HOW CAN A CRIME BE AGAINST HUMANITY? PHILOSOPHICAL DOUBTS CONCERNING A USEFUL CONCEPT

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This paper offers a fresh look at the philosophical tenability of the concept of crime against humanity as it developed since WWII. Its interpretative claim is that the concept has existed in a tension between two approaches to conceptual validity. The first attempts to take the concept seriously—semantically, metaphorically, and, on a realist theory of language, ontologically. This approach posits that the concept signifies a category of the human condition whose treatment in the context of specific historical moments allows for a new normative language, irreducible to that of traditional jurisprudence. Examining the approach against the 1984 Barbie trial in France illustrates the tenuous relations between crimes against humanity and other jurisprudential categories and classifications of victimization.

The second approach is more comfortable with a language of func-

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tional fictions and draws from the legal realism and philosophical pragmatism schools of thought. Rather than striving for metaphysical validity, this approach examines the usefulness of the concept of a crime against humanity in promoting the political goals set by a democratic society and critiques its ideological biases.

The paper traces the two approaches to frameworks offered by Kant and Nietzsche, respectively. It then examines some doctrines and institutions of international criminal justice in order to revisit Hannah Arendt’s jurisprudence of crimes against humanity, setting it against the Hegelian notion of History. However, studying recent developments in the international law of crimes against humanity (including the Rome Treaty, ICC, ICTR, and ICTY) shows that Arendt’s conception, developed against the backdrop of the Eichmann trial, has in fact little current influence on international law in this area, which is better rationalized by the legal realist school than by approaches that seek metaphysical validation and justification.

Finally, the study suggests shifting the emphasis from crimes against humanity to crimes against humanness, and offers an initial marking out of this concept.

To my great friend and mentor, Yitzhak (Isidor) Torchin (1917–2007), in memoriam.

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I. PRAGMATISM AND VALIDITY

At the outset, we may distinguish between two ways of thinking about the concept of crime against humanity. One is to try and take the concept seriously—semantically, metaphorically, and indeed, on a realist theory of language, ontologically. This means that the concept signifies a category of
the human condition whose treatment in the context of specific historical moments allows for a new normative language, irreducible to that of traditional jurisprudence.

The other approach would be much easier to grasp for anyone raised on the traditions of moral pragmatism and American legal realism. Legal realists are used to thinking and indeed are trained to think in terms of functional fictions. They shy away from metaphysics—at least overtly. The legal realists would simply avoid the question of the philosophical tenability of the category of crime against humanity and instead look into its usages. They would treat it like any other legal concept—i.e., property, family, contract, corporation—examining its usefulness in promoting the political goals set by a democratic society and critiquing its ideological biases and real-world repercussions. In other words, the first approach would ask, “How is the concept philosophically tenable?” It was Kant’s strategy to begin inquiries with the question, “How is any synthetic a priori sentence—such as a normative one—possible?” and then move on to the conditions that generate it.1 The second strategy can be traced to Nietzsche: not looking into the metaphysics entailed by the synthetic a priori but examining categorization itself in terms of the interests of the will, namely, “What good is talking (and cogitating) about anything in a certain way, as if it expressed a certain category of reality?”2 In other words, the first approach to crimes against humanity would ask, “What makes it true?” while the other would insist that the first must be avoided at all costs, because the important question isn’t the truthfulness of metaphysical notions but asking, “What use are they?”

In this essay, I claim that the concept of crime against humanity has existed in tension between these two approaches, possibly from its very inception in the mid 19th century, certainly so after WWII. This Article therefore attempts to cursorily delineate both approaches; it begins by asking in what sense the category of crime against humanity is tenable as such. Later, following certain historical and legal developments mainly in the last fifteen years, I shall try to look into the legal realist position that sees the category as a useful, though dangerously manipulable, legal tool of regulating atrocious behavior otherwise falling within lacunae of standard legal rules, while avoiding the questions besetting the former. The former expects the category of crime against humanity to tell us something new and revealing about

our humanness. The latter simply wishes to promote moral goals through manipulation of normative language.

II. VICTIMIZATION, RECOGNITION, AND PRESTIGE: THE BARBIE CASE AS DISCURSIVE PARABLE

Let us begin by examining one of the more controversial instances when the charge of crime against humanity was invoked. The initial legal question facing the French courts in the 1984–87 trial of Klaus Barbie, a.k.a. “the butcher of Lyon,” was for what charges he could be prosecuted. Barbie may be characterized as “a poor man’s Eichmann”: in his role as SS officer and Gestapo chief, he was responsible for viciously cracking down on French Résistance fighters, torturing and killing them. In particular, Barbie was accused of torturing to death the Résistance leader, Jean Moulin. He was responsible for coordinating deportations to Auschwitz that included captured Résistance fighters as well as thousands of French Jews, among them many orphaned Jewish children. These acts fell under separate definitions in his Gestapo role, namely overseeing the successful occupation of France on the one hand, and participating in the policy of the Final Solution, on the other. Significantly, these actions also fell under different legal categories as applied by his prosecutors some forty-odd years later. The former were initially deemed war crimes and as such subject to a twenty-year statute of limitations according to French domestic law; Barbie could no longer stand trial


for those. According to an initial judicial ruling by the Cour d’Appel, he could only be prosecuted for the crime of deportation against the Jews, because that was a crime against humanity. The ruling appalled French public opinion and was duly appealed with various Résistance veterans groups presenting their case in court: they, too, wished to be considered victims of crimes against humanity. As Alain Finkielkraut remarks in La mémoire vaine, an ironic turn occurred: initially, Jews returning to the countries from which they were deported were received back with little more than contempt, sometimes with open hostility, while underground and Résistance fighters were crowned everywhere as heroes. The latter stressed the point that they chose to fight the Nazis, becoming their enemies out of free choice, while the Jews incurred the Nazis adversity as a matter of identity or fate—nothing heroic. Forty years after having denied the victims the status of national heroes, the national heroes demanded to be recognized as victims. In the post-war vagaries of prestige, that of the victims eventually outdid that of the heroes, even when the legal signifier expressing this turn is something as technical as a statute of limitation. For the Résistance veterans, any other ruling would not have made sense. France, to their minds, had not gone to the lengths it did to extradite Barbie, while running the risk of raising long-suppressed questions of collaboration and betrayal from within the Résistance, merely to vindicate the deportation of several thousand Jews to Auschwitz. That would have been unacceptable to the French public, repre-

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6 Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie, 78 I.L.R. 136 (Cour de cassation, cass. crim. [highest court of ordinary jurisdiction, criminal chamber] 1985) (Fr.) (overturning and summarizing the decision of the Cour d’Appel on Oct. 4, 1985). For information on the course of the trial, preliminary proceedings and the four year period of legal entanglements preceding it, see generally MORGAN, supra note 5; CHRONICLES, supra note 3.


9 Even during the war, captured Jewish Résistance fighters were sometimes executed in their former rather than latter capacity (or perhaps, the combination). See JACQUES GIVET, LE CAS VERGES 113 (1986).

10 The defense alleged that Jean Moulin in fact committed suicide in Barbie’s office, having been informed that his capture was due to betrayal within Résistance ranks. Jean Moulin s’est tué lui-même [Jean Moulin Committed Suicide], LE MONDE (Paris), Feb. 11, 1983, at 8. For reports of the trial proceedings on these and other matters and partial transcripts of pleadings, see generally CHRONICLES, supra note 3; PIERRE MÉRINDOL, BARBIE: LE PROCÈS [BARBIE: THE TRIAL] (1987); BOWER, supra note 4, at 226–28.
sentenced by several parties civiles who participated in the prosecution. However, as I will claim shortly, the French court ruling on this matter—allowing Barbie’s treatment of captured Résistance fighters to count as crimes against humanity—cannot be sanctioned by the Arendtian notion of crime against humanity. The reason is the existential difference explored above, namely victimization being entailed by choice and will—the case of the Résistance fighters and the alleged source of their heroism—not immutable identity, as was that of the Jews. For the Arendtian and other metaphysical schools this difference should count; the legal realists and those interested less in philosophical tenability and more in the forms of justice exercised in cases such as Barbie’s, would in all probability brush it aside, as the French Cours de Cassation more or less did. In fact, there is a third way, which to my mind is more attractive than either. Barbie’s actions against the Résistance fighters were indeed war crimes, but in torturing them he committed a crime, not against humanity, but against humanness, against what it existentially means to be a human being. I shall return to this point shortly.


12 Eichmann, to recall, was sentenced to death and remains the only person ever to have been executed in Israel (Demjanjuk having been acquitted on appeal in 1993). See infra text accompanying note 17. Barbie was found guilty in all 340 counts of committing a crime against humanity for which he stood accused at the Cours d’Assises du Rôhn and was sentenced to life imprisonment. See 78 I.L.R. 148 (1988). He died in Prison in 1991.

13 The court’s ruling, however, is important enough in the annals of the jurisprudence of crimes against humanity to merit a lengthy quotation from Fédération Nationale des Déportés et Internés Résistants et Patriotes et Others v. Barbie, 78 I.L.R. 137 (Cour de cassation, cass. crim. [highest court of ordinary jurisdiction, criminal chamber] 1985) (Fr.).

[CR]imes against humanity within the meaning of Article 6(c) of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, which are not subject to statutory limitation of the right of prosecution, even if they are crimes which can also be classified as war crimes within the meaning of Article 6(b) of the Charter: inhumane acts and persecution committed in a systematic manner in the name of a State practising [sic] a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition.

Note the restriction to acts pertaining to be “in the name of a State” that initially barred the prosecution of Vichy officials under this interpretation, unless they were deemed to have acted at the behest of Germany. That restriction was lifted in France in 1992. See Leila Sadat Wexler, The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, 32 COLUM. J. TRANSNAT’L L. 289 (1994).
III. A CRIME AGAINST WHOM?

Unlike Adolf Eichmann’s 1961 trial in Jerusalem, the Barbie trial was attended by no Hannah Arendt, and no Karl Jaspers called for its internationalization. No one seriously advocated delivering Barbie to an international tribunal to be tried, even if a few rhetorical remnants of Arendt’s staunch position in 1961 echoed still. Nor did anyone seriously deny the Jews and Résistance fighters—as well as the French Republic, their proxy of sorts—the status of rightful victims, nor was there any external challenge to the moral competence of the French court. Despite intense national coverage and a high political profile, no serious commentator termed it in disgust a “show trial” as Arendt famously depicted the Eichmann trial,\(^{14}\) possibly because the show was on both sides—the prosecution’s as well as the defense’s.\(^{15}\) This does not mean that the trial did not face claims of illegitimacy, but this time they came from an entirely different quarter, one that Arendt could not have predicted twenty-six years earlier.

Barbie assembled a defense team very different from that of Eichmann. Eichmann had been represented by the Cologne-based lawyer, Dr. Robert Servatius, who earlier had defended Karl Brandt at Nuremberg.\(^{16}\) Barbie’s defense team consisted of three lawyers, all alleged representatives of the so-called “Third World” (or “the South,” etc.). Jacques Vergès, lead counsel, was a native of Thailand of Vietnamese-French parentage. He was aided by Jean-Martin Mbamba, who later became Minister of Justice of the Republic of Congo, and the Algerian, Nabil Bouaita.\(^{17}\) The defense, spearheaded by


\(^{15}\) See Paris, supra note 11, at 210 (“[By 1987] the historical show trial originally desired by both the Résistance and the Jews would probably not take place.”). For discussions of these trials and their far-reaching significance, see generally Leora Bilsky, Transformative Justice: Israeli Identity on Trial (2004); Lawrence Douglas, The Memory of Judgment: Making Law and History in the Trials of the Holocaust (2001).

\(^{16}\) Brandt was Hitler’s physician and chief of the Nazi euthanasia program.

\(^{17}\) It is interesting to compare this with the defense team of John Demjanjuk, allegedly “Ivan the Terrible” of the Treblinka death camp, tried in Israel in 1987–88 and 1992–93. Demjanjuk was a naturalized U.S. citizen and initially the defense team included two Ohioan counsel as well as a local Israeli one; however, the American counsel were gradually edged out while the defense was joined by a Canadian and an additional Israeli lawyer, the ex-judge Dov Eitan who committed suicide on the eve of the appeal, won by the defense in 1993 (the main defense was that of mistaken identity—the court ruled that in spite of documentation and the testimony of eyewitnesses, reasonable doubt existed as to the identification of Demjanjuk as a notorious Treblinka death camp official). CrimA 347/88 Israel v. Demjanjuk, [1993] IsrSC 47(4) 221. See Andrew David Wolfberg, Israel v. Ivan (John) Demjanjuk: Wachmann Demjanjuk Allowed to Go Free, 17 Loy. L.A. Int’l & Comp. L. Rev. 445 (1995).
the flamboyant Vergès, made many eloquent claims, among which was that Barbie could not be charged with crimes against humanity because humanity was not involved in his actions, nor in the Shoah in general. The Shoah was a European affair, played in the backyard of the white race. Ascribing to it the status of crime against humanity was part of the old Eurocentric, colonialist language. And here were representatives of France’s ex-colonies in Asia and Africa explaining that they were humanity by any conceivable notion, and that whatever the Europeans were inflicting on each other was none of humanity’s concern. In fact, they added, focusing on Europe and the Shoah served to normalize the terrible affronts that Europeans had inflicted and continued to inflict on other peoples everywhere, during colonial as well as post-colonial times. Don’t call it a crime against humanity, they argued, as humanity renounces its victimization by the Nazis; far greater are the affronts committed by liberal-democratic regimes such as France, Britain, the United States, and Israel all over the non-industrialized world.\footnote{Vergès published his views in this regard before, during and subsequent to the Barbie trial. \textit{See. e.g., Jacques Vergès, Je Défends Barbie [I DEFEND BARBIE] 175, 176 (1988)}.

[C]e procès conduit en son nom laisse l’humanité bien indifférente. . . . [P]our organiser un procès comme celui-ci, au nom de la conscience humaine, pour punir . . . des crimes “contre l’humanité”, il faut pouvoir parler soi-même au nom de l’humanité tout entière, du haut d’une vertu irréprochable qu’aucun soupçon ne saurait atteindre, avoir les mains pures et la mémoire à jour. Ce n’est pas notre cas.

[This trial, conducted in the name of humanity, leaves it totally indifferent. . . . To organize a trial like this one, in the name of human conscience, to punish crimes said to be “against humanity,” one must oneself be able to speak in the name of humanity in its entirety, above an irreproachable virtue that no suspicion would know how to attain, to have pure hands and undated memory. This is not the case with us.]

19 The Nazis perpetrated “an attack upon human diversity as such, that is, upon a characteristic of the ‘human status’ without which the very words ‘mankind’ or ‘humanity’ would be devoid of meaning.” \textit{Arendt, supra} note 14, at 268-69.
of civilization—which is one category of humanity—but essential to humanity itself. The acts of the Nazis constituted crimes against humanity in a new and modernist sense not because they were extremely cruel, or discriminatory, nor due to their magnitude alone. It was the annihilation—the attempted annihilation—of a comprehensive human way of living, of the possibility of being a Jew that made the Final Solution a totally new and unique phenomenon in human history so far. That is why, although the mass homicide was certainly perpetrated against the Jews, the systematic genocide was a crime against humanity: because it attempted to obliterate the form of existence which is Jewish, for all people, for all eternity or at least for as long as humanity should last, not just for the people who happened to be Jews between 1942 (the Wannsee Conference) and 1945. That is also the reason why most mass killings prior to the Shoah should not be considered crimes against humanity: vicious, murderous, barbarous, they were not intended to rob humanity of one of its own manifestations. In the strict Hegelian scheme, those who perished in them should consider that humanity had emerged on top, got over the hump on its serpentine and ironic path of spiritual progress. People perished; humanity continued, unaffected and unaffected. But not so the Shoah, out of which humanity emerged battered, hurt, vulnerable, and victimized. For the first time, it discovered its own vulnerability. Arendt’s talk of the Shoah as being “a crime against humanity, perpetrated upon the body of the Jewish people” did not always sit well with the direct victims. Telling a people who have barely emerged from the most awful ordeal in a history packed with them that, “It wasn’t personal” or, “It wasn’t about you, it’s about us” or even, as in her coverage of the Eichmann trial, “Bug off and let us—humanity, the true victim—deal with it,” would be prone to be unpopular. However, and significantly, Arendt also would not carry much weight with Vergès, Barbie’s postmodernist lawyer. Con-

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20 See id. See also HANNAH ARENDT, MEN IN DARK TIMES 81 (1968) (noting in particular the chapter on Jaspers). Elsewhere Arendt talks of the “infinite plurality” of human forms of life.

21 Another prevailing concept in Arendt’s analysis is that the Shoah made humans “superfluous” qua humans. See, e.g., HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM, 433 (1st ed. 1951), 457 (3d ed. 1968). This is more extreme than defying the Kantian categorical imperative and treating humans as means to ends alone, because the latter denies them their dignity, but the former makes them superfluous as human beings, denies their membership in humanity and in the world altogether.

22 In following Arendt, Finkielkraut goes further and ascribes to humanity mortality, namely the ontological prerequisite for the ultimate victimization. See FINKIELKRAUT, supra note 8, at 63. I prefer to remain here on a metaphorical level.

23 ARENDT, supra note 21, at 269.
ceivably, Vergès’ position would be: outside of the immediate European context, civilization has no great stake, and no one in the world cares much, whether such a thing as a Jew exists or not, or is possible or not. Other modes and ways of life were routinely and still are obliterated by the West. White Europe should solve its internal problems as such, and not inflate its internal grievances to the level of crimes against humanity. Such acts are routinely perpetrated by the democratic West, are numerous, unacknowledged, and go unpunished. As Finkielkraut bitterly remarks, in Vergès’ world, everybody is a Nazi except for the Nazis. In Fregean terms, Vergès’ performance is linguistically significant in that he transforms “Nazi” into a word with no reference, only a sense.24 It is, of course, a political move, but in a sense also a normal performance in the practice of defensive lawyering: for every defense lawyer wishes to have the court retain the sense-term of the perpetrator and the act involved (e.g., “Nicole’s killer”) but refrain from signification of the particular defendant (“O.J. Simpson”) by it.

Vergès’ argument is bankrupt, and there are several ways to emerge from it. One is the obvious fallacy of universalization, or more precisely the lack thereof: if law is to protect both persons and groups of persons or even humanity itself from abuse and victimization, it must do so for all, evenly. If humanity were an all-mother, then, according to Vergès, she took no interest in her white children. Where Vergès may have a point, however, is in pointing to the West’s scope of attention: that for decades it reserved law in its domestic and international versions mostly to protect itself, paying little heed—and even less legal heed—to the victimization of others; indeed, law has been and still is a tool of oppression and victimization in many, probably most parts of the world. But that, too, can be explained. The West, after all—and no wonder—is the part of humanity that developed the categories of crime against humanity, war crimes and humanitarian law. Not surprisingly, it spent the first decades using these tools for introspection and governing actions within its own cultural and political scope. The category of crime against humanity, however, is finally beginning to emerge from the immediate context of the Shoa towards a global jurisprudence of criminal liability with the recent globalization of criminal justice with the creation of the International Criminal Court (ICC) in 199825 as well as the Special Court

for Sierra Leone (established in 2002 through UN and national cooperation); the International Criminal Tribunal for Rwanda (ICTR), set up by the UN Security Council and dealing with the 1994 genocide, which delivered the first-ever judgment on the crime of genocide by an international court, and the International Criminal Tribunal for Former Yugoslavia (ICTY), which Vergès considers illegal.

ed. 2002).


30 Vergès’ argues that dispensing justice is a prerogative reserved to sovereign states and was never accorded to the Security Council by the UN Charter; as the ICTY was created by the Security Council rather than by international treaty, it functions “hors-la-loi” (“outside law”). Presumably the same would apply to the ICTR. JACQUES VERGES, JUSTICE POUR LE PEUPLE
IV. ARENDT AND THE GLOBAL INSTITUTIONALIZATION OF THE CONCEPT OF CRIMES AGAINST HUMANITY

Ironically, the globalization of the concept of crime against humanity through the creation of international law and international tribunals—which Jaspers and Arendt had envisioned during the Eichmann trial—has all but pulled the carpet from under the Arendtian metaphysics. The reason is that the crimes these modern tribunals wrestle with would not fall under Arendt’s definition. In the former Yugoslavia, ethnic cleansing, while brutal and horrible, was part of a national-ethnic struggle and not of a plan of annihilation. As far as conflicts go, it was a “pre-modern” one. Even the genocide in Biafra and more recently in Sudan—sometimes committed by “criminal states,” sometimes by militia or paramilitary gangs, sometimes by both—are conflicts and atrocities that fall under the traditional categories of war crimes. This is unlike the Shoah, for which the category was invented, and that although it was a historical precursor to subsequent atrocities, in itself it was a unique event in history indeed. This claim centers not on the victimization but on the perpetration. It was unique in that it employed some of the highest achievements of civilization to an end not simply of destruction but of annihilation. It employed the entire bureaucracy of a modern technological state: all the structures of progress that, since the enlightenment, were considered means to benefit humankind. But not just in its means, also in its ideology and structure of legitimization, it employed parallel devices. Theory was its weapon, although it required an almost unimaginable level of vi-


31 This emphasis on the role of a political regime seems to be Saul Friedländer’s perspective as well. See Saul Friedländer, Réflexions sur l’historisation du National-Socialisme [Reflections on the Historization of National-Socialism], 16 VINGTIÈME SIÈCLE, REVUE D’HISTOIRE, Oct.–Dec. 1987, at 43, 45 (Fr.). As for victimization, Ricoeur envisions a representative function within the entire category rather than a separate one. “Les victimes d’Auschwitz sont, par excellence, les délégués auprès de notre mémoire de toutes les victimes de l’histoire.” [“The victims of Auschwitz are, par excellence, the delegates closest to our memory of all the victims in history.”] PAUL RICOEUR, TOME III, TEMPS ET RÉCIT: LE TEMPS RACONTÉ 273 (1985).
ciousness to implement. For the idea of annihilating an entire race or ethnic group from the face of the earth—a race whose existence accompanied Western civilization since its inception—is not just evil, not merely radical, but a deep idea. The Shoa was not a huge-scale pogrom. It was not a logical conclusion of anti-Semitism or racism or discrimination, although all these certainly maintain causal links with it. It proceeded from a system of thought.

This claim runs in contrast to Arendt, who moved away from her discussion of “radical evil” in *The Origins of Totalitarianism* to claim that evil “never possesses depth. . . . It is ‘thought-defying,’ as I said, because thought tries to reach some depth . . . the moment it concerns itself with evil, it is frustrated because there is nothing. That is its ‘banality’.”32 But of course, for evil to be deep, it need not function as an object for profound thought. Evil need not be approached as the object which the reflexive subject (“thought”) examines, for herein lies the blunder: it is not thought that thinks evil (and which, according to Arendt, cannot do this in any profound sense); it is evil that thinks, cogitates, categorizes, acts, arranges the world and positions itself in the world and *contra* the world. The evil of the Shoa is deep and at some of its corners still inscrutable. The gray, bureaucratic people who operated its vast machinery did not conform to the romantic archetypes of evil, the “satanic greatness,”33 but that is exactly what makes the evil they were steeped in more dangerous, complicated and enigmatic, not banal at all. In denying evil’s traditional aesthetic and mythical characteristics, Arendt has exorcised not evil nor its profundness nor its horrible hold on the human imagination, but simply a set of romantic representations going back to the *Nibelungenlied*, *Faust* and Fritz Lang’s *Metropolis*.34 These have quickly

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34 It would be interesting to compare these artifacts with a recent visual work that aspires to mythical representations, the cinematic fantasy trilogy *Lord of the Rings* (New Zealand 2002–04), adapted by director Peter Jackson from J.R.R. Tolkien’s monumental series of books by the same name published in the decade following WWII. While in these films less significant minions of evil are gruesomely and meticulously depicted through very effective special effects, that is not the case with the most awful horrors of them all. The Balrog was an ancient creature of evil whose very presence in its vicinity drove the prospering civilization of Moria
been replaced by Orwellian aesthetics. Bureaucratic structures that divide personal responsibility into tiny bits that leave no one with a sense of moral responsibility are a modern corporate structure used in many “normal” contexts. The silent film documenting the persons acting within such systems will show us banal behavior; but the product of the system need not be, and many times is not banal at all. Many systems of production work this way, producing science and art and law. Arendt’s important point is therefore not about evil itself, but about its perpetrators: it is a project of demystification, of positioning the acts of the Nazis in this world and not, in the words of Yiddish author and Shoah survivor Yehiel Dinur (a.k.a. Kutzentnik), “planet Auschwitz” (Kutzentnik later retracted the dictum). Arendt provided us with useful clues to understand how modern structures facilitate the perpetration of evil. This provides, to my mind, more of a structural analysis of modern bureaucracies than a philosophical thesis about evil itself.

Where, then, does the concept of crime against humanity go from here? For the pragmatists and legal realists, the answer is simple: unconcerned with the collapse of the Arendtian category (as it makes little sense to create a legal category with no ex-ante function, pertaining to a unique event in history), they find the concept useful to broaden, little by little, the rule of law over atrocious acts that previously were subject to no legal discourse and existed only in the realm of réel politique. If the Nuremberg trials represent the “law of the victors,” as some critics claim (but this “critique” has little content and seems almost tautological—for whose law should we expect the victors to install? Isn’t that what “victory” means, except according to Nietzsche’s ironic critique?), well then, it would only be expected that the

to desperate demise and destruction. Visually, it is a total artistic failure—almost a farce of a monster. By 2002, even the most talented visual artists simply lost the ability to convey to us the aesthetics of great evil, the “satanic genius.” Even more tellingly, the lord of the rings himself, the fearsome Sauron—bent on world domination and the submission of civilizations, nations and races to slavery and death—is never visually depicted, nor did the clever Tolkien provide as much as a hint as to his appearance. Which, of course, only renders him (or “it?”) scarier. Evil never became banal, but certainly—as Arendt shows—it has become much more difficult to locate and portray, let alone account for. Camus’ Peste remains, after all, invisible, inexplicable, and yet omnipresent.

35 Nietzsche’s notion of “slave morality” is a structure whereby weaker entities (e.g. a culture or a nation) that have lost out in a struggle to a more powerful one may eventually dominate it through moral imposition. A parable he offers is Christianity, the ethical system by which the vanquished Judea seduced and eventually imposed itself on Rome through the creation of bad conscious (a term of art in Nietzsche’s philosophy) and ressentiment, that in turn “becomes creative and gives birth to values.” FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS, pt. 1, paras. 10–13 (Walter Kaufmann trans., 1974) (1887). See also GILLES DELEUZE, NIETZSCHE AND PHILOSOPHY 124–33 (Hugh Tomlinson trans., 1983). References to
victors should require a jurisprudence to organize the post-WWII world. For myself, I can see the usefulness of this pragmatic approach. It is, however, risky. The risk is that the category of crimes against humanity, because it rides the aftermath of the Holocaust to the status of the most blatant offenses, will be used to harbor too many types of offensive behavior. “Too many” is not an exact measure. The concern is that the rhetorically ominous and useful category would become both abused and trivialized. Indeed, even today, international treaties, not wishing to deny any potential group the status of victims, have broadened the category of crimes against humanity to include offenses that draw further away from the particular parameters that made civilization so invested in the concept of crime against humanity in the first place. Article 7 of the Rome Statute, which established the permanent International Criminal Court in The Hague, identifies the following as crimes against humanity, all when committed as part of a widespread or systematic attack directed against any civilian population:

(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

It is not my intention to discuss here the justification for the inclusion of any of these acts in the definition of crime against humanity, nor to raise the concern of over-inclusion. It is clear, however, that the Arendtian definition, working from the category of diversity, cannot rationalize the lot. There barely seems to be any unifying concept here—which, for the realist-pragmatist, glad to be rid of metaphysical complications, can only be interpreted as a benefit.

Another relevant, emerging approach to the global institutionalization of the concept of crime against humanity can be characterized as victim-
oriented rather than focused on the victimization as such. The point of such a perspective—crucial, in my view—is to provide, rather than merely categories and a language of victimization, types of claims and redresses available to victims against perpetrators: restitution, damages, rehabilitation. Such an approach—sanctioned by the Treaty of Rome—would unshackle legal proceedings from the confines of "memory trials," and afford victims (who, at Nuremberg, were confined to the role of witnesses) true legal venues and instances. This, too, is a legal-realistic approach, as well as a liberal one. A concrete victim is at the focal point, not the question of how humanity was wronged through the act of victimization, nor how humanity (or any community thereof) may make use of the victimization for purposes of its collective memory. This position maintains a mixed relation to Arendt’s jurisprudence in Eichmann. She would probably approve of the growing resistance to using justice for ideological purposes; however, she would be challenged by the notion that the victims proper (or survivors when this is impossible) have the truest quarrel with the perpetrators; that it is, in the final count, about them at least as much as it is about “humanity.”

36 See, e.g., Pierre Truche, Juger demain les crimes contre l’humanité [To Judge Tomorrow Crimes Against Humanity], Epilogue to BARBIE, TOUVIER, PAPON... DES PROCES POUR LA MEMOIRE [BARBIE, TOUVIER, PAPON... TRIALS FOR THE MEMORY] 157, 165 (Jean-Paul Jean & Denis Salas, eds., 2002) [hereinafter BARBIE, TOUVIER, PAPON].

37 For the central role of the generation, manipulation, and edification of memory in what I term “memory trials,” see Denis Salas, La justice entre histoire et mémoire [Justice Between History and Memory], in BARBIE, TOUVIER, PAPON, supra note 36, at 20–22. See also PARIS, supra note 11; BILSKY, supra note 15; DOUGLAS, supra note 15. However, professional prosecutors sometimes resist this function as inherently offensive to justice (possibly influenced by Arendt’s critique of the Eichmann trial). According to Marc Robert, a prosecutor in the 1995–98 trial of high-ranking Vichy official Maurice Papon for crimes against humanity,

[J]e disais aux jurés que le procès intenté contre Maurice Papon n’avait pas pour but de générer de l’histoire et de fabriquer la mémoire, mais simplement de juger un homme.

Cette idée fixe . . . [] la légitimité même du procès en découlait, [et] la liberté des juges en dépendait.

[I have told the jury that the goal of the trial against Maurice Papon was not to generate history nor to create memory, but simply to judge a man. This fixed idea . . . is required for the very legitimacy of the trial, [and] the independence of the judges depends on it.]

Marc Robert, Soutenir l’accusation dans un procès de crime contre l’humanité [To Support the Accusation in a Trial of a Crime Against Humanity], in BARBIE, TOUVIER, PAPON, supra note 36, at 38.
V. A CRIME AGAINST HUMANNESS

When surveying the development of the legal category of crime against humanity since the Eichmann trial and on to the Rome statute—and indeed following Arendt—an essential notion of what we are trying to protect does indeed emerge. The unifying concept, though, is not that of humanity, but rather that of humanness. In regulating against rape, humiliation, persecution and torture, we are attempting to protect not humanity or one of its categories, but the essential humanness carried by each and every person. Kantians and natural law theorists would talk about humanness in terms of human dignity or “an end in itself,” but that is not necessarily the concept here. Infringing on human dignity is one thing; denying humanness is another. The former is ethically wrong, but the latter—crime against humanness—negates the very being in the world as a human being.38 Certainly protecting dignity is a compelling concern. In liberal ethics, human dignity is a predominant ethical category of the human condition, but it is still one single category among several (it maintains, for instance, relations with other existential categories such as will). Criminal law, constitutional law, and in some contexts, other branches of law such as civil law, are well-versed in dealing with offenses against human dignity. Extreme offenses deny the victim dignity altogether; she is then, either for a duration or permanently, a human being whose dignity has been denied or even destroyed; but a human nonetheless, whose other aspects of humanness may not be so traumatized. The crime against humanness obliterates (permanently or temporarily) or attempts to obliterate the person qua human. It treats her as an object—as property or an obstruction that requires removing, etc.—as something that does not have and cannot have any place in this world as a human. Slavery, genocide, and forced pregnancy all seem obvious acts where more than dignity is being violated.

The immediate challenge, of course, would be to distinguish between acts and contexts that fall under traditional law from those that fall under the new category; this would also require dealing with the jurisdictional “division of labor” between an internationalized regime of criminal justice and the several domestic systems. I would not attempt to deal with these topics in the framework of this paper. I think an attractive theoretical model—a fiction—would be to consider humanity (or the “world community” as opposed to the “international community”) as directly having all humans in its

38 See Bernstein, supra note 31, at 97, 139–43 (discussing, inter alia, Arendt’s typification of totalitarian domination—the salient characteristic of the totalitarian state, expressed in its most extreme manifestation in the concentration camps—as that of rendering persons superfluous as such); see also ARENDT, supra note 21, at 433 (1st ed. 1951), 457 (3d ed. 1968).
care and under its protection, and delegating powers and obligations to the several states under doctrines of jurisdiction, while the original, direct relation is never severed. And so humanity, through its agent, the international community, may step in and mete justice directly, either when no one else is doing so, presumably because one or more of the sub-agents, the separate states, is failing in this respect; or because certain types of offenses—typically, crimes against humanness—it retains for its own jurisdiction as its own business. What I see attractive in this model is that we do not lose sight of the fact that the crimes we consider are perpetrated against persons rather than against humanity. We do not create an imagined totem, Humanity, with interests and categories and concerns of its own, separate from those of persons, and proceed to protect it. Of course, the model (or metaphor) of world order I imagine here is truly very far removed from that which sustains the current international order, where sovereign states form the basis for an international regime founded on treaties—a sort of global social contract among states (whereas I see a global contract among all persons, if the contractual metaphor is to be retained at all, and it might very well not). Elaborating and defending such a concept in any detail is too removed from the immediate topic of this work and must be undertaken elsewhere.

CONCLUSION

I am not certain when the term “crime against humanity” began to make the circles of normative discourse. The Unitarian minister, Theodore Parker, used it in a flamboyant sermon rendered in his hometown of Boston in the context of abolitionist politics in 1854. The preamble of the 1907 IV Hague Convention is usually—and imprecisely—credited with the term’s first appearance in an international document. Lenin famously used it to describe the continuation of WWI in his peace decree of 1917. The first attempts to involve the concept judicially may have been British indictments of Turkish officials that took place in Malta during 1919–20; however, these instances

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42 Articles 226–30 of the Treaty of Sèvres (1920) (a peace treaty between the Entente and associated powers and the Ottoman Empire following World War I) required trial for parties guilty of committing acts against “the laws and customs of war”; the treaty never came into
did not quite separate the concept from the general category of war crimes. Nor did the concept emerge into its full strength in the Allied joint "Declaration of German Atrocities" in 1943 ("The Moscow Declaration"); that set the stage for the Nuremberg trials whose constitutive document finally uses the category of "crimes against humanity" as separate from war crimes. As a philosophical concept, distinct from other breaches of legal norms, it is thus very much a post-World War II notion, admittedly not gaining in clarity as much as losing in obscurity; for some critics, it remains "very unstable." Re-invoking Arendt's notion of banality—but aesthetic rather than moral or existential—one notes that crimes against humanity sometimes seem to get lost in the complexities of legal procedure. When an army general or civil official or ex-head of state is held responsible for the rape, torture, deportation and mass murder of tens of thousands, going one witness by one cross-examination at a time—the necessary rituals of due process—seems almost bizarre. The cool, solemn surroundings of courthouses, the cleansed language, the formal talk that Humanity has in some sense been victimized and is now being vindicated is a sobering transformation of the horror, shame and disgust we feel (as well as our mortification from the permutations of wrongdoing to which we ourselves are subject as a matter of moral luck).
The matters of the visibility and aesthetics of Justice then play out in intimate conjunction with its other established functions.

Towards the conclusion of Melville’s moving and important novella, Bartleby the Scrivener, the benevolent, impotent, respectable lawyer-narrator, who has taken a certain liking to the awkward, annoying Bartleby—whose only mode of resistance in the face of a technocratic world that he can neither accept nor defy is passivity—witnesses Bartleby’s demise and death in prison. The lawyer—or perhaps Melville—ends the story with an exclamation: “Oh Bartleby! Oh Humanity!” Both parts ring true. As idiosyncratic as he was, Bartleby’s lot was one related to his part and membership in the human condition. And as general a concept as humanity may appear to be, it is, in the final count, not larger than Bartleby. I propose to critically and responsibly continue to make use of the concept of crime against humanity in the pursuit of justice, but let us keep the language of proxy and not imagine that we are serving a different agent than simply people. I do not want to abandon Bartleby, nor to erect some conceptual goddess or totem called humanity which could never be dearer to my heart, nor protected by our norms and concerns any more than all of its Bartlebies.

47 Herman Melville, Bartleby the Scrivener: A Story of Wall-Street (1853), reprinted in A. Walton Litz, Major American Short Stories 169 (1975).

48 Nietzsche, who admired Melville and was a harsh critic of the new technocratic culture that destroyed Bartleby, appropriated and paraphrased the famous exclamation: “Oh humanity! Oh idiocy!” Friedrich Nietzsche, Beyond Good and Evil ¶ 35 (Helen Zimmern trans., Boni & Liveright 1886).