

**Eichmann's Mistake:  
The Problem of Thoughtlessness in International Criminal Law**

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**Abstract.** Atrocities are often unprecedented and identifying them therefore may require moral and political judgement, not only the application of legal rules. Consequently, potential defendants charged for perpetrating them may be genuinely unable to recognize the law that prohibits their criminal activity. Starting from its classical treatment in Hannah Arendt's *Eichmann in Jerusalem*, this problem has perplexed scholars who have noted the seemingly normal character of defendants in mass atrocity cases. In disagreement with other scholars in the area, I argue for a recognition of a "mistake of law" defense in international criminal law. The Article demonstrates the stakes of the claim through three hypothetical international criminal cases with different political underpinnings: cases against individuals responsible for the risks of climate change; against abusers of migrants in the context of border enforcement; and against individuals responsible for the termination of pregnancies in abortion clinics. I argue for a dual approach: on the one hand, prosecutors and judges must constantly leave open the possibility of a radical departure from extant doctrine and precedent in charging individuals. On the other, they must recognize that defendants may reasonably not be able to recognize the law *qua* law, when such departures occur. The internal tension between these two imperatives sheds light on the predicament of international criminal adjudication. A recognition of the proposed mistake of law defense is but a modest doctrinal solution for a much more fundamental difficulty. Yet it is especially crucial today, with an ever-clearer normative divergence among actors in the "international community."

*Imagine yourself a tribunal. Pretend you have an audience – a community of some sort that will recognize you as a tribunal. Now, go all the way. What grandeur of transformation of the normative universe would you preform? Will you simply issue a general writ of peace? A warrant for justice notwithstanding the facts and the law? Will you order everyone to be good? Perhaps you will judge the dead? Or even bring God as a defendant?*<sup>1</sup>

- Robert Cover

## 1. Introduction

Some seemingly "normal" activities may, under reasonable (if unorthodox) interpretations of international criminal law, be construed as international crimes. Think of activities knowingly increasing the environmental risks of climate change, perhaps initiated by an energy mogul.<sup>2</sup>

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<sup>1</sup> Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 190-191 (1984).

<sup>2</sup> See e.g. Kate Aronoff, *It's Time to Try Fossil-Fuel Executives for Crimes Against Humanity*, JACOBIN (Feb. 5, 2019) <https://www.jacobinmag.com/2019/02/fossil-fuels-climate-change-crimes-against-humanity> (providing a

Consider abusive acts of detention and systematic infliction of pain, physical and mental, which unauthorized migrants, including children, suffer at the hands of border enforcement.<sup>3</sup> Or take an example with a different political valence, that of abortion: some think of the largescale “extermination” of unborn fetuses as atrocities.<sup>4</sup> Should such acts, where “perpetrators” believe they have acted legally, at times even heroically, be the basis for international criminal liability? And if so, subject to what limitations? Beyond the answers of extant law, the question is worth considering in normative terms.

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certain analysis of the Rome Statute and arguing that fossil fuel executives are committing what is “literally a crime against humanity”); Judith Blau, *Trump has Committed a Crime Against Humanity*, 33(4) SOCIO. FORUM (2018), 1101, 1105 (suggesting that rather than the International Criminal Court, jurisdiction can be established over Donald Trump’s anti-environmental policies through universal jurisdiction. Mark Byrne, *Climate Crime: Can Responsibility for Climate Change Damage be Criminalised?* 3 CARBON & CLIMATE L. REV. (2010), 278, 279 (enumerating jurisdictional avenues under the Rome Statute); A group of U.K. lawyers have put together a non-official mass atrocity tribunal against business leaders disproportionately responsible for climate change. See THE ECOCIDE TRIAL: THE SUPREME COURT OF THE UNITED KINGDOM (September 30, 2011) <http://www.thehamiltongroup.org.uk/common/ecocide.asp> (last visited Jan 24, 2019). See also Geoff Gilbert, *International Criminal Law Is Not a Panacea - Why Proposed Climate Change Crimes Are Just Another Passenger on an Overcrowded Bandwagon*, 14 INT’L CRIM. L. REV. 551 (2014) (though skeptical about the international criminalization of climate change, Gilbert proceeds to show all the different ways in which it may be legally possible). For an assessment of international criminal law as environmental protection, see Frédéric Mégret, *The Problem of an International Criminal Law of the Environment*, 36 COLUM. J. ENVTL. L. 195 (2011); Mohammed Saif-Alden Wattad, *The Rome Statute & Captain Planet: What Lies between Crime against Humanity and the Natural Environment*, 19 FORDHAM ENVTL. L. REV. 265 (2009). For a view according to which international criminal law should be amended to include a crime of ecocide, see Jonathan Watts, *Polly Higgins, lawyer who fought for recognition of ‘ecocide’, dies aged 50*, THE GUARDIAN (Apr. 22, 2019, 13:04) <https://www.theguardian.com/environment/2019/apr/22/polly-higgins-environmentalist-eradicating-ecocide-dies>.

<sup>3</sup> See Kate Cronin-Fruman, *The Treatment of Migrants Likely ‘Meets the Definition of a Mass Atrocity’*, N.Y. TIMES (Jun. 29, 2019) <https://www.nytimes.com/2019/06/29/opinion/immigration-children-detention.html>; Mythil Sampathkumar, *Last surviving prosecutor at Nuremberg trials says Trump’s family separation policy is ‘crime against humanity’*, (THE INDEPENDENT, Aug. 9, 2018, 22:24) <https://www.independent.co.uk/news/world/americas/trump-border-crisis-nazis-nuremberg-trial-ben-ferencz-family-separation-migrants-un-a8485606.html>; John Bowden, *Kamala Harris: Trump’s treatment of migrants is ‘a crime against humanity’* (THE HILL, Jun. 22, 2018, 07:10 PM) <https://thehill.com/homenews/senate/393742-kamala-harris-trump-treatment-of-migrants-is-a-crime-against-humanity>; Rebecca Hamilton, *Australia’s Refugee Policy Is A Crime Against Humanity*, FOREIGN POLICY (February 23, 2017) <https://foreignpolicy.com/2017/02/23/australias-refugee-policy-may-be-officially-a-crime-against-humanity/>; Ioannis Kalpouzou & Itamar Mann, *Banal Crimes against Humanity: The Case of Asylum Seekers in Greece*, 16 MELB. J. INT’L L. 1 (2015).

<sup>4</sup> A new Alabama law explicitly likens abortion to a crime against humanity. More “than 50 million babies have been aborted in the United States since the Roe decision in 1973, more than three times the number who were killed in German death camps, Chinese purges, Stalin’s gulags, Cambodian killing fields, and the Rwandan genocide combined,” it says. Human Life Protection Act, AL HB 314 (May 15, 2019) <https://legiscan.com/AL/text/HB314/id/1980843>; See also THE JUSTICE FOUNDATION, THE MORAL OUTCRY, [https://myemail.constantcontact.com/The-Moral-Outcry.html?soid=1101517943192&aid=ETPjdefo4\\_8](https://myemail.constantcontact.com/The-Moral-Outcry.html?soid=1101517943192&aid=ETPjdefo4_8) (last visited Jan 24, 2019). (“Would you join me in signing a petition to the U.S. Supreme Court to reverse its decisions in *Roe v. Wade*, *Doe v. Bolton* and *Planned Parenthood v. Casey*? These three cases allow the slaughter of millions of children in the United States of America. These three cases together constitute a *crime against humanity*” [emphasis added]). As I write this Article, “fetal personhood,” the philosophical view behind this view, is gaining ground in the U.S. Supreme Court. See Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, THE NEW YORKER (Jun. 5, 2019), <https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars>

To examine what is at stake, this Article returns to one of the most perplexing conundrums in criminal legal theory, Hannah Arendt's problem of "the banality of evil."<sup>5</sup> The iconic subtitle of Hannah Arendt's *Eichmann in Jerusalem* has drawn the attention of legal scholars.<sup>6</sup> Yet I believe we have not so far fully developed its implications with regard to mistakes of law. Rather than an interpretation of Arendt's argument, the purpose of this Article is to push her notion of "thoughtlessness" to its prescriptive conclusions (which ultimately, she may not have agreed with).<sup>7</sup> Arendt's argument pertains to the very possibility of establishing criminal liability. As she articulated it, this is a problem of the defendant not showing the mental element (*mens rea*) necessary for conviction of a crime.<sup>8</sup> Should those who follow the expectations of their society, or orders of their military commander, without realizing that they are acting criminally, be held liable for their actions?<sup>9</sup>

If the material elements of the crime are fulfilled, international criminal law generally answers positively. The requirement of intent is realized whenever a person acts of their own volition.<sup>10</sup> Differing from Arendt's *mens rea* framing, criminal lawyers may see the issue as a problem of *mistake of law*.<sup>11</sup> Even if international criminal law allows them, Arendt gives reason to believe that the criminal prosecutions of those who did not know that their actions were illegal are problematic. Such prosecutions may be entirely foreign to defendants' beliefs and their most fundamental convictions. They may therefore render questionable or even defunct basic purposes of criminal law, such as individual retribution and deterrence.<sup>12</sup>

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<sup>5</sup> HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (2006).

<sup>6</sup> Among many: MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* (2007); MARK J. OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1999); L. LEORA BILSKY, *TRANSFORMATIVE JUSTICE: ISRAELI IDENTITY ON TRIAL* (2004); David Luban, *Hannah Arendt as a Theorist of International Criminal Law*, 11 *INTERNATIONAL CRIMINAL LAW REVIEW* 621 (2011); Alette Smeulers and Wouter Werner, *The banality of Evil on Trial*, in *FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE* 24 (C. Stahn and L. van der Herik, eds.) (2010); William Schabas, *The Contribution of the Eichmann Trial to International Law*, 26 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 667 (2013).

<sup>7</sup> On "thoughtlessness" see Arendt, *supra* note 5, at 277-278. For a legal analysis of this theme, see Smeulers and Werner, *Id.*, at 29-31.

<sup>8</sup> Arendt, *Id.*

<sup>9</sup> See recently, Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 *YALE L. J.* 1628-1689 (2014) (arriving at a conclusion this essay will argue against).

<sup>10</sup> For a discussion of the variations in defining such volition across the customary international law terrain, see Carl-Friedrich Stuckenberg, *Problems of 'Subjective Imputation' in Domestic and International Criminal Law*, 12 *J INT CRIMINAL JUSTICE* 311, 315-316 (2014).

<sup>11</sup> Under Article 32 of the Rome Statute. See Rome Statute of the International Criminal Court, art. 7, July 1, 2002 [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) [hereinafter *Rome Statute*]. See also Kevin Jon Heller, *Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis*, 6 *J INT CRIMINAL JUSTICE* 419 (2008); Barrie Sander, *Doing Justice to History: The Construction of Historical Narratives within International Criminal Courts* 441 (2017) (unpublished PhD dissertation, the Graduate Institute of International and Development Studies) (on file with author). On the relationships between mistakes and *mens rea*, see ANNEMIEKE VAN VERSEVELD, *MISTAKE OF LAW: EXCUSING PERPETRATORS OF INTERNATIONAL CRIMES* (2012).

<sup>12</sup> On the purposes of international criminal law, see Mirjan Damaška, *What Is the Point of International Criminal Justice The Henry Morris Lecture*, 83 *CHI.-KENT L. REV.* 329 (2008). For a critical account, see Immi Tallgren, *The Sense and Sensibility of International Criminal Law*, 13(3) *Eur. J. Int'l L.* 561 (2002). The critical perspective has largely been that international criminal law generally does not realize purposes such as retribution or deterrence. Yet, this article takes the position that inasmuch as the purposes of international criminal law are divorced from such ends, it becomes impossible to justify criminal punishment. For example, it would not be acceptable to punish an individual in order to generate a historical record of atrocity; or for the purposes of a political transition from one regime to another.

Arendt did not support the Israeli trial and preferred an international one.<sup>13</sup> Be that as it may, she by no means believed that Eichmann should have been acquitted.<sup>14</sup> Perhaps inadvertently, however, Arendt provides the outlines for a more general conclusion: the contemporary rule according to which a mistake of law cannot normally relieve a person of international criminal liability should be revised.<sup>15</sup> Contrary to current international criminal law, those who are genuinely mistaken about law should not be convicted. The rationale for this becomes starkest in cases where the law itself is not fully settled, which, I argue, nevertheless may be some of the most important cases. Mistakes of law thus shed light on the principle of legality.

The Article spends considerable effort analyzing the contemporary hypotheticals. These concern offenders from developed countries, who morally assess situations around them in a way that differs from a perceived consensus within their societies. In this focus, the Article shares certain preoccupations of critical approaches to international criminal law, including those advanced by Third World Approaches to International Law (TWAIL):<sup>16</sup> it highlights the way in which particular world views can become hegemonic, thus generating questionable priorities for prosecution authorities.<sup>17</sup>

Yet the Article also departs from these important bodies of literature. Critical and TWAIL literature has often stressed that international criminal law may enforce a particularly “Western” normativity. This article proposes a different perspective, highlighting instead the radical discrepancy between normative visions even within developed countries. From the perspective of some critical and TWAIL scholars, the article may be criticized as underplaying important dimension concerning the *actual* priorities of international criminal law, and how they advance neo-colonial dynamics. After all, the point has often been that *in fact* the International Criminal Court’s jurisdiction is triggered selectively against individuals in weak states. I have no dispute with that. I aim to emphasize rather that alongside the dimension of differential power, another dimension of differential moral imaginations should complicate our critique.

While the Article addresses the doctrinal framework of international criminal law, the questions I discuss are pervasive to criminal law more generally. While it addresses the particular doctrinal debate about mistakes of law, it aims to open a larger question about the very nature of criminal law. It will hopefully therefore be of interest not only to international criminal lawyers, but to a wider range of criminal law scholars and legal theorists.

Part 2 below reintroduces Arendt’s argument on the problem of thoughtlessness. Part 3 illustrates the practical implications that the theoretical question has in international criminal cases, addressing the three contemporary hypotheticals I started off with. Part 4 advances my normative argument. I seek to stress the importance of novel interpretations of international criminal law. At the same time, I argue that those who are oblivious of the criminality of their behavior should not be held liable, if they could not have been expected to know the relevant law. This part of the Article further draws connections between the mistake of law questions,

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<sup>13</sup> See Luban’s analysis of Arendt’s exchange of letters with Karl Jaspers. Luban, *supra* note 6, 628.

<sup>14</sup> Arendt, *supra* note 5, 277-278.

<sup>15</sup> Compare with Heller, *supra* note 11 (calling for a different revision).

<sup>16</sup> The literature is vast. See e.g. CHRISTINE SCHWÖBEL (ed.), *CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW* (2014); Asad G. Kiyani, *Third Worlds Approaches to International Criminal Law*, 109 *AJIL UNBOUND* (2015), 255; Frédéric Megret, *The Politics of International Criminal Justice*, 13(5) *EUR. J. INT’L L.* (2002), 1261.

<sup>17</sup> This article thus follows critical and TWAIL scholarship in its concern with forms of “epistemic violence.” See Dianne Otto, *Subalternity and International Law: The Problems of Global Community and Incommensurability of Difference*, 5(3) *SOC. & LEG. STUD.* (1996), 337, 355.

and an ever-clearer reality of global divergent understandings of fundamental normative questions. Part 5 concludes by reference to a work of art.

## 2. The Conundrum of Thoughtlessness

### A. *Mens Rea vs. Mistake of Law*

In an illuminating essay, David Luban explains the fundamental challenges Arendt presents to international criminal lawyers.<sup>18</sup> These challenges are no doubt of historical and philosophical interest, but also pertain to the contemporary practice of international criminal law, at the international criminal court (ICC) and elsewhere.<sup>19</sup> Luban writes, “All the questions she asked remain with us today, and they remain the biggest questions international criminal law must answer.”<sup>20</sup> As a perceived “crisis of liberalism” raises some doubts about the future of international criminal law in its current forms, an opportunity emerges to re-examine these big questions.<sup>21</sup>

Perhaps the most unsettling of these is a question both Arendt and Luban frame as one about the mental element (or *mens rea*) Eichmann’s conviction rested upon. In a dramatic epilogue to her book about “the banality of evil,” she identifies a profound difficulty with Eichmann’s conviction.<sup>22</sup> Writing an imaginary alternative opinion for the court, she addresses the defendant:<sup>23</sup> “[...] you said you had never acted from base motives, that you had never had any inclination to kill anybody, that you had never hated Jews, and still that you could not have acted otherwise and that you did not feel guilty. We find this difficult, though not altogether impossible, to believe [...]”<sup>24</sup>

As Arendt explains, the defendant was apparently not aware that the actions he committed were unlawful. He perpetrated his crimes while believing he was doing the right thing – as a moral, political, and legal judgement. He acted in a way that he thought would be valued in his own time and place.<sup>25</sup> Arendt thus concludes:

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<sup>18</sup> Luban, *supra* note 6. The three challenges Luban identifies are jurisdiction, the nature of crimes against humanity, and the “banality of evil.” This essay focuses exclusively on the third.

<sup>19</sup> As the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been closed, the ICC remains the main forum. As important for the present purposes are trials initiated under the doctrine of universal jurisdiction, as well as other potential fora such as the African Court of Justice and Human Rights. On the former see recently Devika Hovell, *The Authority of Universal Jurisdiction*, 29(2) Eur. J. Int’l L. 427, 456 (2018) (documenting all 52 cases of universal jurisdiction since the Eichmann trial); on the latter see Matiangai V. S. Sirleaf, *Regionalism, Regime Complexes, and the Crisis in International Criminal Justice*, 54 COLUM. J. TRANSNAT’L L. 699 (2015).

<sup>20</sup> Luban, *supra* note 6, 641.

<sup>21</sup> On the “crisis of liberalism” and international courts, see Karen J. Alter, *Critical Junctures and The Future International Courts in a Post-Liberal World Order* (2018), <https://papers.ssrn.com/abstract=3238053> (last visited Jan 27, 2019). On its causes see David Singh Grewal, *Three Theses on the Current Crisis of International Liberalism*, 25 IND. J. GLOBAL LEGAL STUD. 595 (2018).

<sup>22</sup> Arendt, *supra* note 5, 277-278.

<sup>23</sup> For a remarkable analysis of this epilogue, see Judith Butler, *Hannah Arendt’s Death Sentences*, 48 COMPARATIVE LITERATURE STUDIES 280–295 (2011).

<sup>24</sup> Arendt, *supra* note 5, 278.

<sup>25</sup> Mohamed thus emphasizes the “pro-social” nature that mass atrocity crimes often appear to have. Mohamed *supra* note 9, at 1643.

Eichmann was not Iago and not Macbeth [...] He *merely*, to put the matter colloquially, *never realized what he was doing* [...] It was sheer thoughtlessness – something by no means identical with stupidity – that predisposed him to become one of the great criminals of that period [...] That such remoteness from reality and such thoughtlessness can wreak more havoc than all the evil instincts taken together which, perhaps, are inherent in man – that was, in fact, the lesson one could learn in Jerusalem.<sup>26</sup>

Luban explains Arendt's position -- "Eichmann was found guilty, not for succumbing to immoral temptation or being a depraved deviant, but instead for conscientiously observing the flawed mores of the Third Reich."<sup>27</sup> Martti Koskeniemi concurs with the analysis centered on the mental element: "there is no *mens rea*" – he writes -- when "crimes are aspects of political normality."<sup>28</sup>

The requirement of *mens rea* is however generally *fulfilled* if one acts of their own volition.<sup>29</sup> The mental element can be eliminated, e.g., if one sleepwalks into a crime. Another favorite example among criminal law professors is "automation" – a curious condition that supposedly eliminates the *mens rea* by motorically overtaking the self. Aside from such exotic circumstances, acting according to a perceived "normality" is not usually thought of as something that extinguishes the mental element required for conviction.<sup>30</sup>

Under international criminal law, a different doctrine addresses the question what happens when individuals believe they are acting legally while committing a grave crime. "Never to realize what one is doing" is a "mistake of law."<sup>31</sup> To be sure, the doctrine of mistake of law intimately relates to questions of *mens rea*. Scholars have explained this doctrine as reflecting one of the most fundamental principles of criminal law, that there is "no punishment without guilt" (*nullum crimen sine culpa*).<sup>32</sup> Unlike the elimination of the mental element, however, under Article 32(2) those who make such mistakes are *not* excused of criminal liability: "A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility."<sup>33</sup> "*Ignorantia juris non excusat*."<sup>34</sup>

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<sup>26</sup> *Id.*, 287-288.

<sup>27</sup> Luban, *supra* note 6, 621. The formulation "flawed mores" seems to me like an enormous understatement not only of the horrendous extermination policies of the Nazi regime, but also of Arendt's assessment of them (whether one agrees with her philosophical understanding of "banal evil" or not).

<sup>28</sup> Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK YEARBOOK OF U.N. LAW 1-35, 8 (2002).

<sup>29</sup> For an excellent review of the case law from international criminal tribunals, see Sander, *supra* note 11, at 441-452.

<sup>30</sup> Sander, *Id.* See more generally MOHAMED ELEWA BADAR, *THE CONCEPT OF MENS REA IN INTERNATIONAL CRIMINAL LAW: THE CASE FOR A UNIFIED APPROACH* (2015).

<sup>31</sup> Luban, *supra* note 6, at 639. Note that some legal systems include mistake of fact and mistake of law questions within the analysis of *mens rea*, e.g. the German system. See in this regard Mohamed Elewa Badar, *Mens rea - Mistake of Law & (and) Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals*, 5 INT'L CRIM. L. REV. 203, 235 (2005).

<sup>32</sup> Stefanie Bock, *The Prerequisite of Personal Guilt and the Duty to Know the Law in the Light of Article 32 ICC Statute*, 9 UTRECHT L. REV. 184 (2013).

<sup>33</sup> Rome Statute, *supra* note 11, art. 32.

<sup>34</sup> See discussion of how the principle developed in European law in Stuckenberg, *supra* note 10, 320-321.

There are exceptions to this rule, importantly that of superior orders. Article 32(2) of the Rome Statute continues: “A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.”<sup>35</sup> Article 33 provides that when an act is (a) commissioned under superior orders that a person is obliged to carry out; (b) the person involved did not know that the order is illegal; and (c) the order is not “manifestly illegal,” then a mistake of law may relieve that person of criminal liability.<sup>36</sup> As Alette Smeulers has observed, the language here reflects the criminal law requirement of establishing *guilt*: “many low-level perpetrators do not necessarily recognize the manifest illegality of the orders they receive.”<sup>37</sup>

I will have a little bit more to say about the manifestly illegal doctrine below. Leaving that exception aside for now, the basic dilemma Arendt identified remains (even with this limited defense for those following superior orders). What value can criminal sanction have, if defendants genuinely have no understanding of why they are punished?

Arendt invites us, strikingly, to think of Eichmann as *mistaken*.

### **B. Eichmann as History and as Thought Experiment**

But was Arendt’s characterization of Eichmann as lacking consciousness of wrongdoing historically accurate? It seems that in fact, Eichmann knew very well that his actions were murderous and immoral.<sup>38</sup> While Arendt thinks there is “not very much” evidence “in this matter of motivation and conscience” the Jerusalem trial court had indeed based Eichmann’s conviction on a consciousness of wrongdoing.<sup>39</sup> Judges on an appeal to the Israel Supreme Court affirmed. Relying on the defendant’s own words, they emphasized that he was conscious of his crimes upon commissioning them:

[...] the appellant was fully conscious during his actions that he is contributing to the most heinous and terrible crimes. In paragraph 221 of the judgement the appellant’s testimony is quoted, and in it he admits as much:

“Dear President of the Court, after you have called me so that I give a clear answer, I must declare that I see this murder of Jews as one of the most terrible crimes in the history of mankind’.

And answering Justice Levi:

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<sup>35</sup> Rome Statute, *supra* note 11, art. 32.

<sup>36</sup> Rome Statute, *supra* note 11, art. 33. For an account of customary international law in this context, see Paola Gaeta, *The Defence of Superior Orders: The Statute of the International Criminal Court versus Customary International Law*, 10 EUR. J. OF INT’L L. 179 (1999).

<sup>37</sup> Alette Smeulers, *Why Serious International Crimes Might Not Seem ‘Manifestly Unlawful’ to Low-Level Perpetrators*, 0 J. INT’L CRIM. J. (2019) 1, 18.

<sup>38</sup> See e.g. BETTINA STANGNETH, *EICHMANN BEFORE JERUSALEM: THE UNEXAMINED LIFE OF A MASS MURDERER* (2015). For a helpful review see Steven Aschheim, *SS-Obersturmbannführer (Retired)*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2014/09/07/books/review/eichmann-before-jerusalem-by-bettina-stangneth.html>. (“The enduring image of Eichmann as faceless and order-obeying, Stangneth argues, is the result of his uncanny ability to tailor his narrative to the desires and fantasies of his listeners.”)

<sup>39</sup> Attorney General v. Adolph Eichmann (1961), Criminal Case No. 40/61 (Isr.) <http://www.archives.gov.il/archives/#/Archive/0b07170680022dc3/File/0b0717068043adbf>.

‘... Even back then I saw this forceful solution as contrary to the law, a terrible thing, but to my chagrin I was committed to engage with transportation issues related to it, due to an oath of honour I wasn’t released from.’<sup>40</sup>

If one believes the Israeli court (which seems convincing on this point), there is no problem of consciousness of wrongdoing with Eichmann.

Why, then, the continued fascination among scholars with Arendt’s disquieting reading? For a normative inquiry, the question of whether the historical Eichmann was aware that he was acting illegally can be duly set aside. Simply assume Arendt’s characterization was correct. According to this assumption “Eichmann” believed in good faith that his decision to follow the Führer’s orders – in reality he did more than that -- was both legal and moral. Even if the historical Eichmann does not in fact represent this latter Eichmann, Arendt’s characterization remains a bare and extreme example of a wider phenomenon: criminal prohibitions with universal application are not understood in the same way across radically different cultural and historical contexts. Call this person “the-thought-experiment-Eichmann.”

Scientific evidence suggests that the lack of consciousness of wrongdoing, characteristic of such an Eichmann, is quite possible for a sane person (whose actions can therefore not be exculpated under an insanity defense). The classical case in point, which legal scholars often return to,<sup>41</sup> is the Stanley Milgram obedience experiment, published 1963 (the year Arendt’s report from the Jerusalem trial was first published). Subjects famously administered escalating (fake) electric shocks to other participants when an experimenter asked them to do so. Almost two-thirds of the subjects proved willing to continue as their fellow participants screamed and eventually fell silent. The experiment, replicated many times, suggests it is not that difficult to convince ordinary people that otherwise repugnant instructions become legal. Mark Drumbl reminds of another relevant observation by psychologist James Waller: “the most outstanding common characteristic of perpetrators of extraordinarily evil is their normality, not their abnormality.”<sup>42</sup>

Beyond psychology, such conformity to the wrongdoings of one’s immediate social and cultural environment is familiar from introspection. In my own life too, it may sometimes be hard for me to determine whether I’m in an Eichmann-like position -- “conscientiously observing the flawed mores” of an atrocious political, social, and cultural context I happen to live in.

Take for example the systematic extermination and torture of animals in industrial slaughterhouses. Elizabeth Costello, the fictional philosopher that novelist J.M. Coetzee has invented,<sup>43</sup> connects between the slaughter of animals and the problem of thoughtlessness. Speaking of the holocaust, she says, “It was and is inconceivable that people who *did not know* (in that special sense) about the camps were fully human.”<sup>44</sup> An Eichmann who does not realize

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<sup>40</sup> Adolph Eichmann v. Attorney General (1962), Criminal Appeal No. 336/61 (Isr.) [https://openscholar.huji.ac.il/sites/default/files/hebrewlaw/files/dvlp\\_yykmn\\_ngd\\_hyvmsh\\_p\\_ms\\_336-61.pdf](https://openscholar.huji.ac.il/sites/default/files/hebrewlaw/files/dvlp_yykmn_ngd_hyvmsh_p_ms_336-61.pdf).

<sup>41</sup> Stanley Milgram, *Behavioral Study of obedience*, 67 THE JOURNAL OF ABNORMAL AND SOCIAL PSYCHOLOGY 371–378 (1963); Mohamed, *supra* note 9, at 1644–1646. Luban, *supra* note 6, 638 (note 85). David Luban, *Integrity: Its Causes and Cures Symposium*, 72 FORDHAM L. REV. 279–310 (2003). Smeulers, *supra* note x, at 9.

<sup>42</sup> Drumbl, *supra* note 6, at 30. See also Philip Zimbardo’s Stanford prison experiment, and Saira Mohamed’s discussion of it, and a number of other relevant studies: Philip G. Zimbardo, *Revisiting the Stanford Prison Experiment: A Lesson in the Power of Situation*, CHRON. HIGHER EDUC. (Mar. 30, 2007), <https://www.chronicle.com/article/Revisiting-the-Stanford-Prison/9676>.; Mohamed, *supra* note 9, at 1644–1646.

<sup>43</sup> J. M. COETZEE, ELIZABETH COSTELLO (2004).

<sup>44</sup> *Id.*, 93.



what he is doing seems, at first blush, morally inferior to us. Costello continues, addressing her audience with the striking parallel which merits a second thought about any such feeling of superiority:

I was taken on a drive around Waltham this morning. It seems a pleasant enough town. I saw no horrors, no drug-testing laboratories, no factory farms, no abattoirs. Yet I am sure they are here. They must be. They simply do not advertise themselves. They are all around us as I speak, only *we do not, in a certain sense, know about them.* (Emphasis added).<sup>45</sup>

This lack of knowledge is precisely Arendt's thoughtlessness. The industrial slaughter of animals for meat is perhaps never legally prohibited. From a moral point of view, however, it is at the very least hard to *rule out* that it is worthy of the harshest reprimand.<sup>46</sup> Are there other such actions, which *can* be caught in the net of international criminal law, and represent normality in our own societies?

Matthew Zagor observed an interesting phenomenon among Israeli soldiers stationed in the West Bank: immersed in a context of systematic brutality, they apparently have a hard time differentiating between a so-called "manifestly illegal" order and a legal one.<sup>47</sup> But who is to say when an order really falls under such a category? Recall that the distinction is extremely important for the purposes of prosecution under the Rome Statute. Article 33 provides a superior orders defense for soldiers who fulfil criminal orders when the orders were not manifestly illegal.<sup>48</sup> This may be because soldiers in hierarchical military organizations are somehow trained to be "thoughtlessness": As Smeulers explains, they may have a reasonable expectation and an institutional incentive to believe that the legality of orders has been "taken care of" by others.<sup>49</sup> They are often expected to act rapidly and not to hesitate. It is with such people, who may commit atrocities with no understanding of their unlawful behavior, that Arendt's challenge has its sharpest bite. The point here is not to take a position on whether Israeli soldiers are ever in such an insulated cultural context, making it impossible for them to identify international crimes. I will have something to say about that below. My point now is rather that it is unjust to convict individuals whose entire environment and upbringing make it

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<sup>45</sup> *Id.*

<sup>46</sup> See e.g. CHARLES PATTERSON, *ETERNAL TREBLINKA: OUR TREATMENT OF ANIMALS AND THE HOLOCAUST* (2002). The moral considerations I'm thinking of here are the value of animals' life and their scientifically-confirmed experience of pain. As meat eating has recently been connected to climate change, one may also draw the connections to the latter issue, which is discussed below.

<sup>47</sup> Matthew Zagor, *I am the Law - Perspectives of Legality and Illegality in the Israeli Army*, 43 *ISR. L. REV.* 551, 574 (2010). See also Yotam Berger, *Elor Azaria Receives Hero's Welcome at Scene of Hebron Shooting*, *HAARETZ* (July 3, 2018) <https://www.haaretz.com/israel-news/.premium-elor-azaria-receives-hero-s-welcome-at-hebron-shooting-scene-1.6242150>.

<sup>48</sup> As commentators have observed, the doctrine "presumes that the wrongfulness of certain conduct is manifest to the perpetrator" (emphasis added). See Smeulers and Werner, *supra* note 6, at 41. But this may be an unreasonable expectation. See Mark J. Osiel, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, 86(5) *CAL. L. REV.* 939, 1007, 1013 (1998) ("If the reasonable soldier cannot identify his orders as manifestly illegal, then the threat of punishment for obeying them cannot deter him.") See also Hilaire McCoubrey, *From Nuremberg to Rome: Restoring the Defence of Superior Orders*, 50 *INT'L & COMP. L. Q.* (2001) 386, 393 ("...article 33... restored a reasonable balance in the treatment of superior orders as a defence, taking into account both the paramount claims of international law and the nature of military discipline and obligation.")

<sup>49</sup> Smeulers, *supra* note x, at 4.

impossible for them to see otherwise-criminal activity as anything but the fulfilment of a civic duty.

This limitation to a class of clueless criminals by no means renders Arendt's challenge negligible. As others have explained, a similar problem of a seeming lack of consciousness of wrongdoing occurs in many other international criminal cases, both actual and potential. For Luban, there's a parallelism along these lines between the genocide in Germany in the 1940s and the genocide in Rwanda in the 1990s.<sup>50</sup> Like the Eichmann case, other instances where suspects thought they were acting legally may still be the most important ones to prosecute today. The problem may be endemic to the discipline of international criminal law.

Yet Luban seems to disagree about the scope of the problem. While he does not believe it to be exclusively Nazi, he objects to the view that "thoughtlessness" may pervade our own every day. For those of us living in "a decent polity", he says, distinguishing right from wrong should not be a problem.<sup>51</sup> But how are we to know that what we deem to be "a decent polity" is in fact decent? That too might be a false premise, merely reflecting our society's very indecency (or indeed its pervasiveness among multiple contemporary societies). I should be aiming to ask whether my society will be deemed decent by an "objective" observer, unmoored from its own cultural and historical biases.<sup>52</sup> I can never be too suspicious that I have my own little Eichmann within me.

### C. *Three Kinds of Judgement*

The controversy Eichmann in Jerusalem generated is now well-rehearsed. But the charge that Arendt's audiences as well as some of her friends had marshalled was at its time dead serious: she had absolved the Nazi from *moral* responsibility. This accusation is misguided. A related difficulty arises: Arendt may have inadvertently shown that Eichmann should have been acquitted of *criminal charges*. First, note Arendt's answers to questions about Eichmann's *moral* and *political* responsibility.

*Morality.* Eichmann displayed a propensity for clichés, and no personal judgement. In Arendt's words, he exemplified "a curious, quite authentic inability to think."<sup>53</sup> Arendt uses the latter phrase with an addition: "inability to think, namely, to think *from the standpoint of somebody else*" (emphasis added).<sup>54</sup> Exercising judgement does not render anyone immune of bad deeds. But it reflects an attempt to reduce their probability. Thinking might not be a sufficient condition for moral behavior, but it is a necessary one. Thoughtlessness is, quite literally, a display of moral irresponsibility, and is therefore morally objectionable.<sup>55</sup> Arendt's thinking

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<sup>50</sup> Luban, *supra* note 6, 627. For a developed example based on a study of child soldiers in Sierra Leone, see TIM KELSALL, *CULTURE UNDER CROSS-EXAMINATION: INTERNATIONAL JUSTICE AND THE SPECIAL COURT OF SIERRA LEONE* chap. 5 (2009).

<sup>51</sup> Luban, *supra* note 6, 638 (adding that "Disaster results when a criminal regime turns morality upside down and inverts ordinary legal rules and exceptions.")

<sup>52</sup> Though often we are tempted to imagine what future generations might think, such an imagination is likely of no avail. International lawyers sometimes tend towards overblown confidence that history is an enlightened process of progress. For a critique of this tendency See Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal* 16 *Eur. J. of Int'l Law* 113, 123 (2005) (on the "fable" of historical progress).

<sup>53</sup> Hannah Arendt, *Thinking and Moral Considerations: A Lecture*, 38 *SOCIAL RESEARCH* 417, 417 (1971).

<sup>54</sup> Arendt, *supra* note 5, at 49; Luban, *supra* note 6, at 636.

<sup>55</sup> The merits and vulnerabilities of this understanding of ethics are worthy of a separate treatment. They do not directly bear on the stakes of this essay.

here echoes earlier Christian sources, particularly Thomas Aquinas, who has suggested that “conscience is not said to bind in the sense that what one does according to such a conscience will be good, but in the sense that in not following it he will sin.”<sup>56</sup> It is a moral imperative to think.

*Politics.* Arendt’s conception of judgement is of a participatory activity that occurs in the context of a plurality of perspectives. When we make our judgements in common, through public deliberation and mutual attempts to convince each other, we constitute our own political communities.<sup>57</sup> Judgment is essential for the task of self-government.<sup>58</sup> Arendt cleverly illustrated the link between the two in her analysis of the word “conscience”. Conscience, she observed, is not only an individual’s inner voice counselling on the rightness or wrongness of one’s own behavior. It is also, literally, con-science, or knowing-together.<sup>59</sup>

Thoughtlessness therefore may lead to moral culpability or present a political failure. But even assuming that thoughtlessness is a reprehensible category within the two latter domains, it is still unclear that thoughtlessness can be the basis of a criminal conviction. Following legal scholar Yosal Rogat, Arendt ultimately argues that a court should be able to convict a person based on an “objective” element alone. For her, this is the *actus reus* with no corresponding *mens rea*.<sup>60</sup> The idea, as I understand it, is to offer a natural law justification for punishment, which may not require consciousness of wrongdoing when it comes to a class of particularly heinous crimes.<sup>61</sup>

In Rogat’s words (which Arendt quotes), the idea is “that a great crime offends nature, so that the very earth cries out for vengeance; that evil violates a natural harmony which only retribution can restore; that a wronged collectivity owes a duty to the moral order to punish the criminal.”<sup>62</sup> In her imaginary judgement addressed to Eichmann, she summarizes -- “In other words, guilt and innocence before the law are of an objective nature, and even if eighty million Germans had done as you did, this would not have been an excuse of you.”<sup>63</sup>

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<sup>56</sup> THOMAS AQUINAS, *THE DISPUTED QUESTIONS ON TRUTH* (1953), 331-332. See also ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* (2010), at 52.

<sup>57</sup> See e.g. BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 93 (1993).

<sup>58</sup> HANNAH ARENDT, *ON REVOLUTION* 221-224 (2006).

<sup>59</sup> HANNAH ARENDT, *THE LIFE OF THE MIND* 5 (1981). The Eichmann trial can therefore be granted a certain *political* justification. Versions of the latter argument have been powerfully articulated by Judith Shklar (with regard to the Nuremberg Trials); and by Shoshana Felman, with regard to the Eichmann trial. Such political justifications have become among the most commonly referred to in international criminal law. Among the political justifications often cited are vindicating the victims of mass atrocity, creating a record of history, and transitioning to a post-conflict society. Arendt’s is not a political justification for the trial. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* (1986). SHOSHANA FELMAN, *THE JURIDICAL UNCONSCIOUS: TRIALS AND TRAUMAS IN THE TWENTIETH CENTURY* (2002).

<sup>60</sup> Arendt, “Thinking and Moral Considerations” Rogat’s short volume anticipated many of Arendt’s insights, and is worth a close read. YOSAL ROGAT, *THE EICHMANN TRIAL AND THE RULE OF LAW* (1961). See also Luban, *supra* note 6, 640 (on “objective culpability”).

<sup>61</sup> For a contemporary explanation in legal terms see Smeulers and Werner, *supra* note 6, at 42 (“International criminal law needs to recognize that some perpetrators, people like Eichmann and Astiz, sincerely come to believe that what they are doing is right. They should acknowledge this and then tell them and the world: committing crimes against the human status is wrong and should therefore be punished *no matter what* the perpetrators committing the crimes believed.”)

<sup>62</sup> Arendt, *supra* note 5, 277.

<sup>63</sup> *Id.*, 278.

But this is not a satisfying solution.<sup>64</sup> Being thoughtless is marked by the lack of independent decision. Despite the nebulous reference to natural law, it is hard to square with the requirement that one be convicted only for their own actions. Not knowing the law upheld as the most fundamental law signals an alterity so profound, it questions the law's very status as applicable to the person possessing such ignorance. Thoughtlessness is not truly one's own.

The important aspects of thoughtlessness are its moral and political offensiveness: the total absence of an attempt to transcend one's social, cultural, and historical conditions. This is a familiar behavior, but not in itself the basis of a crime. As the Article clarifies below, the moral and political imperatives can inform the interpretation of the law, but they cannot be the basis for eliminating its aim to identify culpability.

### 3. The Problem of Thoughtlessness Today

#### A. *Our Eichmann Within*

Drumbl has perhaps been the most perceptive commentator in explaining the scope of this problem.<sup>65</sup> He emphasizes circumstances of widespread or systematic violence in which entire societies are bent upon killing innocent people. His examples are numerous. He focuses his study on non-Western cultures and societies far removed from liberal legalism. Reading him, it's almost hard to imagine an international criminal case that *would not*, somehow, involve a question about an apparent lack in consciousness of wrongdoing.

Drumbl clarifies that he does not want to revive a defense for those merely following orders.<sup>66</sup> But his analysis is particularly clear when we think precisely of their fate. He contends, "the perpetrator of mass atrocity is qualitatively different than the perpetrator of ordinary crime [...] Extraordinary international crime often flows from organic groupthink in the times and places where it is committed, making individual participation therein less deviant and, in fact, more of a matter of conforming to a social norm."<sup>67</sup> Drumbl further points out the way in which the apparent lack of wrongdoing widens the circle of responsibility. "This deep complicity cascade does not diminish the brutality or exculpate the aggressor. But it [...] assuages the many blaming the few."<sup>68</sup> Assuming that atrocity is based on consciousness of wrongdoing becomes an illusory palliative.

Reading Drumbl may however reaffirm a false impression, which Luban, and other commentators, also make: that the distinction between a context of atrocity where "groupthink" pervades, and a context of normality where we think for ourselves, remains firm and epistemically accessible. Drumbl ends up focusing on situations of mass killing, which we are indeed intuitively accustomed to think of as international crimes.<sup>69</sup> But the full implications of

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<sup>64</sup> Luban, *supra* note 6, at 640 (explaining that "Arendt never came up with a satisfactory conception of objective culpability, nor did she claim to.")

<sup>65</sup> Drumbl, *supra* note 6. See also Kelsall, *supra* note 46.

<sup>66</sup> *Id.*, at 37.

<sup>67</sup> *Id.*, at 32. See also at 24.

<sup>68</sup> *Id.* So as not to assuage the many by blaming the few, Drumbl ultimately counsels a sophisticated and ambitious embedding of international criminal law within "indigenous" non-criminal legal and political processes. See *Id.*, at 206-209.

<sup>69</sup> See also Darryl Robinson, *A Cosmopolitan Liberal Account of International Criminal Law International Criminal Courts and Tribunals*, 26 LJIL 127, 143 (2013) (suggesting the centrality of common moral intuitions in understanding the nature of culpability in international criminal law).

Arendt's argument on thoughtlessness are far more radical. They require not only an analysis of cases that we easily label as cases of international crime (typically far away from home).

The Eichmann thought experiment demands a certain exertion in the task of judgement. It requires us to question our own assumptions. And it asks us to examine where we may have thus far not even *identified* crimes, because atrocious acts somehow dissolve into our common sense and thus may become transparent.<sup>70</sup> Such concealment characteristically may occur due to the laziness of habitual ways of thinking, but also due to cultural preferences (which we may rightfully cherish).

If we are to have any understanding for Eichmann, we might observe that it was *doubly* difficult for him to know that what he was doing was criminal: (i) because he may have been blinded by his following of the Reich, and (ii) because it was not that clear that crimes against humanity existed under positive international law at the time.<sup>71</sup> As it turns out, mistakes of law are intimately related to questions about the principle of legality. Once again, Eichmann's double difficulty, stated this way, is anything but rare. It perfectly represents a larger paradigm of defendants. And it may occur precisely when an international tribunal or a domestic court applying universal jurisdiction seeks to assert accountability for crimes that seem historically *unprecedented*. These crimes can be enormous atrocities, but it is harder to think of them in that way because there is no readily available historical analogy.<sup>72</sup> Many of us may have our own views on what are the unprecedented crimes of our time. Clearly, we would not agree on their designation as such.

The restated question, informed by the Eichmann thought experiment, is therefore: who among us today may be (i) blinded by our own membership in our cultural and social context; and (ii) committing morally atrocious acts, that fit -- perhaps not without difficulty -- into the international criminal law categories of our own time. Answering requires a certain diversion from "ordinary" international criminal cases, venturing into territory that is doctrinally and politically controversial. Three contexts that may illustrate this re-articulation of the Eichmann thought experiment are the context of a discussion on environmental crimes; the context of a discussion on the prosecution of crimes against migrants; and the context of a discussion on crimes against the unborn.

All three sets of issues are at the outer margins of the discipline of international criminal law. They are barely within contemporary understandings of its appropriate scope, or wholly outside of its mainstream views. Yet the public profile of each of them is on the rise as I write these words. In each of these, the expressive charge "crimes against humanity!" has been marshalled

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<sup>70</sup> In other words, the Eichmann thought experiment demands us of an exercise of judgement in the ethical and political sense Arendt characterizes (described above).

<sup>71</sup> The acts of extermination he was tried for were legal under the domestic law of their time and place, Nazi Germany. As a matter of international law, the case was also not straightforward. The customary international law prohibition of mass killing may have not been fully developed at the time and was arguably not a criminal prohibition. This created the much-commented-upon problem of retrospective criminal trial at the International Military Tribunals at Nuremberg. See Shklar, *supra* note 54, 162 (1986) (discussing how American and French prosecutors confronted the seeming violation of the principle of legality). I thank Frédéric Mégret for offering the dual formulation in the text above.

<sup>72</sup> Historical analogy is central to the techniques of international law. SEE FLEUR JOHNS, RICHARD JOYCE, AND SUNHYA PAHUJA (eds.), *EVENTS: THE FORCE OF INTERNATIONAL LAW* (2010), Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 *MOD. L. REV.* 377 (2002).

in good faith.<sup>73</sup> Each of these claims serves to discuss powerful contemporary political sentiments pertaining to aspirations of justice on a planetary scale and -- for those who make them -- unprecedented atrocity.

While the first two examples may be perceived as part of a progressive agenda for international criminal law, the third example belongs to a world of conservative and religious politics. This divergence is crucial for the current argument. It emphasizes the conceptual structure of the problem, rather than any specific priorities for international criminal prosecution. We may assume that each of the groups making the claims below genuinely and emphatically believes that the acts they point to are among the worst on the planet.

## B. *Three Contemporary Illustrations*

### 1. *Crimes against the Climate*

On September 15, 2016, the Office of the Prosecutor of the ICC published a periodical Policy Paper on Case Selection and Prioritization.<sup>74</sup> This document was a shift in the priorities of the prosecutor's office, emphasizing environmental issues.<sup>75</sup>

It's easy to see why one might think that environmental crimes should be included high on the prosecutor's priority list.<sup>76</sup> On March 23, 2017, U.N. Secretary-General António Guterres explained that "Climate change is an unprecedented and growing threat to peace, prosperity and development";<sup>77</sup> invoking a *threat to peace* is traditionally an allusion to the UN's coercive powers -- from war to the establishment of an international criminal tribunal.<sup>78</sup>

If this language seems to pertain to a *future* event, and therefore not to a problem of criminal liability, note the words of the Prime Minister of Dominica, Roosevelt Skerrit: "to deny climate change is to deny a truth we have just lived."<sup>79</sup> Skerrit spoke after Hurricane Maria, which left

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<sup>73</sup> An appeal related to what one scholar calls "the expressive turn" in international criminal law. See Barrie Sander, *The Expressive Turn in International Criminal Law: A Field in Search of Meaning*, LJIL (forthcoming 2019).

<sup>74</sup> Int'l Criminal Court [ICC], *Policy Paper on Case Selection and Prioritization* (September 15, 2016), [https://www.icc-cpi.int/itemsdocuments/20160915\\_otp-policy\\_case-selection\\_eng.pdf](https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf)

<sup>75</sup> *Id.* at 5, 14.

<sup>76</sup> To cite just one source, on September 26, 2018, U.N. Secretary General António Guterres observed that "Climate change is the defining issue of our time – and we are at a defining moment." U.N. Secretary-General, Remarks at High-Level Event on Climate Change (September 25, 2018), <https://www.un.org/sg/en/content/sg/speeches/2018-09-26/remarks-high-level-event-climate-change>.

<sup>77</sup> U.N. Secretary-General, Faced with 'clear science, real threats,' countries must remain committed to the Paris climate deal (March 23, 2017), <https://www.un.org/sustainabledevelopment/blog/2017/03/faced-with-clear-science-real-threats-countries-must-remain-committed-to-paris-climate-deal/>.

<sup>78</sup> U.N. Charter art 39, 51. In the 1990s, both the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were established under the U.N Security Council Authorization to address threats to peace and security. See S.C. Res. 827 (May 25, 1993) and S.C. Res. 955 (November 8, 1994) respectively (both determining that the situations constitute a "threat to peace and security" in their preambles).

<sup>79</sup> U.N. News, 'To deny climate change is to deny the truth we have just lived' says Prime Minister of storm-hit Dominica (September 23, 2017), <https://news.un.org/en/story/2017/09/566742-deny-climate-change-deny-truth-we-have-just-lived-says-prime-minister-storm-hit>.

a death toll of over 4,000 across Caribbean nations,<sup>80</sup> alongside mass displacement and damages estimated around \$90 billion.<sup>81</sup>

The causes of climate change are difficult to square with the requirements of international criminal law, primarily because of how hard it is to show causation with any specific act.<sup>82</sup> There are environmental crimes that are much easier to prosecute than those pertaining to climate change. Protocol 1 of the Geneva Conventions includes a prohibition on “methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment.”<sup>83</sup> As the provision reflects customary international law,<sup>84</sup> it clearly may entail criminal responsibility under the Rome Statute (or by way of universal jurisdiction).

Beyond criminalization of the Protocol 1 provision, international crimes committed during war may have grave environmental consequences. An attack using chemical weapons may amount to a war crime or a crime against humanity regardless of its environmental consequences.<sup>85</sup> But the latter can increase the perceived “gravity” of the crimes and thus push the ICC prosecutor towards prioritizing its investigation.<sup>86</sup>

Most polluting activities, however, are the by-products of business. Such activity seems not only legitimate. It is also widely celebrated for preserving and developing collective wealth. Environmental law has therefore focused on tinkering with business incentives to make polluters “internalize” the costs of their activities. This task is arguably more suitable for administrative law and tort law, rather than for criminal law.<sup>87</sup> It does not come with the expressive bite or negative stigma of criminal law, let alone international criminal law.<sup>88</sup> Criminal enforcement of environmental protection is relatively exceptional, perhaps because most environmental harms are generated by the very structure of a capitalist market.<sup>89</sup>

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<sup>80</sup> Sheri Fink, *Puerto Rico’s Hurricane Maria Death Toll Could Exceed 4,000, New Study Estimates*, N.Y. TIMES, May 30, 2018, <https://www.nytimes.com/2018/05/29/us/puerto-rico-deaths-hurricane.html> (last visited Jan 30, 2019).

<sup>81</sup> Jill Disis, *Hurricane Maria could be a \$95 billion storm for Puerto Rico*, CNN BUSINESS, September 28, 2017 <https://money.cnn.com/2017/09/28/news/economy/puerto-rico-hurricane-maria-damage-estimate/index.html>.

<sup>82</sup> Gilbert, *supra* note 2, at 577.

<sup>83</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 35(3), June 8, 1977, <https://ihl-databases.icrc.org/ihl/WebART/470-750044?OpenDocument>. See also Mégret, *supra* note 2, 197 (“The provision has long been the object of discussion, and has been raised in the context of the use of Agent Orange in Vietnam and the setting ablaze of oil wells in Iraq following the first Gulf War.”)

<sup>84</sup> International Committee of the Red Cross, Customary IHL Database, Rule 45, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule45](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule45).

<sup>85</sup> If it falls under Article 7 of the Rome Statute, as a widespread or systematic attack against a civilian population, with knowledge of the attack, in the form of extermination or otherwise. See also U.N. News, *Use of chemical weapons in Syria would be ‘crime against humanity’ – Ban* (August 23, 2013) <https://news.un.org/en/story/2013/08/447352-use-chemical-weapons-syria-would-be-crime-against-humanity-ban>.

<sup>86</sup> For the notion of “gravity” see the Rome Statute, *supra* note 11, art 53 1.(c).

<sup>87</sup> Gilbert, *supra* note 2, at 556-557; Mégret, *supra* note 2, at 219-220.

<sup>88</sup> On stigmatization in international law generally, see Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252–349 (2011); in the context of international criminal law, Frédéric Mégret, *Practices of Stigmatization: The Practices of the International Criminal Court*, 76 LAW & CONTEMP. PROBS. 287–318 (2013); on expressivism see Sander, *supra* note 68.

<sup>89</sup> Among many: NAOMI KLEIN, *THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE* (2014). And yet, a conversation about the role of international criminal law in environmental protection had been carried out for

Yet as early as 1997, speaking of the “cultural genocide” of climate change,<sup>90</sup> President Kinza Clodumar of the Republic of Nauru warned: “...the willful destruction of entire countries and cultures, *with foreknowledge*, would represent an unspeakable crime against humanity. No nation has the right to place its own, misconstrued, national interest before the physical and cultural survival of whole countries” (emphasis added).<sup>91</sup> His words are not only an invocation of international criminal law categories. They also attempt to impute a consciousness of wrongdoing to the culprits. The latter cannot be mistaken and think that these activities are legal, says Clodumar.

At the wake of President Donald Trump’s anti-environmental policies,<sup>92</sup> another commentator invoked the expressive charge of crimes against humanity -- once again referring to climate change. In an opinion piece published by *The Guardian*, Lawrence Trocello described the problem of thoughtlessness.<sup>93</sup> Trocello suggests that “Most of us have wondered about the human context of past crimes against humanity: why didn’t more people intervene? How could so many pretend not to know? *To be sure, crimes against humanity are not always easy to identify while they unfold*”<sup>94</sup> (emphasis added). His questions could not be more relevant. Arendt’s Eichmann is the paradigmatic example of why such crimes may not be easy to identify in real time. We are often so immersed in our world in which they represent positive activities, as not to be able to think of them at all. To reiterate Elizabeth Costello’s words, we “do not know.”

For Trocello, this seeming lack of understanding of how crimes against humanity unfold is a kind of willful blindness.<sup>95</sup> Reflection can dispel the clouds, at least when coupled with some temporal distance from the social context in which a crime was committed: “We need some time to reflect and to analyze, even when our reasoning suggests that large-scale human suffering and death are imminent. The principled condemnation of large-scale atrocity is, too often, a luxury of hindsight.”<sup>96</sup> This question about the possibility of judgement to transcend social context has been introduced above. The imagination of a more enlightened future is the writer’s attempt to avoid the pitfalls of thoughtlessness.<sup>97</sup>

Both Clodumar in 1997, and Trocello two decades later, invoke the category of crimes against humanity rather casually. Neither of them makes any real case under international criminal law. They nevertheless open a richer understanding of how Arendt’s thoughtlessness remains important in popular thinking about global justice. And they signal a general direction as to

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more than two decades now, see e.g. Gerhard Loibl & Markus Reiterer, *International Criminal Law and the Environment*, 26 ENVTL. POL’Y & L. 192–195 (1996).

<sup>90</sup> International criminal law does not include a category of cultural genocide. The phrase is brought, in scare quotes, only to reflect the idea that the speaker conveyed.

<sup>91</sup> Quoted in KEVIN HILLSTROM & LAURIE COLLIER HILLSTROM, AUSTRALIA, OCEANIA, AND ANTARCTICA: A CONTINENTAL OVERVIEW OF ENVIRONMENTAL ISSUES, 193 (2003).

<sup>92</sup> David Cutler and Francesca Dominici, A Breath of Bad Air: Trump Environmental Agenda May Lead to 80,000 Extra Deaths per Decade, NEWS@JAMA, May 10, 2018, <https://newsatjama.jama.com/2018/05/10/jama-forum-a-breath-of-bad-air-trump-environmental-agenda-may-lead-to-80%E2%80%85000-extra-deaths-per-decade/> (for a widely-reported assessment by Harvard scientists).

<sup>93</sup> Lawrence Torcello, *Yes, I am a climate alarmist. Global warming is a crime against humanity*, THE GUARDIAN, April 29, 2017, <https://www.theguardian.com/commentisfree/2017/apr/29/climate-alarmist-global-warming-crime-humanity> (last visited Jan 30, 2019).

<sup>94</sup> *Id.*

<sup>95</sup> On willful blindness in international criminal law, see e.g.: William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015–1036 (2002).

<sup>96</sup> Torcello, *supra* note 87.

<sup>97</sup> But see Koskenniemi, *supra* note 48.



how the concept may be incorporated into contemporary international criminal legal argumentation.

Climate change is of interest because its atrocious consequences, including mass displacement and food shortages, are currently unfolding in growing speed.<sup>98</sup> In recent years, we have increasingly tended to imagine what the planet will be like when human presence is no longer possible.<sup>99</sup> Particularly harmful policies may conceivably fall under Article 7 of the Rome Statute: a widespread attack against a civilian population that may amount to extermination or forced displacement of populations.<sup>100</sup> At the same time, the underlying behavior stems precisely from a cultural context that valorizes the maximization of profit and thus may come with no consciousness of wrongdoing. Harmful emissions stem from “positive” business activity rather than “guilty minds.”

If a prosecutor chooses to indict individuals for international crimes leading to climate change, demonstrating its *foreseeable* deadly results, defendants may raise the argument that such activity is not criminal. The prosecution, they would say, violates the principle of legality.<sup>101</sup> For that argument to succeed, they would have to show that their activities are *not* currently criminal under international criminal law (which, once again, is a question). But such individuals, heroes of the market, can be understood as being in the Eichmann-like position described above. Their actions result from their embeddedness in a social context where such behavior is valued. Even if it is true that their actions directly contribute to calamitous climate change, it is ultimately not *clear* extant international criminal law applies to it. These defendants’ social contexts may not be wholly different from our own.

## 2. Crimes Against Migrants

In March 2011, the ICC Office of the Prosecutor opened its investigation into the situation in Libya, following a referral by the UN Security Council.<sup>102</sup> The investigation concerns crimes against humanity, including of murder and persecution, starting February 15, 2011.<sup>103</sup> As the ICC Prosecutor explained to the UN Security Council in her statement of May 8, 2017, the investigation also concerns “serious and widespread crimes against migrants attempting to transit through Libya.”<sup>104</sup> ICC Prosecutor Fatou Bensouda labels Libya as a “marketplace for

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<sup>98</sup> See generally MIT JOINT PROGRAM ON THE SCIENCE AND POLICY OF GLOBAL CHANGE, FOOD, ENERGY, CLIMATE OUTLOOK: PERSPECTIVES FROM 2016 (2016) <https://globalchange.mit.edu/sites/default/files/newsletters/files/2016-JP-Outlook.pdf>; World Bank, Shock Waves: Managing the Impacts of Climate Change on Poverty (2015) <https://research.un.org/en/climate-change/reports>; Lyal S. Sunga, *Does Climate Change Kill People in Darfur*, 2 J. HUM. RTS. & ENV’T. 64–85 (2011);

<sup>99</sup> For an analysis of this imagination, see Dipesh Chakrabarty, *The Climate of History: Four Theses*, 35 CRITICAL INQUIRY 197 (2009).

<sup>100</sup> Rome Statute, *supra* note 11. While objecting to the criminalization of climate change inducing activities generally, one scholar emphasizes that its consequences in terms of displacement may already be internationally criminalized. See Gilbert, *supra* note 2, at 554.

<sup>101</sup> Gilbert, *supra* note 2, at 562 (invoking the principle of legality as a possible defense against attempts to internationally criminalize activities resulting in climate change).

<sup>102</sup> S.C. Res. 1970 (February 26, 2011); Int’l Criminal Court [ICC], Situation in Libya ICC-01/11 <https://www.icc-cpi.int/libya>.

<sup>103</sup> *Id.*

<sup>104</sup> Int’l Criminal Court [ICC], Statement of ICC Prosecutor to the UNSC on the Situation in Libya (May 9, 2017) <https://www.icc-cpi.int/pages/item.aspx?name=170509-otp-stat-lib>.

the trafficking of human beings.”<sup>105</sup> As she explains, “thousands of vulnerable migrants, including women and children, are being held in detention centers across Libya in often inhumane condition.”<sup>106</sup>

At question are acts not strictly within the traditional scope of international criminal law. Yet, for influential observers, they have seemed to reinstitute a modern form of slavery.<sup>107</sup> In a statement from November 22, 2017, French President Emmanuel Macron invoked slavery, explaining that trafficking in Libya has become a crime against humanity.<sup>108</sup> At the same time, however, various observers have pointed to the complicity of European countries with the relevant acts.<sup>109</sup> EU states, and Italy in particular, have used Libyan militia to ensure migrants do not make it across the Mediterranean.<sup>110</sup> *Foreknowledge* is often invoked by the most sophisticated humanitarian and pro-migrant organizations in this area: by supporting and arming Libyan militia, European actors knowingly expose migrants to those acts they condemn.<sup>111</sup> In other words, they display a certain consciousness of their own wrongdoing.

The border enforcement and deportation policies of other countries have also raised concerns about possible internationally criminal acts. Particularly infamous are facilities Australia has managed on the Papua New Guinean island of Manus, and is still managing on Nauru.<sup>112</sup> Here, private contractors such as G4S and Ferrovial have run camps of systematic or widespread inhuman detention.<sup>113</sup> UN watchdogs as well as NGOs have observed that agents of these facilities have applied torture on detainees under their custody. Activists have submitted

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<sup>105</sup> *Id.*, para. 27.

<sup>106</sup> *Id.*, para. 26.

<sup>107</sup> “Enslavement” is a crime against humanity when carried out in the context of a widespread or systematic attack on a civilian population. See Rome Statute, *supra* note 11, art. 7 1.(c).

<sup>108</sup> *France calls UN Security Council meeting over Libya slave auctions*, FRANCE24 (November 22, 2017) <https://www.france24.com/en/20171122-france-calls-un-security-council-meeting-libya-slave-auctions-macron>.

<sup>109</sup> See e.g. Violeta Moreno-Lax and Mariagiulia Giuffrè, *The Rise of Consensual Containment: From ‘Contactless Control’ to ‘Contactless Responsibility’ for Forced Migration Flows*, RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW (S. Juss, ed., forthcoming) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3009331](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009331).

<sup>110</sup> AMNESTY INTERNATIONAL, *Cruel European migration policies leave refugees trapped in Libya with no way out* (November 12, 2018) <https://www.amnesty.org/en/latest/news/2018/11/cruel-european-migration-policies-leave-refugees-trapped-in-libya-with-no-way-out/>.

<sup>111</sup> FORENSIC OCEANOGRAPHY, *MARE CLAUSUM: ITALY AND THE EU’S UNDECLARED OPERATION TO STEM MIGRATION ACROSS THE MEDITERRANEAN* 7 (2018) (explaining that “Italy and the EU have come to exercise both strategic and operational control over the Libyan Coast Guard, which has been made to operate refoulement by proxy on behalf of Italy and the EU. This policy has been implemented with full knowledge of the Libyan Coast Guard’s violent behaviour and the detention and inhumane treatment that awaited migrants upon being returned to Libya.”)

<sup>112</sup> Claire Henderson, *Australia’s Treatment of Asylum Seekers: From Human Rights Violations to Crimes Against Humanity*, 12 J INT CRIMINAL JUSTICE 1161 (2014); Amy Maguire et al., *Australia, Asylum Seekers and Crimes against Humanity?*, 40 ALTERNATIVE LAW JOURNAL 185–189 (2015); Ben Doherty, *International Criminal Court told Australia’s detention regime could be a crime against humanity*, THE GUARDIAN, February 13, 2017, <https://www.theguardian.com/australia-news/2017/feb/13/international-criminal-court-told-australias-detention-regime-could-be-a-against-humanity> (last visited Jan 30, 2019); Helen Davidson, *Australia subjected refugees to crimes against humanity, class actions allege*, THE GUARDIAN, December 9, 2018, <https://www.theguardian.com/australia-news/2018/dec/10/australia-subjected-refugees-to-crimes-against-humanity-class-actions-allege> (last visited Jan 30, 2019).

<sup>113</sup> AMNESTY INTERNATIONAL, *Spanish corporate giant Ferrovial makes millions from Australia’s torture of refugees on Nauru* (April 5, 2017) <https://www.amnesty.org/en/latest/news/2017/04/spanish-corporate-giant-ferrovial-makes-millions-from-australias-torture-of-refugees-on-nauru/>;

complaints about their activities to the ICC Office of the Prosecutor (further discussed below).<sup>114</sup>

US Immigration enforcement officers have also increasingly been accused of torture practices.<sup>115</sup> Democratic Party Representative Alexandria Ocasio-Cortez, of New York, has memorably called migrant detention facilities “concentration camps.”<sup>116</sup> Though the label is not a legal category, it is a clear appeal to a cultural imagination of atrocity. Particularly infamous is the Trump administration’s defense of the child separation policy, and its unprecedented application of punitive measures on children.

Recently, the ICC Prosecutor has opened a preliminary examination examining the deportation of the Rohingya people from Myanmar to Bangladesh.<sup>117</sup>

On September 13, 2017, UN Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions, Agnes Callamard, published her report to the UN General Assembly, on the “Unlawful Death of Refugees and Migrants”.<sup>118</sup> The report meticulously documents border control practices with horrible impacts on the world’s most disempowered populations: mass deaths by drowning,<sup>119</sup> an epidemic of mental illness and self-harm in refugee camps,<sup>120</sup> and indefinite detention periods in harrowing conditions.<sup>121</sup> Callamard’s report does not absolve human traffickers from responsibility, but opens a much wider net for a future international criminal investigation focusing on crimes against migrants, including indictments of agents of “developed” countries.<sup>122</sup>

Callamard’s findings are squarely relevant to a discussion of the problem of thoughtlessness in international criminal law. As she writes, the report concerns “an international crime whose

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<sup>114</sup> See e.g. a communication submitted by the Global Legal Action Network (GLAN) together with Stanford Law School’s International Human Rights Clinic: Tendayi E. Achiume et al., *The Situation in Nauru and Manus Island: Liability for crimes against humanity in the detention of refugees and asylum seekers* (February 13, 2017) (Hereinafter: GLAN-Stanford complaint) [https://docs.wixstatic.com/ugd/b743d9\\_e4413cb72e1646d8bd3e8a8c9a466950.pdf](https://docs.wixstatic.com/ugd/b743d9_e4413cb72e1646d8bd3e8a8c9a466950.pdf) .

<sup>115</sup> Sam Levin and Amanda Holpuch, *Trump policy of detaining children “may amount to torture”, UN says – as it happened*, THE GUARDIAN, June 22, 2018, \_\_\_\_\_ (last visited Jan 30, 2019); Beth Van Schaack, *The Torture of Forcibly Separating Children from their Parents*, JUST SECURITY (October 18, 2018) <https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/>; Meg Satterthwaite and Rebecca Riddell, “Zero Tolerance” and the Detention of Children: Torture under International Law, JUST SECURITY (June 21, 2018) <https://www.justsecurity.org/58269/zero-tolerance-detention-children-torture-international-law/>; Widespread or systematic torture may constitute a crime against humanity. See Rome Statute, *supra* note 11, art. 7 1.(f).

<sup>116</sup> See e.g. Masha Gessen, *The Unimaginable Reality of American Concentration Camps*, THE NEW YORKER (Jun. 21, 2019) <https://www.newyorker.com/news/our-columnists/the-unimaginable-reality-of-american-concentration-camps>.

<sup>117</sup> Int’l Criminal Court [ICC], Statement of ICC Prosecutor, Mrs Fatou Bensouda, on Opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh (September 18, 2018); see also Kevin Jon Heller, *Implications of the Rohingya Argument for Libya and Syria (and Jordan)*, OPINIO JURIS (April 10, 2018) <http://opiniojuris.org/2018/04/10/additional-implications-of-the-otps-rohingya-argument/>.

<sup>118</sup> Agnes Callamard (Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions), *Unlawful death of refugees and migrants*, U.N. Doc A/72/335 (August 15, 2017) <http://undocs.org/A/72/335>.

<sup>119</sup> *Id.*, at para. 2.

<sup>120</sup> *Id.*, at para. 52(b).

<sup>121</sup> *Id.*, at para. 6.

<sup>122</sup> *Id.*, at para. 55.

very banality in the eyes of so many makes its tragedy particularly grave and disturbing.”<sup>123</sup> The idea of “banality in the eyes of many” refers to the fact many do not believe these are crimes. From Callamard’s perspective, I think, these people are making a mistake about the law. In her recommendations, she spells out the practical implications: “The International Criminal Court should consider preliminary investigation into atrocity crimes against refugees and migrants where there are reasonable grounds that such crimes have taken place and the jurisdictional requirements of the court have been met.”<sup>124</sup>

Callamard suggests investigations going far beyond Bensouda’s consideration of human trafficking in Libya and the deportation of the Rohingya people. The story she tells in her report has a truly global scale. It is not ordinary for a UN body to recommend to the ICC what cases it should consider.<sup>125</sup> Yet Callamard concludes that parts of these practices amount to international crimes. They are composed of prohibited acts, which, in a “systematic” or “widespread” manner, constitute an “attack” against the “civilian population” of migrants.<sup>126</sup>

Callamard is pointing to the fact that the abuse of migrants is far from being a concern shared by humanity at large. Many of us ignore it or respond with a shrug. For Callamard, this collective shrug, however, does not serve as evidence that no crime has occurred. To the contrary, this disregard may be a sign of *how grave the crime really is*.<sup>127</sup> A global audience of spectators who are happy to see migrants suffer makes their degradation even worse.

On February 26, 2018, Nils Melzer, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, joined many of Callamard’s conclusions about the treatment of migrants: “Migration laws, policies and practices that knowingly or deliberately subject or expose migrants to foreseeable acts or risks of torture or ill-treatment [...] are conclusively unlawful and give rise to State responsibility...”<sup>128</sup> Beyond state responsibility, Melzer too references personal international criminal liability:

States and the ICC-Prosecutor should examine whether investigations for crimes against humanity or war crimes are warranted in view of the scale, gravity and increasingly systematic nature of torture, ill-treatment and other serious human rights abuses [...] as a consequence of corruption and crime, but also as a direct or indirect consequence of deliberate State policies and practices of deterrence, criminalization, arrival prevention, and refoulement.<sup>129</sup>

Focusing specifically on the U.S.-Mexican border, human rights scholar Kate Cronin-Furman published an op-ed in *The New York Times* focusing on themes relevant to the problem of thoughtlessness.<sup>130</sup> Citing testimony from atrocity trials and truth commissions, the author argues that border enforcement personnel committing crimes such as torture likely “think of what they’re doing as they would think of any other day job.” These people, who are “just following orders” as she says, should be shamed through the initiation of international criminal

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<sup>123</sup> *Id.*, at para. 1. See also Kalpouzos and Mann, *supra* note 3.

<sup>124</sup> *Id.*, at para. 90.

<sup>125</sup> Of course, beyond the formal mechanism of U.N. Security Council referral, enshrined in the Rome Statute, *supra* note 11, art. 13(b).

<sup>126</sup> The formulation tracks the language of the Rome statute, *supra* note 11, art. 7.

<sup>127</sup> See also Mohamed, *supra* note 9, at 1637 (explaining that “we can see the normalcy of violence as a feature that makes violence an even more appropriate target for the criminal law”).

<sup>128</sup> Nils Melzer, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. Doc A/HRC/37/50 (February 26, 2018), para. 64(e).

<sup>129</sup> *Id.*, para. 65(j).

<sup>130</sup> Cronin-Furman, *supra* note x.

prosecution. They can thus be deterred, explains the author, from continuing to commit their atrocities.

Assume that Italian coast guard forces knowingly expose migrants and asylum seekers to torture in Libyan detention centers: either by directly handing them over to Libyan militia, or by alerting Libyan militia when migrant boats leave the Libyan coast.<sup>131</sup> Would such Italian agents be liable for torture as a crime against humanity, either directly or vicariously?<sup>132</sup>

One defense that these agents may raise, as above, is the principle of legality. Such acts stem from the state's interest in protecting its borders and are not (clearly) illegal. But even if the acts would be found to be illegal under international law, a defense of mistake of law under Articles 32 and 33 of the Rome Statute could perhaps be voiced: the Italian agents were following orders that even if illegal, are surely not "manifestly" so. The defendants are immersed in a world in which border protection is an important civic duty, even if it takes a high human toll. And it is not that clear, after all, that their actions are indeed criminalized.

### 3. *Crimes Against the Unborn*

The two sets of examples offered above may seem to have in common an aim of expanding the types of cases falling under the jurisdiction of the court. Liberal internationalists and left-leaning cosmopolitans have often expressed such a wish.<sup>133</sup>

Yet there is no promise that such an expansion would ultimately work in favor of political goals that such groups cherish. "Creative" interpretations of international criminal law can also advance prosecutions with a very different political valence.<sup>134</sup> If imputing criminal liability to individuals responsible for numerous abortions now seems like a somewhat outlandish hypothetical, this is by no means *analytically* necessary. It is simply the result of Christian ultra-conservative views not, for now, being all that popular among those entrusted with interpreting the relevant legal instruments.

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<sup>131</sup> See also Itamar Mann, Violeta Moreno-Lax, and Omer Shatz, *Time to Investigate European Agents for Crimes against Migrants in Libya*, EJIL:TALK! (March 29, 2018) <https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/>.

<sup>132</sup> Recently, two lawyers made this and further such claims in a submission to the international criminal court. See Omer Shatz and Juan Branco, *Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute* (2019) [https://www.academia.edu/39389018/EU\\_Migration\\_Policies\\_in\\_the\\_Mediterranean\\_and\\_Libya\\_2014-2019](https://www.academia.edu/39389018/EU_Migration_Policies_in_the_Mediterranean_and_Libya_2014-2019).

<sup>133</sup> See e.g. Michael G. Kearney, *On the Situation in Palestine and the War Crime of Transfer of Civilians into Occupied Territory*, 28(1) CRIM. L. FORUM 1, 3 (noting that "The impetus towards advancing the application of international criminal law beyond atrocity is clearly perceived in contemporary analyses of poverty, discrimination, asylum status, and hate speech"). For a collection of critiques of this orientation, see ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, (Karen Engle, Zinaida Miller, & D. M. Davis eds., 2016).

<sup>134</sup> The Heritage Foundation has been a particularly active think tank when it comes to international criminal law. See e.g. Paul Larkin Jr., *Can Captured ISIS Fighters Be Prosecuted for Genocide in an International Tribunal?* 225 THE HERITAGE FOUNDATION LEGAL MEMORANDUM (January 22, 2018) <https://www.heritage.org/sites/default/files/2018-01/LM-225.pdf>. More generally, a body of scholarship has recently emerged demonstrating the conservative potential of human rights arguments. See e.g. MARCO DURANTI, *THE CONSERVATIVE HUMAN RIGHTS REVOLUTION: EUROPEAN IDENTITY, TRANSNATIONAL POLITICS, AND THE ORIGINS OF THE EUROPEAN CONVENTION* (1 edition ed. 2017); SAMUEL MOYN, *CHRISTIAN HUMAN RIGHTS* (2015); NICOLA PERUGINI & NEVE GORDON, *THE HUMAN RIGHT TO DOMINATE* (2015).

On November 1, 2017, the United States' Congress heard testimony on a new anti-abortion Bill, the Heartbeat Protection Act of 2017.<sup>135</sup> Star Parker, a conservative activist and the founding director of the Center for Urban Renewal and Education, gave an interesting speech, worth analyzing here in some detail.<sup>136</sup> Just like others did in the context of climate and migration, Parker chose to make her case through an invocation of mass atrocity: "Slavery was, as abortion is, a crime against humanity."<sup>137</sup> The fact Parker is black makes her reference to slavery all the more compelling.

Indeed, Parker spoke from a position rooted in black identity and black culture. She started by referring to rapper Nicki Minaj, about whom she said that her "abortion of her unborn daughter still haunts her."<sup>138</sup> Parker then referred to her own past experience, explaining that she too decided to have a number of abortions, and was ridden by guilt: "I was one such woman."<sup>139</sup> In line with Arendt's view on moral judgement briefly explained above, the invocation of conscience is coupled with a claim about the ability to see from the perspective of the other. This is a silenced, invisible other, made vulnerable by existing social conditions: "My testimony on behalf of the innocent life growing in the womb, and the vulnerable men and women considering abortion."<sup>140</sup> Such conditions, she explains, are aggravated by antagonistic social forces: the intrinsic value of life is constantly eliminated by a desire for material gain, instrumental efficiency, and social conformity. For her, this is a "conflict between humanity and convenience, personhood and property, justice and public opinion."<sup>141</sup>

Parker takes slavery as a paradigmatic crime against humanity.<sup>142</sup> Like the charge in climate change advocacy, the idea is that a fundamental value was destroyed for the sake of utility and greed. Parker also presents this as a case of thoughtlessness. Owning slaves was previously an "acceptable" American behavior (embraced by American heroes such as Thomas Jefferson and George Washington).<sup>143</sup> People who failed to transcend their own cultural contexts through the exercise of judgement could be involved in slavery without having any kind of consciousness of wrongdoing. In this context, Parker takes a clear position on the most basic debate in legal philosophy, between positivism and natural law. Just like Arendt obliquely did in this context, Parker sides with natural law.<sup>144</sup>

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<sup>135</sup> Heartbeat Protection Act, H.R. 420, 115<sup>th</sup> Cong. (2017-2018) <https://www.congress.gov/bill/115th-congress/house-bill/490/text>.

<sup>136</sup> Star Parker, *Star Parker tells U.S. Judiciary Committee Slavery and Abortion are the Same*, YOUTUBE (November 1, 2017) <https://www.youtube.com/watch?v=jMdN69mgMzQ> (last visited January 30, 2019).

<sup>137</sup> *Id.* One might note here that it is unlikely that slavery was a crime against humanity during the entire history of slavery. For the early roots of judicial enforcement of a prohibition on slavery see JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2014).

<sup>138</sup> Parker, *supra* note 127. See also Ashley McGuire, *Nicki's abortion: Minaj reveals unspoken truths*, N.Y. POST (January 8, 2015) <https://nypost.com/2015/01/08/nickis-abortion-minaj-reveals-unspoken-truths>.

<sup>139</sup> Parker, *supra* note 127.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* Compare with a classical work of legal theory in which "personhood and property" are mutually-constitutive, not oppositional: Margaret Jane Radin, *Property and Personhood*, 34 *STANFORD LAW REVIEW* 957 (1982).

<sup>142</sup> See also W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA, 20 1860-1880* (1998).

<sup>143</sup> William W. Freehling, *The Founding Fathers and Slavery*, 77 *THE AMERICAN HISTORICAL REVIEW* 81 (1972).

<sup>144</sup> In keeping with a tradition of thinking among American conservatives, see e.g. Robert P. George, *Natural Law*, 31 *HARV. J. L. & PUB. POL'Y* 171 (2008); Randy E. Barnett, *Law Professor's Guide to Natural Law and Natural Rights*, 20 *HARV. J. L. & PUB. POL'Y* 655 (1996).

This appeal to natural law allows Parker to discuss another important theme linking abortion to a history of mass atrocity, i.e., the question who counts as human.<sup>145</sup>

Like slavery, tensions were created in a public square and in law concerning who qualified for *natural rights* worthy of protection. In the first eighty nine years of our nation's existence it was the black slaves who sought freedom, and equal protection under the law, and many attempts were made to heed their cry [...] Today it is the conceived person living in the womb of its mother that should be considered human with opportunity of equal protection under the law" (emphasis added).<sup>146</sup>

Parker's discourse displays three relevant and interrelated assumptions: (1) one must transcend their own historical conditions, asserting one's individual conscience against *doxa*; (2) history is a progressive process, which allows us in the present to better judge the past, and will also allow future generations to better judge our own time; and (3) while some atrocities might seem unprecedented, one can nevertheless adopt an appropriate attitude towards them by highlighting their commonalities with past atrocities.<sup>147</sup>

This style of reasoning cuts across partisan politics: one can take precisely the same rhetorical stance while claiming that certain contributions to climate change must be interpreted as criminal. One can invoke them to protect and assist the most destitute of unauthorized migrants. Rather than testifying to their weakness, the political malleability of these arguments speaks to how commanding they can be.

But can her claim that abortions are a crime against humanity be taken seriously? Conservative scholar Robert George has argued that embryos fully qualify as rights-bearing persons, just as severely disabled or comatose individuals are. He thus equates between abortions and acts of killing.<sup>148</sup> Similarly, U.S. Supreme Court Justice Clarence Thomas compared birth control to eugenics, and its historical motivation "to exterminate" the black population.<sup>149</sup>

Based upon the black letter of the law alone, there is no reason to disagree. Under Article 7 of the Rome Statute, systematic or widespread extermination of a civilian population amounts to

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<sup>145</sup> See also George, *Id.*, at 176.

<sup>146</sup> Parker, *supra* note 127.

<sup>147</sup> When Parker concluded her testimony, a Congressman asked her whether the comparison between abortion and slavery was her own. He must have forgotten that not so long earlier, in July 2017, John Bush was confirmed as a judge on the 6<sup>th</sup> Circuit Court of Appeals. Bush's nomination caused some controversy due to a blog post in which he compared, under a pseudonym, between slavery and abortion. Parker, *supra* note 127. On the same blog, the confirmed judge had also mocked climate change alarmism. See Alexandra Wilts, *Republicans confirm Trump-nominated judge who compared abortion to slavery*, INDEPENDENT (July 20, 2017) <https://www.independent.co.uk/news/world/americas/us-politics/john-bush-trump-judge-republicans-confirm-lgbt-rights-abortion-slavery-a7851976.html>.

<sup>148</sup> George, *supra* note 135, at 176. Compare with Sheila Jasanoff, *Biology and the Bill of Rights: Can Science Reframe the Constitution Symposium*, 13 AM. J.L. & MED. 249, 269 (1987) (discussing the analogy between abortion and eugenics in public discourse).

<sup>149</sup> *Box v. Planned Parenthood of Indiana and Kentucky, Inc.* 587 U.S. 1, 12 (2019) [https://www.supremecourt.gov/opinions/18pdf/18-483\\_3d9g.pdf](https://www.supremecourt.gov/opinions/18pdf/18-483_3d9g.pdf).

a crime against humanity.<sup>150</sup> There is no reason, in principle, why unborn fetuses cannot constitute a civilian population.<sup>151</sup>

In many parts of the world, including nine U.S states, abortions are permitted at any stage of pregnancy.<sup>152</sup> Framing abortion as widespread or systematic killing directly collides with the normative convictions reflected by such laws: reproductive rights, says the title of another Bill, are human rights.<sup>153</sup> Pro-life advocates, arguing against such policies, point to the fact that some fetuses have the capacity to experience pain.<sup>154</sup> Some of them, they rightfully say, could survive outside the womb and become adults. There is no *necessary* or *analytic* reason to determine the debate one way or the other. There is no such reason to exclude unborn fetuses from protections given to other humans. Within the U.N. Human Rights Committee, a lively discussion recently emerged on the question whether the unborn enjoy the right to life protected by Article 6 of the International Covenant on Civil and Political Rights (ICCPR).<sup>155</sup>

If we do indeed try to take Parker’s crime against humanity argument seriously, we might conclude that she demands of us no departure from extant law. Neither popular opinion (international or American), nor the jurisprudence of international criminal tribunals, support the idea that mass abortions constitute a crime against humanity. A recent general comment on the right to life by the U.N. Human Rights Committee militates precisely to the opposite direction, protecting a right to healthy and safe abortion.<sup>156</sup> But a textual reading of the Rome Statute does allow for such an interpretation. And human rights instruments (those of international criminal law included) are often understood as protections precisely *against* the dangers of public opinion.<sup>157</sup> Someone like Parker may claim: doctors performing or directing such abortions should not enjoy protections if they are mistaken about the law. “A mistake [...] shall not be a ground for excluding criminal responsibility.”<sup>158</sup> These doctors, so the argument goes, are misguided by the social and cultural contexts in which they are living.

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<sup>150</sup> Rome Statute, *supra* note 11, art. 7.

<sup>151</sup> Under international criminal law, there is no need for there to be an armed conflict, and humans outside the context of war are protected by the provision. (I’ve relied on this point above as well, in the contexts of environmental and migration atrocities). See

<sup>152</sup> *Abortion Restrictions in States*, N.Y. TIMES (June 17, 2013)

<https://archive.nytimes.com/www.nytimes.com/interactive/2013/06/18/us/politics/abortion-restrictions.html>.

<sup>153</sup> Reproductive Rights are Human Rights Act of 2018, H.R. 7228, 115<sup>th</sup> Cong. (2017-2018)

<https://www.congress.gov/bill/115th-congress/house-bill/7228>.

<sup>154</sup> See e.g. Stuart W G Derbyshire, *Can fetuses feel pain?*, 332 BMJ 909 (2006).

<sup>155</sup> The committee formally excluded the unborn from the right to life, “despite pleas from more than one hundred governments and pro-life organizations,” including the United States, Russia, Poland, and Egypt. See Stefano Gennarini, *UN Human Rights Committee formally excludes unborn child from ‘right to life,’* LIFESITE (November 3, 2017) <https://www.lifesitenews.com/news/un-human-rights-committee-formally-excludes-unborn-child-from-right-to-life>. For the general comment by the committee, generally protecting women’s rights to safe and health abortions, see Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc CCPR/C/GC/36 (October 30, 2018).

<sup>156</sup> Human Rights Committee, *Id.* Yet note that the United States, for example, has opined in this context that the Committee’s work products “do not in and of themselves provide legal support under international law.” They are rather “merely [...] non-binding views...” See Observations of the United States of America on the Human Rights Committee’s Draft General Comment No. 36 On Article 6 – Right to Life (October 6, 2017) <https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx>.

<sup>157</sup> See also Re’em Segev, *Justification, Rationality and Mistake: Mistake of Law is no Excuse? It Might Be a Justification!* 25(1) LAW AND PHILOSOPHY 31, 35 (2006) (noting that “interpretations of legal rules could be (not only justified but also) correct even when different from those of authorized individuals or institutions.”)

<sup>158</sup> Rome Statute, *supra* note 11, art. 32.



It would be a gross understatement to say that it is “not entirely clear” that international criminal law prohibits systematic abortions. But it was also truly unclear that there was an international criminal prohibition against genocide during Eichmann’s criminal acts. The literature on retrospective punishment, particularly surrounding the (earlier) Nuremberg tribunals, unquestionably testifies to the latter legal difficulty.<sup>159</sup>

#### 4. When do We Acquit the Thoughtless?

Many of those who commit mass atrocities act without knowledge of the law. Presumably some of them could have known about it. Especially when the law is not entirely clear, it is questionable whether perpetrators of mass atrocity with no such knowledge should be convicted. Such convictions, whether of Arendt’s Eichmann or of perpetrators in the hypothetical cases above, may be detrimental to the purposes of international criminal law. It is hard to imagine that persons punished for heinous acts that they had no idea are criminal, can comprehend the punishment (even if they do not agree with it). And it is hard to imagine that they would be deterred from performing other atrocities that they do not see as morally or legally problematic.

Of course, to convict a defendant of an international crime there is no need that the defendant agrees with the law. Nor is there any requirement that a defendant recognize the result of the criminal process as just. What is a necessary condition is that the defendant will be able to identify the law *qua* law. A useful distinction here is the difference between John Austin’s positivism, and H.L.A. Hart’s corrective. While for Austin law is a command backed by a sanction, Hart required that people be able to recognize the binding force of law as something else than simply brute force (applying a so-called “rule of recognition”).<sup>160</sup> It is necessary that a defendant in an international criminal trial be able to recognize the law as law, not as an arbitrary infliction of violence.<sup>161</sup>

The Eichmann thought experiment requires us to imagine minds with moral convictions that are far removed from our own. As the thought experiment reflects, people with such minds can believe the most morally repugnant actions imaginable are nevertheless legal. The three hypothetical examples provided above are intended to show that there is nothing necessarily correct about our own contemporary moral convictions. These are three cases that, I hope, have moved various kinds of readers in different directions (with at least some degree of discomfort about one or more of the examples). Indeed, The Eichmann thought experiment requires us to acknowledge that our moral convictions are often fundamentally *divided*.

Some may object, assuming a kind of consensus in the international community around certain basic values. International criminal law is directed towards “core crimes.” War crimes, crimes against humanity, and genocide – so goes the argument -- are precisely the kind of crimes that “anyone knows” are illegal. The principle of legality, fundamental to criminal legal theory, requires that such crimes be interpreted in accordance with widely held perceptions and expectations. In the Rome Statute, the principle is codified in Article 22 -- “*nullum crimen sine lege*.” The principle is also referred to as *the principle of strict interpretation*, suggesting an

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<sup>159</sup> See Shklar, *supra* note 54.

<sup>160</sup> H. L. A. HART ET AL., THE CONCEPT OF LAW (3 edition ed. 2012).

<sup>161</sup> Even if they end up *saying*, as will often be the case, that the trial is illegitimate. See in this regard Koskenniemi’s discussion of Slobodan Milošević. Koskenniemi, *supra* note 26, at 1.

analysis that will follow well-trodden paths.<sup>162</sup> Particularly relevant, Article 22(2) provides that “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.”<sup>163</sup>

According to the objection, there can therefore be no problem of “mistakes” about international criminal law. These are the acts held as criminal by the “international community as a whole.”<sup>164</sup> Whoever commits such crimes must know that they have acted criminally. The problem of thoughtlessness may have been relevant during the formative post-war period in which Eichmann was tried. But the basic international legal norms and institutions have since solidified. Today, the problem of thoughtlessness simply does not arise.

This type of response assumes that when a person intentionally engages in behavior that is morally reprehensible from the perspective of the “international community,” consciousness of wrongdoing can be imputed to them. In criminal law more generally, suspects are assumed to have the ability to find out the law if they do not know it. A defense for mistakes of law, the literature often reiterates, simply encourages an undesirable behavior of indifference and willful blindness about the law. Oliver Wendell Holmes is often quoted on this: “It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit [mistake of law as an] excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.”<sup>165</sup>

As for international crimes, a characteristic argument is slightly different: there are certain acts for which consciousness of wrongdoing does not have to be proven, because they are so manifestly unlawful on their very face. This is what a reference to “manifestly illegal acts” means. And this is likely what Arendt meant, when she wrote that “the very earth cries out for vengeance.”<sup>166</sup> As one commentator asserts -- perhaps overconfidently -- “honest errors about the illegality of genocide, crimes against humanity, and aggression are unthinkable.”<sup>167</sup>

But this attempt to brush away the problem of thoughtlessness is unsatisfactory. No such consensus in “the international community” exists -- even not about the fundamental prohibitions of international criminal law.

The existing language of the Rome Statute too admits that there can be mistakes about some international crimes, i.e., war crimes. Article 33 provides a defense for soldiers following orders that are not manifestly illegal. The Statute further assumes that unlike war crimes, crimes against humanity and genocide are always “manifestly illegal” (Article 33 2.). The distinction within Article 33 supports the argument I make here inasmuch as some “thoughtless” criminals

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<sup>162</sup> Caroline Davidson, *How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court*, 91 ST. JOHN’S L. REV. 37 (2017); Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law*, 2 J. INT’L CRIM. JUST. 1007, 1009 (2004).

<sup>163</sup> Rome Statute, *supra* note 11, art. 22. Note the suspicion of analogy, which, as demonstrated in the analysis of Parker’s testimony, is a central device for unorthodox legal interpretation.

<sup>164</sup> *Id.* (preamble).

<sup>165</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 41 (Belknap Press 1963) (1881).

<sup>166</sup> Arendt, *supra* note 5, 277.

<sup>167</sup> Stuckenberg, *supra* note 10, 322. Compare with Smeulers and Werner, *supra* note 6, at 42 (“Social-psychological research has shown how even reasonable people can come to see genocide as legitimate and necessary and thus proves that we can and may not take it for granted that reasonable people will always recognize such an order as manifestly illegal.”)

are granted a defense. But I believe granting the defense only in cases of war crimes committed under superior orders makes no sense analytically. The underlying “problem of thoughtlessness” may be applicable in crimes against humanity and genocide as well. From this perspective, the subordinate following orders and the uncritical follower of cultural mores are not qualitatively different; they are points on a spectrum of socialized normativity. As Christian theologians such as Aquinas and Grotius had it, “invincible ignorance exculpates acts resulting from it.”<sup>168</sup> Though soldiers act within an organization that encourages such ignorance for the sake of operational speed and seamlessness, it cannot be regarded as the provenance of soldiers alone.

For years, torture joined slavery as a paradigmatic absolute prohibition of customary international law (“*jus cogens*”). But recall President Donald J. Trump, far from being alone, repeatedly demanding that terrorism suspects receive treatment worse than water-boarding.<sup>169</sup> Perhaps there is a near-unanimous agreement that genocide is always prohibited. But the rubber meets the road when one *operationalizes* the genocide definition in concrete circumstances. We have seen the lack of consensus, e.g., in the aftermath of allegations of genocide in Sudan.<sup>170</sup> To paraphrase an oft-quoted quip by Carl Schmitt, whoever invokes interests of “the international community as a whole” wants to cheat.<sup>171</sup>

Recently, defending the notion of an international community commonly upholding core global values, James Crawford wrote that

[...] whether or not there is a ‘global community’ – a matter that rather depends on one’s definition of community – there are incontestably global, communal or collective interests. Among these, I would list a minimum of environmental stewardship – for example, the preservation of species from avoidable extinction, the protection of the ozone layer – and the prevention as far as possible of wars of destruction and weapons of mass destruction.<sup>172</sup>

Does this mean that acts contributing to climate change should be prosecuted as crimes against humanity? At present, that does not seem likely. Does this mean that there will be an international consensus around prosecuting the Syrian regime for its war of annihilation, including the use of weapons of mass destruction, when such a proposal will come before the U.N. Security Council? There is no reason to believe a proposal that has so far failed -- on normative grounds from Russian and Chinese perspectives -- will succeed in the foreseeable

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<sup>168</sup> In the words of Ben Vermeulen, *Grotius on Conscience and Military Orders*, 6 GROTIANA (N.S.) (1985), 3, 14. On the relationship between law and conscience, see also James Scott Brown, *Francisco Suárez: His Philosophy of Law and of Sanctions*, 22(3) Geo. L. J. (1934), 405, 421.

<sup>169</sup> Tom McCarthy, *Donald Trump: I’d bring back “a hell of a lot worse than waterboarding,”* THE GUARDIAN, February 7, 2016, <https://www.theguardian.com/us-news/2016/feb/06/donald-trump-waterboarding-republican-debate-torture> (last visited Jan 31, 2019).

<sup>170</sup> Which emerged largely due to Antonio Cassese’s finding that violence in Sudan did not constitute genocide. For an illuminating analysis of the political stakes of the debate, see MAHMOOD MAMDANI, *SAVIORS AND SURVIVORS: DARFUR, POLITICS, AND THE WAR ON TERROR* (2010). For Cassese’s full report see International Commission of Inquiry on Darfur, Report to the Secretary-General (January 25, 2005) [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf).

<sup>171</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 54 (George Schwab tran., Enlarged edition ed. 2007). Also quoted in Luban, *supra* note 6, 626 (referred to as Schmitt’s “cynical slogan”).

<sup>172</sup> James Crawford, *The Current Political Discourse Concerning International Law* 81(1) MODERN LAW REV. 1, x (2018).

future.<sup>173</sup> Perhaps a criminal prohibition was not what Crawford had in mind. However, he does write of a “minimum,” which only illustrates that the so-called international community may never agree about when international criminal prosecution is appropriate. A lack of consensus about the most fundamental categories of international criminal law is built into the discipline and cannot be denied. This lack of consensus emerges from a context of difference among members of the relevant “community.” It is not only that we consciously disagree. It is also that we do not share our unconscious normatively-laden cultural assumptions.

The text of the Rome Statute – particularly Article 7 on crimes against humanity emphasized above – allows for, even invites, a wide scope of interpretation. International criminal law more broadly is often indeterminate and has an “open texture.” The three examples described above demonstrate that the capacity for novel interpretations within the text of Article 7 is vast.<sup>174</sup> Tribunals have warned that the category of “other inhumane acts” (Article 7(k)), which can also be the basis of liability for crimes against humanity, should be interpreted carefully.<sup>175</sup> The reason for this is that it may be in tension with the principle of legality.<sup>176</sup> On the other hand, in a textual interpretation, one cannot ignore that the drafters put the provision there.

The fact that a certain heinous activity may pass among “the international community” at large as innocuous seems to be a good reason for such a catch-all provision. Indeed, such indifference may be one more reason to investigate a suspect activity: those who are its victims may not have any other forum for their claims.<sup>177</sup> The argument that international criminal law should be interpreted conservatively may end up granting immunity for widely accepted atrocities while capturing only the atrocities that come with ready-made social stigma. But as Arendt warned, the most heinous acts are often not simply repetitions of yesterday’s crimes. Prosecutors aiming to apply international criminal law, both at the ICC and in the domestic contexts of universal jurisdiction, must exercise their own judgement in interpreting the law. It is within such *interpretations* that Arendt’s moral and political reflections on judgement become relevant.<sup>178</sup>

It is important to advance morally and politically new interpretations of international criminal law to address acts that are terrible and novel in equal parts.<sup>179</sup> In my own opinion, the

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<sup>173</sup> See U.N. Security Council, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution SC/11407 (May 22, 2014) <https://www.un.org/press/en/2014/sc11407.doc.htm>; U.N. News, Those responsible for war crimes in Syria ‘will be held accountable for what they have done,’ (March 2, 2018) <https://news.un.org/en/story/2018/03/1003981>.

<sup>174</sup> This pervasiveness of interpretation of criminal provisions is, of course, not specific to international law. See in this context, Dan M. Kahan, *Ignorance of Law Is an Excuse: But Only for the Virtuous*, 96 MICHIGAN LAW REVIEW 127–154, 153 (1997) (“The principle of *legality*, for example, proclaims that legislatures alone are responsible for defining crimes and disavows any lawmaking role for courts; the truth, however, is that criminal statutes typically emerge from the legislature only half-formed and must be completed through contentious, norm-laden modes of interpretation that are functionally indistinguishable from common-law making.”)

<sup>175</sup> Prosecutor v Muthaura, ICC-01/09-02/11, Judgment, ¶ 269 (January 23, 2012) (“this residual category [...] must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity”).

<sup>176</sup> KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 336 (2010).

<sup>177</sup> Itamar Mann, *The Dual Foundation of Universal Jurisdiction: Towards a Jurisprudence for the Court of Critique*, 1 TRANSNAT’L LEGAL THEORY 485, 484-496 (2010) (explaining the notion of a “court of last resort”).

<sup>178</sup> Affirming the role of political judgment in legal responses to political violence, see BRONWYN LEEBAW, JUDGING STATE-SPONSORED VIOLENCE, IMAGINING POLITICAL CHANGE 5, 14-27 (2011). See more generally Shklar, *supra* note 54.

<sup>179</sup> On universal jurisdiction prosecution and the “daring judge” (which Robert Cover alludes to in epigraph), see Hovell, *supra* note 17, at 447.

environmental and migration issues addressed above reflect injustices rooted in globalization and extreme global inequality, which previous generations likely could not have imagined. But it is equally important not to end up convicting defendants who *could not have known* they were violating international law. International criminal law cannot simply rely on the conservatism of consensus, because such consensus may amount to the background cultural conditions for the worst of crimes. But it cannot hold people liable of the gravest crimes when they could not have been expected to do otherwise.

In domestic law, if a person had a *bona fide* belief that they were acting lawfully, it may (or may not) be appropriate for them to be convicted.<sup>180</sup> But the reasoning with international criminal law should be somewhat different. The discipline self-consciously seeks to go beyond particular political communities.<sup>181</sup> Prosecutors and judges should exercise their own judgement and advance new interpretations of international criminal law, while recognizing mistake of law defenses when such interpretations end up foreign to defendants.

In a recent Article also addressing the seeming normality of international criminals within their own societies, Saira Mohamed makes a proposal very different from my own. In her view, international criminal law should set “aspirational goals.” She explains that international criminal law “does more than just reflect average behavior: it can function as a voice of our moral imagination and move us to aspire beyond the ordinary.”<sup>182</sup> The proposal is a possible solution to what Mohamed calls the “deviance paradox”: the fact that international criminal trials often prosecute defendants with no consciousness of wrongdoing for the worst of crimes.

I disagree. Coercive legal arrangements are not an appropriate vessel for expressing public ideals and aspirations. And international criminal tribunals should not be in the business of “giving voice to the better angels of our nature” – as Mohamed writes.<sup>183</sup> Generally, aspirational goals should be the subject of public discussion and political deliberation. As far as international law goes, they are appropriate for declarations and non-binding, soft law, instruments. But when they refer to international criminal law, such recommendations amount to a call to punish people who cannot *recognize* their own wrongdoing.<sup>184</sup> This is of course problematic from the perspective of the principle of legality. Note however that the concern is also closely tied with mistakes of law. A problem in recognizing the law naturally leads to more mistakes about it.

Such a policy may also solidify the role of international criminal law as a site for the performance of ideological domination.<sup>185</sup> Defendants in an international criminal law context should not be punished by a system where they cannot be expected to identify the law, or think

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<sup>180</sup> The question of a cultural defense for perpetrators of crime has often been debated. Whatever one’s opinion about that question, in the domestic context of a democracy, citizens are at least in principle given an opportunity to recognize the law through participation in its framing.

<sup>181</sup> In the context of human rights more generally, see Jennifer Nedelsky, *Communities of Judgment and Human Rights Judgment* 1 THEORETICAL INQ. L. 245 (2000).

<sup>182</sup> Mohamed, *supra* note 6, at 1636-1637.

<sup>183</sup> *Id.*, at 1666.

<sup>184</sup> Such an issue can problem may be identifiable, for example, in the case of Dominic Ongwen, the child-soldier who became a commander in Joseph Kony’s Lord’s Resistance Army. See Mark A. Drumbl, *Victims who victimise*, 4 LOND. REV. INT’L L. 217, 234-243 (2016); Barrie Sander, *We Need to Talk about Ongwen: The Plight of Victim-Perpetrators at the ICC*, JUSTICE IN CONFLICT (April 19, 2016) <https://justiceinconflict.org/2016/04/19/we-need-to-talk-about-ongwen-the-plight-of-victim-perpetrators-at-the-icc/>

<sup>185</sup> This critique echoes the preoccupations of the critical and TWAIL literature in international criminal law. See above, note x.

of somehow as their own. During investigations, suspects should be questioned on issues related to whether they even *suspected* their actions might be internationally proscribed. During trials, defendants should be allowed to show evidence relevant to their peculiar cultural contexts. Once again, this does not mean that they must ultimately agree with any finding the tribunal reaches on these issues.

The recommendation can perhaps be clearer when applied to the illustrations provided above. Assume that the ICC Office of the Prosecutor considers the investigation of cases against energy moguls, border guards, or directors of abortion clinics. Assume that a sufficiently solid *textual* interpretation of Article 7 can frame each of them as crimes against humanity. And assume, finally, that the Prosecutor also believes they all show a sufficient level of gravity.<sup>186</sup> Should defendants in either category be able to raise a mistake of law as a defense? The standard should be whether they *could have known* their actions would be thought of as illegal.<sup>187</sup> One domestic rule that comes close to such a standard is Article 17 of the German Criminal Code, which provides that -

If at the time of the commission of the offence the offender lacks the awareness that he is acting unlawfully, he shall be deemed to have acted without guilt if the mistake was unavoidable. If the mistake was avoidable, the sentence may be mitigated pursuant to section 49(1).<sup>188</sup>

Think of the complaints submitted to the ICC Office of the Prosecutor, regarding alleged crimes against humanity committed by Australian agents in the context of border enforcement.<sup>189</sup> As described above, the circumstances concern offshore detention and processing facilities on Nauru and Manus Island. When the complaints began, it may have been the case that such agents could not have known that their actions would be considered as crimes. Not only were they presumably immersed in a culture that normalized the so-called “deterrence” of migrants.<sup>190</sup> The interpretation of international criminal law that made their acts illegal may have not been entirely clear. At that point in time, they should have been able to raise a defense based on a mistake of law.

As complaints multiplied, as did their news coverage,<sup>191</sup> it likely became impossible to remain so immersed in the insular context, as to fail to realize that this became a debated issue. Or, if one did remain so immersed, it could very well have been the result of a kind of irresponsibility, deliberately avoiding judgment. Now the relevant enforcement personnel could no longer be

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<sup>186</sup> Under the Rome Statute, *supra* note 11, art. 17 1.(d).

<sup>187</sup> In the German legal system, “avoidable” mistakes of law lead to mitigation of sentence; “unavoidable” mistakes relieve defendants of culpability. And see in this context KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME I: FOUNDATIONS AND GENERAL PART (2013): “Article 32(2) of the ICC Statute should be interpreted in a more flexible or liberal way, taking recourse to a criterion of *avoidability* or *reasonableness*, which would enable the judges to find practical and just solutions on a case-by-case basis.” Ambos is quoted alongside other relevant sources in Sander, *supra* note 11, footnote 4064.

<sup>188</sup> Strafgesetzbuch [StGB] [Criminal Code], §17, translation at [https://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html). See also Stuckenberg, *supra* note 10, 321-322 (“a liberal and principled criminal law *must* exonerate if a mistake is unavoidable because it would be manifestly unjust – and a violation of the principle of guilt – to punish a person for the failure to do something they were unable to do.”)

<sup>189</sup> E.g. the GLAN-Stanford complaint, *supra* note 108.

<sup>190</sup> Sharon Pickering & Leanne Weber, *New Deterrence Scripts in Australia’s Rejuvenated Offshore Detention Regime for Asylum Seekers*, 39 LAW & SOCIAL INQUIRY 1006 (2014); on deterrence more generally see Thomas Gammeltoft-Hansen, *International Refugee Law and Refugee Policy: The Case of Deterrence Policies*, 27 J REFUG. STUD. 574 (2014).

<sup>191</sup> Doherty, *supra* note 106.

so mistaken as not to *consider the possibility* that their actions were indeed criminal. Such a failure would reflect *morally and politically blameworthy* thoughtlessness in the rudimentary kind of legal *interpretation* that is expected of officials in such positions.<sup>192</sup>

When they can be expected to know about them, individuals have an obligation to *consider* interpretations of international criminal law that may apply to their actions. (The source of this obligation is not legal per se, as the discussion above of the three kinds of Arendtian judgement reveals). This of course does not mean that they must reach the conclusion such interpretations are correct. Nor does it mean, going back to the example, that a conviction of Australian agents who performed roles within this abusive system can be predetermined. Surely, numerous factual and legal issues remain to be investigated. But it does draw the normative limits on when a defense of mistake of law should be recognized in the context of heinous acts of systematic inhuman treatment and torture.

A similar analysis holds true about the Israeli soldiers discussed above, those who cannot tell the difference between a legal and a “manifestly illegal” order. If they simply cannot have any suspicion that a certain order is “manifestly illegal” it would most certainly be fair to exculpate them from international criminal liability. With Israeli military practices in the West Bank and Gaza so often under public scrutiny, it is hard to imagine how that would be the case.<sup>193</sup> They should thus have an obligation to exercise judgement on the issue and have a position, even if a basic one. Once again, this does not mean that in case of prosecution, conviction would in any way be obvious. It does not even mean, in and of itself, that they will reach a conclusion that their behavior must change. It just sets the limits on when a mistake of law excuse would be appropriate, if extant law were to be corrected. The same principle applies regarding interpretations of the law rooted in *any* political or moral orientation. As realist and critical legal scholars have taught us long ago, it is truly impossible to have an interpretation free of such an orientation.

An influential group of scholars has explained the mistake of law doctrine in the common law context, appealing to morality.<sup>194</sup> Though they do not work in international law, briefly responding to them may illuminate the present argument. Motivating these theorists is the question: why cannot those who attempted to act legally, but failed, be excused?

The “moralists” explain: if the rationale of the doctrine is the one Holmes identified, namely encouraging individuals to learn the law, punishing those who tried seems counter-productive. Excusing them would be much more effective in encouraging citizens’ legal education. These theorists advance a critique of Holmes. Encouraging technical-legal knowledge, they say, is simply not the justification for the doctrine. To the contrary, the doctrine is based on a deeply moralist view of criminal law. This view tells citizens that they will fare best in the legal system if they act according to the social morality of their community. Dan Kahan put this lucidly:

If maximizing legal knowledge were really the objective, however, the law would apply a negligence standard, rather than a strict liability standard, to legal mistakes. Refusing to excuse even reasonable mistakes discourages investments in legal knowledge by making it hazardous for a citizen to rely on her private understanding of the law. This resentment of legal knowledge makes sense because the doctrine assumes, contrary to

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<sup>192</sup> In the words of a German court, such behavior reflects a failure to “exert one’s conscience.” Quoted in Badar, *supra* note 29, 243.

<sup>193</sup> And see the German cases quoted in Badar, *supra* note 29, 243.

<sup>194</sup> For a good overview, see Ahson T. Azmat, *What Mistake Of Law Just Might Be: Legal Moralism, Liberal Positivism, And The Mistake Of Law Doctrine*, 18 NEW CRIMINAL LAW REVIEW 369 (2015) (labelling this group of theorists “moralists”).

the classic conception, that individuals are and should be aware of a society's morality and that morality furnishes a better guide for action than does law itself. Thus, far from trying to maximize the incentive that presumptively bad men have to know that law, the doctrine seeks to obscure the law so that citizens are more likely to behave like good ones.<sup>195</sup>

From the perspective of such moralists, this essay's argument may seem curious. I have offered a potential excuse precisely for those who have committed the morally most repugnant crimes (at least in the eyes of the prosecuting authority).<sup>196</sup> Indeed, the argument seems flawed both from a Holmesian point of view (it does not encourage people to learn the law); and from a moralist point of view (it does not encourage people to act morally). Can the argument survive?

Notice Kahan's reference to "a society's morality." The assumption of a shared community is common to several of the scholars who have advanced the "moralist" argument. This essay does not aim to refute (or bolster) such views. What is common to them is that they assume the backdrop of a common set of normative assumptions that the prosecution and the defendant have some epistemic access to. This assumption does not necessarily hold when it comes to the mass atrocities international criminal law addresses. Such cases may ensue from contexts in which there is an epistemic difference between the prosecuting authority and the suspect.<sup>197</sup>

Ignoring such a difference cannot make potential defendants learn the law (as Holmes would like); Such defendants are psychologically or culturally too far removed from a given interpretation of the law to even know what it is they should learn. And ignoring it also cannot rest on the assumption of a shared community of morals. When it is made outside of a context of public deliberation and participation, such an assumption may eliminate the legal aspect of law, maintaining a mere mechanism of coercion.

## 5. Conclusion

In his *Glass [booth]* (2010-11), artist Moshe Ninio presents a photo of Eichmann's iconic stand prepared for his Jerusalem trial. Eichmann sat here back in 1962, shielded by bullet-proof glass. The trial was famously broadcast to Israeli listeners in real time, and the booth had previously been the subject of countless images. Arendt too, when she examined Eichmann's figure, looked at him through this transparent box. Ninio's image is however different: he took his photo from inside the booth.<sup>198</sup>

Perhaps unbeknownst to the artist, the image provides an illustration of an imperative that should be recognized in the structure of international criminal law. The image is diametrically opposed to Cover's words, which I have opened with. Cover elevates his readers by asking them to radically reopen the question: who is it that is most worthy of criminal sanction? Ninio submerges his viewers and situates them in the defendant's seat, as if charged with the worst

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<sup>195</sup> Dan M. Kahan, *supra* note 163, at 152-153.

<sup>196</sup> See e.g. Segev, *supra* note 147, at 35 (arguing that mistakes of law can be morally justified, though "perhaps it is never justified for persons to be ignorant or mistaken concerning rule that reflect fundamental and obvious moral conclusions [...] This category... might be narrower than what is usually meant by the notion *mala in se*.")

<sup>197</sup> On the problem of identifying the relevant political community in context of universal jurisdiction prosecution, see Hovell, *supra* note 17.

<sup>198</sup> Compare with Lyndsey Stonebridge, *The Perpetrator Occult: Francis Bacon Paints Adolf Eichmann*, 17 HOLOCAUST STUDIES 101-121 (2011).



of crimes. By doing so, the artist says: we may all have our Eichmanns within. Sitting in Eichmann's booth can therefore be interpreted as a call to recognize the condition of thoughtlessness in the sense of not aiming to convict those who cannot recognize their own crimes.

Embeddedness in our social, historical, and cultural contexts is what makes us who we are. So much of what such embeddedness gives us we justifiably hold dear. This essay does not aim to dismiss the value of tradition or collective identity (which the Eichmann trial helped assert). To the contrary, it offers one component for a more pluralist practice of international criminal law; a version of international criminal law that recognizes a reality of global cultural and moral difference, without relinquishing the discipline's commitment to account for the worse of crimes.

Our embeddedness in radically different cultural contexts and epistemic communities makes it difficult for us to transcend such contexts and judge from the no-man's perspective of global law. Any such attempt to apply global law comes with a situated perspective. A recognition of mistakes of law (as characterized above), admits such situatedness, without conceding that situatedness makes the moral and political conclusions of judgement any weaker.

Arendt regarded Eichmann with bitter mockery and loathing. But criminal law should reflect that the thoughtlessness of Eichmann in the thought experiment version is not some exotic disfunction. The more important point in Arendt's analysis is revealing that such thoughtlessness is commonplace. If international criminal law purports to advance criminal justice the world over, the law that applies should recognize the multiplicity of moral worlds among its subjects.



Moshe Ninio, Glass [booth]  
(2010-11)