. Second, and more fundamentally, the focus on the intent to destroy a group was meant to identify the singular evil of genocide: it encompasses not merely physical attacks ("barbarity," in Lemkin's early terminology) but also efforts to wipe out the victimized group's distinctive culture (which Lemkin called "vandalism"). In other words, Lemkin understood genocide to be a spiritual as well as a physical attack on groups as such, and he meant for the intent requirement to focus on the communal rather than the individual aspect of the crime. On these points, see SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 21, 43, 54, 57 (2002) and, more generally, chapters 2-4 of the same work.

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a second difference: the definition of genocide does not contain a requirement of either a "widespread or systematic attack," or a "state or organizational policy." A solitary individual who disseminates a deadly disease with intent to destroy, in whole or in part, a national group is guilty of genocide, even if he acted entirely on his own—but he will not be guilty of the crime against humanity of extermination.[45] The distinguishing feature of the crime against humanity is not the actor's genocidal intent, but the organized, policy-based decision to commit the offenses. One might say that whereas the definition of genocide focuses attention on the collective character of the victim, the definition of crimes against humanity emphasizes the collective character of the perpetrator.

4. *Crimes against humanity consist of the most severe and abominable acts of violence and persecution.* Article 6(c) of the Nuremberg Charter distinguishes between two types of crimes against humanity. The first consists of murder, extermination, enslavement, deportation, and "other inhumane acts," and commentators sometimes use the shorthand term "crimes of the murder type."[46] Crimes of the murder type are those that, in the words of the Canadian Supreme Court's *Finta* decision, have an "added dimension of cruelty and barbarism."[47] To the Article 6(c) list of murder, extermination, enslavement, and deportation, subsequent statutes have added imprisonment "in violation of fundamental rules of international law,"[48] torture, enforced disappearance, sex crimes against women (including rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization), and, in the Rome Statute, the "crime of apartheid."[49] Article 6(c) and all subsequent

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45. A real-life example is the strange case of Abba Kovner, a Holocaust survivor, resistance fighter in the Vilna ghetto, and poet, who in 1945 unsuccessfully attempted to poison the Hamburg water supply in revenge for the Holocaust. Kovner said that his ultimate goal was to kill six million Germans. The incident is described in SEGEV, *supra* note 12, at 140-46.

There exists some legal authority to the contrary of my assertion that genocide can occur even without organizational responsibility. *See, e.g.*, Prosecutor v. Jelisec, Case No. IT-95-10-A, para. 101 (App. Chamber, Int'l Crim. Trib. for the Former Yugoslavia, July 5, 2001), http://www.un.org/icty/jelisi/appeal/judgment (noting that "it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system"). A similar observation is made in Prosecutor v. Kayishema, Case No. IT-95-1-T, para. 94 (Trial Chamber II, Int'l Crim. Trib. for Rwanda, May 21, 1999), http://www.ictr.org/ENGLISH/cases/kayRuz/Judgement/4.htm. *See generally* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 207-09 (2000). Schabas notes that Amnesty International has opposed the proposal of building organizational responsibility into the set of elements that must be proven to establish genocide. However, the *Jelisec* and *Kayishema* decisions do not require such proof. Instead, they merely argue that without proof of an organizational plan, it would be difficult to prove genocidal intent in practice. *See Jelisec*, *supra*, para. 100; *Kayishema*, *supra*, para. 94. This conclusion, I think, shows failure of imagination on the part of the Tribunals. Abba Kovner essentially admitted his genocidal intent and, unhappily, the possibility of a lone terrorist aiming to wipe out a population by introducing biological agents is all too imaginable.

46. This terminology dates back to Egon Schwelb, *Crimes Against Humanity*, 32 BRIT. Y.B. INT'L. L. 178, 190 (1946). A better term might be "acts of the murder type," to avoid the implication that these acts are already criminalized under domestic law, which they may or may not be.

47. Regina v. Finta, [1994] S.C.R. 701, 818.

48. Rome Statute, *supra* note 41, art. 7(1)(e).

49. Rome Statute, *supra* note 41, art. 7(1)(j). For conceptual clarity, one should probably classify the crime of apartheid among the crimes of the persecution type rather than the crimes of the murder type because one of its elements is "an institutionalized regime of systematic oppression and domination by one racial group over another racial group or groups." *Id.* art. 7(2)(h). Of course,

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statutes add the catch-all category of "other inhumane acts," of which Ratner and Abrams offer the following examples: "medical experimentation, mutilations, severe beatings, food deprivation, sterilizations, violations of corpses, forced undressing, forced witnessing of atrocities against loved ones, and other egregious physical and mental assaults."[50] The "big idea" seems to be that these are crimes whose sheer ugliness places them beyond the pale of ordinary criminality.

The second Article 6(c) category—"crimes of the persecution type"—consists of persecutions on racial, religious, or political grounds. In the category of persecutions, Ratner and Abrams, drawing on Nuremberg and CCL No. 10 decisions, include "deprivations of the rights to citizenship, to teach, to practice professions, to obtain education, and to marry freely; arrest and confinement; beatings, mutilation, and torture; confiscation of property; deportation to ghettos; slave labor; and extermination."[51] Some of these offenses, however, are already crimes of the murder type (e.g., confinement, beatings, mutilation, torture, deportation, slave labor, extermination). Eliminating persecutions that are already acts of the murder type would leave a residual category of "pure" persecutions consisting of severe group-based discrimination—those on Ratner and Abrams's list, together with indignities such as compelling group members to wear distinctive costume (such as the Nazis' infamous yellow arm bands for Jews), or prohibiting use of the group's native language. The Rome Statute defines persecution as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity,"[52] and this definition—leaving aside some vagueness about which rights are "fundamental" and which rights are protected by international law—captures the basic idea.

Severity appears to be the most fundamental criterion for making international crimes of these deeds: the category of crimes against humanity should contain only the worst things that people do to each other. At the time of the Nuremberg Charter and CCL No. 10, those crimes included murder, extermination, enslavement, deportation, torture, and rape. Over the decades, the list has slowly expanded, in sad tribute to the range of human inventiveness in devising ways to torment other people. The Rome Statute adds to the catalogue other items from the Pandora's box of atrocious evils: "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,"[53] enforced disappearance, apartheid, and lawless imprisonment.[54] Of course, as a historical matter, Nazi Germany had engaged in all of these practices except

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apartheid was implemented through crimes of the murder type, including murder, torture, and mass deportation; perhaps apartheid cannot even be conceived without these accompaniments. But it is the acts of murder, torture, and deportation, not the overall legal regime of systematic racial oppression and domination, that constitute crimes of the murder type. The establishment of grossly discriminatory laws seems much closer to a crime of the persecution type.

50. RATNER & ABRAMS, *supra* note 43, at 74.

51. *Id.* at 74-75. Ambos & Wirth include destruction of one's home as a form of persecution. Ambos & Wirth, *supra* note 33, at 79-80.

52. Rome Statute, *supra* note 41, art. 7(2)(g).

53. *Id.* art. 7(1)(g).

54. *Id.* art. 7(1)(e), (i), (j).

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enforced impregnation, and perhaps the only reason they were omitted from the enumeration of crimes in Article 6(c) of the Nuremberg Charter was that the overwhelming immensity of genocide eclipsed them in the minds of the Charter's drafters. Perhaps their salience became clear only after the experiences of South African apartheid, enforced disappearance in the Argentinian and Chilean "dirty wars," and ethnic cleansing and political sex crimes in Bosnia. In any event, the drafters of the international statutes also understood that human beings will always come up with novel atrocities, and for that reason, all the statutes include the "other inhumane acts" catch-all provision—or, in the case of the Rome Statute, the more developed category of "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[55]

In precisely the way that the statutory lists of crimes of the murder type have followed humankind's learning curve in devising new forms of organized atrocities, the statutory definitions of persecution have followed the learning curve of group discrimination. The Nuremberg Charter singles out discrimination on political, racial, or religious grounds, while the Tokyo Charter mentions only discrimination on political or racial grounds, presumably because Japan did not persecute on the basis of religion.[56] Evidently, each of these statutes was tailored to their target states, although the catalogue of victim groups in the Nuremberg Charter was already too narrow, failing to mention homosexuals, the mentally retarded, the aged, and the infirm, all of whom suffered group-based attacks by the Nazis. The ICTR Statute expands the list to cover attacks on "national, political, ethnic, racial or religious grounds,"[57] and the Rome Statute broadens the range even further to "[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law."[58] Just as "progress" in the art of atrocity required expanding the Article 6(c) list of murder-type crimes to include forced impregnation, "progress" in the art of hatred necessitates expanding the list of groups likely to suffer persecution.[59]

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55. *Id.* art. 7(1)(k).

56. Charter for the International Military Tribunal for the Far East, Apr. 26, 1946, T.I.A.S. No. 1589.

57. In fact, the ICTR Statute is muddled. In Article 3, it criminalizes "persecutions on political, racial and religious grounds" when they are "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds." ICTR Statute, *supra* note 40, art. 3. No explanation seems forthcoming of this convoluted and almost inconsistent formulation.

58. Rome Statute, *supra* note 41, art. 7(1)(h).

59. Are acts of terrorism crimes against humanity? Some scholars have answered in the affirmative. *See, e.g.*, James D. Fry, *Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT'L L. & FOREIGN AFF. 169 (2002); Lucy Martinez, *Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems*, 34 RUTGERS L.J. 1, 26-41 (2002). However, as ICTY ex-President Antonio Cassese notes, during the negotiations leading up to the Rome Statute, the U.S. government successfully opposed adding terrorism to the list of crimes against humanity because, among other reasons, the offense is not well-defined and thus doing so might lead to excessive politicization of the International Criminal Court (ICC). Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L. L. 993, 994 (2001). Cassese also points out that American and French courts have rejected treating terrorist attacks as crimes against humanity. *Id.* An attack such as the September 11, 2001 attack on the World

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Crimes of the murder type and crimes of the persecution type have one obvious feature in common. In the same way that crimes of the murder type are the most appalling evils that people have devised to visit on the bodies of others, crimes of the persecution type are the most extreme humiliations to visit on their spirits. In both cases, the intuitive ground for condemnation seems to be the desire to draw a line between civilized and uncivilized conduct, and to insist that some torments and humiliations cross that line. I suspect that no underlying principle explains why some evils cross the boundary between the civilized and the barbaric, whereas others—such as banditry, suppression of the free press, and denial of the right to vote or own real property—do not.[60] The atrocities and humiliations that count as crimes against humanity are, in effect, the ones that turn our stomachs, and no principle exists to explain what turns our stomachs.

But crimes of the persecution type are not just discrimination taken to the most extreme degree, such as the 1935 Nuremberg Laws, Jim Crow laws in the southern United States, or the non-violent aspects of apartheid. All the statutes contain requirements similar to the Rome Statute's mandate that the acts of persecution be "committed as part of a widespread or systematic attack directed against any civilian population."[61] The requirement of an *attack* means that something more is going on than the erection of a stable system of group subordination or oppression, such as the subordination of women

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Trade Center would nevertheless very likely fall under the Rome Statute's definition of crimes against humanity, which includes murder and extermination "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" and defines an "attack directed against any civilian population" as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 [including murder] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack." Rome Statute *supra* note 41, art. 7(1). Although a terrorist group like al Qaeda is a non-state actor, the "State or organizational policy" language demonstrates that the statute does not limit itself to crimes sponsored by states. However, although the September 11 attacks fall under the ICC's statutory definition of crimes against humanity, the ICC would not have jurisdiction over the attacks because they took place before the statutory limit. *See id.* art. 11 (on jurisdiction *ratione temporis*). Furthermore, some cases of terrorism, such as attacks against property, acts committed by individuals who are not part of an organization, or acts of hijacking or aerial piracy, are clearly not crimes against humanity. The September 11 attack against the Pentagon, like the bombing of the *U.S.S. Cole* on October 12, 2000, might likewise not count as a crime against humanity because it was arguably an act of war against a military force rather than a civilian population, even though civilians work at the Pentagon and were among the casualties. On the question of whether an attack on a military target can be a crime against humanity, see *infra* note 73 and accompanying text. But, quite aside from the litigator's question of whether a terrorist attack can or cannot be shoehorned into the existing statutory language, there is the deeper question of whether doing so amounts to "disrupting some crucial legal categories." Cassese, *supra*, at 993. I think the answer is yes, and so I would not include terrorism among the crimes against humanity. Like Richard Vernon, I argue in this Article that the basic evil the law of crimes against humanity aims to condemn is a perversion of politics—the use of political and military power to assault rather than protect the well-being of those over whom the perpetrators exercise de facto authority. *See* Vernon, *supra* note 3. Even highly organized terrorist attacks seldom meet this description, as terrorists normally employ political violence divorced from governmental powers and political authority. However, under some circumstances, terrorist attacks may amount to genocide, a crime whose idea focuses on the evil of attempting to destroy groups on the basis of their ethnic, religious, or racial character, quite apart from any specifically political motivation. *See supra* note 44 and accompanying text.

60. So I argue in David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, *in* GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION 79, 101-07 (Pablo de Greiff & Ciaran Cronin eds., 2002).

61. Rome Statute, *supra* note 41, art. 7(1).

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throughout most of recorded history. The word suggests something dynamic, something moving and ongoing—a persecution in the process of getting worse, persecution conducted through a military campaign of some kind, persecution working to destroy or drive away the persecuted group rather than subordinating and exploiting it, and typically conjoined with crimes of the murder type. This limitation of the concept of persecution makes sense. Without it, the concept of persecution threatens to balloon until most of the world is implicated in crimes against humanity because, after all, most of the world is implicated in nauseating racial, ethnic, religious, or political discrimination. No good purpose is served by labeling all the world's oppressions crimes against humanity. Doing so would be little more than an invitation to permanent misanthropy.

The Rome Statute embodies this approach in its definitions of the phrase "attack on a civilian population,"[62] the crime of apartheid,[63] and persecution.[64] An attack on a civilian population consists of committing the particular crimes against humanity itemized in Article 7(1) multiple times. Fulfilling this definition requires specific flash points of criminality over and above the general evil of erecting a social system of oppression and domination. Indeed, even the crime of apartheid as defined in Article 7(2)(h) consists of specific acts constituting crimes against humanity, committed against a background of racial oppression and domination, rather than the system itself.[65] Finally, persecution counts as a crime against humanity only "in connection with any act referred to in this paragraph [i.e., the paragraph enumerating crimes against humanity] or any crime within the jurisdiction of the Court."[66] All of these definitions adopt the same approach: they define concepts denoting generalized evils—attacks on civilian populations, apartheid, and persecution—as patterns of specific criminal acts committed in a context of organizational planning.[67] Taken together, these three definitions imply that

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62. *Id.* art. 7(2)(a).
63. *Id.* art. 7(2)(h).
64. *Id.* art. 7(1)(h).
65. *Id.* art. 7(2)(h).
66. *Id.* art. 7(1)(h). It should be noted, however, that the ICTY has concluded that this stipulation in the Rome Statute does not reflect customary international law, and that persecutions not accompanied by other crimes may still constitute crimes against humanity. Prosecutor v. Kupreskic, Case No. IT-95-16-T, para. 580 (Trial Chamber II, Int'l Crim. Trib. for the Former Yugoslavia, Jan. 14, 2000), http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm. Ambos and Wirth agree with the *Kupreskic* panel in rejecting the rule of thumb I am proposing—namely that discrimination rises to the level of a persecution-type crime against humanity only when accompanied by crimes against humanity of the murder type. They regard it as a wrongheaded vestige of the now-abandoned requirement of a nexus to war, resulting from nothing more than a political compromise during the drafting of the Article. Ambos & Wirth, *supra* note 33, at 71-72. However, they also observe that the connection between persecution and murder-type acts "serves the . . . purpose of limiting the court's jurisdiction to forms of persecution which are of an elevated objective dangerousness," *id.* at 73, which in my view is an important rationale, not merely a pointless vestige of the Nuremberg Charter. My argument differs slightly from theirs because in my view the point of this "connection requirement" is not limiting jurisdiction to acts of "an elevated objective dangerousness," but rather limiting jurisdiction to persecutions that form part of an attack.
67. An American criminal lawyer will no doubt see analogies with the Racketeer Influenced and Corrupt Organizations (RICO) Act, which criminalizes multiple criminal offenses that form a "pattern" of racketeering activity, defined as at least two crimes on a specified list of offenses committed within ten years of each other. 18 U.S.C. § 1961(5) (2000). As elaborated by the Supreme Court, the

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non-violent persecutions become crimes against humanity only when accompanied by crimes of the murder type, a context that distinguishes persecution from "mere" oppression.[68]

In sum, if the "big idea" behind the crimes of the murder type is their cruelty and barbarity, the big idea behind crimes of the persecution type seems to be that severe non-violent indignities visited upon individuals offend against humanity when they form part of an attack on a group, recognizable as such because it includes crimes of the murder type.

5. *Crimes against humanity are inflicted on victims based on their membership in a population rather than their individual characteristics.* Unlike crimes of the persecution type, Article 6(c) of the Nuremberg Charter attaches no requirement that crimes of the murder type be committed with discriminatory intent—that is, on the basis of the victim's political, racial, or religious group—and neither does the subsequent formulation in the ICTY statute.[69] But this issue became a matter of controversy: in the *Tadic* judgment, the ICTY imposed a discriminatory intent requirement for all crimes against humanity notwithstanding the contrary language in the Statute, only to be reversed by the Appeals Chamber.[70] The corresponding definition in the ICTR Statute *does* require discriminatory intent for crimes of both the

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crime of RICO consists of multiple individual crimes woven into a pattern characterized by continuity and relatedness. H. J. Inc. v. Northwestern Bell Tel., 492 U.S. 229, 250 (1989).

68. Unfortunately, Article 7(1)(h) of the Rome Statute muddles this idea. Its phrase "persecution . . . in connection with any act referred to in this paragraph" (i.e., persecution in connection with any crime against humanity) should properly read "persecution in connection with any act referred to *in other subsections of* this paragraph" (i.e., persecution in connection with any murder-type crime against humanity) in order to avoid a problem of self-reference. *See* Rome Statute, *supra* note 41, art. 7(1)(h). As commentators have noted, the current phrasing criminalizes not merely acts of persecution connected with murder-type acts, but also acts of persecution "in connection with . . . any act of persecution." Machtheld Boot & Christopher K. Hall, *Persecution, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 146, 151 (Otto Triffterer ed., 1999) [hereinafter TRIFFTERER COMMENTARY]. But criminalizing acts of persecution committed in connection with acts of persecution comes close to nonsense. Every act is committed in connection with itself, so the clause as written fails to delimit the class of persecutions in any way. Furthermore, the clause abandons the point of the rule of thumb, which is to criminalize persecutions only when they occur within a pattern of violent attacks.

In proposing that attacks, persecutions, and crimes of apartheid must include crimes of the murder type—and proposing to read the Rome Statute this way—I am rejecting the assertion in the *Akayesu* judgment of ICTR Trial Chamber I that "[a]n attack may also be non violent in nature, like imposing a system of apartheid . . . or exerting pressure on the population to act in a particular manner . . . ." Prosecutor v. Akayesu, Case No. ICTR-96-4-T, para. 581 (Trial Chamber I, Int'l Crim. Trib. for Rwanda, Sept. 2, 1998), http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm. It strikes me as naive to suppose that a system of apartheid could be established nonviolently; and "pressure on the population to act in a particular manner" is far too vague, and encompasses far too much, to constitute a crime against humanity. Under this definition, a system of laws prohibiting the use of foreign languages in official documents and traffic signs, if designed to force immigrant groups to learn the native language of a country, could constitute crimes against humanity of the persecution type. Regardless of what one thinks of the wisdom of such language laws, labeling them crimes against humanity is absurd.

69. Nuremberg Charter, *supra* note 5, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288; ICTY Statute, *supra* note 37, art. 5.

70. Prosecutor v. Tadic, Case No. IT-94-1-T, paras. 644, 652 (Trial Chamber II, Int'l Crim. Trib. for the Former Yugoslavia, May 7, 1997), http://www.un.org./icty/tadic/trialc2/judgement/tad-tsj70507JT2-e.pdf; Prosecutor v. Tadic, Case No. IT-94-1-T, paras. 281-305 (Appeals Chamber, Int'l Crim. Trib. for the Former Yugoslavia, July 15, 1999), http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf. *See* Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L L. 307, 311, 327-28 (2000).

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murder and persecution types.[71] However, the Rome Statute contains no such requirement, and consequently ICC prosecutors will not have to prove discriminatory intent to secure convictions for crimes against humanity of the murder type.

Nevertheless, even though Article 6(c) imposes no discriminatory intent requirement on crimes of the murder type, it does require that they be committed against a "civilian population," a requirement that the ICTY, ICTR, and Rome Statutes all retain.[72] For short, I will call this the "population requirement." It contains two important ideas. First, if we emphasize the word "civilian" in "civilian population," the requirement serves to distinguish crimes against humanity from military battles against soldiers, which might otherwise formally qualify as crimes against humanity.[73] Second, and more importantly for the present argument, if we emphasize the word "population," the requirement distinguishes crimes directed *against a population* from crimes directed *against individual victims*.[74] That contrast implicitly means that those who launch crimes against humanity are targeting individuals on a non-individualized or collective basis.[75]

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71. ICTR Statute, *supra* note 40, art. 3. France, in the *Touvier* decision, and Canada, in *Finta*, likewise read a discriminatory intent requirement into the definition of crimes against humanity. Prosecutor v. Touvier, CA Paris, 1e ch., Apr. 13, 1992, Gaz. Pal. 1992, I, 387, *translated and reprinted in* 100 INT'L L. REP. 338, 341 (1995) (holding that an individual "cannot be held to have committed a crime against humanity unless it is also established that he had a specific motivation to take part in the execution of a common plan by committing in a systematic manner inhuman acts or persecutions in the name of a State practicing a policy of ideological supremacy"); Regina v. Finta, [1994] 1 S.C.R. 701, 814 (holding that "[w]hat distinguishes a crime against humanity from any other criminal offence under the Canadian *Criminal Code* is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race"). But neither of these decisions represents the main line of thought about crimes against humanity, nor should they. Leila Sadat Wexler describes *Touvier* as a "blatant attempt[] to exonerate, in advance, the Vichy government from wrong," and notes that French commentators suspect that the decision also may have aimed to release French officials from potential liability for atrocities in Algeria. Leila Sadat Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 355 (1994). No such suspicion clouds the *Finta* decision, but the Court has, in my view, misread the plain language of the Canadian statute. The statute defines a crime against humanity as one of the specific enumerated acts "committed against any civilian population or any identifiable group of persons." Canadian Crim. Code, § 7(3.76), quoted in *Finta*, 1 S.C.R. at 802. The Court bases its discriminatory intent requirement exclusively on the "identifiable group of persons" clause and in effect reads the "any civilian population" clause out of the statute. Of course, it is the latter clause, not the former, that appears in the principal international instruments defining crimes against humanity. *Finta*, 1 S.C.R. at 814.

72. ICTY Statute, *supra* note 37, art. 5; ICTR Statute, *supra* note 40, art. 3; Rome Statute, *supra* note 41, art. 7.

73. *See* Chesterman, *supra* note 70, at 322-26. In conversation, Paul Kahn has argued that the military/civilian distinction may no longer make sense, because in an age when enemy soldiers are as helpless as civilians to protect themselves against American air power, and pose no greater risk than civilians, blowing up a battalion of enemy soldiers seems morally indistinguishable from exterminating an equivalent population of civilians. *See generally* Paul W. Kahn, *The Paradox of Riskless Warfare*, *in* WAR AFTER SEPTEMBER 11, at 37 (Verna V. Gehring ed., 2002). I do not address this provocative argument here. However, it is worth noting that the jurisprudence of crimes against humanity counts resistance fighters and even soldiers as civilians when they are *hors de combat*. *See, e.g.*, Fédération Nationale v. Barbie, Cass. Crim. Paris, Dec. 20, 1985, J.C.P. 1986, II, 20655, *translated and reprinted in* 78 INT'L L. REP. 136, 140; *Kupreskic*, *supra* note 66, para. 547.

74. *See Justice* case, *supra* note 35, at 40.

75. This holds true even if individual perpetrators of the crimes select some of their victims for more individualized reasons. For example, if a militiaman participating in an attack chooses his rape

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Let me emphasize that the population requirement does not build discriminatory intent into the definition of crimes of the murder type. After all, an organization can target a civilian population for reasons having nothing to do with group-based animus—for example, because targeting the population is the simplest way to eradicate the resistance fighters living within it, or because the population occupies strategically or economically important territory that the oppressor wishes to seize. The perpetrators in such circumstances have no discriminatory intent: if the civilian population lived elsewhere, or if there were no resistance fighters, its members would not become victims of crimes against humanity. In the language of the Genocide Convention and the Rome Statute, the perpetrators in these examples are not targeting the group "as such."[76] Or rather, although they may in fact be targeting the group as such, this is not a requirement for the crimes committed in the attack to count as crimes against humanity.

In another sense, however, crimes against humanity share one morally disturbing telltale feature with genocide and other forms of group-based discrimination: the victims become victims for reasons having nothing to do with their individual characteristics. As in the crime of genocide, the victims are, in Samantha Power's telling words, "getting attacked for being (rather than for doing)."[77] In this latter sense, the population requirement in the definition of crimes of the murder type functions in parallel to the discriminatory intent requirement in the definition of crimes of the persecution type. Both requirements imply that at bottom crimes against humanity are launched against individuals because they belong to a targeted group. The difference between the two requirements is that the discriminatory intent requirement for persecutions and genocide limits itself to specific categories of groups (political, religious, racial, etc.), whereas a "population" can be any identifiable group.

At first glance it may seem that drawing the distinction this way makes sense. Exterminations, enslavements, and other murder-type crimes are so intrinsically atrocious that they will count as crimes against humanity whenever they are inflicted on a population, regardless of the nature of the population, whereas persecutions that are not so atrocious will be crimes against humanity only when they are inflicted on "suspect classes," that is,

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victims for their looks rather than at random, the rape is still a crime against humanity because the attack in which he is participating is aimed at a population rather than individuals within it. Thus, I do not mean to suggest a motive requirement, such that a perpetrator must be shown to attack a victim because of group membership rather than individual enmity. The Rome Statute imposes no such mens rea requirement. Rome Statute, *supra* note 41, art. 7(1). But the attack itself is launched against a population, not against individual victims—and, in any case, evidence about motive may well prove relevant in determining whether the crime was part of the attack rather than a crime of opportunity merely taking advantage of the lawless chaos produced by the attack. The latter is not a crime against humanity. Recall that "crimes against humanity . . . must be strictly construed to exclude isolated cases of atrocities or persecutions." *Justice* case, *supra* note 35, at 47. In drafting the Rome Statute, "the concern had been to exclude isolated and random acts, and ordinary crimes under national law, from the ambit of crimes against humanity." Rodney Dixon, *Article 7: Introduction/General Remarks*, *in* TRIFFTERER COMMENTARY, *supra* note 69, at 123.

76. Genocide Convention, *supra* note 44; Rome Statute, *supra* note 41, art. 6.

77. POWER, *supra* note 44, at 36.

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groups whose commonalities have historically formed the basis for targeting by outsiders.[78]

I wish to reject this line of thought, however, and argue that severe persecutions of *any* population, not just racial, religious, ethnic, and political groups, should be treated as crimes against humanity. In other words, just as crimes of the murder type are forbidden regardless of the specific nature of the victim population, crimes of the persecution type should be as well. Why should international criminal law give persecutors a free pass merely because the group they persecute consists of gays or intellectuals, rather than Jews or Tutsis? One familiar answer is that discrimination among groups is inevitable in any legal system because laws always classify people and fall with differential force on different groups. Only when the type of group suffering discrimination is a "suspect class"—American constitutional law's term for a class that has historically been a target of bigotry—can we be confident that the discrimination is invidious enough to be criminalized.[79]

This reply fails, however, once we recall that discriminatory practices count as persecution-type crimes against humanity only when they form part of an attack on a group, accompanied by crimes of the murder type. All such attacks are invidious, and no discrimination in the course of such an attack can be rationalized away as the mere accidental by-product of an otherwise defensible legal classification. It follows that severe group-based persecutions in the course of a violent attack on the group—think, for example, of suppression of the group's native language or confiscation of group members' property—should count as crimes against humanity regardless of the nature of the group. The drafters of the Nuremberg, ICTY, and ICTR Statutes apparently missed this point. The drafters of the Rome Statute came closer because they expanded the list of "suspect classes" to include any group whose persecution is "universally recognized as impermissible under international law." The breadth of the latter category remains unclear. I am arguing that it should include any group at all—"any civilian population"—if

78. Ratner and Abrams reflect this line of thought: "The bifurcation makes sense as an effort to derive notions of humanity. Certain acts are so heinous and destructive of a person's humanity that they *per se* are crimes. Others are crimes because the assault on the victim is based on political, racial, or religious grounds and thereby attacks humanity through some of the most basic groups into which it is organized." RATNER & ABRAMS, *supra* note 43, at 62-63. The "bifurcation" of which they speak is a bifurcation between murder-type crimes, for which there is no discriminatory intent requirement, and persecution-type crimes, for which there is. I am suggesting that the population requirement itself functions as a kind of discriminatory intent requirement, because it requires attacks on a population rather than on individuals. But a bifurcation remains—between the broad population requirement for murder-type crimes and the narrower discriminatory intent requirement for persecution-type crimes—which singles out specific categories of groups rather than criminalizing attacks against any "civilian population." Unlike Ratner and Abrams, I deny that the bifurcation makes sense as an effort to derive notions of humanity.

79. On the notion of a suspect classification in American constitutional law, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1465-521 (2d ed. 1988). I do not mean to suggest that the "suspect classes" recognized by the law of crimes against humanity coincide with the suspect classes in American constitutional law. I mean only that the root idea is the same: certain groups have so persistently been the objects of bigotry that any measures which selectively damage these groups must be supposed to arise from bigotry rather than the pursuit of legitimate governmental ends.

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the group is suffering an attack that includes crimes against humanity of the murder type.[80]

To sum up, statutes defining crimes against humanity include the population requirement as an element of crimes of the murder type, and the discriminatory intent requirement as an element of crimes of the persecution type. Both of these specify, in effect, that a misdeed counts as a crime against humanity only when it forms part of an attack on a group or population, disregarding the individuality of group members. Until the Rome Statute, the two requirements differed in that the discriminatory intent requirement limited itself to national, ethnic, racial, religious, and political groups, while the population requirement included any group. The Rome Statute expands the categories of persecuted groups to include all groups whose unequal treatment in the course of a violent attack contravenes international law—and, if I am right, this development should bring the discriminatory intent requirement for persecution into parity with the population requirement.

One final question is how large a group must be to constitute a population. Does the population requirement mean that the crimes are committed on a large "population-size" scale—in other words, that to qualify as crimes against humanity, they must be not just atrocities but *mass* atrocities?[81] To support this reading of the population requirement, it might be argued that nothing less than mass horror justifies internationalizing the crimes and making them matters of worldwide rather than domestic concern.

However, such reasoning ignores the main animating idea behind outlawing crimes against humanity, namely the interest of humankind in preventing and penalizing the horrors that governments inflict on their own people. To assert that only large-scale horrors warrant international interest reverts to the very fetishism of state sovereignty that the Nuremberg Charter rightly rejected. The assertion implies that small-scale, government-inflicted atrocities remain the business of national sovereigns—that a government whose agents, attacking a small community as a matter of deliberate policy, forcibly impregnate only one woman, or compel only one father to witness the torture of his child, retains its right to be left alone. These are profoundly cynical conclusions, and it will do no credit to the Rome Statute if the ICC accedes to them by interpreting the requirement of multiple acts to mean many acts.[82] Fortunately, "multiple" might be read to mean as few as two, in which case the damage the multiple act requirement inflicts need not be severe. Indeed, reading "multiple" to mean "two or more" in the Rome Statute's

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80. Rome Statute, *supra* note 41, art. 7(1)(h). The drafters of the Rome Statute had in mind groups persecuted on the basis of "social, economic and mental or physical disability grounds." *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Case, at 26 n.15, U.N. Doc. A/CONF.183/2/Add.1 (1998).

81. *See, e.g.*, Prosecutor v. Blaskic, Case No. IT-95-14-T, para. 205 (Trial Chamber I, Int'l Crim. Trib. for the Former Yugoslavia, Mar. 3, 2000), http://www.un.org/itcy/blaskic/trialc1/judgement/bla-tj00303e.pdf (stating that to count as "systematic" an attack must contain crimes committed on a very large scale).

82. Rome Statute, *supra* note 41, art. 7(2)(a) (interpreting the population requirement to require "the multiple commission of acts").

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formulation has the virtue of making clear that even small-scale atrocities and persecutions can be crimes against humanity.

Furthermore, the Rome Statute, like the ICTR statute, stipulates that the attack on civilian populations must be "widespread *or* systematic."[83] The word "or" signals that systematic attacks can be crimes against humanity whether or not they are widespread.[84] Any body-count requirement threatens to debase the idea of international human rights and draw us into what I once called "charnel house casuistry"—legalistic arguments about how many victims it takes to make a "population."[85] No doubt political prudence will make outsiders reluctant to intervene against any but large-scale atrocities. But the question of whether crimes against humanity call for a humanitarian military intervention to halt them is both conceptually and practically different from the question of whether to charge someone with crimes against humanity and try him.[86] To decline to prosecute a perpetrator because his attack on a civilian population had "only" a few victims diminishes the value of the victims.

It is time to summarize this discussion of the five distinguishing characteristics of crimes against humanity. Crimes against humanity are international crimes committed by politically organized groups acting under color of policy, consisting of the most severe and abominable acts of violence and persecution, and inflicted on victims because of their membership in a population or group rather than their individual characteristics. Is there a core intuition that this body of "common law" expresses? It seems clear that the answer is yes. The *leitmotif* binding together all the legal features is that of politics gone horribly wrong. The crimes are committed by organized political groups against other groups, typically within the same society. Rivalry and antagonism is normal among groups in virtually every society, but crimes against humanity occur when normal rivalry and antagonism "go supernova"

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83. *Id.* art. 7(1) (emphasis added).

84. Systematicity refers to the element of coordinated planning, which in my view can exist even if the attack succeeds in harming only one person (perhaps because the assailants are swiftly repelled by defenders). Here I disagree with Ambos and Wirth, who believe that to speak of an attack on a "population" "simply requires that a multiplicity of victims exists." Ambos & Wirth, *supra* note 33, at 21.

85. David Luban, *The Legacies of Nuremberg, in* LEGAL MODERNISM 335, 343-44 (1994). Simon Chesterman is likewise skeptical of what he calls "the gruesome calculus of establishing a minimum number of victims necessary to make an attack 'widespread.'" Chesterman, *supra* note 70, at 315. It should be noted that debates over "the numbers problem" have persisted for decades in discussions of the law of genocide because of its requirement of specific intent to destroy a civilian population "in whole or in part." How big must a "part" be? *See* POWER, *supra* note 44, at 65-66; SCHABAS, *supra* note 45, at 230-40. The U.S. Senate, in ratifying the Genocide Convention, included an understanding that "part" means "substantial part," and the implementing legislation defines "substantial part" as "a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part." 18 U.S.C. § 1091(a), § 1093(8) (2000). In my view, debates over "the numbers problem" for the crime of genocide make a certain amount of sense given the definition of genocide, because the character of the crime as an assault on a group "as such" inevitably invites the question of how large a part of the group must be the target of destructive intention for the intention to count as aiming at the group. My point about "charnel house casuistry" is that parallel questions about crimes against humanity are wrongheaded and even grotesque.

86. For a discussion of the moral requirements for humanitarian military intervention, see Luban, *supra* note 60, at 88-90.

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and explode into violence and extraordinary persecution. Their character as international crimes reflects the idea that sovereignty—the talisman states invoke to shield their own political processes from interference by others—should no longer be permitted to protect politics that have become so dreadful. Thus, all five characteristics of crimes against humanity reflect the same basic idea, namely that political infernos generate a distinctive evil that the law must condemn. The next task is to put this analysis to work answering the questions raised in Part I, namely how these deeds violate humanness, and why they offend against all humankind.

III. CRIMES AGAINST HUMANNESS AND THE POLITICAL ANIMAL

A. *Aspects of Humanity*

Crimes against humanity cut deep; they are the worst thing that human beings do to each other. Intuitively, they seem to violate humanness itself. The question is how.

What makes this question so pressing is that the very idea of "humanness itself," what Richard Rorty derisively calls "Man's Glassy Essence," seems deeply suspect.[87] The Judaeo-Christian notion of man created in God's image, like the metaphysical concept of an immaterial, immortal soul, is too parochial and too contestable to anchor our intuitions about what makes humans special and gives us special value—all the more so if these intuitions are supposed to be shared across confessions and cultures. Indeed, it seems likely that *any* metaphysical theory of humanness will prove far more debatable than the intuitions it is supposed to anchor. For that reason, it would be a mistake to seek an answer to our question through metaphysical investigation. Instead, we should seek the idea in the same set of intuitions that informs the law of crimes against humanity. That is, we should seek the image of humanness reflected in the law.

Recall the five defining features of crimes against humanity (presented in altered order for convenience in the subsequent discussion):

> (1) Crimes against humanity are inflicted on victims based on their group membership rather than their individual characteristics;
>
> (2) Crimes against humanity are crimes committed against fellow nationals as well as foreigners;
>
> (3) Crimes against humanity are international crimes, and their criminality overrides state sovereignty;

87. RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 42-43 (1980). Rorty explicitly connects his skepticism about philosophical anthropology with the subject of human rights in Richard Rorty, *Human Rights, Rationality, and Sentimentality*, *in* ON HUMAN RIGHTS 111, 114-19 (Stephen Shute & Susan Hurley eds., 1993).

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(4) Crimes against humanity are committed by politically organized groups acting under color of policy;

(5) Crimes against humanity include only the most severe and abominable acts of violence and persecution.

What image of humanness do these five features capture? I shall argue that the specific fact about human beings most central to the law of crimes against humanity is our character as *political animals*. To forestall misunderstanding: although the phrase is classical, the explication that I shall offer is not.

To describe humans as political animals does not imply yet another picture of Man's Glassy Essence competing with the metaphysical theories of soul-substance, creation in God's image, or other familiar attempts to nail down what it is that differentiates us from the rest of nature. We ought to be skeptical of claims that any one feature can be identified as the essential quality that makes us special. Many things can lay claim to being central aspects of the human condition, in the sense that to imagine human life without them is to imagine something alien and in some cases repugnant. Philosophers over the centuries have focused attention on rationality, on language use, on our capacity to transform nature through artifice (*homo faber*), on autonomy and free will, on individuality, on awareness of our own finitude and mortality,[88] and even on such seemingly incidental features of humanity as playfulness[89] or our capacities to laugh and cry.[90] Nietzsche slyly inverted the classical philosophers' attempts to discover an immutable human essence when he wrote that man is the as-yet-undetermined animal,[91] and in so doing he provided an especially memorable determination of the human animal: an image of protean fluidity to add to the gallery of philosophical anthropologies. The dangers of this kind of speculation are obvious—pretentiousness, glibness, banality—but when they avoid these dangers, this multitude of philosophical musings on the human condition has plenty to teach us even if none can really stake a credible claim to defining the unique human essence (because there is no such thing). They shed light on aspects, not essences, of humanness.

In this respect, it seems possible to find crimes corresponding to various aspects of humanness, and in an important sense these would all be "crimes against humanity." If, for example, we focus on rationality as a defining feature of humanity, it would be a crime against humanity to kidnap people and deliberately subject them to brain surgery that destroys their reason. Opponents of human cloning sometimes envision a science-fiction dystopia of narcissists and megalomaniacs populating the world with hosts of their own

88. *See generally* MARTIN HEIDEGGER, BEING AND TIME (John Macquarrie & Edward Robinson trans., Harper & Row 1962) (1927).

89. *See generally* JOHAN HUIZINGA, HOMO LUDENS (The Beacon Press 1955) (1950).

90. *See generally* HELMUTH PLESSNER, LAUGHING AND CRYING (James Spencer Churchill & Marjorie Grene trans., Northwestern Univ. Press 1970) (1961).

91. FRIEDERICH NIETZSCHE, BEYOND GOOD AND EVIL § 62, at 74 (Walter Kaufmann trans., Vintage Books 1989) (1886).

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genetic replicas.[92] That would make human cloning a "crime against humanity" if we regard genotypic uniqueness as a defining aspect of humanity. Plainly, these are not the crimes against humanity defined in international legal instruments. The interpretation offered here is that the crimes defined by propositions (1) through (5) above violate aspects of humanness pertaining to our political nature.

B. *The Political Animal*

To declare that we are political animals is not meant as a metaphysical speculation. On the contrary, the observation that we are political animals is a wholly naturalistic one, anchored at bottom in common observation and common sense. It begins with the fact that we are just one kind of animal among many in the natural order. Some animals—tigers, bears, and butterflies, for example—lead an essentially solitary existence. They come together to mate, but they do not travel in packs or flocks, and outside the reproductive process they live alone. Others—the ants and the termites—are entirely social. Individual insects removed from the colony quickly die, and indeed they barely count as individuals, except in the arithmetic sense of being numerically distinct from one another. Human beings occupy a mid-point between these extremes.[93] We live in groups, but we are not social

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92. *See, e.g.*, George J. Annas et al., *Protecting the Endangered Human: Toward an International Treaty Prohibiting Cloning and Inheritable Alterations*, 28 AM. J. L. & MED. 151, 153-54 (2002). *See also The Science and Ethics of Human Cloning: Hearing Before the Subcomm. on Sci., Technology and Space of the Sen. Comm. on Commerce, Sci., and Transp.*, 108th Cong. (2003), http://commerce.senate.gov/pdf/kass012903.pdf (statement of Leon Kass, Chairman of the President's Comm. on Bioethics, describing cloning to produce people as a threat to personal identity); Leon Kass, *The Meaning of Life – In the Laboratory*, PUB. INT., Winter 2002, at 38 (likening human cloning to the "Brave New World," from ALDOUS HUXLEY, BRAVE NEW WORLD (Harper & Row 1969) (1946)); Rick Weiss, *Free To Be Me: Would-Be Cloners Pushing the Debate*, WASH. POST, May 12, 2002, at A1 (describing cloning as "the chance to propel one's genetic self into the future undiluted by another").

93. The variety of animal social behavior is enormous, and the evolution of social behavior in animals is a vast and fascinating subject explored by sociobiology. *See generally* EDWARD O. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS (1975). Patterns range from solitary life through herd or pack behavior to "parasociality" (several families cooperating) and fully colonial or "eusocial" behavior. Eusociality "means that two or more generations overlap in the society, adults take care of the young, and, most importantly, adults are divided into reproductive and nonreproductive castes, in other words queens and kings versus workers." BERT HÖLLDOBLER & EDWARD O. WILSON, THE ANTS 1 (1990). Although eusocial behavior occurs only in termites, ants, and some bees and wasps, these turn out to be the dominant insects on the planet, in the sense that they compose three-fourths of the total insect biomass. *Id.* A colony of eusocial insects consists of a single vast family: the myriad individuals in each caste come from the eggs of a single queen or a small group of related queens. In this sense, the sociality of insects is very different from the sociality of, for example, a monkey colony or a herd of sheep, which will include multiple families. However, one evolutionary route to eusociality among wasps begins with several females from the same generation cooperating in a single colony, with one female eventually dominating the others and becoming a de facto queen. *Id.* at 27. This pattern of parasociality helps to verify the idea that animals can be ranged on a continuum from true solitaries (which include certain kinds of wasps), through parasociality, to full sociality. On the evolution of eusociality, see *id.* at 27-30, 184-85. The fundamental mechanism for the evolution of social behavior seems to be kin selection: propagating one's genes by advancing the interests of relatives as well as of one's self and one's offspring. *Id.* at 180. On the evidence for and against kin selection as the driving mechanism for the evolution of eusocial insects, with a cautious endorsement of the theory, see *id.* at 184-96.

Obviously, the naturalistic outlook adopted in this Article assumes that human sociality is an evolved trait that will be explained by the same kind of naturalistic arguments that are used in animal

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animals in the selfless way that ants are social.[94] Although communitarian theorists often insist that groups constitute our individual identity, their claim is grossly misleading if we take it literally. As a metaphysical thesis, it implies the absurd consequence that two people involved in identical social relationships are literally the same person; and as a natural observation, it erroneously lumps us together with the bees and termites, wholly lacking in individuality.[95] But, unlike the bees and termites, human beings *are* individuals, and each of us recognizes himself or herself as an individual. This fact—call it self-awareness—lies at the basis of what the Universal Declaration of Human Rights calls "the inherent dignity" of each human being.[96]

For us—self-aware individuals with interests of our own, who nevertheless have a natural need to live in groups—sociability has an ambiguous character. It is always at once a necessity and a threat.[97] Kant speaks of mankind's "unsociable sociability," the "propensity to enter into society, bound together with a mutual opposition which constantly threatens to break up the society."[98] "Unsociable sociability" seems like a happy phrase

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sociobiology. But great caution is in order. In recent years, many legal scholars have fallen in love with human sociobiology as a way of explaining moral and social phenomena without appealing to moral laws or political choices. It is important, however, not to oversell the explanatory power of human sociobiology. For important cautions on this issue, see generally PHILIP KITCHER, VAULTING AMBITION: SOCIOBIOLOGY AND THE QUEST FOR HUMAN NATURE (1985); Alan Gibbard, *Sociobiology*, *in* A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 597 (Robert E. Goodin & Philip Pettit eds., 1993). My own naturalism in this section is not meant to imply a grand reductionism of complex human aspirations to aspects of inclusive fitness (that is, fitness that includes kin selection). Neither is it meant to endorse dubious analogies between animal and human behavior designed to show that unappealing human traits are hard-wired into us and therefore beyond our power to change or control.

94. In this respect, the view offered here quibbles with Kant. In his *Anthropology*, Kant writes, "Man was not meant to belong to a herd like the domesticated animals, but rather, like the bee, to belong to a hive community. It is necessary for him always to be a member of some civil society." IMMANUEL KANT, ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW 247 (Victor Lyle Dowdell trans., S. Ill. Univ. Press 1978) (1798). Like Kant, I mean to emphasize that the natural condition of humanity is social living, but Kant's hive metaphor is not a happy one because it carries misleading overtones of natural hierarchies and caste divisions that are actually antithetical to Kant's fundamental egalitarianism and cosmopolitanism. If an animal metaphor is really called for, the herd seems far better than the hive.

95. For an elaboration of this critique of communitarianism's theory of the self, see David Luban, *The Self: Metaphysical Not Political*, 1 LEGAL THEORY 401 (1995).

96. *Universal Declaration of Human Rights*, G.A. Res. 217A, pmbl., U.N. Doc. A/810 (Dec. 10, 1948), http://www.un.org/Overview/rights.html.

97. One might say that communitarians notice only the necessity of social living, whereas contractarians (who model society on contractual agreements among self-interested individuals who can identify their own interests exogenously to the life of the group) notice only the threat. Fans of critical legal studies will note some similarity between my remarks here and the notion of a "fundamental contradiction" in human nature between individuality and sociability. *See* Duncan Kennedy, *The Structure of Blackstone's* Commentaries, 28 BUFF. L. REV. 205, 211-13 (1979). Roberto Unger calls attention to "the problem of solidarity," namely that "[w]e present to one another both an unlimited need and an unlimited danger, and the very resources by which we attempt to satisfy the former aggravate the latter." ROBERTO MANGABEIRA UNGER, PASSION: AN ESSAY ON PERSONALITY 20 (1984). More poetically, Unger observes that "people . . . live in mutual longing and jeopardy." *Id.* at 95.

98. Immanuel Kant, *Idea for a Universal History from a Cosmopolitan Point of View* (1784), *reprinted in* ON HISTORY 15 (Lewis White Beck ed. & trans., 1963). The phrase "unsociable sociability" translates Kant's "*ungesellige Geselligkeit*." Kant elaborates the idea behind this phrase in one of his least read works, the *Anthropology*, in a section entitled "Basic Features Concerning the Description of the Human Species' Character." KANT, *supra* note 94, at 247-51. "The character of the species, as is well known from the experience of all times and all nations, is as follows . . . . [Human beings] cannot

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to describe why we are not so much *social* animals as *political* animals. For politics is the art of organizing society so that the "mutual opposition which constantly threatens to break up the society" does not turn our "propensity to enter into society" into a suicide pact. Politics is as much about individual self-assertion against groups as it is about group solidarity. Only individuals with unsociable natures *need* to be bound by political rather than natural bonds, but only individuals whose nature is sociable *can* be bound by political bonds. Human beings are both, and as I use it, the phrase "political animal" is nothing more than convenient shorthand for recognizing this double nature of ours. To call us political animals underlines a fundamental fact of life: we need to live in groups, but groups pose a perpetual threat to our individuality and individual interests. Hence, human existence involves a perpetual negotiation over the terms of our own belonging to society—a belonging that we need and dread. Social life, like individuality, comes naturally to human beings; but there is nothing natural about the specific terms of social life, and calling us "political animals" signifies the necessity of *some* form of artificial coercive organization together with the contingency and variability among particular forms.[99]

It is possible to couch this description of humankind in game-theoretic or rational-choice terms, which some readers may find more perspicuous. As students of simple, paradigmatic games—such as the prisoner's dilemma, the chicken game, or the assurance game—have long understood, individual rationality may conflict with collective rationality. In the prisoner's dilemma, for example, defection is the individually rational strategy, whereas mutual cooperation is the collectively rational strategy—a fact that all players can, in principle, recognize, even though they recognize as well that their rationality dooms them to mutual defection. The basic problem of social living is, in these terms, figuring out some way that rational individuals can be gotten to do what is collectively rational. The simplest mechanism seems to be an external enforcer who alters the payoffs by making defection a worse option than cooperation. In the schematic world of game theory, the enforcer represents the political system or state, and the tension between individual and

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be without peaceful coexistence, and yet they cannot avoid continuous disagreement with one another." *Id.* at 249.

99. Kant concludes the *Anthropology* by observing that we strive "to advance constantly from the evil to the good," and thus that "our intention in general is good, but achievement is difficult because we cannot expect to reach our goal by the free consent of individuals, but only through progressive organization of the citizens of the earth . . . ." KANT, *supra* note 94, at 251. That is why politics is necessary. The argument that "political animal" and "social animal" are not at all synonymous comes from HANNAH ARENDT, THE HUMAN CONDITION 22-28 (1958).

Although I emphasize the Kantian notion of "unsociable sociability," J. B. Schneewind finds the same idea in the work of the founder of international law, Hugo Grotius. Schneewind describes "the Grotian problematic" in terms very much like Kant's: "We are self-preserving and quarrelsome beings; but we are also sociable. These two aspects of human nature make the problem of maintaining the social order quite definite: how are quarrelsome but socially minded beings like ourselves to live together?" J. B. SCHNEEWIND, THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY 72 (1998). The phrase "Grotian problematic" appears in *id.* at 70, and Schneewind later points out the echo of the Grotian problematic in Kant's writings, *id.* at 519-20.

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collective rationality represents "unsociable sociability," the feature of our existence that makes us political animals as well as social animals.[100]

C. *"Unsociable Sociability" Versus Group Diversity; Crimes Against Humanity Versus Genocide*

Earlier I presented an argument offered by Hannah Arendt: what makes crimes against humanity an offense against humanness is their assault on human diversity, the "characteristic of the 'human status' without which the very words 'mankind' or 'humanity' would be devoid of meaning."[101] More recently, Michael Ignatieff has echoed and expanded Arendt's argument:

> What it means to be a human being, what defines the very identity we share as a species, is the fact that we are differentiated by race, religion, ethnicity, and individual difference. These differentiations define our identities both as individuals and as a species. No other species differentiates itself in this individualized abundance. A sense of otherness, of distinctness, is the very basis of our consciousness of our individuality, and this consciousness, based in difference, is a constitutive element of what it is to be a human being. To attack any of these differences—to round up women because they are women, Jews because they are Jews, whites because they are whites, blacks because they are blacks, gays because they are gay—is to attack the shared element that makes us what we are as a species.[102]

We are now in a position to see what is right in this argument and what is not. What is right is that group diversity accounts for half of the double nature of humanness represented in the conception of us as political animals. A crucial fact about human groups is their plurality—the fact that we are born into famil*ies*, communit*ies*, ethnicit*ies*, religious confession*s*, societ*ies*—and their inherent diversity—the fact that human groups vary widely in their form and content. Diversity does not logically follow from plurality: beehives of a single species of bees are plural—there are thousands of them—but they are all more or less interchangeable.[103] For that matter, individual diversity does not follow from plurality either. One could imagine a race of clones who all possess individual self-awareness but display no other meaningful differences. However, the diversity of human beings as well as human groups is a natural fact.

What is also right is that individual diversity—or, more simply, individuality—composes the other half of the political animal's double nature. Lastly, what is right is that individual diversity lies at the root of group diversity. The fact that human groups vary widely in their form and content,

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100. It may be objected that a state is not invariably necessary to solve the problem posed by individual rationality. The classic defense of this anarchist view in game theory can be found in MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION (1987). Taylor demonstrates the possibility of uncoerced cooperation under certain conditions. But in my view, the conditions Taylor discovered—roughly, that a sufficiently large number of people are conditional cooperators, who will cooperate if they know that enough other people are also conditional cooperators—are so unrealistic because of the level of mutual transparency and knowledge they require that his argument for the possibility of cooperation is equally an argument for its improbability.

101. ARENDT, *supra* note 8, at 268-69.

102. Michael Ignatieff, *Lemkin's Word*, THE NEW REPUBLIC, Feb. 26, 2001, at 27-28.

103. Vernon notes the important distinction between plurality and diversity. Vernon, *supra* note 3, at 241.

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their languages and customs and religions, derives from the differences among individual human beings, who leave their personal imprints on groups to which they belong even as they imperfectly transmit the imprints left by their ancestors.

What is wrong in Ignatieff's argument is the thought that individual diversity (individuality) can be meaningfully lumped together with group diversity into a single category of diversity, and hence that diversity alone is "what it means to be a human being." We are indeed, in Ignatieff's words, "differentiated by race, religion, ethnicity, and individual difference,"[104] but individual difference belongs in a category distinct from the three group-based differentiations Ignatieff enumerates. Group diversity and individuality are very different; they are not simply two different forms of diversity. As individuals, we are not only differentiated *by* race, religion, and ethnicity; we are also differentiated *from* all other individuals, including those who share our race, religion, or ethnicity. Thus, when Ignatieff writes that "[t]hese differentiations define our identities . . . as individuals,"[105] he is mistaken if by "these differentiations" he means differentiations into racial, religious, or ethnic groups. Individual identity can never be reduced to the nexus of groups to which one belongs; indeed, our nature as political, rather than social, animals derives from the fact that our groups often pose an existential threat to individual identity. Alternatively, if Ignatieff means that individual differentiation defines our identity as individuals, his proposition becomes a tautology. Both Arendt and Ignatieff err when they use words like "diversity" and "differentiation" to define "the human status," because these words equivocate between the diversity of individuals and the diversity of groups.[106]

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104. Ignatieff, *supra* note 102

105. *Id.*

106. Their arguments reflect a more serious fallacy, namely treating "diversity" in the sense of "difference from other things" as a property of individuals, be they individual persons or individual groups, rather than a relation among individuals. This is the fallacy of inferring from the statement "They are a diverse couple" that "He is a diverse person, and she is a diverse person." Put this starkly, the error seems too elementary to miss: the word "diversity" in the premise refers to the differences between the members of the couple, whereas the conclusion fallaciously distributes "diversity" to each member. But the error can also occur more subtly. Arendt commits this fallacy when she writes: "Everything that exists among a plurality of things is not simply what it is, in its identity, but it is also different from others; *this being different belongs to its very nature.*" HANNAH ARENDT, THE LIFE OF THE MIND: THINKING 183 (1978) (emphasis added). To define "otherness from the rest of the world" as part of the "nature" of a thing confuses a merely formal fact—that every thing is identical to itself and not identical to things other than itself—with a claim about a thing's substantive properties. It is this metaphysical view, I fear, that underlies Arendt's identification of "human diversity" as "a characteristic of the human status." ARENDT, *supra* note 8, at 269. Ignatieff brushes against the same fallacy in the final sentence of the passage quoted above: "A sense of otherness, of distinctness, is the very basis of our consciousness of our individuality, and this consciousness, based in difference, is a constitutive element of what it is to be a human being." Ignatieff, *supra* note 102, at 28. A sense of distinctness—of *being this person, me*, and not someone else—is not the same as a sense of otherness—of *not being that person*, as though identity consists only in the negative property of "difference from others" rather than in positive attributes that make me who I am.

Richard Vernon offers a different criticism of Arendt's argument. He argues that when Arendt promises a defense of diversity, she really succeeds in delivering only a defense of plurality. Vernon points out that in Arendt's overall political theory, it is not the diversity of human groups that makes them valuable, but "the fact that they are self-constructed and serve important universal purposes." Vernon, *supra* note 3, at 241. I am not so sure. For Arendt, the fact of human individuality connects closely with creativity—the possibility of imagining the world different than it is and acting to bring that

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"Unsociable sociability"—sociality coupled with individuality—keeps the distinction straight by reminding us that the political animal has a double nature within which association and individuality cannot be reduced to each other. It seems clear that Arendt and Ignatieff focus on the value of group diversity because their topic is not crimes against humanity in general, but rather the specific crime of genocide.[107]

Why should this make a difference? I pointed out earlier that genocide targets groups "as such," that is, groups taken as collective entities. Arendt's and Ignatieff's arguments make sense as efforts to explain the special value of collective entities over and above the value of the individuals composing them. They mean to argue that killing off an entire human grouping harms all of humanity—humanity taken *collectively*, not severally—because the human species is characterized by an "individualized abundance"[108] of groups. As we saw earlier, diversity among groups is an aspect of humanity, and genocide is a crime against this aspect of humanity.

However, the trouble with regarding group diversity as the defining feature of humanity is that it ignores the value of individuals apart from the groups to which they belong. Arendt and Ignatieff obviously realize this, as evidenced by their interest in showing that diversity is central to the life of each of us as well as all of us. But, if I am right, the gap between individual and collective cannot be papered over. As I shall now argue, this double nature as individuals and group members is precisely what crimes against humanity assault, and precisely what makes them crimes against humanness. I verify this by showing how the political nature of human beings underlies the five defining features of crimes against humanity identified earlier in the Article.

IV. CRIMES AGAINST HUMANITY AS POLITICS GONE CANCEROUS

The point comes out most plainly when we consider the first item in our catalogue of legal features of crimes against humanity: crimes against humanity are inflicted on victims based on their membership in a population rather than their individual characteristics. The crimes therefore possess a double character: they simultaneously assault individuals and groups. More than that, crimes against humanity do not merely assault individuals. All crimes against persons do that. Crimes against humanity violate one of the political animal's two defining characteristics: individuality, respect for which

difference about. In Arendt's vocabulary, freedom arises from natality. Her defense of plurality connects very closely with the value she places on human creativity, that is, diversity. But Vernon is surely right that even if human groups were as alike as beehives or anthills, it would still be a crime against humanity for one hive to exterminate another.

107. Genocide is Ignatieff's explicit topic in the article from which I have quoted, and Arendt's topic is the Holocaust. Arendt uses the term "crime against humanity" to refer to genocide, which is perfectly natural in everyday usage, but in legal terms confuses two distinct crimes with different elements. ARENDT, *supra* note 8, at 268-69, 273.

108. Ignatieff, *supra* note 102, at 28.

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requires that even my enemies must attack me because of who I am, not merely because of what group I belong to.[109]

Similarly, by directing the attack against groups, crimes against humanity violate the second of the political animal's defining characteristics: the fact that to be human is to live in groups with other humans. Living in some group or another is a human inevitability, and attacking people because of their membership in a group violates humanity as much as attacking them because they breathe would. By attacking individuals on the basis of their group affiliation and targeting groups and populations through their individual members, crimes against humanity assault humanness as such, provided that we understand "humanness as such" in terms of the political animal.

Crimes against humanity are committed against groups or populations; they are also committed *by* groups—by states or state-like organizations. This is another important way in which crimes against humanity may be understood as violations of our nature as political animals. Crimes against humanity are not just horrible crimes; they are horrible *political* crimes, crimes of politics gone cancerous.[110] The legal category of "crimes against humanity" recognizes the special danger that governments, which are supposed to protect the people who live in their territory, will instead murder them, enslave them, and persecute them, transforming their homeland from a haven into a killing field.[111] As political animals, we have no alternative to living in groups; and groups have no alternative to residing in territories under someone or another's political control. For a state to attack individuals and their groups solely because the groups exist and the individuals belong to them transforms politics from the art of managing our unsociable sociability into a lethal threat. Criminal politics bears the precise relationship to healthy politics that cancer bears to healthy tissue.

This point, I think, captures the significance of the next three defining features of crimes against humanity as the law understands them: that the crimes are characteristically committed against fellow nationals, or others in territory under the perpetrators' control; that state sovereignty provides no shield from culpability; and that the crimes are committed by organized groups. To criminalize acts of a government toward groups in its own jurisdiction, and thus to pierce the veil of sovereignty through international criminal law, is tantamount to recognizing that the cancerous, autopolemic character of crimes against humanity represents a perversion of politics, and thus a perversion of the political animal.[112]

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109. Even the mugger attacks me for my wallet, not my skin color. The hate criminal attacks me for my skin color, and that makes him a proto-criminal against humanity. Put him in an organized political group attacking my race systematically, and he becomes the paradigm case of a criminal against humanity.

110. This idea receives important development in Vernon's work. Vernon, *supra* note 3, at 242, 244-45. What I call "politics gone cancerous" Vernon describes as "an abuse of state power involving a systematic inversion of the jurisdictional resources of the state." *Id.* at 242. The systematic inversion he refers to is that "powers that justify the state are, perversely, instrumentalized by it." *Id.* at 245.

111. In Vernon's words, "territoriality is transformed from a refuge to a trap." *Id.*

112. Understanding that crimes against humanity represent a perversion of politics may help us come to terms with their novelty. In the great multiethnic empires of the past—the Roman, Han, Ottoman, and Austro-Hungarian empires—the imperial power subjugated other peoples, but the aim was

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To describe autopolemic political violence as a perversion of politics is not uncontroversial; it represents a fundamentally liberal vision of politics. On one longstanding view of politics, violence, massacre, and persecution represent something close to the essence of politics, rather than a perversion of it. Machiavelli aimed to teach princes how *not* to be good and insisted that a prince is always better off being feared than loved.[113] The historical examples Machiavelli used to illustrate his argument, drawn from classical antiquity as well as from the Italy of his own day, consist almost entirely of shocking treacheries, strangulations, and massacres. In the same vein, Shakespeare's histories, together with *Julius Caesar* and *Macbeth*, dramatize the most typical move in politics: the seizure of power through vile murder. The Greek city-states were perpetually riven by *stasis* (civil war);[114] and even the Roman Republic, which hoped to pacify politics by forbidding active-duty military leaders from setting foot within the city, dissolved in a century of civil war and violence well before Caesar defied the ban and crossed the Rubicon.[115] Max Weber painted a less bloody but equally bleak picture of the absolute incompatibility of politics and morality in *Politics as a Vocation.*[116] The "problem of dirty hands"—the recognition that no one can expect to win and retain political power without getting their hands dirty—is a theme that has preoccupied many writers.[117] Carl Schmitt, whose views I examine in

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to rule them, not to persecute or exterminate them. Although the Romans and Ottomans were often harsh, and nearly always exploitative, they generally adopted policies of toleration toward their ethnic minorities; every school child knows that the Romans incorporated foreigners' deities into the Pantheon. One suspects that these imperial powers would have found the very idea of exterminating or expelling minority ethnic groups baffling. Why eliminate sources of your own wealth and power? (I do not mean to deny that under fanatical rulers exterminations and expulsions did sometimes happen.)

Matters were different in the age of imperialism, when African conquest combined imperial ambition with the poison of European racism. At that time, figures such as Belgium's King Leopold and the German General von Trotha, who committed the twentieth century's first genocide in German South West Africa, proved perfectly willing to combine conquest with extermination. *See, e.g.*, ADAM HOCHSCHILD, KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (1998) (describing Belgian colonialization of the Congo); MAMDANI, *supra* note 39, at 11-12 (describing von Trotha's as the first genocide of the twentieth century). But perhaps the true origin of crimes against humanity lies in another transformation. Tolerant as they may have been of diversity, the multiethnic imperial powers never appear to have entertained the contemporary idea that all groups are created equal. Barbarians were not equal to Romans, and *dhimmis* were not equal to Muslims. Imperial toleration was, oddly enough, a product of imperial condescension. Once the ideal of group equality took hold, however, diversity became a source of cultural and political threat rather than of wealth. Minorities were newly prepared to assert their own way of life, and that made them enemies of the regime. At that point, the idea of using the state to persecute minorities grew more compelling. Ignatieff perceptively notes that genocide represents a twisted form of utopianism—a vision of a world without enemies, without the threat posed by self-assertive groups whose manner of life differs from our own. Ignatieff, *supra* note 102, at 27. Just as imperial toleration could emerge from imperial condescension, crimes against humanity emerged as a kind of perverted by-product of group equality.

113. NICCOLÒ MACHIAVELLI, THE PRINCE 61, 65-68 (Harvey C. Mansfield, Jr. trans., Yale Univ. Press 1985) (1532).

114. *See* M. I. FINLEY, THE ANCIENT GREEKS: AN INTRODUCTION TO THEIR LIFE AND THOUGHT 42-43, 68-71 (1964). *See generally* the pages indexed under the word "*stasis.*"

115. Historian Michael Grant notes that "savage chaos and vendetta . . . signalized these last moribund years of the Republic." CICERO, SELECTED POLITICAL SPEECHES 216 (Michael Grant trans., Penguin Books 1973).

116. Max Weber, *Politics as a Vocation* (1919), *reprinted in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 117-28 (H. H. Gerth & C. Wright Mills eds. & trans., 1991).

117. For especially thought-provoking treatments, see STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 161-89 (1989); the papers collected in PUBLIC AND PRIVATE MORALITY (Stuart Hampshire

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greater detail later in this Article, argued that all authentic politics consists in mortal struggles between enemies.[118] All of this suggests that murderousness is not so much the occupational disease of princes as their occupation.

For liberals, the aim of government is advancing the interests of the governed rather than the power and glory of the rulers; the hallmark of liberalism lies in the protection of vital interests from encroachment by the state. Liberals are not so starry-eyed that they believe that politics is anything less than a bruising contact sport. Nevertheless, they draw the line at autopolemic violence. Theirs is a different vision of politics—a vision in which violence is counterposed to politics, rather than constituting it.[119] To the claim that their vision is unrealistic and utopian, liberals can respond with important examples, of which the United States is one of the clearest because of its two centuries of peaceful presidential succession unmarred by *coups d'états*.[120]

The vision of human beings as political animals that I have presented here—and which, I am arguing, undergirds the legal conception of crimes against humanity—is liberal in the sense I have just described. It focuses on the natural need of human beings to dwell in society, the threat that social living inevitably poses to individual well-being, and the necessity of political organization to cabin that threat. Healthy politics is politics that succeeds in containing the threat. Perverted politics, or politics gone cancerous, intensifies the threat and in that respect truly counts as a crime against the human status.

We have just seen that our character as political animals accounts for four of the five legal features of crimes against humanity. What about the fifth, the cruel and inhuman character of the particular offenses included in the legal definitions—the fact that the evils they inflict are the worst we can devise? On its face, this characteristic of crimes against humanity has the least to do with humans' character as political animals, and thus this characteristic seems to fit the theory I am proposing least well. It seems rather straightforward that these misdeeds get singled out not because they violate our nature as political animals, but because they violate basic moral decency. The underlying murder-type and persecution-type offenses inflict the maximum in suffering and humiliation that we can imagine. The special viciousness of these acts seems to signify bottomless hatred and enmity, coupled with a complete indifference toward the individual victim, who is humiliated and tormented for reasons having nothing to do with who she is, only with what group she belongs to. To combine maximum cruelty with maximum indifference pushes these offenses beyond the pale of civilized

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ed., 1978); and Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFF. 160 (1973).

118. SCHMITT, *supra* note 2, at 26-29. For further discussion, see *infra* Part V.

119. Arendt provides a clear statement of this vision. *See* HANNAH ARENDT, ON VIOLENCE (1970) (distinguishing between genuine political power, constituted by people working together, and violence, which Arendt regards as fundamentally apolitical).

120. Even the American Civil War was not a struggle over who would rule the country, and the losers were not tortured, banished, or executed as they would certainly have been in Machiavelli's times.

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behavior.[121] Labeling them "crimes against humanity" registers our moral revulsion, which has little apparent relationship with a political definition of "humanity."

Yet the connection between moral revulsion by great cruelty and the protection of our political nature exists even here, I believe. Great depravity by itself does not distinguish crimes against humanity from the cruelest deeds that municipal systems criminalize. Rather, what makes crimes against humanity distinctive lies in the fact that they are atrocities committed by governments and government-like organizations toward civilian groups under their jurisdiction and control. The drafters of laws on crimes against humanity intend not just that great cruelty be forbidden, but more specifically that *henceforth, whatever else political conflict encompasses, it must never again include the greatest cruelties in its repertoire.* Machiavelli was not wrong—politics is rough and ruthless, and nothing will ever change that fundamental fact of life. But never again must politics cross over from ruthlessness to the abominations that we call crimes against humanity. The distinctive significance of this category of crimes is political, not simply moral.

The preceding discussion has gone through the five characteristics of crimes against humanity, arguing that the humanness that crimes against humanity violates lies in our status as political animals. To sum up, crimes against humanity offend against that status in two ways: by perverting politics, and by assaulting the individuality and sociability of the victims in tandem. Identifying humanness with our capacity for politics is not, of course, the only way to understand humanness, nor is it the most edifying way. If I am right, however, it is the way that best captures whatever intuitions have framed the law governing crimes against humanity.

V. SCHMITT'S DEMONIZATION CRITIQUE: A RESPONSE

At this point, I wish to return to a topic I have mentioned previously but postponed for separate consideration: the danger that talk of crimes against humanity whose perpetrators are "enemies of humanity" threatens to demonize the perpetrators, to brand them as less than human, and hence to expel them from the circle of those who deserve human regard. The obvious paradox is that doing so undercuts the root idea of international human rights, namely that *everyone* deserves human regard. It is an indisputable fact that millions of ordinary human beings have committed crimes against humanity. If their deeds seem undeniably demonic, we must conclude that you do not have to be a demon to behave like a demon. As Mahmood Mamdani reminds us, the enthusiastic killers in the Rwandan genocide included priests, physicians, teachers, and even human rights activists.[122] The "demonization

121. My remarks here have been influenced by Avishai Margalit & Gabriel Motzkin, *The Uniqueness of the Holocaust*, 25 PHIL. & PUB. AFF. 65 (1996), as well as by AVISHAI MARGALIT, THE DECENT SOCIETY 89-112 (Naomi Goldblum trans., 1996).

122. MAMDANI, *supra* note 39, at 228. For an analysis of who committed the genocide and why, see *id.* at 202-33. According to Mamdani, the perpetrators included a large number of Hutu refugees from Burundi's Tutsi-led massacres of 1993, as well as the nearly one-seventh of Rwanda's Hutus displaced by the civil war. Both groups had a profound and understandable fear of what might

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critique" argues that, at its very core, the concept of crimes against humanity entails the falsehood that the perpetrators have made themselves less than human.

We may frame the point in a different way. I have argued that the aim of declaring crimes against humanity to be universal violations of law is ultimately to reformulate the very idea of politics to exclude these acts. In that sense, defining a category of "crimes against humanity" aims to transform the very meaning of human beings as political animals. Such utopianism should give us pause because utopianism creates the danger of doing whatever it takes to eliminate those who stand in its way—the enemies of humanity.[123] Carl Schmitt—that most disquieting of legal philosophers—argues forcefully that trying to impose moral limits on politics is a utopian project that will only make politics more cruel. Schmitt offers one of the clearest and most forceful versions of the demonization critique, and I wish to set out his argument and respond to it.[124] Responding to Schmitt is important not only because of the remarkable power of his ideas—which have undergone a renaissance in recent years despite the stigma of his Nazi allegiance—but also because of his intellectual influence (via Hans Morgenthau) on the foreign policy realists who for so long have dominated U.S. political decision-making.[125] The realists have always been skeptical of humanitarian projects in international affairs, including international criminal law, and their skepticism—when it is not simply cynical—probably arises from their instinctive mistrust of political utopianism.

Schmitt's "concept of the political" grows from two basic theses. First, and foremost, Schmitt insists that politics is about just one thing—the distinction between friend and enemy, and the basic life-and-death struggle between clashing groups.[126] Second, this life-and-death struggle is no mere metaphor: "[T]he friend, enemy, and combat concepts . . . refer to the real possibility of physical killing."[127] Schmitt does not mean that all political conflicts end in war, which he knows is patently untrue, but he *does* mean that "to the enemy concept belongs the ever present possibility of combat."[128] Real

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become of them under a Tutsi government, and, as Mamdani points out, "[b]y portraying opponents as potential perpetrators and ourselves as potential victims, war tends to demonize opponents and sanctify aggression as protective and defensive." *Id.* at 217. Obviously, this is no excuse for genocide, but it is worth pointing out that demonizing *génocidaires* may equally "sanctify aggression" against them. This is the argument I wish to consider in the present Part.

123. Indeed, Ignatieff argues perceptively that genocide itself represents a perverse form of utopianism, the quest for a world in which the Enemy—the Jews, the Tutsis, or whoever—no longer stands in the way of happiness and harmony. Ignatieff, *supra* note 102, at 27.

124. Another particularly biting version of the demonization critique may be found in Rorty, *Human Rights, Rationality, and Sentimentality*, *supra* note 87, at 113.

125. Koskenniemi has drawn attention to the historical progression from Schmitt to Morgenthau to contemporary realism. KOSKENNIEMI, *supra* note 2, at 436-40. Koskenniemi notes the undeniable appeal of the realists' anti-utopianism, especially given that "while there has never been as much talk about international law and morality as in the twentieth century, never have atrocities on such wide scale been committed in the name of political utopias." *Id.* at 424. He adds: "Under such circumstances, the choice between writing another 1,000 page textbook on humanitarian law and trying to deal with Schmitt's critiques of universal moralism should not be too difficult." *Id.*

126. SCHMITT, *supra* note 2, at 26-29.

127. *Id.* at 33.

128. *Id.* at 32.

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combat between real enemies, for mortal stakes, constitutes the deep meaning of politics for Schmitt.

Schmitt's critique of liberalism is, quite simply, that liberalism closes its eyes to the basic fact of politics—the ever-present and ultimately deadly combat between enemies. Liberals want to cabin struggle to the non-violent realms of economic competition and intellectual debate, but they deceive themselves if they think this is genuinely possible. Their enemies will force the issue, and a society that turns the other cheek will simply disappear.[129] Like it or not, politics and violence are mankind's destiny.[130]

Alternatively, liberals may join issue with their enemy and fight back, but then, like it or not, they have entered the political world of friend and enemy locked in combat, the very world that liberalism rejects. This sounds like a logical point—an argument that liberalism implies its opposite. But Schmitt's fundamental argument against liberalism is not logical analysis but prophetic warning that the liberal desire to eradicate friend-enemy death struggles from politics in the name of "humanity" will simply launch the most terrifying friend-enemy death struggle of them all—a war to end all wars in which the enemy is a "monster that must not only be defeated but also utterly destroyed."[131] Schmitt's conclusion is the famous slogan: "[W]hoever invokes humanity wants to cheat."[132] He explains:

> To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.[133]

That, in a nutshell, is the demonization critique. It seems astonishing that Schmitt wrote these words in the 1920s, before Great Britain terror-bombed residential neighborhoods in German cities and the U.S. fire-bombed Tokyo and nuked Hiroshima and Nagasaki, all in the name of defeating the enemies of humanity. The importance of his critique to the topic of crimes against humanity should be obvious: in Schmitt's eyes, the entire concept of humanity is a ruse that groups use in their struggle to master other groups.

At bottom, Schmitt offers a *moral* argument against liberal moralism. His theory of politics, which at first exposure seems like nothing more than typical fascist-era glorification of war, turns out to be just the opposite—a warning against the destructive potential of war launched for humanitarian reasons. In fact, Schmitt insists that nothing can justify war except a threat to one's own existence.[134] The parallel worry in the case of crimes against humanity seems clear: to label someone a criminal against humanity seems to justify any measures anyone might take to eliminate such an "inhuman" monster. The label substitutes for an argument, and outrage replaces the legal

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129. *Id.* at 51-53.
130. *Id.* at 76.
131. *Id.* at 36.
132. *Id.* at 54.
133. *Id.*
134. *Id.* at 49. He labels as "sinister and crazy" the kind of national-interest thinking that accepts wars launched on behalf of enhanced prosperity. *Id.* at 48.

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process—hence the conclusion that "whoever invokes humanity wants to cheat."[135]

But criminal prosecution is not war-fighting, and international criminal law is not a war against war. In the end, I do not believe that Schmitt's critique damages the conception of crimes against humanity offered here. On the contrary, the critique strengthens it. His warning about the dangers of dehumanizing others by labeling them enemies of humanity is important and, one hopes, unforgettable. It would apply, however, only if the project of international criminal law were the physical annihilation of criminals against humanity, which it plainly is not. If anything, the legal process offers greater protection to criminals against humanity than they have any reason to expect. That was precisely Robert Jackson's point in his opening speech at Nuremberg, when he stated: "Realistically, the Charter of this Tribunal, which gives them a hearing, is also the source of their only hope."[136]

Furthermore, Schmitt's insistence on the inevitability of violent friend-enemy groupings in human affairs should not and cannot carry over to a government treating the people it rules as the enemy. No doubt he had in mind the street battles between Communists and Nazis in Weimar Germany, which both sides regarded as a death struggle. But the step from street violence to the victorious Nazi government murdering its enemies in concentration camps marks the fatal moment when politics goes cancerous. The moment the Nazis took control of Germany, they assumed responsibility for the basic rights of even their enemies. The same was true when the Bolsheviks took control of Russia, notwithstanding Trotsky's sneers about "their morals and ours."[137] As Schmitt himself writes, "no program, no ideal, no norm, no expediency confers a right to dispose of the physical life of other human beings."[138] Attacks on civilian populations always emerge from programs and expediency, typically in the form of paranoid frenzy, historical fantasy, or simply cold-blooded calculation. The step from murdering Communists for their political commitments to murdering Jews on the basis of theories of race enmity is a short one. That is why the declaration that certain ways of treating enemies are unacceptably atrocious is not an evasion of the political, even in Schmitt's sense of the term. Political struggles will continue to be waged as long as human beings exist, but they can be waged without exterminating, enslaving, raping, or persecuting civilian populations. These are forms of politics gone cancerous—the body politic becoming its own enemy. These are the forms that criminal law aims to punish.

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135. *Id.* at 54.

136. 2 INT'L MILITARY TRIBUNAL, NUREMBERG, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER – 1 OCTOBER 1946, at 102 (1947).

137. LEON TROTSKY, THEIR MORALS AND OURS (Pioneer 1939).

138. SCHMITT, *supra* note 2, at 48. Apparently, when it came time to sign up with the Nazi Party, Schmitt quickly forgot his own warning.

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VI. CRIMES AGAINST HUMANKIND AND THE LOCUS OF JURISDICTION

When we read "crimes against humanity" to mean "crimes against humankind," we highlight that all humankind is a party in interest because all humankind has been offended by what the perpetrator has done. This suggests the jurisdictional conclusion that Arendt draws: "[I]nsofar as the crime was a crime against humanity, it needed an international tribunal to do justice to it."[139] As we saw earlier, the argument appeals to an analogy between domestic and international criminal law. Offenses against important community norms are domestic crimes tried by the state, the domestic community. In the same way, offenses against "the laws of humanity" are international crimes and as such, they must be tried by the international community. The analogy is straightforward. States are to the community of states as individual subjects are to their own state; international criminal laws are norms of the international community in the same way that domestic criminal laws are norms of the state that enacts them.[140]

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139. ARENDT, *supra* note 8, at 269.

140. As indicated earlier, Arendt borrows the domestic analogy argument from Telford Taylor, *supra* note 33 and accompanying text. But her principal inspiration, she explains, was the philosopher Karl Jaspers. ARENDT, *supra* note 8, at 269. Jaspers was Arendt's friend and mentor, and they exchanged a fascinating series of letters on whether an Israeli court or an international tribunal should try Eichmann. *See* HANNAH ARENDT – KARL JASPERS CORRESPONDENCE 1926-1969, at 410-26 (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimber trans., 1992) (letters of Dec. 12, Dec. 16, Dec. 23, Dec. 31, 1960, and Jan. 3, Feb. 5, and Feb. 14, 1961). Jaspers argued that an international tribunal was essential because "[t]his case concerns all of humanity." *Id.* at 413 (letter of Dec. 16, 1960). He later added that humanity "is represented formally today by the UN," and continued: "It is a task for humanity, not for an individual national state, to pass judgment in such a weighty case . . . . What he did concerns all of you [i.e., the members of the United Nations], not just us. Create the means by which humanity can mete out justice . . . ." *Id.* at 419 (letter of Dec. 31, 1960). If Israel was indeed to conduct the trial, Jaspers thought that it should conduct an inquiry but pass no sentence, instead holding Eichmann in custody until a sentence could be passed by some "court that, as a representative of humanity, is competent to judge a crime against humanity—and today the UN professes to be such an authority." *Id.* at 424 (letter of Feb. 14, 1961). Arendt at first responded that Eichmann was a *hostis humani generis*, like the pirate in traditional international law, over whom any state is competent to exercise jurisdiction. *Id.* at 414, 416 (letter of Dec. 23, 1960). She argued that politics would prevent the establishment of an ad hoc tribunal to try Eichmann, and then suggested that the only feasible alternative would be "to attach to the International Court at The Hague a criminal court for *hostes generis humani* [sic] that would be competent to try individuals regardless of nationality." *Id.* at 416. But, "[a]s long as such a court does not exist, international law holds that any court in the world is competent—so why not Israel?" *Id.* Subsequently, however, she concluded, "My pirate theory won't do. For the definition of piracy to apply, it is both factually and legally essential for the pirate to have acted out of private motives. And therein lies the rub." *Id.* at 423 (letter of Feb. 5, 1961). She went on to agree with Jaspers that it would be crucial to the trial that the crime was against all of "humanity," and "is in no way limited to the Jews or the Jewish question." *Id.* But how the fact that Eichmann's crimes were against all humanity "can be presented both politically and legally remains the question." *Id.*

By the time she wrote *Eichmann in Jerusalem*, Arendt had completely abandoned the theory of universal national jurisdiction based on the piracy analogy, expanding the reasoning in her letter of February 5, 1961, *supra*. The reason for universal jurisdiction over the pirate is that he commits his crimes on the high seas, not because robbery and murder are unique crimes; and what makes him *hostis humani generis* is that "he has chosen to put himself outside all organized communities"; he is "in business for himself or . . . he acknowledged obedience to no flag whatsoever." ARENDT, *supra* note 8, at 262. She therefore thought that analogizing Eichmann to a pirate "served only to dodge one of the fundamental problems posed by crimes of this kind, namely, that they were, and could only be, committed under a criminal law and by a criminal state." *Id.* International lawyers have likewise criticized the analogy between the pirate (who is subject to universal jurisdiction only for practical reasons of enforcement) and the criminal against humanity (who, if he is subject to universal

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Although Arendt does not use the phrase "laws of humanity," the domestic analogy requires the existence of some humanity-wide law that crimes against humanity violate. The phrase "laws of humanity" is in any case not my invention; it comes from the most important precursors to the Nuremberg Charter's terminology—the so-called "Martens clause" in the Preambles to the 1899 and 1907 Hague Conventions. The phrase was used as well in a 1919 report to the Versailles Treaty drafters proposing to try the Turkish perpetrators of the Armenian genocide for "offenses against the laws of humanity," "breaches of the laws of humanity," and "crimes against civilization and humanity."[141] In this Part, I argue against the domestic analogy and against Arendt's jurisdictional conclusion that only international tribunals should try crimes against humanity. I argue that "humanity" does not form a political community that can enact "laws of humanity." International law is the product of state consent, and states represent humanity only in an attenuated, once-removed fashion. Political theorists sometimes overlook how weak this connection is because they are used to thinking in social-contract terms of states as recipients of delegated authority from their people. I argue, however, that social contract theory is unable to explain why states should choose a system of international law that protects human rights in other states. This part of the argument focuses on John Rawls's version of the theory, the best-developed attempt to offer a contractarian account of international law.[142] In the end, I trace the failure of Rawls's argument back to a failure in the domestic analogy itself, which requires that the interests of humanity be mediated through states.

A. *The Normative Weakness of "Laws of Humanity"*

The term "laws of humanity" carries natural law resonance. But I suspect the term arose out of an embarrassed reluctance by twentieth-century jurists to invoke natural law, or to invoke more old-fashioned phrases like "laws of God" or even the Enlightenment's favorite "laws of reason."[143] It is too evident that each of these lacks the positivity appropriate to a criminal statute, and perhaps that each of them too obviously begs the question of how some people but not others know what nature, God, or reason command, to say nothing of whether nature, God, or reason command anything at all. Talk

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jurisdiction, is so because of the unique character of his crime). *See, e.g.*, LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 102-16 (1992). Arendt's position in *Eichmann in Jerusalem* blends Jaspers's unflinching insistence that Eichmann's case is appropriate only for an international tribunal with her own more pragmatic concern that such a trial would be politically infeasible. She believed that Israel was fully entitled to try Eichmann for crimes against the Jews, but "insofar as the crime was a crime against humanity, it needed an international tribunal to do justice to it." ARENDT, *supra* note 8, at 269. For a discussion of the legitimacy of Israel trying Eichmann for crimes against the Jews, see *id.* at 263.

141. BASSIOUNI, *supra* note 1, at 63.

142. *See* RAWLS, *supra* note 14. This book is an expansion of John Rawls, *The Law of Peoples*, *in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 41 (Stephen Shute & Susan Hurley eds., 1993).

143. The traditional phrase *jus gentium* refers not to "laws of humanity," but to international law, that is, law among states. It originally referred to the body of Roman law governing relations between Roman citizens and foreigners, or between foreigners, within the Roman empire. MALCOLM N. SHAW, INTERNATIONAL LAW 15 (4th ed. 1997).

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of laws of humanity finesses these epistemological and metaphysical embarrassments by intimating that the laws have human provenance and human legislators.

The trouble is that only political communities can promulgate laws, and humanity does not form a political community. There is no world government (a good thing, too), nor do relationships exist among humanity as a whole that qualify it as a single people. Human groups are diverse, and diversity as such yields no basis for political community. On the contrary, political communities always exist in a tension between the centrifugal forces of diversity and the centripetal forces of shared customs, languages, experiences, and projects—forces that bind the community together, prevent it from disintegrating, and make political organization possible. But these centripetal forces are precisely what humanity as a whole lacks.

We may be inclined to resist this conclusion, which runs so contrary to millions of people's yearning for human solidarity that transcends nations and nationalism. Each year on New Year's Eve, choral societies the world over gather to perform the finale to Beethoven's Ninth Symphony—thousands of voices, from Bloomington to Capetown to Tokyo, singing Schiller's stirring invocation of Joy, the divine spark whose magic reunites the multitudes whom custom has divided, so that all men will finally be brothers.[144] One can almost imagine that all those thousands of harmonizing voices unite their audiences throughout the world and come close to making the words a self-fulfilling prophecy. But twenty minutes later the music stops, Joy folds her soft wings, and the choruses disperse back into communities that custom divides. In these communities, languages differ, ways of life differ, voices clash as well as harmonize, and political processes generate laws that vary and refract all the other differences. None can properly be regarded as laws of humanity because, in the important sense according to which laws express the political will of a people, *there is no such people as "humanity."*[145]

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144. I am, of course, paraphrasing Schiller's *Ode to Joy*, as quoted in Beethoven's Ninth Symphony. "Deine Zauber bindet wieder/Was die Mode streng geteilt;/Alle Menschen werden Brüder,/Wo dein sanfter Flügel weilt" (Your magic reunites/What custom strictly divides;/All men become brothers/Wherever your soft wings linger). LUDWIG VON BEETHOVEN, SYMPHONY NO. 9, OPUS 125, FOURTH MOVEMENT (1824). The words may be found in any respectable recording of the symphony; I have taken them from the notes to HERBERT VON KARAJAN, BEETHOVEN 9 SYMPHONIEN DGG (1962).

145. These observations in no way imply a cultural-relativist view about basic human rights, nor a denial that core principles of universal human rights may be identified. Indeed, my claim that all humankind has an interest in repressing crimes against humanity presupposes at the very least a universal human right not to be subjected to these crimes. For reasons skillfully argued by Bernard Williams, cultural relativism is an incoherent position if it is taken to imply the (non-relative) wrongness of interfering with other people's cultures on behalf of human rights. Provided that interfering on behalf of human rights is one of our own values, a consistent relativist has no basis for complaint. *See* BERNARD WILLIAMS, MORALITY: AN INTRODUCTION TO ETHICS 20-26 (1972). For an example of the relativist position Williams attacks, see *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539 (1947). Williams describes relativism as "possibly the most absurd view to have been advanced even in moral philosophy." WILLIAMS, *supra*, at 20. In any case, even those inclined to embrace relativist positions on human rights never press their relativism to the point of overtly defending genocide or crimes against humanity. In the late 1990s, human rights theory was involved in an active debate about whether there were "unique Asian values," emphasizing community and economic development above individualism and political liberty. *See, e.g.*, THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne

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One response to these concerns is that "humanity" is simply rhetorical shorthand for international society, that is, the community of states. Unfortunately, international society is at best an inadequate stand-in for humanity. The ban on crimes against humanity—arising, supposedly, from all humankind's revulsion at the gravest possible offenses—presents itself as a more powerful norm than any that we can think of. But international law norms are less powerful than domestic norms, because they have less connection with legitimate political processes of lawmaking.

In domestic law, it is the connection between the state, the legal norms it promulgates, and the community whose values those norms express that makes the state a legitimate party in interest when those norms are transgressed. Legitimacy arises from the consent of the governed—from popular sovereignty institutionalized through democratic governance mechanisms.[146] If legitimacy requires popular sovereignty, then international law, formed by state actions and diplomatic undertakings many steps removed from popular control, necessarily has less legitimacy than domestic law.[147] As Paul Kahn puts it:

> The rule of law . . . is not simply a matter of getting the content of rights correct. It is first

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R. Bauer & Daniel A. Bell eds., 1999); Yash Ghai, *Human Rights and Governance: The Asia Debate*, 15 AUSTL. Y.B. INT'L L. 1 (1994) (criticizing the "Asian values" thesis). But even those advancing the "Asian values" thesis never claimed that gross violations of basic human rights are an accepted and acceptable part of "Asia's different standard." Bilahari Kausikan, *Asia's Different Standard*, FOREIGN POL'Y, Fall 1993, at 24. My argument is thus not a defense of human rights relativism. Rather, it is an argument that the norms forbidding crimes against humanity do not arise from processes that would permit us to regard them as laws governing a cosmopolitan political community.

146. Something like this theory of legitimacy is embodied in important international standards. The right to democratic governance appears explicitly in the *Universal Declaration of Human Rights*, art. 21, *supra* note 96, and in the International Covenant on Civil and Political Rights, Dec.16, 1966, art. 25, 999 U.N.T.S. 171, http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; it is implicit in the right to self-determination recognized in the International Covenant on Civil and Political Rights, *supra*, art. 1(1) and the International Covenant on Economic, Cultural and Social Rights, Dec. 16, 1966, art. 1(1), 999 U.N.T.S. 3, (entered into force Jan. 3, 1976) http://www.unhchr.ch/html/menu3/b/a_cescr.htm. On the incorporation of this norm into international law, see generally Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

147. This problem has been noted repeatedly by observers of the development of the so-called "new" customary international law (CIL), that is, the customary international law governing how states treat their own nationals. The term "new customary international law" originates in Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 111 HARV. L. REV. 815, 838-42 (1997). Bradley and Goldsmith's influential argument is that the American constitutional scheme does not and should not permit the new CIL to override domestic law, in large part because it attempts to make an end-run around domestic political processes that are more legitimate. *Id.* at 857-58. Elsewhere, Goldsmith and Eric Posner observe that many critics believe that the new CIL is "incoherent and illegitimate." Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 640 (2000) (citing G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY (1993); J. SHAND WATSON, THEORY AND REALITY IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 79-106, 106 (1999); Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000)). In the same vein, but with a less American slant, Bruno Simma and Philip Alston decry *coutume sauvage* (their term for the new CIL) as "a product grown in the hothouse of parliamentary diplomacy," a "cultured pearl version of customary law" that operates "through proclamation, exhortation, repetition, incantation, lament." Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 89 (1992). Customary law, they fear, "has changed from something happening out there in the real world, after the diplomats and delegates have had their say, into paper practice: the words, texts, votes and excuses themselves. The process of customary law-making is thus turned into a self-contained exercise in rhetoric." *Id.*

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> of all an expression of our sense of ourselves as a single, historical community engaging in self-government through law. To obey the law, on this conception, is to participate in the project of popular sovereignty. That project makes us a single community with a unique—and uniquely meaningful—history.[148]

It seems plain that just as all humankind has no such common project, neither does the international community of states. On the contrary. A state is charged with advancing the interests of its own people, not of people in general. To be sure, governments may fall far short of advancing the interests of their own people, but even if they do not, their duties to their own people are likely to make them unresponsive to universal human interests, precisely because domestic interests come first. This is no less true in democracies than in tyrannies: popular sovereignty means the sovereignty of our people, not of all people everywhere.

Even international relations theorists who reject the realist premise that world politics consists of the anarchic competition of unitary, self-interested states still explain the emergence of international norms and institutions as functional means of facilitating state cooperation that is, broadly speaking, in the states' interests.[149] These theories differ from realism because they draw attention to subtleties that realists overlook: that international norms not only advance state interests but also constrain state behavior; that non-state groups are also players in international affairs; that states' interests are often redefined or constructed by their participation in international affairs and institutions; and that states are not unitary entities, but complex creatures with their own internal politics. All of this is completely compatible with the recognition that the primary responsibilities of governments run to their own people, not to a hypothetical cosmopolis or to abstract others elsewhere.

How powerful are norms of international criminal law? To answer this question, it is useful to ask another. What does it mean for a society—either domestic or international—to adopt a norm of criminal law? It means, first, that men and women in the society are told not to engage in the forbidden conduct on pain of moral condemnation and punishment. Second, it means that the society undertakes to enforce the norm. Following Bentham, Meir Dan-Cohen has distinguished two kinds of legal rules: *conduct rules* directed to the general public and *decision rules* directed to officials.[150] Often, the two are equivalent. For example, a typical domestic criminal statute consists of what is generally understood as a conduct rule, roughly "Don't do *X*!", phrased as a decision rule: "Anyone who does *X* shall be fined or imprisoned."

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148. Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 4 (2000). My argument in this Section draws on Kahn's essay, as well as on Paul W. Kahn, *On Pinochet*, BOSTON REV., Feb./Mar. 1999, at 8, http://bostonreview.mit.edu/BR24.1/kahn.html.

149. For a useful overview of the variety of international relations theories in connection with international law, see Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998).

150. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

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But such equivalences do not mean that decision rules exist in one-to-one correspondence with conduct rules. The criminal statute will give rise to a host of additional decision rules directed toward a variety of officials: toward police ("Be on the lookout for people doing *X* and arrest them!"); toward prosecutors ("You may bring charges against *X*-perpetrators provided you have credible evidence"); toward legislators ("Budget money for *X*-prevention"); and toward judges or juries ("Convict on charges of *X* if the evidence warrants it and none of the available defenses applies"). Dan-Cohen focuses on criminal law defenses—decision rules directed toward judges specifying when otherwise criminal conduct should not result in a conviction. Perhaps that explains why he labels rules directed toward officials "decision rules." I prefer to broaden the judge-centered notion of decision rules to include what might be called *enforcement rules*—norms directing officials in various offices to enforce the conduct rules. In these terms, adopting a norm of criminal law means simultaneously projecting a rule of conduct to the general public and an entire complex of enforcement rules toward a host of officials. Merely declaring that conduct is forbidden, without undertaking to enforce the conduct rule, is not adopting a norm of criminal law. It is adopting half a norm. To adopt a norm of criminal law, a state must not only condemn conduct, it must enforce the condemnation. In international criminal law, adopting the norm implies a third commitment as well, namely a commitment that the state itself should not organize or instigate the crime—in effect, a conduct rule directed at the state. No doubt the same is true in domestic law, but in domestic law the state's commitment not to engage in criminal behavior is so obvious that it is usually left unspoken. This is not the case in international law, where states explicitly undertake to avoid torture or genocide, either by signing treaties or participating in custom-formation. These, then, are the three components of a norm of international criminal law: conduct rules directed toward individuals, enforcement rules directed toward a multitude of state officials, and conduct rules directed toward states. Because international law has long been regarded as solely concerned with state behavior, not individual behavior, the least controversial form international criminal law assumes consists of state commitments not to engage in criminal conduct.

If the last of these components seems the most firmly established in international law, the first, by contrast, is only indirectly part of international law given the classical understanding according to which international law creates a "horizontal" relationship between state and state, not a "vertical" relationship between international society and individuals.[151] Classically, a norm binds individuals only when it is incorporated into a state's law.

Obviously, the practice of holding individuals accountable before international tribunals has transformed the classical picture, and the specification of crimes in the law of the tribunals is vertical law—conduct

151. I borrow this terminology from Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2351 (1991), who in turn borrows it from Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2295 (1991).

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rules directed toward individuals. But it cannot truly count as a criminal law norm unless it is enforced, and the commitment of the community of states to enforcement has proven to be pitifully weak. Conduct rules stripped bare of enforcement rules are legal norms only in an attenuated sense.

The clearest proof of how weak states' political commitment to international criminal norms really is lies in their unwillingness to take risks to halt crimes against humanity while they are being committed. The Balkan Wars offer a telling case in point. Even the Western Europeans, in other respects the world's foremost advocates of legally enforceable international human rights, proved no more willing to halt the slaughter than the Americans or Russians.[152] Nor, of course, was the United Nations any more effective. The catastrophe in Rwanda proved no different. By now everyone knows the story of the extraordinary fecklessness of the United Nations, the discreditable role of France, and the lengths to which the U.S. government went to prevent anyone from intervening to stop the genocide—because the United States did not want to intervene and feared that if anyone else took the lead the United States would look bad.[153] Instead, the world community opted for inaction followed by after-the-fact tribunals capable of handling only a handful of cases. A genuine commitment to repressing crimes against humanity would require more than tribunals; it would require willingness to engage in humanitarian military interventions, willingness to provide massive assistance for states to build rule of law capacity, and willingness to forgo development strategies that create the social disruption that breeds crimes against humanity.[154] Without such proactive, politically unpopular efforts to forestall humanitarian crimes, the enterprise of occasionally putting perpetrators on trial—even leaders like Milosevic and Kambanda—seems more like a publicity stunt than a commitment to humanitarian legal values. Kahn puts it well: "An international community that allows massive violations of human rights as long as a regime is in power, but then threatens to prosecute offenders once they are out of power—and even then only if they happen accidentally to fall within a state's jurisdictional grasp—is not a regime of law's rule."[155] Until very recently, the international community showed no interest in the carnage and devastation that has killed millions in the Congo in

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152. For an analysis of the dynamics of international failure in former Yugoslavia, see Stanley Hoffman, *Humanitarian Intervention in the Former Yugoslavia*, *in* THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION 38 (Stanley Hoffman ed., 1996).

153. *See generally* LINDA MELVERN, A PEOPLE BETRAYED: THE ROLE OF THE WEST IN RWANDA'S GENOCIDE (2000) (discussing international inaction in Rwanda, with special focus on the United Nations); POWER, *supra* note 44, at 329-89 (detailing American policy in Rwanda). *See also* PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 147-71 (1998) (discussing the American and French roles in the Rwanda catastrophe); GÉRARD PRUNIER, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 273-305 (1995) (discussing the French intervention).

154. *See, e.g.*, AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY (2003); HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 40-51 (1st ed. 1980); PETER UVIN, AIDING VIOLENCE: THE DEVELOPMENT ENTERPRISE IN RWANDA (1998).

155. Kahn, *On Pinochet*, *supra* note 148.

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the past five years, and few resources are currently devoted to responding to the crisis. Perhaps in a few years there will be trials.

It might be thought that the Rome Statute of the International Criminal Court[156] provides a counterweight to these pessimistic conclusions, a demonstration that the community of states is indeed willing to commit itself to the project of international criminal accountability. Regrettably, I fear it is not so. Of the ten most populous countries in the world, only Brazil and Nigeria have ratified the treaty. The eight populous non-ratifiers by themselves encompass most of the world's population (3.4 billion out of over 6 billion), and include the major powers of China, India, Indonesia, Japan, Pakistan, and Russia, with the United States spearheading the anti-ICC campaign.[157] France and the United Kingdom are the only members of the nuclear club that have ratified the treaty. Even among the ratifiers it is hard not to suspect that many have little real interest in the project of international criminal accountability. Tyrannical states obviously have no interest in holding tyrants accountable for their crimes; democratic states have little interest in subordinating their own domestic laws to international law, as accountability requires; and powerful states have never conceded that they should be held accountable in the first place. Rather, in Richard Falk's words, they favor "an approach to accountability with the following feature—'everybody but us.'"[158]

The main point here is not simply that, as a matter of *realpolitik*, great powers are unwilling to subordinate their interests to the enforcement of international human rights. The point is rather that as a matter of principle, states owe it to their people to favor national interests over cosmopolitan ones—and so states will advance international human rights only to the extent that the advancement of human rights is widely perceived by their people as a national interest. By its very nature, the community of states cannot properly accommodate the interests of humanity.

B. *Social Contract Theory and the Domestic Analogy: Rawls*

To see this more clearly, it will be useful to examine a well-known argument to the contrary. In *The Law of Peoples*, John Rawls argues that a social contract among free and democratic peoples bargaining in an "international original position"[159] to determine the principles of their foreign policy—the Law of Peoples—would incorporate the principle that "[p]eoples

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156. Rome Statute, *supra* note 41.

157. The eighth state among the populous non-ratifiers is Bangladesh.

158. Richard Falk, *Accountability for War Crimes and the Legacy of Nuremberg*, *in* WAR CRIMES AND COLLECTIVE WRONGDOING: A READER 113, 115 (Aleksandar Jokić ed., 2001). Falk is particularly scathing about "the reluctance of major states, especially the United States and China, to participate in this process [of accountability] if it includes the risk that their leaders might stand accused at some future point." *Id.* at 130. Falk notes "the central point that American leadership was never prepared to accept . . . a framework of restraint as seriously applicable to *its* future diplomacy." *Id.* at 131.

159. RAWLS, *supra* note 14, at 32.

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are to honor human rights."[160] If Rawls is right, then the failure of the actual community of states to commit itself strongly to human rights projects such as the eradication of crimes against humanity proves nothing about whether, in ideal theory, states can adequately represent humanity's interests. Rawls's argument purports to show that rational representatives of decent peoples would insist on incorporating human rights concerns into their foreign policies.

Disappointingly, however, Rawls fails to supply any reasoning at all to support the conclusion that the Law of Peoples contains a human rights clause. Perhaps Rawls believes that the liberal and democratic character of the parties to the international social contract straightforwardly implies that all would place a premium on human rights, and presumably that much is correct. But it is one thing to place a premium on human rights in one's own society, another to place a premium on human rights in someone else's, and a third thing altogether to insist on an international law principle of human rights—a principle that might constrain foreign policy decisions reached through democratic means, such as a decision to offer most-favored-nation trade status to an egregious human rights violator. Every liberal society will honor human rights; that is what makes it liberal. But it does not follow that the principle of honoring human rights must belong to the Law of Peoples rather than to the domestic law*s* of peoples. Principles of national law do not automatically become principles of international law, even if all liberal democracies enact parallel principles. Principles of national law do not necessarily even translate into principles of a state's own foreign policy.

Actually, Rawls offers no reasoning to support any of the eight articles in his proposed Law of Peoples; in effect, he leaves them as exercises to the reader. But it is fairly straightforward to supply the reasoning that would lead peoples to agree to most of them in a hypothetical social contract. For example, if I—as representative of my people—do not know whether, when the veil of ignorance is lifted, we will be a small and weak people or a great power, I will have good reason to insist that "our freedom and independence are to be respected by other peoples" (Principle 1) or that "peoples are bound to observe a duty of non-intervention" (Principle 4). Principles like these protect the weak nations from the strong.

But why will I have reason to insist that other nations respect the human rights of their own nationals? Perhaps one can demonstrate that domestic human rights violators are more likely to aggress against their neighbors, but that proposition seems doubtful. During the heyday of Latin American dictatorships, the gross human rights violations of the regimes in Argentina, Brazil, Chile, Ecuador, El Salvador, Guatemala, Paraguay, and Uruguay did not lead to international aggression, and today human rights violators like Cuba and Myanmar show no predilection toward aggressing against their neighbors. Alternatively, Rawls may believe that liberal democracies treasure their own human rights so much that they would agree ex ante (in the

160. *Id.* at 37. This principle is one of the eight that constitute the Law of Peoples. Subsequently, Rawls extends the result to include decent non-liberal peoples as well. *Id.* at 62-80.

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international original position) to permit international sanctions against them if they ever become human rights violators. But it is far from self-evident, to say the least, that any liberal democratic people would actually choose this as a clause in the social contract, let alone that the clause is a requirement of reason. Nor would liberal democratic peoples necessarily accept a pro-human-rights clause in the Law of Peoples that might require them to stop doing business with human rights violators. In the end, it seems to me that Rawls offers no glimmerings of an argument connecting a liberal democratic domestic basic structure with a reasonable requirement to incorporate human rights into foreign policy or international law.

What has gone wrong in the contractarian argument? At bottom, the problem stems from the domestic analogy—the analogy between people in a domestic society and peoples in an international society. Rawls builds the domestic analogy into the fundamental structure of his argument. Rather than modeling the Law of Peoples as the outcome of a hypothetical worldwide social contract among individuals, Rawls employs a more indirect two-level argument, with a separate social contract at each level. In the first, individuals agree to fair terms of cooperation within a single polity; this corresponds to familiar social contract derivations of governing principles within societies. In the second, "rational representatives of liberal peoples . . . specify the Law of Peoples"[161] through a social contract among peoples. The two contracts mirror each other: in one, individuals choose principles for domestic society, and in the second, peoples choose principles for the Law of Peoples. The argument straightforwardly tracks the terms of the domestic analogy. It implies that the resulting principles of international law represent the wills of states (the organized form peoples assume), not of humanity. Principles representing the interests of humanity would be better modeled by the simpler version of the social contract in which individuals directly specify the Law of Peoples without the intermediation of states.[162] Once Rawls accepts the domestic analogy and treats states rather than individuals as bargaining agents for the Law of Peoples, the game is up for universal human rights.[163] States' interests are parochial rather than cosmopolitan, and states have no reason to incorporate the principle that "[p]eoples are to honor human rights" into the Law of Peoples.[164]

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161. *Id.* at 32.

162. Two well-known attempts to work out a Rawlsian view of international justice based on the one-tier version of the contract are CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979) and THOMAS W. POGGE, REALIZING RAWLS 241-73 (1989).

163. It might be objected that Rawls is talking about peoples, not states, and takes pains to insist that a people is not the same as a state. However, as Allen Buchanan correctly points out, Rawls means "peoples with their own states." Allen Buchanan, *Rawls's Law of Peoples: Rules for a Vanished Westphalian World*, 110 ETHICS 697, 698 (2000). Rawls attributes most traditional powers of sovereignty to peoples, and this can make sense only if the people has a state. Only states, not peoples, have foreign policies. *Id.* at 698-99.

164. For an argument to this effect, see Jack Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 GREEN BAG 2d 365; 369-71 (1998). The proposition that states have no reason to incorporate a pro-human rights principle into the Law of Peoples does not mean that states have no reason to sign or ratify human rights treaties. Provided that the treaties are under-enforced, and do not require parties to expend political, economic, or human resources to fight human rights abuses abroad, signing the treaties is a relatively cost-free enterprise that may purchase some good

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We are left with a dilemma. Humanity cannot enact laws, because humanity is not a political community. International society (the society of states) can enact international laws, at least in the formal sense of hammering out verbal formulas endorsing human rights; but these will not be genuine laws of humanity without a commitment to enforcement that states have proven unwilling to undertake and which is difficult for states to undertake given their obligation to put their own citizens' interests first.[165] The domestic analogy fails to bridge the gulf between the interests of states and those of humankind.

C. *The Failure of the Domestic Analogy*

At this point, it should be clear that Arendt's domestic analogy argument that "insofar as the crime was a crime against humanity, it needed an international tribunal to do justice to it"[166] rests on an equivocation. Insofar as the crime was a crime against the international society of states, it arguably needed an international tribunal to do justice to it; but insofar as it was a crime against humanity, an international tribunal may well miss the point. An international tribunal—a creature of diplomacy and statecraft, not of humanity—should arouse a healthy skepticism about whether it can transcend the politicking, posturing, and intrigue that mark international political life.

Obviously, this is not merely a theoretical problem. Although I have little doubt that Slobodan Milosevic is responsible for crimes against humanity, his accusation that the ICTY proceedings against him are political is not absurd (although I believe it is untrue). Nor are American fears that the ICC's jurisdiction over the crime of aggression may result in politicized prosecutions of American leaders merely redneck intransigence.[167] The international tribunals will have to demonstrate that they represent the moral interests of humanity and not only the political and ideological interests of states parties.

The alternative to international tribunals is the use of national courts to prosecute international crimes, either under their national or territorial

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publicity. *Id.* at 370-71. Oona Hathaway offers a similar explanation for her finding that some countries' ratification of human rights treaties correlates with worse human rights records: "When countries are rewarded for positions rather than effects—as they are when monitoring and enforcement of treaties are minimal and external pressure to conform to treaty norms is high—governments can take positions that they do not honor, and benefit from doing so." Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1941 (2002). Rawls is discussing the real, not merely feigned, adoption of a Law of Peoples.

165. A striking illustration of how states value nationals in comparison to foreigners occurred when, in the aftermath of the Rwandan genocide, the United States finally sent troops to Kigali. According to General Romeo Dallaire, the commander of the United Nations's peacekeeping force in Rwanda, Pentagon planners regarded one American casualty to be the equivalent of 85,000 dead Rwandans. POWER, *supra* note 44, at 381.

166. ARENDT, *supra* note 8, at 269.

167. Rome Statute, *supra* note 41, art. 5(1)(d). There exists no single, agreed-upon definition of aggression, and the United States fears that an expansive definition might turn most first uses of American military force into aggression. Whether they ought to be regarded as aggression is, of course, an explosively political issue. In the face of deeply politicized disagreement during the drafting of the Rome Statute, the drafters in the end punted, postponing granting the ICC jurisdiction over the crime of aggression for at least seven years, while the parties negotiate over the definition of the crime. Rome Statute, *id.* arts. 5(2), 121.

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jurisdiction or, more controversially, under universal jurisdiction. Under the Rome Statute, the principle of complementarity gives primacy to national investigations over international prosecutions.[168] The ICJ's well-known *Barcelona Traction* dictum states that "the principles and rules concerning the basic rights of the human person" give rise to obligations *erga omnes*—obligations in the performance of which all states have a legal interest.[169] Originally intended as a theory of diplomatic protection, not universal jurisdiction, the *Barcelona Traction* dictum has nevertheless entered legal folk-culture as an authorization for wide-ranging protection of human rights, including universal jurisdiction.[170] A few states have accepted the invitation and enacted domestic laws against crimes against humanity so that offenders can be tried under national rather than international law; a few others have enacted universal jurisdiction statutes.[171] In effect, states that offer their national courts to try crimes against humanity do so as a kind of foreign aid, lending their well-financed, mature judicial institutions to nations that are worse off. The same seems to be true with Alien Tort Statute litigation in the

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168. Rome Statute, *id.*, art. 17(1)(a)-(b). The essence of complementarity is that the ICC's jurisdiction complements the jurisdictions of states such that the ICC cannot assert jurisdiction unless states prove unwilling or unable to investigate and, when appropriate, prosecute.

169. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, paras. 32-34 (Feb. 5). In effect, the ICJ argued that basic human rights norms are so important that all states have an interest in their protection. That may be true, but we have seen that very little in the political theory of the state explains why.

One solution to this problem lies in the idea that the international community gets its legal personification in the United Nations, and thus that the United Nations is the party in interest when obligations *erga omnes* get asserted. *See* ANDRÉ DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 91-127 (1996). But surely it is a far cry from the idea of a crime against all humankind—a crime in which all of us have a legal interest—to the idea of a crime in which the United Nations has a legal interest. The political authority of the United Nations rests entirely on the acquiescence of states and has very little to do with a claim to speak as humanity's representative. Of course, the United Nations sometimes does speak as humanity's representative—several Secretary Generals can lay claim to having done so, often with great courage and conviction—but the moral authority of the Secretary General's office should not be mistaken for the political authority of the United Nations, any more than the moral authority of the papacy to speak for the interests of humankind should be mistaken for political authority to do so.

170. *See* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 57 (1994); Alfred P. Rubin, *Actio Popularis, Jus Cogens and Offenses* Erga Omnes, 35 NEW ENG. L. REV. 265, 277-78 (2001).

171. For a meticulous country-by-country overview of universal jurisdiction statutes and jurisprudence, current through summer 2003, see LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 81-219 (2003). In addition to Reydams's book, there is by now a large literature on universal criminal jurisdiction. *See, e.g.*, Gilbert Guillaume, *La compétence universelle, formes anciennes et nouvelles*, in MÉLANGES OFFERTS À GEORGES LEVASSEUR: DROIT PENAL, DROIT EUROPÉEN 23 (1992); Luis Benavenides, *The Universal Jurisdiction Principle: Nature and Scope*, 1 ANNUARIO MEXICANO DE DERECHO INTERNACIONAL 19 (2001); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, U. CHI. LEGAL F. 323 (2001); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988); Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals By National Courts*, 21 BERKELEY J. INT'L L. 111 (2003); Mark A. Summers, *The International Court of Justice's Decision in* Congo v. Belgium*: How Has It Affected the Development of a Principle of Universal Jurisdiction That Would Obligate All States To Prosecute War Criminals?*, 21 B.U. INT'L L.J. 63 (2003); Symposium, *Universal Jurisdiction*, 35 NEW ENG. L. REV. 241 (2001); *Harvard Research Project on Criminal Jurisdiction*, *supra* note 1, at 563-92. *See also* PRINCETON PROJECT ON UNIVERSAL JURISDICTION: THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001), *available at* http://www.princeton.edu/~lapa/unive_jur.pdf.

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United States.[172] Inevitably, such efforts straddle the same fault line as all foreign aid and development projects—the line between humanitarianism and distributive justice, on the one hand, and paternalism or self-interested political meddling on the other. Neither possibility can be excluded. Like Belgium's prosecution of Rwandan nuns who participated in the genocide, Spain's efforts to go after crimes against humanity committed during the Argentinean and Chilean dictatorships may be disinterested pursuits of justice, but they also strike some observers as transparent meddling by a former colonial master—condescending at best and neo-colonialist at worst.[173]

For better or for worse, international criminal law remains jurisdictionally eclectic. Crimes against humanity have been prosecuted in national courts (e.g., Canada, France, and Israel)[174] and in international tribunals (Nuremberg, ICTY, and ICTR), and the Rome Statute's complementarity provisions perpetuate this jurisdictional eclecticism.[175] In subsequent sections, I shall explain why I think that this should remain a live option notwithstanding the possibility of political abuse.

Our basic question still remains, however: in what sense is *humanity* (as distinct from states or international organs created by states) the party in interest when it comes to crimes against humanity? With it comes a parallel question: if the international party in interest is humanity, what entitles state-created courts, either municipal or international, to try criminals in humanity's name?

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172. *See* 28 U.S.C. § 1350 (2000). See also the view of Anne-Marie (Slaughter) Burley that behind the Alien Tort Statute lay the notion that the United States is honor-bound to fulfill duties under the law of nations. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989).

173. *See, e.g.*, *Congo v. Belgium*, *supra* note 19, (separate opinion of Judge *ad hoc* Bula-Bula), discussed at length *infra* in Section IV.A; REYDAMS, *supra* note 171, at 192 (discussing the hypocrisy of Spain prosecuting officials of former colonies while failing to prosecute members of the Franco regime); Sammons, *supra* note 171, at 138-39 (discussing Belgian colonialism and human rights prosecutions); Francisco Valdes, *Postcolonial Encounters in the Post-Pinochet Era: A Lat-Crit Perspective on Spain, Latinas/os and "Hispanismo" in the Development of International Human Rights*, 9 U. MIAMI INT'L & COMP. L. REV. 189, 208-11 (2000-2001) (discussing tension between the Spanish colonial ideology of Hispanismo and human-rights prosecutions).

The case involving two Rwandan nuns and two other defendants is Prosecutor v. Vincent Ntezimana et al., Cour d'Assises de l'Arrondissement Administratif de Bruxelles-Capital (8 June 2001) (Belg.), http://www.asf.be/AssisesRwanda2/fr/fr_VERDICT_verdict.htm.

174. *See, e.g.*, the *Finta* case, *supra* note 47 (Can.); the *Touvier* case, *supra* note 71, and the *Barbie* case, *supra* note 73 (Fr.); Cr.C. (Jm.) 40/61, Attorney-Gen. of the Gov't of Israel v. Eichmann, 45 P.M. 3, *translated in* 36 INT'L L. REP. 18 (1968) [hereinafter *Israel v. Eichmann*].

175. *See* Rome Statute, *supra* note 41, art. 17 (1)(a)-(b). It is an interesting and unsettled question whether a state's investigation or prosecution of a purported international criminal under a universal jurisdiction theory, rather than a theory of territorial or nationality jurisdiction, would mean that, under complementarity, the ICC could not assert its jurisdiction. If the ICC's jurisdiction is someday held to pre-empt other tribunals' universal jurisdiction, that will undermine jurisdictional eclecticism.

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VII. THE VIGILANTE JURISDICTION

A. *The Human Interest in Repressing Crimes Against Humanity*

The answer to the first question, I think, has been apparent all along. To call humanity—humankind—a party in interest is not to regard humanity as a political community, but rather as a set of human individuals. To say that humanity has an interest in suppressing crimes against humanity is to say that human individuals share that interest, not that some collective entity called "humanity" has it.

It is tempting to argue that the interest all humans share in expunging crimes against humanity from the repertoire of human behavior is a moral interest, a recognition that these crimes are the most odious we can imagine. But this argument is too facile. After all, in the twentieth century, hundreds of thousands of more-or-less ordinary people committed crimes against humanity, apparently with few if any moral qualms. In what sense, then, did these legions of ordinary executioners share a moral interest in repressing their own crimes? Arendt puts the objection strongly: "To fall back on an unequivocal voice of conscience—or, in the even vaguer language of the jurists, on a 'general sentiment of humanity'—not only begs the question, it signifies a deliberate refusal to take notice of the central moral, legal, and political phenomena of our century."[176] Line up the 1915 Turkish army, the 1942 S.S., the 1992 Balkan militias, the *interahamwe* and machete-wielding Rwandan civilians of 1994—and, for that matter, the American lynch mobs of the 1920s—in an imaginary diabolical muster of criminals against humanity. Then tell this enormous multitude of humanity that what they have done violates the general sentiment of humanity and hear their response: "Who is this 'humanity' whose general sentiment we have violated? Humanity consists of people like *us*." Unless we are prepared to deny the humanity of the criminals—and reflect on the irony of that!—we will have to agree with their response.

To be sure, sophisticated psychology contains resources for explaining how people's moral responses can deviate catastrophically from their baseline moral beliefs without their being aware of it. Famous experiments in social psychology have demonstrated that people subjected to seemingly mild situational pressures to conform to murderous roles and commands will do so in remarkably high numbers, even though what they are doing deviates from their sincerely stated moral convictions when they are outside the situation.[177] But the disquieting ease of recruiting people to commit crimes against humanity nevertheless casts doubt on how universally shared the purely moral interest in repressing these crimes really is. After all, how can we be certain which situationally induced moral beliefs represent the baseline and which

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176. ARENDT, *supra* note 8, at 148 (citation omitted).

177. I summarize and discuss some of these experiments in David Luban, *The Ethics of Wrongful Obedience*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 94 (Deborah L. Rhode ed., 2000); David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279 (2003).

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represent the deviations? Why not suppose that murderous attacks on supposed blood enemies of one's ethnic, racial, or religious group, encouraged by community leaders and moral authorities, *do* represent some people's moral baseline?[178] Richard Rorty may well be right when he speculates that most people "live in a world in which it would be just too risky—indeed, would often be insanely dangerous—to let one's sense of moral community stretch beyond one's family, clan, or tribe."[179] For such people, claiming that their moral baseline condemns the group-on-group violence of crimes against humanity simply begs the question.

Once again, I suggest that looking to the law itself explains the universal human interest in repressing crimes against humanity. The theory embedded in the law, developed in Part III of this Article, explains why all humankind shares that interest. According to that theory, the distinguishing feature of crimes against humanity arises from our character as political animals. Each of us is an individual who belongs to groups and who has no alternative to living in politically organized communities; we are all, in effect, hostage to politics. Even if Rorty is right that expanding the sense of moral community beyond the family, clan, or tribe seems unacceptably dangerous to most people in the world, the last century's historical experiences of massacre and violence show how much more dangerous it is not to. The law was born out of these experiences, and its birth pains were the agonies of millions.

The human interest in expunging crimes against humanity from the repertoire of politics seems straightforward: in a world where crimes against humanity proceed unchecked, each of us could become the object of murder or persecution solely on the basis of group affiliations we are powerless to change. This is not a merely hypothetical threat. Today we live in a world in which almost all nations are patchworks of ethnic, racial, religious, and cultural groups. In part, this is the result of globalization. But it is also the product of a century of wars and upheavals that have displaced hundreds of millions of people. Ours is a world of diasporas everywhere, a world in which innumerable groups find themselves in the situation of the "eternal Jew": strangers in a strange land, even when—like the German Jews and the Rwandan Tutsis—they are no strangers and have dwelt in the land for centuries. The crimes against humanity that drenched the twentieth century in gore proved that group-on-group politics has no built-in principle of restraint. And so, just as all women share an interest in ensuring that women are not killed solely for being women, and all Jews share an interest in ensuring that Jews are not killed solely because they are Jews, all human beings share an interest in ensuring that people are not killed by their neighbors solely because

178. Of course, matters are unlikely to be quite so simple. For example, Mark Osiel reports that Argentinian officers involved in the disappearances and tortures of the Dirty War were often deeply reluctant to commit what they knew were atrocious crimes. They turned for guidance to the priests they regarded as supreme moral authorities, and were told that their deeds were essential to defend Catholic civilization against communism and the slow moral decay brought on by liberalism. MARK J. OSIEL, MASS ATROCITY, ORDINARY EVIL, *supra* note 12. Here, the officers' moral baselines seem to have included inconsistencies between the recognition that they were committing profound crimes and the belief in the moral authority of their priests.

179. Rorty, *Human Rights, Rationality, and Sentimentality*, *supra* note 87, at 125.

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of their group affiliation; for all of us have neighbors whose group is not our own.

The nature of modern states intensifies this interest, because technical advances in administration, in information gathering, in monitoring and tracking people, in transporting killers and victims swiftly from place to place, and—above all—in slaughtering people, have made crimes against humanity feasible to a degree never attained in earlier epochs. Even the low-tech Rwandan genocide, carried out in large part with machetes and clubs, was possible only because of a highly rationalized state apparatus, a system of ethnically coded identity cards, and a centralized radio station inciting and coordinating the murderers. The Rwandan genocide could hardly have occurred before the twentieth century. These two facts of modern life—the piebald character of states, and the technical advances that make large-scale, coordinated attacks on civilians possible—are the real source of the universal human interest in suppressing crimes against humanity.

Thus the "laws of humanity" are a recognition of the heightened danger of politics in the modern world. They are not, at bottom, laws created by any political community at all, but rather by universal human need. Their normative force does not arise from the fact that they have been positivized in the statutes of the international tribunals and a few domestic legal systems, nor from the tepid commitment of states to enforce them. They represent every human being's rightful demand that the political rough-and-tumble never again include the uttermost barbarism that crimes against humanity represent. Anyone who transgresses these laws is henceforth an enemy of all humans.[180]

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180. As we saw earlier in Part V there is a danger that thinking in such terms demonizes criminals against humanity. But I trust that the earlier discussion of the demonization critique offers adequate caution against this danger.

The approach I follow here—combining (a) an insistence that jurisdiction over crimes against humanity originates in people, not states; (b) a jurisdictional eclecticism that allows various tribunals to exercise that jurisdiction; and (c) an argument that the human interest in repressing crimes against humanity arises from piebald societies and advanced technology—superficially resembles the "cosmopolitan pluralism" of Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 490-96 (2002). But the resemblance is more apparent than real. Berman's theory of jurisdiction derives from a postmodernist recognition that people belong to multiple and shifting communities, including sub-state communities, all of which have claims to jurisdiction over some matters of concern to them. The view I present here is a straightforward Enlightenment-inspired conception of a universal human interest in expunging extreme violence and persecution from the repertoire of politics. It is based on a universalist description of human political nature, and that makes it cosmopolitan universalist rather than cosmopolitan pluralist. Moreover, I suspect that—like most liberal cosmopolitans—I take a more jaundiced view of "imagined communities" than Berman does. Where he finds them a source of meaning and identity, *id.* at 472-76, I find them a seed-bed of ethnic or religious strife, and thus contributing causes of crimes against humanity; furthermore, I find metaphysical claims that community constitutes identity overstated. Luban, *supra* note 95. Most importantly, my argument is far narrower than Berman's; it is an argument about jurisdiction over crimes against humanity, not about jurisdiction in general, and I have no wish to generalize the jurisdictional theory beyond crimes against humanity. The argument, after all, is that all humankind has an interest in repressing these crimes, not that all humankind has an interest in anything more robust.

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B. Hostis Humani Generis

The precondition of criminal punishment is the severing of bonds with the wrongdoer—the withdrawal of social protection that opens him to shunning, imprisonment, or, in the extreme case, execution. In ordinary domestic crimes (not crimes against humanity, but crimes against a specific community), the withdrawal of protection is only partial. The community—personified for such purposes by the state—gets to punish the wrongdoer, but individuals, including the crime victims, do not. This merely restates the earlier observation that municipal crimes are offenses against the community, and that the community is the party in interest. As we have seen, because there is no world community, the party in interest in a crime against humanity is humanity itself taken severally, not jointly. Here, the withdrawal of social protection from the wrongdoer is universal. As Arendt put it in her imaginary speech to Eichmann about why he must be punished: "[W]e find that no one, that is, no member of the human race, can be expected to want to share the earth with you."[181]

The archetype of such universal severing of bonds with the wrongdoer is God's banishment of Cain (before God relents and protects him). "[T]he voice of thy brother's blood crieth unto me from the ground. And now *art* thou cursed from the earth, which hath opened her mouth to receive thy brother's blood from thy hand; . . . a fugitive and a vagabond shalt thou be in the earth."[182] Cain immediately understands the practical significance of God's curse: "[E]very one that findeth me shall slay me."[183] Cain has become, in the literal sense, *hostis humani generis*—unfit for the society of anyone, and (within the moral limits of proportionality) anyone's legitimate target.

I am suggesting that taking seriously the notion of crimes against humanity, in the sense of crimes against all humankind, implies a different jurisdictional conclusion than Arendt's domestic analogy argument for international tribunals. The jurisdiction implicit in crimes against humanity is not international jurisdiction, nor even universal jurisdiction in the familiar lawyer's sense of jurisdiction that falls to the courts of any state, but rather what might be called *vigilante jurisdiction* in which the criminal becomes anyone's and everyone's legitimate enemy.[184] I choose this term, with all its

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181. ARENDT, *supra* note 8, at 279. Arendt is explaining why Eichmann must be executed, but her explanation fits non-capital punishment as well: I do not quote her to signify my support for the capital punishment of those who perpetrate crimes against humanity. My own view is that justice neither requires nor forbids capital punishment for heinous violations of other people; thus, the decision whether to abolish capital punishment must be arrived at on other grounds, such as the presence or absence of a collective sense that capital punishment is inconsistent with civilized standards.

182. *Genesis* 4:10-12 (King James).

183. *Genesis* 4:14 (King James).

184. Interestingly enough, Arendt comes close to this suggestion when she proposes that it might have been legitimate for a Jew to assassinate Eichmann on the streets of Buenos Aires, provided that the assassin was willing to stand trial. She praises similar assassinations carried out by solitary individuals on the streets of Europe against the organizers of the 1917-20 Ukrainian pogroms and the Armenian genocide. ARENDT, *supra* note 8, at 265-67. Paul Kahn comes close to a similar suggestion when he argues that the Spanish efforts to bring Pinochet to trial are neither more nor less legitimate than a hit squad pursuing grave human rights violators around the world. Kahn, *On Pinochet*, *supra* note 148.

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uncomfortable connotations, rather than the familiar legal term "universal jurisdiction," for an important reason. A universal jurisdiction offense is one that all *states* have an interest in prosecuting, but I am arguing that the interest in repressing crimes against humanity is universal among *people*, not necessarily among states. Humankind, not the community of states, is a party in interest in crimes against humanity, and "humankind" refers to an aggregate of humans, not a collective entity. Politically speaking, no such collective entity exists. And the concomitant obligation *erga omnes* of states is the obligation to withdraw protection from the perpetrator, just as God withdrew human protection from Cain.[185]

VIII. NATURAL JUSTICE AND JURISDICTIONAL ECLECTICISM

I expect the notion of vigilante jurisdiction will strike many readers as a monstrous suggestion, because it declares open season on anyone whom anyone else reasonably believes to be a criminal against humanity. I agree that the prospect of vigilante justice *is* monstrous. But it is important to see why. The reason is not that only states and their instrumentalities have the moral right to punish the guilty. It is that vigilantes cannot be trusted to determine who is guilty and who is not, nor to moderate their punishments to fit the crime. Remember that in the Bible story, God tempers Cain's punishment by protecting him against vigilantes.[186]

Consider a fictional example of vigilante justice at work: Ariel Dorfman's disturbing drama of transitional justice, *Death and the Maiden.*[187] Through a series of coincidences, a physician who may have presided over rape and torture sessions during the Pinochet dictatorship falls into the clutches of one of the victims, Paulina. Paulina stages her own "trial" of the doctor, based on a simple proposition: confess and live, or deny and die. The doctor frantically insists that she has the wrong man. Paulina was blindfolded during her entire ordeal fifteen years before, and she recognizes the doctor only by his voice. Her husband, Gerardo, a prominent human rights lawyer, is in agony over Paulina's mad plan, but he can do nothing because Paulina has a gun pointed at the doctor's head. All he can do is plead with her.

> *Gerardo*: A vague memory of someone's voice is not proof of anything, Paulina, it is not incontrovertible . . . . What can he confess if he's innocent?
>
> *Paulina*: If he's innocent? Then he's really screwed.[188]

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185. This view is analogous to early theorists' analysis of universal jurisdiction. As Luc Reydams explicates the arguments of Grotius and Vattel, "The accent is . . . more on the negative obligation not to shield a fugitive from prosecution by granting asylum than on a positive right to exercise universal jurisdiction. The right is primarily a corollary of the obligation." REYDAMS, *supra* note 171, at 36-37.

186. *Genesis* 4:10-12 (King James).

187. ARIEL DORFMAN, DEATH AND THE MAIDEN (1991).

188. *Id.* act 1, sc. 4; act 2, sc. 1.

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Paulina insists that "[d]uring all these years not an hour has passed that I haven't heard it, that same voice,"[189] but later even she admits that she may be mistaken.[190] And the price of her mistake will be a death sentence, regardless of whether the doctor has committed crimes. The doctor's plight—on Gerardo's hypothesis of innocence—represents the problem with vigilante justice.[191]

Of course, official tribunals also screw the innocent, because courts are seldom interested solely in the truth. In recent years, the American debate about the death penalty has finally begun to come to grips with the travesty of many capital trials, with their incompetent defense attorneys and vindictive prosecutors. In every legal system, rules of evidence and procedure incorporate trade-offs between fact-finding accuracy, the protection of privacy, investigative cost, and the sheer desire to mollify the public with quick convictions and harsh penalties.

But these difficulties demonstrate the need for better tribunals, not no tribunals. Open tribunals with even-handed and rational rules, written bills of indictment for crimes whose elements must be specified and proven beyond a reasonable doubt, uncompromised defense counsel, a presumption of innocence, and the other requirements of natural justice provide the best safeguard against punishing the innocent, whereas vigilante justice offers no safeguard at all.[192] As Jackson argued at Nuremberg (in words I quoted earlier): "If these men are the first war leaders of a defeated nation to be prosecuted in the name of the law, they are also the first to be given a chance to plead for their lives in the name of the law. Realistically, the Charter of this Tribunal, which gives them a hearing, is also the source of their only hope."[193] The British, after all, wished to shoot them on the spot rather than try them. And if the British had spared them, it seems entirely likely that their own countrymen would have lynched them. Limiting the entitlement to punish to tribunals built on the requirements of natural justice functions like the mark of Cain, protecting suspected wrongdoers from the caprice of vigilantism or victors' vengeance.

Only tribunals respecting the requirements of natural justice should be authorized to try those accused of crimes against humanity, and in practice these tribunals must be established by states or international organizations established by states. But the authority of these tribunals derives from the vigilante jurisdiction and the requirements of natural justice, not from the political authority of the states that sponsor them. If state-established tribunals

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189. *Id.* act 1, sc. 4.

190. *Id.* act 3, sc. 1.

191. Or rather, it represents *a* problem with vigilante justice. The fundamental objection to vigilantism since Aeschylus's *Oresteia* has not been its erratic fact-finding, but its potential for generating endless blood feuds. At the end of *Eumenides*, where the establishment of a court displaces the Furies (representing endless cycles of vengeance and vendetta), the chorus prays that their city should not be given over to "the dry dust that drinks/the black blood of citizens/through passion for revenge/and bloodshed for bloodshed." AESCHYLUS, *Eumenides*, *in* AESCHYLUS I: ORESTEIA 169, ll. 979-82 (Richard Lattimore trans., 1953).

192. For an explanation of the term "natural justice," see *supra* note 17.

193. 2 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 136, at 102.

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assume exclusive power to try and punish, the primary reason is to protect the accused against mistakes and not because states have a direct interest in punishment. In effect, this brings universal jurisdiction in through the back door, because any national or international tribunal satisfying the conditions of natural justice may exercise it. But the real basis is a kind of delegated or representative jurisdiction, derived from the vigilante jurisdiction.

The arguments I offer here are hardly novel. In fact, they echo Grotius, the founder of international law. According to Grotius, anyone has the natural right to punish a criminal.[194] "But as our judgment is apt to be biassed [sic] . . . since the formation of families into states, judges have been appointed, and invested with the power of punishing the guilty . . . ."[195] Grotius's natural right to punish resembles what I have called the vigilante jurisdiction—and his caution about biased judgment implies that official tribunals derive their jurisdiction from the natural right to punish, an argument parallel to the one offered here. Notably, Grotius also maintained that any state has jurisdiction "not only for injuries affecting immediately themselves or their own subjects, but for gross violations of the law of nature and of nations, done to other states and subjects"—that is, for crimes against humanity.[196]

Tribunals that respect natural justice may be either national or international, just as tribunals that violate it may be either. The requirement of natural justice implies jurisdictional eclecticism, governed by the principle that any forum is appropriate to try crimes against humanity provided that it offers a good approximation of natural justice.

The other reason for jurisdictional eclecticism, a reason inherent in the Rome Statute's complementarity principle,[197] is that nations may not be willing to prosecute their own criminals against humanity. Criminals against humanity have friends and defenders; operating, as they do, in their organized groups, they could hardly fail to. The vigilante jurisdiction permits any tribunal—be it a national tribunal exercising jurisdiction over its own citizens or those who have injured its citizens, the national tribunal of a third-party country exercising universal jurisdiction, the ICC, or an ad hoc international tribunal—to adjudicate crimes against humanity, so long as it provides natural justice.

A crucial component of natural justice is impartiality—in Grotius's words, "our judgment is apt to be biassed [sic] by our affections, in cases where our interest is concerned."[198] That raises the delicate question of whether a politically motivated prosecution violates the requirements of natural justice. As a general proposition, the answer is no. After all, *every*

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194. HUGO GROTIUS, DE JURE BELLI AC PACIS [THE RIGHTS OF WAR AND PEACE] 228, bk. II, ch. 20, sec. VII (A.C. Campbell trans., M. Walter Dunne 1901). Elsewhere, Grotius is more cautious and confines the natural right to punish to individuals "of competent judgment, and not implicated in similar or equal offences." *Id.* at 226.

195. *Id.* at 228.

196. *Id.* at 247, bk. II, ch. 20, sec. XL. The Israeli District Court that convicted Adolph Eichmann quoted these arguments of Grotius to justify its exercise of jurisdiction in the case. *Israel v. Eichmann*, *supra* note 174, para. 14.

197. Rome Statute, *supra* note 41, art. 17 (1)(a)-(b).

198. GROTIUS, *supra* note 194, at 228, bk. II, ch. 20, sec. VIII.

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prosecution of crimes against humanity originates in political decisions and motives. Political organization gives birth to these crimes, and putting perpetrators on trial means putting their politics on trial. Justice in such cases can hardly be disentangled from political ends such as discrediting the perpetrators' politics. Some theorists maintain that political trials of major human rights violators are not only inevitable, but indeed desirable.[199] Both the Nuremberg and Eichmann trials were politically motivated, but their overall fairness—and above all the felt sense of necessity in staging them—ultimately overcame the appearance that they were tainted.

Arendt's complex view of the Eichmann trial seems right to me. Contrary to the exponents of political trials, Arendt insists that the sole purpose of the trial was to do justice to Eichmann, not to fulfill political goals or even to make a historical record of Nazi crimes.[200] She harshly criticizes the prosecution and Israeli Prime Minister David Ben-Gurion for muddying the waters of the trial with ulterior political motives. But she also rejects the argument that Israeli judges could not be counted on to conduct a fair trial and lauds the judges for doing everything in their power to prevent the trial from deteriorating into a political sham.[201] In other words, Arendt grasps that a trial launched for political reasons may nevertheless be conducted fairly; and even those who favor political trials do not want rigged Vishinskyite farces.[202] No doubt the professionalization of the judiciary and a separation of powers that provides judges with genuine insulation will prove to be necessary conditions for the requisite objectivity, though no one should be under any illusions that these conditions will be sufficient.[203]

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199. This view is defended most famously by JUDITH N. SHKLAR, LEGALISM (1964). The best contemporary exponents are DOUGLAS, *supra* note 1 and MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW (1999).

200. ARENDT, *supra* note 8, at 253. In this view, Arendt echoes the eloquent disclaimer of the Israeli District Court, which emphasized that "[t]he judicial process has ways of its own, laid down by law and immutable, whatever the subject-matter of the trial," and forcefully insisted that a court of law is suited neither for historical investigation (because the court passively accepts only the evidence the parties bring to it) nor for moralizing (because "[a]s for questions of principle which are outside the realm of law, no one has made us judges of them and therefore our opinion on them carries no greater weight than that of any person who has devoted study and thought to these questions"). *Israel v. Eichmann*, *supra* note 174, para. 2.

201. ARENDT, *supra* note 8, at 259-60.

202. Andrei Yanuarievich Vishinsky (1883-1954) was the chief prosecutor at the Moscow "Witch Trials" of 1936-38. *See generally* ROBERT CONQUEST, THE GREAT TERROR (1968). *See also* DOUGLAS, *supra* note 1, at 11 (arguing that even a political trial "must satisfy law's stern requirements"); OSIEL, *supra* note 199, at 69 (arguing that liberal governments may stage show trials only if they "adhere to legal rules reflecting liberal principles of procedural fairness and personal culpability as conditions of criminal liability"); SHKLAR, *supra* note 199, at 152 (arguing that "[p]olitical trials are not defensible" if they "circumvent the demands of legality").

203. The best proof of the fairness of the Nuremberg Tribunal lies in its acquittal of such major figures of the Third Reich as Fritzsche, Papen, and Schacht. In this vein, it seems relevant that it was an Israeli court that ultimately exonerated Ivan Demjanjuk from charges that he was the Treblinka guard "Ivan the Terrible." Cr.C. (Jm.) 373/86, Israel v. Demjanjuk (1988), *rev'd* Cr.A. 347/88, Demjanjuk v. Israel, 47(4) P.D. 221 (S. Ct.1993). This was after an American court had found to the contrary. United States v. Demjanjuk, 518 F. Supp. 1362 (N.D. Ohio 1981). The Israeli court's decision was based on the finding that Demjanjuk was actually an S.S. guard at Sobibor — hardly a show-stopper if the Israeli court was truly bent on vengeance. The *Demjanjuk* case stands as a testimonial to the ability of a court to engage in objective fact-finding, notwithstanding the political stake that its nation has in pursuing the trial. A useful summary of the history of the *Demjanjuk* case, and the extensive investigation Israel

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The case may be different when it comes to a prosecution under universal jurisdiction, where the transparent urgency of the Nuremberg and Eichmann trials is absent, the trier's connection to the case is slight, and a political motivation is suspected. Precisely because many nations *could* prosecute under universal jurisdiction in such cases, the trial may raise suspicions grave enough to violate the requirements of natural justice even though its overall process is fair.[204]

Jurisdictional eclecticism holds that any tribunal satisfying the requirements of natural justice should be able to assert jurisdiction over crimes against humanity, but the natural question arises as to who decides whether a tribunal meets the requirements of natural justice. After all, it is one thing to state an ideal and another to institutionalize it. To begin with the obvious, no person brought to trial for a crime against humanity can count on a custodial court for protection from its own unfairness. Faced with a challenge, a fair court will decide fairly that it is a fair court; and an unfair court will decide unfairly that it is a fair court.[205] Diplomatic or political pressure from the outside world is the only real protection against an unfair trial that an accused person can count upon once he or she is in the custody of a court lacking in natural justice. Thus, scrutinizing the fairness of tribunals can protect suspects from unfair trials only if it happens before they fall into the custody of the tribunals. In practice, this means that any institutional mechanism for evaluating tribunals must operate when a custodial power is deciding whether to honor the tribunals' extradition requests.

There is no reason to doubt that outsiders can judge the natural justice of a tribunal; existing law contemplates such an inquiry in various circumstances. One is the procedure contemplated by the ICC's complementarity provisions. Under the Rome Statute, the ICC has jurisdiction over a case only if a state which has jurisdiction over it is "unwilling or unable genuinely to carry out the investigation or prosecution,"[206] which implies that the ICC may have to put a state's legal system on trial to determine unwillingness.[207] Indeed, where doubts arise as to whether a state is merely

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undertook that led to Demjanjuk's eventual acquittal, may be found at Israel Ministry of Foreign Affairs, *The* Demjanjuk *Case Factual and Legal Details* (July 28, 1993), *at* http://www.israel.org/mfa/go.asp?MFAH0azi0. Extensive documention of the Israeli proceedings are available at The Nizkor Project, *John Demjanjuk*, *at* http://www.nizkor.org/hweb/people/d/demjanjuk-john/ (last visited Dec. 14, 2003).

204. I elaborate elsewhere on this argument in connection with the British House of Lords' decision to set aside its first *Pinochet* opinion because of an apparent conflict of interest on the part of one of the judges. David Luban, *Law's Blindfold*, *in* CONFLICT OF INTEREST IN THE PROFESSIONS 23, 25-27, 30-34 (Michael Davis & Andrew Stark eds., 2001). I argue that while the mere appearance of conflicts of interest not actually present should not generally disqualify judges from trying cases, a high-profile international case like *Pinochet* demands different treatment. The suspicion of a politically partial decision could discredit the process and turn Pinochet into a martyr. The *Pinochet* case is also discussed further *infra* at notes 264-271 and accompanying text.

205. In either case, the inquiry is not likely to be searching—in the case of an unfair tribunal, because it does not want a searching inquiry, and in the case of a fair tribunal, because it does not need one. The ICTY, the procedural fairness of which is in my view beyond serious doubt, faced challenges to its natural justice by Slobodan Milosevic. It disposed of them in a few short paragraphs. Decision on Preliminary Motions, Prosecutor v. Milosevic, Case No. IT-02-54, paras. 8-22 (Trial Chamber, Int'l Crim. Trib. for the Former Yuglosavia, Nov. 8, 2001), http://www.un.org/icty/ind-e.htm.

206. Rome Statute, *supra* note 41, art. 17(1)(a).

207. *See id.*, art. 17(2).

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going through the motions of investigation and prosecution in order to shield a defendant, the Rome Statute instructs the Court to "consider . . . whether . . . the proceedings were not or are not being conducted independently or impartially."[208] In other words, the Rome Statute presumes that the ICC is competent to scrutinize state legal systems for fairness.

By contrast, states hearing extradition requests by other states normally follow a "rule of judicial noninquiry" into the fairness of the requesting state's legal system.[209] However, the rule does not derive from an incapacity of one state's judiciary to evaluate the fairness of another's; rather, its motivation is to preserve international comity. Furthermore, the rule has exceptions, and courts in both the United States and Canada have stated that they will not follow it in cases where a foreign court's deviations from due process are gross—a dictum that implies the availability of judicial inquiry into other states' judicial systems, for how else could a judge determine that the foreign court's deviations are gross?[210] It would require no great modification of existing law to reverse the presumption of judicial noninquiry when a state with no obvious jurisdictional connection to a supposed crime against humanity attempts to extradite a suspect for trial under universal jurisdiction. Thus, in two of the most likely contexts where the question of jurisdiction arises—potential prosecution by a party to the ICC, and extradition requests by states wishing to prosecute someone accused of crimes against humanity—mechanisms modeled on those already in place could be instituted to examine whether a state aiming to put the accused on trial satisfies the conditions of natural justice.

IX. AN ILLUSTRATION: *CONGO V. BELGIUM*

At this point, I wish to illustrate several themes broached so far by discussing an extended example: the ICJ's *Congo v. Belgium*[211] decision, also known as the *Arrest Warrant* case. First, I take up the question about political trials raised in the preceding section by examining accusations that Belgium's attempted prosecution of the Democratic Republic of the Congo's foreign minister was politically tainted. Next, I examine the various separate opinions debating the legality of universal jurisdiction statutes. My aim is to demonstrate that the debate lies precisely on the fault line separating classically state-centered international law from a view that subordinates the interests of states to those of humankind. Precisely the same large divide lies at the basis of the final issue I consider—the question of immunity that the ICJ addressed in its principal *Congo v. Belgium* holding. Thus, the overall aim of this extended case study is to illustrate the instabilities that the appeal to "humanity" occupies in the world of international law.

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208. *Id.* art. 17(2)(c).

209. *See* John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 189-91, 202-04 (1998) (discussing rule of noninquiry and exceptions to protect defendants against human rights violations).

210. *Id.* at 190.

211. *Congo v. Belgium*, *supra* note 19.

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Congo v. Belgium arose from the attempt by Belgium to prosecute the Democratic Republic of Congo's foreign minister, Abdulaye Yerodia Ndombasi, for grave breaches and crimes against humanity. The charges were based on anti-Tutsi speeches Yerodia had made in 1998, which allegedly led to several hundred lynchings and summary executions.[212] When a Brussels magistrate issued a warrant for Yerodia's arrest under Belgium's universal jurisdiction statute,[213] Congo instituted proceedings against Belgium in the International Court of Justice to quash the warrant, in order to redress the "moral injury" done to Congolese sovereignty. Congo argued that Belgium's universal jurisdiction statute violated international law, and that under customary international law a foreign minister enjoys immunity from prosecution. After the parties agreed to drop the universal jurisdiction issue, the ICJ addressed only the immunity issue (although several judges issued separate opinions on universal jurisdiction), and agreed with the Congo.[214]

This case attracted a great deal of attention. Belgium's universal jurisdiction statute compelled prosecutors to investigate complaints initiated by putative victims of humanitarian crimes. The result was a flood of proceedings against other world leaders, including Yasser Arafat (Palestine), Paul Biya (Cameroon), Fidel Castro (Cuba), Laurent Gbagbo (Ivory Coast), Hissen Habré (Chad), Saddam Hussein (Iraq), Denis Nguesso (Congo-Brazzaville), Augusto Pinochet (Chile), Hashemi Rafsanjani (Iran), and Ariel Sharon (Israel); the Sharon case, in particular, proved to be a lightning-rod of controversy.[215] Belgium, apparently, had decided to become the Delaware of international criminal law.[216] Indeed, in the wake of *Congo v. Belgium*, Belgian legislators who support expansive universal jurisdiction introduced legislation to reassert Belgium's ability to pursue its prosecutions.

Subsequent events unfolded at a startling pace. In March 2003, at the behest of family members of civilians killed in the 1991 Gulf War, Belgian prosecutors launched an investigation of former President George H.W. Bush, Vice President Dick Cheney, Secretary of State Colin Powell, and retired

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212. Jacques Vergès, an attorney representing the Democratic Republic of the Congo in the ICJ proceeding, explained the basis of the charges:

> In the first place, he is alleged to have made a televised statement on 4 August 1998, in which "speaking in Kilongo, the language of the Bas Congo [sic]", he called on "his brothers" to "rise up as one to throw the common enemy out of the country" using all possible weapons available, "including shotguns, machetes, pickaxes, arrows, sticks and stones." It is further alleged that on 27 August 1998 H.E. Yerodia Ndombasi said of the enemy: "They are scum, germs that must be methodically eradicated . . . ."

Oral Pleadings of Nov. 20, 2000, *Congo v. Belgium*, *supra* note 19, http://www.u-paris2.fr/cij/icjwww/idocket/iCOBE/iCOBEcr/iCOBE_icr2000-32_translation.htm.

213. Loi du 16 juin 1993 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocols I et II du 8 juin 1977, additionnels à ces Conventions, Moniteur Belge, Aug. 5, 1993, at 17751 (Belg.).

214. *Congo v. Belgium*, *supra* note 19. Originally, the Democratic Republic of the Congo had based its complaint both on objections to universal jurisdiction and arguments that Yerodia should be immune from prosecution. During the course of the litigation, Congo abandoned the first claim, and this precluded the ICJ from addressing it.

215. *Congo v. Belgium*, *supra* note 19 (separate opinion of Judge *ad hoc* Bula-Bula), para. 79; *Congo v. Belgium*, *supra* note 19 (dissenting opinion of Judge *ad hoc* Van den Wyngaert), para. 87.

216. For a clear discussion of the Belgian events, see REYDAMS, *supra* note 171, at 106-18. Not without reason, Reydams describes the events as "a veritable juridical soap opera." *Id.* at 109.

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General Norman Schwartzkopf, concerning the bombing of Baghdad's al-Amiriya shelter.[217] Belgium hastily amended its law to exclude such embarrassing prosecutions in the future; nevertheless, at a June NATO meeting, U.S. Defense Secretary Donald Rumsfeld threatened to move NATO's headquarters out of Brussels unless the Belgian law was rescinded.[218] In July 2003, Belgium responded by caving in to American pressure. The Belgian legislature amended the statute to apply only if the victim or the accused was a Belgian citizen or long-term resident at the time of the alleged crime, and to grant immunity to high government officials.[219] It is thus no longer a universal jurisdiction statute. In one sense, this history presents a cautionary tale on the imprudence of an aggressive, overreaching universal jurisdiction statute, and it is conceivable that it is the end of universal criminal jurisdiction, because henceforth no nation will risk arousing American wrath.[220] Nobody wants to become a second Icarus. In another sense, of course, the fact that Belgium was bullied out of her ambitious enforcement project proves nothing at all about the soundness or wisdom of universal jurisdiction as a matter of principle. In the discussion that follows, I adopt the latter perspective. As we shall see, important arguments can be offered against universal jurisdiction, but the bare fact that the U.S. government aggressively opposes it is not one of them.

A. *Judge Bula-Bula's Separate Opinion*

Among the numerous separate opinions in *Congo v. Belgium*, the astonishing diatribe by Judge *ad hoc* Bula-Bula (the Democratic Republic of the Congo's representative on the Court) stands out. The lengthy, unconventional, and frequently very passionate opinion denounces Belgium's attempt "to pose as prosecutor for all mankind, in other words, to claim the right to redeem human suffering across national borders and over generations."[221] But Bula-Bula also levels a number of more specific political accusations at Belgium. For him, Belgium is not guilty merely of moral hubris. Belgium is guilty of political bad faith. Bula-Bula reminds his readers that Belgium was the Congo's colonial master, inflicting hideous evils on the Congolese people for decades.[222] Furthermore, during the civil war following decolonization, Belgium was deeply implicated in the assassination of nationalist Prime Minister Patrice Lumumba (a deed Bula-Bula labels a

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217. *US Leaders Named in War Crimes Charges*, INDEP. (London), Mar. 19, 2003, at 8.

218. Vernon Loeb, *Rumsfeld Says Belgian Law Could Imperil Funds for NATO*, WASH. POST, June 13, 2003, at A24.

219. *Belgium Scales Back Its War Crimes Law Under U.S. Pressure*, N.Y. TIMES, Aug. 1, 2003, at A6; *War Crimes Bill Eased by Belgium*, WASH. POST, Aug. 2, 2003, at A17.

220. *See* Glenn Frankel, *Belgian War Crimes Law Undone by its Global Reach; Cases Against Political Figures Sparked Crises*, WASH. POST, Sept. 30, 2003, at A1. In the words of one of the law's supporters: "'We didn't lose everything, but we lost a lot. We have to live in the real world. It was an excellent law, but unfortunately it was used in a political way, and at the end of the day, we moved backward rather than forward. It's a setback.'" *Id.* at A15.

221. *Congo v. Belgium*, *supra* note 19 (separate opinion of Judge *ad hoc* Bula-Bula), para. 81.

222. *Id.* n.81 (citing HOCHSCHILD, *supra* note 112). *See generally* HOCHSCHILD, *supra* note 112.

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"crime against humanity")[223]—and Bula-Bula reminds us that Yerodia was a Lumumbist in the government of fellow Lumumbist Laurent Kabila.[224] According to Bula-Bula, the sole reason that Yerodia was forced out of Kabila's government was Belgian meddling on behalf of a Congolese opposition party.[225] He finds it "most singular" that of all the world leaders investigated by Belgium, Belgium issued a warrant only for Yerodia, meanwhile backpedaling as hard as possible from the politically embarrassing Sharon prosecution.[226] Nor does Bula-Bula neglect to call attention to the continuing "illegal exploitation of natural resources" in the Democratic Republic of the Congo by Belgian companies;[227] he asks bitterly why Belgium does not exercise its territorial jurisdiction by prosecuting those companies.[228] More significantly, he points to the deaths of millions of Congolese in the recent wars against Rwanda and Uganda—deaths largely ignored by the Western press—and asks why no one seems eager to prosecute these as international crimes.[229] In short, Belgium is not simply setting herself up as the "prosecutor for the whole human race," she is also acting in questionable faith to perpetuate "neocolonialist chaos" that serves her own interests.[230]

For human rights lawyers applauding Belgium's excellent adventure in universal jurisdiction and taking for granted the purity of Belgian motives, these accusations—not to mention the bitter invective of Bula-Bula's opinion—should serve as an important caution. I should say straightaway that I have no idea to what extent Bula-Bula's accusations are true, although the Belgian role in Lumumba's death is by now beyond serious dispute and the millions of recent deaths in the Congo have been ably documented. Belgium's Judge *ad hoc* Christine Van den Wyngaert denies any Belgian impropriety.[231] But even if Bula-Bula's accusations of conspiracy prove false, they have the ring of plausibility and there can be little doubt that they will be widely believed in much of the world. One's inclination may be to conclude that any state *except* Belgium should prosecute the Yerodia case.

For the fact remains that regardless of Belgian motives, the Yerodia case concerns grave and eminently prosecutable accusations. Here, at any rate, Judge Bula-Bula's opinion offers no satisfaction. To be sure, he points out that nineteenth-century Belgians used accusations of native barbarity as an excuse

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223. *Congo v. Belgium*, *supra* note 19 (separate opinion of Judge *ad hoc* Bula-Bula), paras. 8-11.

224. *Id.* para. 14.

225. *Id.* para. 23.

226. *Id.* para. 80.

227. *Id.* para. 13.

228. *Id.* para. 14.

229. *Id.* paras. 72, 82. In fact, however, Congo has filed a genocide complaint against Rwanda in the ICJ. Press Release 2002/15, Int'l Court of Justice, *The Democratic Republic of the Congo Initiates Proceedings Against Rwanda Citing Massive Human Rights Violations by Rwanda on Congolese Territory* (May 28, 2002), http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-15_crw_20020528.htm.

230. *Congo v. Belgium*, *supra* note 19 (separate opinion of Judge *ad hoc* Bula-Bula), paras. 75, 25.

231. *Congo v. Belgium*, *supra* note 19 (dissenting opinion of Judge *ad hoc* Van den Wyngaert), para. 87.

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for colonialism, and insinuates that Belgium is up to its old tricks.[232] On the facts of the case, however, he offers only the unsurprising news that the Democratic Republic of the Congo rejects the charges against Yerodia and the risible reassurance that "Presidents of the Congolese Bar asserted before local media, the day after notification of the [Belgian] warrant . . . that 'the case-file was empty.'"[233]

The Yerodia case starkly represents both troubling and hopeful aspects of universal jurisdiction, understood as a stand-in for vigilante jurisdiction. The prosecution may well represent a political abuse of legal process for base ends; alternatively, it may represent the only hope to bring an instigator of mass murder to justice. Disturbingly, it may represent both at once.

On the theory presented here, the fundamental question should be whether the Belgian prosecution satisfies the demands of natural justice. At a minimum, natural justice requires fair courts with fair procedures and accurate fact-finding. Even supposing that the Belgian courts satisfy these minimal requirements, however, the credible possibility that Belgium's prosecution results from base political motives may itself violate natural justice. In that case, Belgian jurisdiction in this case is a mistake, even if Belgium is right to exercise its jurisdiction in its other high-profile cases, where it has no political dog in the fight.[234]

B. *The Universal Jurisdiction Opinions*

In this Article, I have defended jurisdictional eclecticism, the view that whichever tribunal offers an acceptable approximation to natural justice may try crimes against humanity. This view presupposes that any tribunal may exercise jurisdiction regardless of its territorial or national connection to the crime, which in turn implies universal jurisdiction. As mentioned above, the ICJ in *Congo v. Belgium* did not, in the end, rule on the legitimacy under international law of Belgium's universal jurisdiction statute; however, a number of separate opinions addressed the issue. In fact, eight separate opinions, representing ten of the Court's sixteen judges, discussed universal jurisdiction. They divided almost evenly over the legitimacy of universal

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232. *Congo v. Belgium*, *supra* note 19 (separate opinion of Judge *ad hoc* Bula-Bula), para. 50.

233. *Id.* para. 71.

234. However, Luc Reydams offers additional criticisms of Belgium's adherence to the requirements of natural justice in its universal jurisdiction cases—criticisms that, if accurate, apply across the board. He points to the remarkable delays in the trial of the four Rwandan *génocidaires* (five years), and remarks, "Such a delay is hardly reconcilable with the right to be tried within a reasonable time." REYDAMS, *supra* note 171, at 111. He elaborates the criticism of "the gap between the aim of the Belgian legislature (the establishment of universal jurisdiction far beyond treaty obligations) and the apparent lack of institutional capacity of the domestic criminal justice system," and comments further:

> The presence in Belgium of suspected Rwandan *génocidaires* illustrates this: four were tried after an unjustifiable delay, a dozen or more are left in peace. The situation fuels the criticism that the proceedings *in absentia* against the world's villains are window-dressing . . . . The result was absurd: a tiny country (with a none too efficient criminal justice system) assumes broader powers than the ICC.

Id. at 118.

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jurisdiction, with five judges supporting it,[235] four opposing it,[236] and one (Judge Oda) finding the present law too unsettled to tell.[237] The currently-pending ICJ case between Congo and France will specifically address the universal jurisdiction issue that *Congo v. Belgium* failed to reach;[238] in the meantime, the separate opinions in the latter case provide some insight into the fault lines between competing approaches.

The most thorough consideration by non-partisan judges appears in the pro-universal jurisdiction opinion of Judges Higgins, Kooijmans, and Buergenthal and the anti-universal jurisdiction opinion of President Guillaume.[239] Guillaume takes the dimmest view, arguing that universal jurisdiction would create "judicial chaos" that would benefit only the powerful.[240] Significantly, he argues that "international law knows only one true case of universal jurisdiction: piracy"[241]—a substantially narrower view of universal jurisdiction than that of most scholars and jurists. Conventional law, Guillaume notes, often incorporates obligations either to extradite or to prosecute (*aut dedere aut prosequi*), but it authorizes only "subsidiary" universal jurisdiction for offenders that states choose not to extradite, not true universal jurisdiction.[242] Finally, Guillaume objects that "[u]niversal jurisdiction *in absentia* as applied in the present case is unknown to international law."[243]

The first of these arguments is unpersuasive. The second is more complex; I shall suggest that Guillaume's reading of the current state of international law presupposes the very conclusion he means to establish, namely that universal jurisdiction must be subordinated to the other jurisdictional principles. And the objection to universal jurisdiction *in absentia* turns out, I believe, to be only a variant of the more general argument against universal jurisdiction, namely that it violates the traditional sovereign rights of states. I take up these points in order.

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235. *Congo v. Belgium*, *supra* note 19 (separate opinion of Judge Koroma), para. 9; *id.* (dissenting opinion of Judge *ad hoc* Van den Wyngaert), para. 59; *id.* (separate opinion of Judges Higgins, Kooijmans & Buergenthal), para. 65.

236. *Id.* (separate opinion of President Guillaume), para. 16; *id.* (declaration of Judge Ranjeva), para. 12; *id.* (separate opinion of Judge Rezek), para. 6; *id.* (separate opinion of Judge *ad hoc* Bula-Bula), para. 79.

237. *Id.* (dissenting opinion of Judge Oda), para. 12.

238. *See Congo v. France*, *supra* note 20.

239. "Partisan" judges were Judge Van den Wyngaert (Belgium's judge *ad hoc*) and Judge Bula-Bula (the Democratic Republic of the Congo's judge *ad hoc*).

240. *Congo v. Belgium*, *supra* note 19 (separate opinion of President Guillaume), para. 15. It should be noted that President Guillaume is a noted authority on universal jurisdiction. *See* Guillaume, *supra* note 165.

241. *Congo v. Belgium*, *supra* note 19 (separate opinion of President Guillaume), para. 12.

242. *Id.* "Subsidiary" means that a state having custody of suspects can exert universal jurisdiction over them only if for reasons unrelated to the crime they cannot be extradited. *See* REYDAMS, *supra* note 171, at 29-31, for a sketch of the early history of subsidiary universal jurisdiction. In this portion of the argument, I draw heavily on Reydams's superb book. I note, however, that Reydams is much less sympathetic to universal jurisdiction than I, and reaches the opposite conclusion about *Congo v. Belgium*, endorsing the Guillaume opinion and criticizing that of Higgins, Kooijmans, and Buergenthal. *Id.* at 227-31.

243. *Congo v. Belgium*, *supra* note 19 (separate opinion of President Guillaume), para. 12.

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Clearly, Guillaume's "judicial chaos" argument envisages a multitude of states squabbling over jurisdiction to try international offenders, with the powerful grabbing the defendants they want to try and protecting those they do not. Admittedly, this is a horrible prospect, as even Judge Van den Wyngaert concedes.[244] But Guillaume overlooks the fact that the same prospect for judicial chaos frequently exists *without* universal jurisdiction. After all, under accepted jurisdictional principles, states can prosecute offenses committed by anyone within their own territorial boundaries, or by their own nationals anywhere, or by non-nationals abroad whose crimes have their effects on a state's territory, or whose victims are nationals, or whose crimes injure a state's national security interests.[245] Realistically, this wealth of jurisdictional options means that under existing law, three or more states—the territorial state where the conduct occurred, the perpetrator's national state, and the victims' states—will often have concurrent jurisdiction over the offender, but judicial chaos has not been the result. Instead, jurisdictional priority is settled through diplomatic means and the balancing of different states' interests.[246] Guillaume offers no reason for believing that matters would be different under universal jurisdiction. Moreover, Guillaume's judicial chaos argument presupposes multiple states—and perhaps the ICC—fighting over the right to prosecute international crimes, where in reality states have proven unwilling to touch these cases with a ten-foot pole.[247]

Next, consider Guillaume's argument that conventional international law does not recognize universal jurisdiction except in the case of piracy, but rather accepts only "subsidiary" *aut dedere aut prosequi* jurisdiction. Dozens of international treaties contain *aut dedere aut prosequi* clauses, which all follow the same format: the treaties obligate their parties to extradite or prosecute those accused of certain crimes (such as skyjacking or official torture) and further obligate their parties to establish through statute their jurisdiction to prosecute these crimes. The question is whether the jurisdiction established in accordance with these treaties is invariably subsidiary.

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244. *Congo v. Belgium*, *supra* note 19 (dissenting opinion of Judge *ad hoc* Van den Wyngaert), para. 87.

245. Respectively, these fall under the subjective territorial principle, the nationality principle, the objective territorial or effects principle, the passive personality principle, and the protective principle, all of which are well-established grounds of jurisdiction. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) [hereinafter RESTATEMENT].

246. Reasonable exercise of jurisdiction and a balancing of legal interests is called for in Inst. of Int'l Law, *Draft Resolution on the Extraterritorial Jurisdiction of States*, art. 4.1 (1993), *reprinted in* 65-II Y.B. INST. INT'L L. 133 (1993). Similarly, the *Restatement of the Foreign Relations Law of the United States* limits "unreasonable" exercises of jurisdiction by states even when one of the jurisdictional principles is satisfied, and offers a list of eight factors whose balancing determines the reasonableness of jurisdiction. RESTATEMENT, *supra* note 245, § 403. Admittedly, the *Restatement*'s reasonableness test does not apply to universal jurisdiction, but nothing in the *Restatement* comes close to suggesting that jurisdictional disputes involving multiple assertions of universal jurisdiction would not be resolved the same way that other concurrent jurisdiction disputes are. *See id.* § 404.

247. For example, in 1997 the United States lobbied several states with universal jurisdiction statutes to try Khmer Rouge leader Pol Pot, but all of them refused. *See* Elizabeth Becker, *U.S. Spearheading Effort To Bring Pol Pot to Trial*, N.Y. TIMES, June 23, 1997, at A1.

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Modern international criminal law treaties divide into three distinct groups.[248] The first, and oldest, do indeed establish only subsidiary universal jurisdiction. They contain explicit language stating that the custodial state can prosecute a non-national only if extradition has been demanded and cannot be granted for reasons unconnected with the offense.[249] By conditioning prosecution on the failure of extradition, these treaties make it clear that universal jurisdiction is subsidiary to other forms of jurisdiction. However, beginning with the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, known commonly as the "Hague Hijacking Convention," more than twenty treaties have adopted *aut dedere aut prosequi* clauses that do not contain language conditioning prosecution on non-extradition.[250] More significantly, these treaties all add explicit language that the treaty "does not exclude any criminal jurisdiction exercised in accordance with national law."[251] In other words, the treaty obligations set only a lower bound on the exercise of jurisdiction, not an upper bound. Given that these treaties require parties to establish universal jurisdiction and impose no conditions on its exercise, it seems that the universal jurisdiction established under them is *not* merely subsidiary.[252] The third group of treaties bolsters even more the contention that non-subsidiary universal jurisdiction exists in conventional law: these treaties, including the Convention for the Suppression and Punishment of the Crime of Apartheid and the 1949 Geneva Conventions, clearly permit states to try alleged offenders of any nationality.[253] Evidently these conventions contemplate full-fledged universal jurisdiction—the very universal jurisdiction whose existence Guillaume denies. In short, non-subsidiary universal jurisdiction exists to a greater extent in international law than Guillaume acknowledges.

Of course, treaties often contain ambiguities, and these are no exceptions; jurists have read the universal jurisdiction in them broadly, as I

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248. REYDAMS, *supra* note 171, at 43-68.

249. These include the pre-World War II conventions on counterfeiting currency, on suppression of the illicit traffic in dangerous drugs, and for the prevention and punishment of terrorism. REYDAMS, *supra* note 171, at 44-47.

250. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 7, 22 U.S.T. 1641, 1646, 860 U.N.T.S. 105, 109 [hereinafter Hague Hijacking Convention]. For a summary of the *aut dedere aut prosequi* clauses in numerous multilateral conventions, see M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 122-134 (2001).

251. Hague Hijacking Convention, *supra* note 250, art. 4(3), 22 U.S.T. at 1645, 860 U.N.T.S. at 108. For a discussion of similar language in other multilateral conventions, see Bassiouni, *supra* note 250, at 122-134.

252. One reply to this argument is that the Hague Hijacking Convention and others that mimic its formulations obligate states parties to establish universal jurisdiction over the offense only "in the case where the alleged offender is present in its territory and it does not extradite him . . . . " Hague Hijacking Convention, *supra* note 252, art. 4(2), 22 U.S.T. at 1645, 860 U.N.T.S. at 108. But this clause limits only the obligation of states to establish universal jurisdiction, not the scope of the universal jurisdiction they establish.

253. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, arts. 4(b), 5, 13 I.L.M. 50, 54 (1976); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 3418, 75 U.N.T.S. 135, 236 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 3616, 75 U.N.T.S. 287, 386 [hereinafter Geneva Convention IV]. See the discussion of these Conventions in REYDAMS, *supra* note 171, at 53-56, 59-61.

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have, but also more narrowly.[254] However, the heart of the argument is not about the fine-grained parsing of treaty language. It is about a fundamental difference in interpretive outlook—the very difference between statism and cosmopolitanism that recurs at every point in the discussion of crimes against humanity. Maurice Travers, for example, wrote in 1920 that unrestricted universal jurisdiction "goes against the nature of the penal law and against the very conception of State."[255] Sixteen years later, Mikliszanski countered that universal jurisdiction:

> places itself at the philosophical level, at the level of the very nature of the penal norm: stripping the latter of the statist-territorial character (*caractère étatico-territorial*) which has been wrongly attributed to it, and retaining only its true and unique value which is to be fundamentally and uniquely human.[256]

If you begin, as Travers does, with the viewpoint that the traditional order of states constitutes the essential subject of international law, it seems inevitable that the reach of jurisdiction ends where the usual powers of states end. Traditionally, states exert sovereignty over their territory and their nationals, and are entitled to protect their people and their vital interests. These elementary propositions of political theory generate the territorial, nationality, passive personality, and protective principles of jurisdiction. For a statist, these principles are the default settings in international jurisdiction; thus, the statist reading of treaties containing universal jurisdiction clauses assumes that they cannot intend to bypass the more basic principles. A cosmopolitan, on the other hand, takes seriously the idea that in recognizing crimes against humanity, the law aims to expunge these acts from the political repertoire of states. The cosmopolitan no longer assumes that the political theory of sovereignty sets the defaults in international law. The interests of humanity—humankind—take precedence. Thus the cosmopolitan will read universal jurisdiction clauses in treaties without assuming tacit defaults to traditional sovereignty-based principles. Judge Guillaume's opinion adopts the statist stance, whereas Judge Van den Wyngaert's adopts the cosmopolitan one. The argument turns on the background assumptions of political theory that interpreters bring to the task. In effect, Guillaume's interpretation of the treaties assumes what he wishes to show—that full-fledged universal jurisdiction does not exist in conventional law. As we move forward in time from the pre-war treaties to the Hague Hijacking Convention, and then to the

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254. For example, Judge Guillaume—who was involved in the drafting of the Hague Hijacking Convention—has argued that the treaty incorporates subsidiarity. *See* Guillaume, *supra* note 171, at 33-35. For a similarly narrowing interpretation of the universal jurisdiction clauses in the Geneva Conventions, see REYDAMS, *supra* note 171, at 54-55.

255. MAURICE TRAVERS, 1 LE DROIT PÉNAL INTERNATIONAL ET SA MISE EN OEUVRE EN TEMPS DE PAIX ET EN TEMPS DE GUERRE 75 (1920), *quoted and translated in* REYDAMS, *supra* note 171, at 32.

256. K. Mikliszanski, *Le système de l'universalité du droit de punir et le droit pénal subsidiare*, REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 331, 333 (1936), *quoted and translated in* REYDAMS, *supra* note 171, at 33-34. Reydams's survey of treaty debates, international resolutions, and official drafts and studies finds the same disagreement surfacing again and again. REYDAMS, *supra* note 171, at 43-80.

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Apartheid and Torture Conventions,[257] the statist stance recedes and becomes less credible as an interpretation of the history that the treaties reflect.

What about Guillaume's argument that universal jurisdiction *in absentia* is "unknown to international law"?[258] In my view, the "*in absentia*" issue is far less important than it may at first appear. Talk of "universal jurisdiction *in absentia*" conjures up the image of a judicial travesty in which Yerodia is tried and convicted in his absence, without a defense—a major outrage against the requirements of natural justice. But nothing of the sort was going on. Belgium opened an investigation of Yerodia *in absentia*, and issued an arrest warrant to try to get him into Belgium. The real issue is not judicial proceedings *in absentia*, but Belgium's effort to get custody of Yerodia in order to exercise jurisdiction that is not *in absentia*. Traditionally, universal jurisdiction meant custodial jurisdiction: the state with custody of a suspect investigated and tried him. First came custody, then investigation. Here, Belgium investigated first and then attempted to gain custody. It is hard to see why anything of vital importance turns on the sequence of events.[259]

Congo argued that by attempting to obtain custody of a Congolese national who was not in Belgian territory, and who had not harmed Belgian interests, Belgium was violating Congo's sovereign rights. By now, however, the reply is clear: it simply begs the question to suppose that a state has a sovereign right to protect perpetrators of crimes against humanity. In the end, then, the argument against universal jurisdiction *in absentia* is no stronger—indeed, it is no different—than the overall argument against universal jurisdiction.[260] It rests on a view that the sovereign rights of states prevail over the interest in prosecuting crimes against humanity, and that is precisely the premise that cosmopolitans are unwilling to grant.

I shall spare only a few words on the Higgins-Kooijmans-Buergenthal opinion, which comes very close to the jurisdictional eclecticism I favor, and with which I largely agree. The three judges believe that international law is evolving in the direction of universal jurisdiction over crimes against humanity, and they favor "a flexible strategy, in which newly-established international criminal tribunals, treaty obligations and national courts all have their part to play."[261] Their "flexible strategy" does not specify that the requirements of natural justice must determine which part each institution

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257. *See supra* notes 251-53.

258. *See Congo v. Belgium*, *supra* note 19 (separate opinion of President Guillaume), para. 12.

259. Indeed, trying to get custody of a suspect abroad in order to try him is not "unknown to international law," even under a theory of universal jurisdiction. An example is the *Pinochet* case, where the United Kingdom held Pinochet pending an extradition proceeding launched by Spain for universal jurisdiction crimes. *See* Regina v. Bow St. Metro. Stipendiary Magistrate and Others, *Ex parte* Pinochet Ugarte, [2000] 1 A.C. 147 [hereinafter *Pinochet III*]; *infra* note 264 (discussing the Pinochet litigation). *See also* United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (asserting universal jurisdiction over a Jordanian who had hijacked a Jordanian airliner in Lebanon; the United States obtained custody of Yunis by luring him onto a yacht and arresting him when it entered international waters).

260. I take this to be the import of the Higgins-Kooijmans-Buergenthal opinion. *See Congo v. Belgium*, *supra* note 19 (separate opinion of Judges Higgins, Kooijmans, and Buergenthal), at paras. 53-58.

261. *See id.* paras. 51-52.

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plays—but nothing they say excludes these requirements, and jurisdictional flexibility is another name for jurisdictional eclecticism.

C. *Immunity and the End of Politics as Usual*

The principal holding of *Congo v. Belgium* limits the capacity of third parties to prosecute crimes against humanity against incumbent officials of other countries. The ICJ finds a rule of customary international law that immunizes sitting foreign ministers—and, by implication, a potentially broader class of high governmental officials—from prosecution by third parties.[262] The basis of the immunity is functional—foreign ministers must be able to travel about the world freely in order to conduct the foreign policies of their countries.[263] The same argument may extend the scope of the immunity to finance ministers and others whose positions require international travel.

One reply to this argument might be that nothing compels states to appoint suspected criminals against humanity to important diplomatic posts, and that they perhaps ought to do so only at their own peril. But many regimes in the world are steeped in gore, with leadership corps all implicated to some degree in gross crimes. Other nations must still be able to do diplomatic business with criminal regimes; thus, their foreign ministers require immunity. The case is little different from honoring white flags so that criminal armies can send emissaries to parley. On practical grounds, it is hard to see how the ICJ could have decided the immunity issue differently.

But the theory behind the judgment begs the question in the same way as the arguments against universal jurisdiction. It supposes that the customary international law of immunity, the purpose of which is to permit diplomatic business as usual, applies even where the diplomat on the other side may have committed crimes against humanity. It makes state-to-state diplomacy the be-all and end-all of international law. But the whole idea behind prohibiting crimes against humanity is that these crimes should never be tolerated in the course of politics. The ICJ fails to acknowledge that just to the extent that international law recognizes the category of crimes against humanity, it departs from its statist premises. The *Congo v. Belgium* opinion reveals an unbridgeable gap between the perspectives of states and their individual human victims. States are an unavoidable necessity; states are also a dire threat. That double fact forms an integral part of the human condition, and the argument over immunity for high state officials with bloody hands displays the political nature of our existence in its harshest and most troubling light.

One way out of this dilemma—a way, oddly enough, that the ICJ did not pursue in *Congo v. Belgium*—is the path taken by Britain's Law Lords in their

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262. The grounds are shaky because, as Judge Van den Wyngaert points out in her dissenting opinion, the Court does not bother to demonstrate—and probably could not demonstrate—a state practice of immunizing foreign ministers charged with crimes against humanity. *See Congo v. Belgium*, *supra* note 19 (dissenting opinion of Judge *ad hoc* Van den Wyngaert), at paras. 11-23. There simply exists no paper trail of investigations and indictments of other states' foreign ministers for crimes against humanity that have been quashed invoking a rule of immunity, and that is what it would take to prove a rule of customary international law.

263. *See Congo v. Belgium*, *supra* note 19, at para. 53.

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final *Pinochet* decision.[264] They faced an issue directly analogous to that in *Congo v. Belgium*: do heads of state and former heads of state enjoy immunity from prosecution in other states' courts for international crimes? The rules for head-of-state immunity are very similar to those the ICJ finds for foreign ministers. As Lord Millett explains, within the classical theory of international law—the theory "that states were the only actors on the international plane"[265]—head-of-state immunity derives from the immunity of states themselves, because the head of state personifies the state. According to customary international law, an incumbent head of state enjoys immunity for all his misdeeds, public and private, out of respect for his office. For example, even if he is a kleptomaniac who goes on shoplifting sprees in foreign countries, he retains personal immunity by reason of his office from prosecution abroad for his thefts. Once he leaves office, however, he loses immunity for his private acts. Now other states can prosecute for his previous shoplifting, because it is a quintessentially private act having nothing to do with his functions as a head of state. Nevertheless, his official acts retain their character as acts of the state itself, and so he still enjoys subject-matter immunity from prosecution for those acts, even if they were crimes. In short, during his incumbency, he is immune for all acts, public or private; but after his incumbency, he retains immunity only for official acts, and he can be criminally tried for private acts committed while in office as well as for crimes committed before and after the incumbency. The ICJ articulates the identical rule for foreign ministers in *Congo v. Belgium*.[266]

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264. Regina v. Bow St. Metro. Stipendiary Magistrate and Others, *Ex parte* Pinochet Ugarte, [2000] 1 A.C. 61 [hereinafter *Pinochet I*]; *Pinochet III*, *supra* note 259. Augusto Pinochet, Chile's former leader, was detained in London when a Spanish magistrate issued an extradition request for him to stand trial in Spain for crimes committed during his brutal dictatorship. The original warrant concerned murders, but a subsequent warrant substituted charges of torture and terrorism. Pinochet claimed immunity from prosecution as a former head of state, but the Law Lords rejected the claim in *Pinochet I*. Subsequently, the opinion was withdrawn because one of the Lords voting in the narrowly-divided opinion had an official connection with Amnesty International, which had intervened in the case. The opinion withdrawing *Pinochet I* is Regina v. Bow St. Metro. Stipendiary Magistrate, *Ex parte* Pinochet Ugarte, [2000] 1 A.C. 119 [hereinafter *Pinochet II*]. After rehearing the case, a different panel of Lords also found Pinochet extraditable, but narrowed the class of crimes for which he could be extradited based on a reading of the double-criminality requirement in the British extradition statute. Although only the opinions in *Pinochet III* have legal force in the United Kingdom, I believe that all the opinions in both *Pinochet I* and *Pinochet III* contribute to the meaning of the case in international law; *Pinochet I* was withdrawn for reasons independent of its reasoning on the legal issues, and *Pinochet III* reached the same result as *Pinochet I* on the immunity issue, differing from *Pinochet I* only in its reading of the British extradition statute. Thus, for purposes of determining the Pinochet litigation's contribution to the customary international law of immunity, all the speeches in both opinions seem equally relevant. (Lord Hoffman, the member of the *Pinochet I* panel whose alleged appearance of bias led to the withdrawal of the opinion, did not make a speech.)

265. *Pinochet III*, *supra* note 259, at 268 (Lord Millett, J., dissenting).

266. The ICJ stated the rule as follows:

> [A] Minister for Foreign Affairs . . . occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office . . . . The Court accordingly concludes that . . . he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability.

Congo v. Belgium, *supra* note 19, paras. 53-54. The court continued, however, to state that immunity would not be permanent:

Lord Millett's way of posing the issue, by emphasizing that the statist or classical view of international law would grant Pinochet immunity even for gruesome international crimes, raises precisely the dilemma between statist "business as usual" and the human interest in eliminating crimes against humanity from the repertoire of politics. But the Law Lords found a way out of the dilemma that superficially preserves the immunity of states while actually accepting the alternative picture. Former heads of state enjoy subject matter immunity for their official acts. The question, as the Law Lords saw it, was whether Pinochet's acts of torture were official. Lord Goff of Chieveley thought the answer is yes: "The functions of . . . a head of state are governmental functions, as opposed to private acts; and the fact that the head of state performs an act, other than a private act, which is criminal does not deprive it of its governmental character."[267] In *Pinochet I*, Lord Lloyd of Berwick elaborated this argument more clearly than did any of the *Pinochet III* opinions. "Of course it is strange to think of murder or torture as 'official' acts or as part of the head of state's 'public functions.' But if for 'official' one substitutes 'governmental' then the true nature of the distinction between private acts and official acts becomes apparent."[268] He explained:

> It is a regrettable fact that almost all leaders of revolutionary movements are guilty of killing their political opponents in the course of coming to power, and many are guilty of murdering their political opponents thereafter in order to secure their power. Yet it is not suggested (I think) that the crime of murder puts the successful revolutionary beyond the pale of immunity in customary international law.[269]

However, most of the Lords in *Pinochet III* disagreed. The heart of their response was that at least since the Convention Against Torture, acts of torture "cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime."[270] In other words: states (and their personifications, heads and former heads of state) retain immunity for their official acts, and so the classical theory that states must honor each other's sovereign dignity gets upheld, at least nominally. But torture can no longer be regarded as an official act.

It is this last finding that bears radically humanitarian implications—implications that, if taken seriously, spell the end of the classical theory. If we take officially sponsored torture as a synecdoche for all the crimes against

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> [A]fter a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Id. para. 61.

267. *Pinochet III*, *supra* note 259, at 217 (Lord Goff of Chieveley, J.).

268. *Pinochet I*, *supra* note 264, at 96 (Lord Lloyd of Berwick, J.).

269. *Id.*

270. *Pinochet III*, *supra* note 259, at 262 (Lord Hutton, J.). Lord Browne-Wilkinson reaches the same conclusion. *Id.* at 203-05 (Lord Browne-Wilkinson, J.). He asks: "Can it be said that the commission of a crime which is an international crime against humanity and jus cogens is an act done in an official capacity on behalf of the state?" *Id.* at 203. His answer is no. *Id.*

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humanity, the argument in effect concludes that from the moment that international law prohibits them, crimes against humanity can no longer form a lawful part of politics. Acts of state remain beyond the reach of other states' courts, but henceforth the most typical brutalities of politics no longer count as acts of state. This doctrine accords perfectly with the account of crimes against humanity offered here, in which autopolemic political violence violates humanity's nature as a political animal and should no longer count as a legitimate part of politics. In the guise of a conservative opinion, the *Pinochet* Lords reached their result through a deeply anti-conservative argument, one that declares a legal end to the worst of politics as humanity has had to endure it up to now.

As mentioned above, the *Congo v. Belgium* opinions never even consider the question of whether Yerodia's speeches were an official function of a foreign minister, given that they may well have been incitements to crimes against humanity. Had the ICJ done so, the *Pinochet* doctrine suggests that it should have decided the immunity issue differently.[271] Plainly, the ICJ was not prepared to do so. Perhaps the judges understood all too well that to accept the argument that crimes against humanity are *ultra vires* acts would profoundly undermine the statist premises of international law, and therefore the ICJ itself. We shall see. In August 2003, Liberia brought proceedings in the ICJ against Sierra Leone for issuing an arrest warrant for former Liberian President Charles Taylor.[272] The ICJ will thus confront the immunity issue once again.

X. CONCLUSION: WHAT'S IN A NAME?

This Article offers an interpretation of crimes against humanity—an interpretation according to which they represent an affront to our nature as political animals, our double character as unsociably social individuals who combine self-awareness and self-interest with a natural need for the society of others. This double character, I have argued, is the aspect of humanity that the law aims to protect; its universal importance is the reason that all humanity has an interest in criminalizing atrocious violence and persecution committed by organized groups against civilian populations. The interpretation, therefore,

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271. One important question *Pinochet III* leaves unsettled concerns what sort of legal events convert torture from an official to an *ultra vires* act. Here, the Law Lords disagreed among themselves, with some locating the date at whatever point—presumably Nuremberg—when torture became an international crime, others focusing on its criminalization in the Convention Against Torture, and still others emphasizing the fact that the Convention contains a universal jurisdiction clause. This question, which may seem like the sort of dreary technicality that only a lawyer or a theologian can love, has important implications when we turn from torture to other crimes against humanity. If the decisive legal event making them *ultra vires* is their criminalization in a widely-accepted international treaty, then the Rome Statute has the effect of stripping away former head-of-state immunity in national courts. If, on the other hand, the decisive event is the enactment of a treaty containing a universal jurisdiction clause, the Rome Statute, which has no universal jurisdiction clause, will not fill the bill and—on the *Pinochet* arguments—the immunity remains intact.

272. Press Release, Int'l Court of Justice, *Liberia Applies to the International Court of Justice in a Dispute with Sierra Leone Concerning an International Arrest Warrant Issued by the Special Court for Sierra Leone Against the Liberian President* (Aug. 5, 2003), http://www.icj-cij.org/icjwww/ipresscom/ipress2003/ipresscom2003-26_xx_20030805.htm.

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explains the sense in which crimes against humanity are crimes against humanness as well as crimes against humankind. These are crimes committed by politically organized groups against other groups in the same civil society—crimes consisting of the most barbaric atrocities and humiliations, and falling outside the legitimate realm of sovereign self-determination. Crimes against humanity assault our individuality by attacking us solely because of the groups to which we belong, and they assault our sociability by transforming political communities into death traps. In a world consisting largely of piebald, patchwork polities, where distinct groups live uneasily side by side, every human being has an interest in ensuring that politics never transgresses the limits set by these laws. Anyone who violates them becomes an enemy and legitimate target of all humankind. This gives rise to what I have labeled the "vigilante jurisdiction." However, I have also argued that vigilante justice by its very character violates the precepts of natural justice, and thus that vigilante jurisdiction must always be delegated to tribunals, provided that these conform to the standards of natural justice. The point of the argument is that tribunals trying crimes against humanity are not vindicating state interests, but rather human interests; their obligation is simply to ensure that this vindication satisfies natural justice. As a consequence, I have defended *jurisdictional eclecticism*: any tribunal, national or international, should potentially have authority to try crimes against humanity, and the choice of tribunal should be based largely on the requirements of natural justice.

Lawyers in the tradition of legal realism may well be skeptical of the very project of trying to establish legal conclusions by analyzing concepts such as "crimes against humanity." For the realists, concepts are traps and conceptual analysis is a distraction. They argue that the sole meaning of legal terms lies in their practical consequences, to be discovered by examining what courts actually do with the concepts.[273] Holmes goes so far as to suggest that the law might be better off if all moral terms were replaced with artificial words carrying no extralegal connotations.[274] That way, no one would be misled into supposing that legal phrases are anything more than terms of art.

Realists would dismiss the thought that "crimes against humanity" has anything to do with "humanity" in any of its senses. "Crime against humanity" is just a semantically-neutral label, with no more internal structure than the nonsense word "Crimeagainsthumanity," a word to which "humanity" (the last eight letters of the nonsense word) has no more conceptual relevance than "Crimea" (the first six letters). And propositions like "ethnic cleansing is a crime against humanity" mean nothing more than that those responsible for ethnic cleansing will be treated in certain specified ways by courts.

Needless to say, I reject this argument, both in general and in the particular case of crimes against humanity. Law is hardly an esoteric subject,

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273. *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820-23 (1935).

274. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897).

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and legal words are nowhere near as specialized as Holmes suggests. Of course, law contains some wholly technical words—renvoi, subpoena, fee simple—but most legal words are not technical. How could they be, if law is supposed to guide human action? Any literate person, with or without legal training, will be able to read a statute or a judicial opinion and follow most of what it says.

In the case of crimes against humanity, there is no robust case law assigning the phrase a technical meaning, and indeed the various statutes defining it—the Nuremberg Charter, Allied Control Council Law No. 10, the ICTY, ICTR, and Rome Statutes, national statutes, and a handful of law commissions' proposals—all define it differently. The concept is still in the childhood of its legal development, and those wrestling with the appropriate codification are in very much the same position as mathematicians in the early stages of a new field. The pioneers of topology had no "official" definition of a topological space. Their task was to come up with one, and the raw materials they had to work with were intuitions about what conceptual work the definition was supposed to do. Lawyers trying to codify crimes against humanity are in the same boat. They must begin with an intuitive idea of what crimes against humanity are, and then test their formulations against their intuitions. Whatever connotations the language itself has will greatly influence these intuitions. The language may put them on false trails, but it is not simply a placeholder for legal decisions that have not yet been made. The term "crimes against humanity" packs an enormous rhetorical wallop, and it does so not because lawyers treat it as a technical term, but rather because all of us know that "humanity" means something universal and immensely important. After a century in which crimes against humanity have taken tens of millions of lives, it may be that understanding the twin meanings of "humanity" that these deeds offend is the least we owe the dead.

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APPENDIX: SOME STATUTORY DEFINITIONS OF CRIMES AGAINST HUMANITY AND GENOCIDE

(1) Nuremberg Charter[275]

Article 6(c):

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

(2) Allied Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity[276]

Article II(c):

Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

275. Nuremberg Charter, *supra* note 5.
276. CCL No. 10, *supra* note 33.

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(3) Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[277]

Article 5 – Crimes against humanity:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts.

277. ICTY Statute, *supra* note 37.

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(4) Statute of the International Criminal Tribunal for Rwanda (ICTR)[278]

Article 3 – Crimes against Humanity:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

(h) Persecutions on political, racial and religious grounds;

(i) Other inhumane acts.

278. ICTR Statute, *supra* note 40.

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(5) Rome Statute of the International Criminal Court (ICC)[279]

Article 7 – Crimes against humanity:

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

279. Rome Statute, *supra* note 41.

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2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give

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information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 6 – Genocide:

For the purpose of this Statute, "genocide" means 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.

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