



Crimes against Humanity and Extreme Power Imbalances:  
a Three-dimensional Account

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## **Abstract**

Despite a shared sense that there is something special about crimes against humanity, consensus about what makes them so remains elusive.

Much of the doctrinal and philosophical scholarship on crimes against humanity is driven by a desire to articulate the concept's essential characteristics. Existing accounts of the nature of crimes against humanity generally do so by focusing on the victims, perpetrators, or the acts of violence themselves. Most accounts maintain that it is one of these three elements that is essential to a crime against humanity, to the exclusion of the others.

In this thesis, I claim that instead of such an exclusive focus on victims, perpetrators, or acts, crimes against humanity can be better understood in terms of the violent creation, proliferation and exploitation of extreme power imbalances in three dimensions: societal, inter-group, and interpersonal. This notion of extreme power imbalances provides an analytical framework that has several benefits compared to existing accounts. It helps us understand the logic of the particularly shocking violence found in cases of crimes against humanity, emphasises the inherent relationality of the dynamics of such crimes, acknowledges that victims, perpetrators, and acts are inextricably linked, and accounts for key intuitions we hold about what sets the concept apart from other crimes.

The account I propose is based on a study of factual findings contained in judgments of international courts and tribunals in which a finding of crimes against humanity has been made. A focus on such factual findings enables us to build a comprehensive understanding of the often-overlooked details of crimes against humanity, while remaining tethered to the concept's legal roots.

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## 1. Introduction

In this thesis I propose an account of the crimes against humanity in terms of extreme power imbalances.

Based on the detailed study of factual findings contained in judgments of international courts and tribunals, I claim that crimes against humanity can be understood as the violent creation, proliferation and exploitation of extreme power imbalances in three dimensions: societal, inter-group, and interpersonal. I demonstrate that the notion of extreme power imbalances provides an analytical framework that can make sense of the particularly shocking violence found in cases of crimes against humanity, complements the legal development of the concept, and accounts for our key intuitions about what sets such crimes apart from other crimes.

The account I offer is theoretical and interdisciplinary. Although it is rooted in curial artifacts – factual findings from court judgments – it is presented as a contribution to theory rather than doctrine. The purpose of this thesis is to further our understanding of the concrete dynamics of crimes against humanity and what makes such crimes special. I do not set out to offer a legally operable definition of a crime against humanity or an exegesis of existing legal formulations of the concept. Nor do I engage with important legal practicalities such as prosecutorial decision-making. And while I do discuss issues around jurisdiction over crimes against humanity, I do so mainly in the context of theoretical accounts of the concept that are based on jurisdictional considerations.

The structure of this thesis is as follows. In this first chapter, I introduce the nature of the concept of crimes against humanity, explain the methodology used to construct my account based on extreme power imbalances, and discuss several fundamental political critiques of crimes against humanity that take issue with its universalist aspirations.

Chapter 2 gives an overview of the doctrinal and philosophical literature on crimes against humanity. I classify accounts of the concept into three broad types of approach: victim-based, perpetrator-based, and act-based. Whereas most existing accounts favour one of these types of approach to the exclusion of the others, I will argue that an exclusive focus on the nature of victims, perpetrators, or acts does not lead to a satisfactory account of what makes crimes against humanity special.

In Chapter 3, I introduce the analytical framework which I claim is more useful to understanding the concept of crime against humanity: the notion of extreme power imbalances. I explain what I mean by extreme power imbalances, how such imbalances operate in the societal, inter-group, and interpersonal dimensions, and how studying the interplay between these three dimensions and the way in which they amplify each other is crucial to capturing the elusive essence of the concept.

In Chapters 4, 5, and 6, I discuss the three dimensions of extreme power imbalances in detail. Chapter 4 focuses on the societal dimension, Chapter 5 the inter-group dimension, and Chapter on the interpersonal dimension. Based on my study of factual findings found in judgments of international criminal courts and tribunals, I analyse the ways each dimension manifests in a particular crime against humanity and how the

dimensions interrelate. In doing so, I demonstrate that an analytical framework based on extreme power imbalances makes sense of the fact patterns of legally recognised occurrences of crime against humanity, successfully integrates key intuitions about what sets such crimes apart from other crimes and provides a rich understanding of the crime's specific dynamics.

Chapter 7 provides the conclusion to this thesis.

### *1.1 The nature of the concept*

The concept of crime against humanity straddles the legal and philosophical realms. This is not just an academic observation. Courts, too, seem aware that while they may be called upon to qualify a body of facts as a crime against humanity based on a formal legal definition, the situations they are faced with are not at all easily captured in such a formal definition.

One of the clearest examples of this is found in the *Einsatzgruppen* case. *Einsatzgruppen* were the mobile killing squads used in eastern Europe by Nazi Germany to massacre millions of civilians. After the war ended, several cases of Nazi crimes were tried based on the Allied Control Council Law 10,<sup>1</sup> which gave Allied courts jurisdiction over war crimes, crimes against humanity, and crimes against the peace. The *Einsatzgruppen* case was one such case, tried by an American court. It is a particularly revealing case because the tribunal reflects explicitly on its role in humanity's response to atrocity and the concept of a crime against humanity.

At the outset it must be acknowledged that the facts with which the Tribunal must deal in this opinion are so beyond the experience of normal man and the range of man-made phenomena that only the most complete judicial inquiry, and the most exhaustive trial, could verify and confirm them. Although the principle [sic] accusation is murder and, unhappily, man has been killing man ever since the days of Cain, the charge of purposeful homicide in this case reaches such fantastic proportions and surpasses such credible limits that believability must be bolstered with assurance a hundred times repeated. The books have shown through the ages why man has slaughtered his brother. He has always had an excuse, criminal and un-godly though it may have been. He has killed to take his brother's property, his wife, his throne, his position; he has slain out of jealousy, revenge, passion, lust, and cannibalism. He has murdered as a monarch, a slave owner, a madman, a robber. But it was left to the twentieth century to produce so extraordinary a killing that even a new word had to be created to define it.

[...]

If what the prosecution maintains is true, we have here participation in a crime of such unprecedented brutality and of such inconceivable savagery that the mind rebels against its own thought image and the imagination

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<sup>1</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (CCL 10) (1945) 3 Official Gazette Control Council for Germany 50.

staggers in the contemplation of a human degradation beyond the power of language to adequately portray.<sup>2</sup>

The tone of voice conveys that the court is aware that it is not simply applying positive law in order to legally qualify a body of facts as a crime. It acknowledges that it is dealing with acts that it describes as at the limits of what is believable to “normal men”. And not just that. The court appears to claim that one of the crucial tools of the realm of law – language itself – might not suffice to adequately describe what happened. This is why we needed to create a new word to define “so extraordinary a killing”.

This sentiment of a crime so depraved that it cannot be grasped using our normal language and conceptual framework goes to the core of many accounts of crimes against humanity. Arendt, for example, describes them as crimes that

explode the limits of the law; and that is precisely what constitutes their monstrosity. For these crimes, no punishment is severe enough. [...] That is, their guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems.<sup>3</sup>

Jaspers pushes back against this conception of crimes against humanity. He cautions against the claim that crimes against humanity as the expression of some kind of ‘satanic greatness’.<sup>4</sup> Instead, he posited, crimes against humanity – in the context of the crimes of the Nazis – are characterised by their total banality.<sup>5</sup> Arendt, in turn, emphasised that she did not intend to claim any form of satanic greatness; rather, the point was that this new crime did not align with how we generally think of the concept of a crime:

[They] built factories to produce corpses. [...] [I]ndividual human beings did not kill other individual human beings for human reasons, but [...] an organised attempt was made to eradicate the concept of the human being.<sup>6</sup>

According to Arendt, the Nazi crimes were qualitatively different: these crimes were of an entirely different category and magnitude, embedded in a society that, under Nazi rule, had ‘fallen below a level of normal human intercourse’, and ‘had developed a wholly distorted sense of right and wrong [...]’<sup>7</sup> For Arendt, much like the court cited above, there appears to be a sense of “unreason” to these crimes.

Although we have seen Arendt and the *Einsatzgruppen* court emphasise the novelty and extremity of this type of crime, such claims are controversial. In fact, the same *Einsatzgruppen* judgment contains the following passage:

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<sup>2</sup> *United States of America v Otto Ohlendorf et al. (Einsatzgruppen)*, Opinion and Judgment, IV Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law 10 (1949), 411-412.

<sup>3</sup> Lotte Kohler and Hans Saner (eds), Rita Kimber & Robert Kimber (trans), *Hannah Arendt/Karl Jaspers Correspondence, 1926–1969* (Harcourt Brace Jovanovich 1992), 54.

<sup>4</sup> *ibid* 62.

<sup>5</sup> *ibid* 62.

<sup>6</sup> *ibid* 69.

<sup>7</sup> Alan Norrie, ‘Justice on the Slaughter-Bench: The Problem of War Guilt in Arendt and Jaspers’ (2008) 11(2) *New Criminal Law Review: An International and Interdisciplinary Journal* 187, 195.



The crimes against which this law is directed are not unique. They have unfortunately been occurring since the world began, but not until now were they listed as international offenses.<sup>8</sup>

Thus, the court makes two claims that appear to be contradictory. On the one hand, it claims to be dealing with a crime that is unprecedented; on the other, it posits that it is a type of crime that has been occurring since the world began. There are, of course, pragmatic reasons that might explain at least partially why the court makes this second claim. For instance, it may wish to counter the accusation of applying criminal law retroactively, by claiming that this behaviour has been well-known throughout history and has always offended against morality or natural law. But aside from pragmatic explanations, this seeming inconsistency points at a fundamental element of the nature of the concept of a crime against humanity. Even though we might very well *know* that human beings have done awful things to other human beings on a massive scale since the beginning of time, each concrete episode of such violence nonetheless feels unprecedented, and large swathes of humanity find themselves incredulous again.

This sense of dealing with acts that are indescribable, irrational, or beyond the human imagination is one of the defining characteristics of the concept of a crime against humanity. Although this has not changed since the concept's first application at Nuremberg, it is harder to find similarly expressive language in more recent judgments. Increasingly, courts have attempted to treat these cases in the same way that cases of "regular" crime would be treated. For international courts and tribunals especially, concerns about perception and legitimacy have made it important to avoid any appearance of show trials. I return to this point below.

But the tensions and difficulties that are part of the concept of crimes against humanity have not disappeared. Despite contemporary international courts and tribunals being more reticent to use the type of language cited above, the moral overtones and weight of the endeavour they are engaged in still manage to seep into their judgments from time to time. We can see this happening, for example, in the *Krstić* case at the ICTY. Despite stating that '[t]he Trial Chamber cannot permit itself the indulgence of expressing how it feels about what happened in Srebrenica,' and that it does not want to express 'rhetorical indignation,' the introductory paragraph of the case reads as follows:

The events of the nine days from July 10-19 1995 in Srebrenica defy description in their horror and their implications for humankind's capacity to revert to acts of brutality under the stresses of conflict. In little over one week, thousands of lives were extinguished, irreparably rent or simply wiped from the pages of history. The Trial Chamber leaves it to historians and social psychologist to plumb the depths of this episode of the Balkan conflict and to probe for deep-seated causes. The task at hand is a more modest one: to find, from the evidence presented during the trial, what happened during that period of about nine days and, ultimately, whether the defendant in this case, General Krstić, was criminally responsible, under the tenets of international law, for his participation in them. The Trial Chamber cannot

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<sup>8</sup> *Einsatzgruppen* (n 2) 497.

permit itself the indulgence of expressing how it feels about what happened in Srebrenica, or even how individuals as well as national and international groups not the subject of this case contributed to the tragedy. [...]. Thus, the Trial Chamber concentrates on setting forth, in detail, the facts surrounding this compacted nine days of hell and avoids expressing rhetorical indignation that these events should ever have occurred at all. In the end, no words of comment can lay bare the saga of Srebrenica more graphically than a plain narrative of the events themselves, or expose more poignantly the waste of war and ethnic hatreds and the long road that must still be travelled to ease their bitter legacy.<sup>9</sup>

On the one hand, as the court points out, “crime against humanity” is a legally operable term, formulated in articles and statutes of domestic and international criminal courts. As such, it must be clearly delineated, predictable, and unambiguous. This is what we expect from the definition of a crime. It is therefore highly problematic if crime against humanity, in the words of Arendt, “explodes the limits of the law”. On the other hand, crimes against humanity capture the most horrible things human beings do to each other: the concept encodes excesses that are often unpredictable *a priori*.

This tension is acknowledged in the literature. Dubler, for instance, notes that ‘given the indeterminacy of the term, the label, a “crime against humanity”, has been used by commentators [...] to describe a vast array of different human rights abuses. [...] It appears the term can be used to describe anything which outrages us.’<sup>10</sup> Similarly, Vernon observes that some have suggested that legal thought and discursive thinking are ‘unable to seize evils of great magnitude’.<sup>11</sup> . If the term “crime against humanity” does indeed refer to the excesses of human depravity, to ‘human degradation beyond the power of language to adequately portray,’ in the words of the court above, then to what extent can it be fruitfully analysed at all? Are episodes of crime against humanity simply synonymous with ‘anything atrocious committed on a large scale’?<sup>12</sup>

It would be problematic if this were indeed the case. The concept of crimes against humanity is not just an abstract construct. It is used politically and legally in ways that have important practical consequences for the world.

First, there is the power of the label itself. If crimes against humanity signify ‘a level of callousness that embodies the very essence of evil itself,’<sup>13</sup> then branding a body of acts a crime against humanity – and their perpetrator a criminal against humanity – is an act of serious magnitude. As noted in literature on fair labelling in criminal law, the name of a crime has a ‘symbolic function’.<sup>14</sup> It may ‘symbolise the degree of condemnation that should be attributed to the offender and signals to society how that

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<sup>9</sup> *Prosecutor v Krstić* (Judgment) ICTY-98-33 (2 August 2001) para 2.

<sup>10</sup> Robert Dubler, ‘What’s in a Name? A Theory of Crimes against Humanity’ (2008) 15 Australian International Law Journal 85, 86.

<sup>11</sup> Richard Vernon, ‘What is Crime against Humanity?’ (2002) 10(3) The Journal of Political Philosophy 231, 232.

<sup>12</sup> Dawn L Rothe and Cristopher W Mullins, ‘Darfur and the Politicization of International Law: Genocide or Crimes against Humanity?’ (2007) 31(1) Humanity & Society 83, 95.

<sup>13</sup> Vernon, ‘What is Crime against Humanity?’ (n 11) 232.

<sup>14</sup> James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71(2) Modern Law Review 217, 226.

particular offender should be regarded.<sup>15</sup> Given that crimes against humanity are widely perceived to be acts of the gravest moral reprehensibility,<sup>16</sup> it is especially important to have a degree of clarity about the situations to which the label – and the stigma – might be applied. A conception of crimes against humanity that is simply equivalent to “anything which outrages us” is not nearly precise enough.

But requiring a more specific meaning of the concept of crimes against humanity is not just a matter of clarifying a label. Legally, too, it is important that the concept be clearly delineated. As Van Schaack notes, the legal concept of crimes against humanity came with a legal innovation: ‘the exercise of jurisdiction over acts committed by Germans against other Germans.’<sup>17</sup> Today, this is still one of the key aspects of legally qualifying a body of acts as a crime against humanity. Doing so ‘unlocks the closed door of state sovereignty.’<sup>18</sup> Such potential practical consequences necessitate a thorough understanding of the circumstances in which they might be justified. In the words of Larry May, ‘we cannot prosecute on the basis of our moral outrage alone.’<sup>19</sup> While this thesis does not engage explicitly with questions of jurisdiction, having a clear understanding of the concept’s nature is a prerequisite for the fruitful analysis of such questions.

There are myriad legal and theoretical accounts that set out to define what makes crimes against humanity special. Most struggle with the tension I discussed above. They must be cognisant of the sense of exceptionality that permeates the concept while capturing it in a formal, judicially operable definition, or define its essential characteristics. Several of the most prominent doctrinal and philosophical approaches to understanding the concept and resolving this tension will be discussed in the next chapter. While these approaches are nuanced and varied, I have classified them into three broad categories according to which characteristic they privilege in their explanation of the nature of a crime against humanity.

First, there are victim-based explanations: a crime against humanity is best understood by focusing on the special nature of the victim of such crimes. Second, there are accounts that are perpetrator-based. These accounts claim that there is something particular about the type of perpetrator – usually, the fact that it is a state or state-like entity – which helps us understand the nature of a crime against humanity. Third, and finally, there are authors who emphasise the nature of the violent acts themselves, rather than the victims or perpetrators. I will refer to their accounts as act-based. These three archetypes of account of crime against humanity do not always appear in isolation; some accounts are “blended”, combining elements of these approaches.

In my view, none of these approaches by itself can fully resolve the tension between the exceptionality and singular depravity of crimes against humanity on the one hand,

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<sup>15</sup> *ibid.*

<sup>16</sup> See e.g., Micaela Frulli, ‘Are Crimes against Humanity More Serious than War Crimes?’ (2001) 12(2) *European Journal of International Law* 329.

<sup>17</sup> Beth Van Schaack, ‘The definition of Crimes against Humanity: resolving the incoherence’ (1998) 37 *Columbia Journal of Transnational Law* 787, 791.

<sup>18</sup> Geoffrey Robertson, *Crimes Against Humanity: The Struggle For Global Justice* (Penguin 2006), 375.

<sup>19</sup> Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge University Press 2005), 4.

and the recurring characteristics that appear crucial to all crimes against humanity on the other. I do not believe that any of these types of accounts are *wrong*, in that they describe something that does not matter. Quite the opposite: they all point to salient characteristics of a crime against humanity. It matters who the victims are; it matters who the perpetrators are; and the particularities of the depraved acts themselves matters, too. I do claim, however, that none of these characteristics is essential to concept of a crime against humanity to the exclusion of the others.

In this thesis, I argue that crimes against humanity can be more fully understood as the violent creation, proliferation, and exploitation of extreme power imbalances between perpetrators and victims. There are multiple dimensions to these extreme power imbalances: societal, inter-group, and interpersonal. I demonstrate that conceiving of crimes against humanity in terms of these three dimensions of extreme power imbalances allows us to construct a richer and more intersectional account of the dynamics of such crimes. In doing so, it becomes clear that the nature of victims, perpetrators and acts committed in episodes of crimes against humanity are inextricably linked.

I should make clear that the emphasis in this thesis is on what Renzo refers to as the 'conceptual question.'<sup>20</sup> I am chiefly interested in answering how we ought to understand the content of the concept of crime against humanity: what is it, conceptually, that makes a crime against humanity different from other crimes? Renzo also identifies a second question, which he calls 'normative'.<sup>21</sup> He describes this as 'the question of why the international community has a right to prosecute and punish crimes against humanity.'<sup>22</sup> Although I think a strong argument can be made that the creation and exploitation of extreme power imbalances justifies international prosecutions, this purpose of this thesis is not to develop such an argument.

This exclusive focus on the conceptual question might raise objections. Renzo, for instance, claims that any adequate account of the concept of crimes against humanity must also provide an answer to this second question.<sup>23</sup> Similarly, Chehtman argues that 'the link between the conceptual enquiry into the notion of [crimes against humanity] and the normative implications associated with them is intrinsic and not just contingent.'<sup>24</sup> In his view, the main difference between crimes against humanity and domestic crimes is precisely that there are different normative implications – i.e., the prospect of international prosecutions – attached to them.<sup>25</sup> It is, in his words, 'their peculiar jurisdictional regime which distinguishes CAH from municipal offences.'<sup>26</sup>

Chehtman recognises that defining crimes against humanity in terms of their jurisdictional consequences might be 'putting the cart before the horse' because it

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<sup>20</sup> Massimo Renzo, 'A Criticism of the International Harm Principle' (2010) 4(3) *Criminal Law and Philosophy* 267, 269.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*

<sup>24</sup> Alejandro Chehtman, 'Contemporary Approaches to the Philosophy of Crimes against Humanity' (2014) 14 *International Criminal Law Review* 813, 817.

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*, 818.

'favours the strategy of isolating what is characteristic of [crimes against humanity] – i.e., that they allow extraterritorial prosecutions – and provide a normative argument to account for it.'<sup>27</sup> He nonetheless justifies doing so by referring to the fact that much of the discourse around crimes against humanity focuses on their international element. From this, he derives the view that 'the best way to understand, and arguably to identify [crimes against humanity] is precisely to examine the reasons why we should subject them to this particular jurisdictional regime.'<sup>28</sup>

I do not agree with this claim that any successful conceptual account of crimes against humanity must necessarily also provide an account of why international prosecutions are justified. This claim only holds if one subscribes to the view that the essential conceptual characteristic of crimes against humanity is precisely their jurisdictional effect. Yet such an understanding of crimes against humanity does not provide us with much conceptual clarity. Defining a crime in terms of its jurisdictional effect tells us little about the character of the crime and does not distinguish it from other international crimes.

Chehtman appears to acknowledge this, given that he does not simply define crimes against humanity as crimes that can be prosecuted on the international plane. Instead, he wants to examine the reasons *why* they can be internationally prosecuted. The answer to this question, according to him, will go to the core of what is special about a crime against humanity.

This is exactly what I set out to do in this thesis. In my view, such a philosophical investigation into what makes crimes against humanity conceptually different from ordinary crimes need not necessarily take the legal consequence of international jurisdiction as its point of departure. Unless one takes a strictly positivist view of the concept, there is no a priori reason why the two need to be connected. In fact, constraining the definition of the concept in terms of its jurisdictional effect risks limiting the concept based on the geopolitics of which courts are afforded jurisdiction over which crimes.<sup>29</sup>

I do not wish to reject the view that the conceptual and normative questions are, in practice, closely interlinked. It is hard to imagine finding a clear answer to the question of why (or whether) international intervention might be justified for a given type of crime unless it is understood what that specific type of crime entails. Therefore, while the focus of this thesis is on the nature of the crimes themselves, I hope that the conception of crimes against humanity that I propose might help guide debates about the need for international jurisdiction and further our understanding of the concept's role in international law.

## 1.2 Methodology

Most legal and philosophical accounts of the concept of a crime against humanity approach defining it by asking what makes a crime against humanity different from "regular" crimes. Doctrinal accounts focus on the development of the legal definition

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<sup>27</sup> *ibid.*

<sup>28</sup> *ibid.*, 819.

<sup>29</sup> See section 1.3 below for a discussion of these geopolitics.

over time as used by different courts, as well as the jurisprudence of courts and writings of legal scholars. Philosophical accounts of the concept, by contrast, try to reason from first principles. They focus on the phrase “against humanity”: what does it mean for a crime to be “against humanity”?

As will be discussed in more detail in the next chapters, the answers to these questions are often noticeably abstract. This makes sense. A doctrinal definition must be general enough so that it may be used to legally qualify potentially very different concrete acts as being the same crime. Likewise, philosophical accounts want to formulate a sufficiently wide understanding of the concept that holds for all its cases.

However, there is a problem with this approach to the concept. Let us assume that the nature of a crime against humanity is indeed that it refers to excesses of human violence; to acts that are so depraved that, according to the *Einsatzgruppen* court, our language scarcely suffices to describe them. If we were to simply accept that this is the case and gloss over the details and dynamics of the acts committed, then we are stuck in a circular definition. Ignoring these details means that the nature of a crime against humanity will necessarily remain abstract and its specific horrors obscured behind generalised language. The concept of a crime against humanity in that scenario would not be much more than a means of referring to arbitrary horrors of a certain magnitude, which are defined by the very fact that their nature is unimaginable and impossible to define *a priori*.

Such an understanding of the concept would not bring us much. That is why this thesis focuses heavily on the details of “what actually happens”<sup>30</sup> during episodes of crimes against humanity. I focus on the facts of cases of crimes against humanity, rather than the abstract formulations under which these facts are often subsumed. The purpose of doing so is to dig down into the dynamics of these crimes in order to consider what makes them special. The court in the *Einsatzgruppen* case recognises the value such a study of the details of the relevant facts brings:

[T]he number of deaths resulting from the activities with which these defendants have been connected and which the prosecution has set at one million is but an abstract number. One cannot grasp the full cumulative terror of murder one million times repeated.

It is only when this grotesque total is broken down into units capable of mental assimilation that one can understand the monstrosity of the things we are in this trial contemplating. One must visualize not one million people but only ten persons -men, women, and children, perhaps all of one family - falling before the executioner's guns.

[...]

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<sup>30</sup> The phrase “what actually happened” is problematic, given that we are dealing with facts that are contained in legal judgments and which are therefore the result of a specific process with specific biases. I discuss this point in more detail in the next section.

A tribunal may not avert its head from the ghastly deeds whose legal import it is called upon to adjudicate.<sup>31</sup>

In this thesis this is what I have set out to do: to analyse those ghastly deeds in order to understand the elements that different episodes of crimes against humanity have in common. It should be noted that it is unsettling to study the details of the acts that make up a crime against humanity. At times, especially when analysing the interpersonal dimension of violent acts, doing so felt voyeuristic. It felt as though I was being drawn into a spectacle of horrors, unable to stop looking. I mention this because I think it is salient: as I will argue in what follows, I am convinced that at least some of the excessive violence committed as parts of crimes against humanity is specifically meant to be observed and to simultaneously captivate and horrify onlookers.<sup>32</sup> This is another reason why a close study of the details of crimes against humanity helps to further our understanding of the nature of the concept.

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<sup>31</sup> *Einsatzgruppen* (n 2) 413.

<sup>32</sup> This tendency of a crime against humanity to demand an audience is further explored in Chapter 6, on the interpersonal dimension of extreme power imbalances.

### 1.2.1 Facts as data

I have approached the question posed by taking as my point of departure a rich body of data that is not always studied in detail: factual findings contained in legal judgments and underpinning a finding of the presence of crimes against humanity. I take these bodies of facts both as an expression of what international courts and tribunals consider relevant in adjudicating cases of crimes against humanity, and as an invitation to closely study the dynamics within the situations described in order to come to a deeper understanding of “what actually happens” in episodes of violence that have been branded crimes against humanity.

This approach is in part inspired by the notion of ‘rational reconstruction’, as described by MacCormick in his 1990 paper *Reconstruction after Deconstruction*. According to him, the purpose of legal scholarship is the ‘rational reconstruction’ of legal materials.<sup>33</sup> In the field of law, like in other areas of scholarship, scholars are confronted with large amounts of ‘raw data’, which ‘may seem confused and disorderly, partly or potentially conflicting, [or] gappy in places.’<sup>34</sup> The point of rational reconstruction is to formulate principles that can make sense of this raw data, to find a way or ordering the disparate data and show them as expressions of a coherent whole.<sup>35</sup> ‘Rational reconstruction’ means the production of clear and systematic statements of legal doctrine, accounting for statute law and case law in terms of organizing principles, relating actual or hypothetical decisions both to their factual bases and to governing norms elaborated out of the authoritative materials.<sup>36</sup> The information – the data – that one has to work is, is ‘episodic and fragmentary in character’.<sup>37</sup> That is where the value of rational reconstruction lies; in helping curtail this potential chaos and finding means of understanding a large and disparate data set.

MacCormick refers to data coming out of the judicial process as being “raw”. From a strictly doctrinal point of view, this is indeed true, in the sense that a “raw” judgment, for instance, requires interpretation and incorporation into the existing doctrine. This is perhaps the crux of doctrinal legal scholarship: to integrate this raw data, such as judicial outputs, into the evolving body of doctrine.

However, factual findings contained in judgments are not “bare facts”. Quite the opposite. The facts that make it into a judgment are carefully selected both for their relevance to the case and for its potential to be qualified in terms of the legal definitions by which the court is guided. In the case of crimes against humanity, this means that the body of facts contained in a judgment is by no means a collection of “raw” data. Rather, the sections of factual findings contained in cases in which a crime against humanity is established, are anthologies of multiply-filtered, privileged facts. From the complex, multi-faceted, and often murky situations in which crimes against humanity occur, some facts are selected for their purported relevance by the participants to the trial and finally presented and reformulated by the court in the context of the legal

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<sup>33</sup> Neil MacCormick, ‘Reconstruction after Deconstruction: A Response to CLS’ (1990) 10(4) Oxford Journal of Legal Studies 539, 556.

<sup>34</sup> *ibid* 556.

<sup>35</sup> *ibid* 556.

<sup>36</sup> *ibid* 556.

<sup>37</sup> *ibid* 557.



norms based on which it adjudicates. Moreover, as I shall discuss below, a politics of victory and post-war retribution determines questions of jurisdiction and influences prosecutorial discretion as to whether a given situation should be taken forward to trial.

For the methodology used in this thesis, the curated nature of the factual findings under study is an advantage rather than a disadvantage. It means that a study of factual findings contained in judgments of crime against humanity can help us achieve two goals. First, it allows us to gain a detailed understanding of the dynamics of the acts that make up crimes against humanity. Secondly, it forces us to remain tethered to the legal development of the concept despite taking a theoretical approach, given that the data we are working with has been distilled by the legal process. This makes it easier to achieve a 'fit' between theory and practice.

There is an apparent contradiction here between the subject under study and the notion of rational reconstruction. If crimes against humanity are expressions of excess and "unreason", then does it make sense to rationally reconstruct the concept? Is such a rational reconstruction not doomed to fail, given the concept's nature? There are two responses to this concern. First, as I set out to show in this thesis, I do not agree that the concept of crime against humanity cannot be fruitfully analysed. While it is true that one of its characteristics is the excessive and seemingly irrational violence, I will argue that there are commonalities to this violence and that it often follows a perverted logic. Focusing on the bodies of facts that constitute crimes against humanity will enable us to surface that logic. Second, even if one were to accept that episodes of crime against humanity itself might be irrational in some sense, the data studied in this thesis are not. They are the product of legal process and legal and philosophical scholarship: all highly rational pursuits. There is no reason, therefore, that a rational reconstruction of a concept that is partially the result of these endeavours would be unsuccessful.

While the methodology I use in this dissertation is inspired by the notion of rational reconstruction, it differs from MacCormick's exposition on at least two important points. First, my goal is not to produce 'clear and systematic statements of legal doctrine.' Instead, the purpose of this research is to propose a means of understanding the data to integrate the legal and philosophical aspects of the concept of crimes against humanity.

Second, I take a wide view of what qualifies as useful data. As said, factual findings in judgments of crimes against humanity are my point of departure. They are key pieces of data, but not the only ones. Other parts of the fragmented landscape of data that can help us understand the concept of crimes against humanity are the legal and philosophical accounts themselves, given that they are expressions of intuitions that feed into the "coherent whole". I will also use secondary sources – particularly journalistic reports. Such reports allow us to include salient additional information about episodes of crimes against humanity that can enhance, or provide a gloss on, the factual findings found in legal judgments. In addition, they are also a source of more diffuse intuitions held by the public of what a crime against humanity is. As such, they provide a data point that is important to include.

### 1.2.2 The emergence of the notion of extreme power imbalances

When I began my study of fact patterns of crimes against humanity, I was not looking for extreme power imbalances. In fact, I began this project with a rudimentary hypothesis in mind that was entirely unrelated to the notion of power. My hypothesis was that, in order to make sense of the disparate theoretical accounts of crimes against humanity and the iterative legal development of the concept, I would have to treat the concept of crimes against humanity as having multiple ‘archetypes’. I expected the study of factual findings to lead me to a typology of crimes against humanity, with each type overlapping to varying degrees with the key types of legal and philosophical account (victim-based, perpetrator-based, and act-based).

In order to formulate this typology, I set out to create a dataset containing what I considered the most the salient characteristics of each case. I took inspiration from the idea of thematic analysis, a methodology for interpretation qualitative data that emerged from the field of psychology.<sup>38</sup> This analysis proceeds according to a number of stages: first, the researcher familiarises themselves thoroughly with the data, then they *code* the data (creating labels for expressions found in the data that recur throughout the dataset), and finally themes are generated based on this coding of data.<sup>39</sup> My approach to this analysis was what Braun and Clarke refer to as “inductive”: I wanted to be directed by the content of my dataset, rather than start coding based on a pre-existing theoretical framework.

The way I coded the set of factual findings was based on several labels related to the societal circumstances in which violence occurred, the types of perpetrator and victim, and the details of the discrete acts of violence that were committed and the dynamics of the relationships in which they occurred. In doing so, my aim was to categorise crimes against humanity based on recurring combinations of contextual factors and discrete acts of violence: to create themes around these codes that provided some organising principle for collections of them. This would then lead to a typology of cases of crime against humanity.

However, as my close reading and coding of cases progressed – I had studied about 40 cases at this point – I did not feel that significantly divergent themes were presenting themselves from the data. There were no combinations of contextual factors and concrete acts of violence that seemed to “go together”. Instead, I began to see a striking similarity between the dynamics and acts of violence in episodes of crimes against humanity that occurred across historical and political contexts that seemed significantly different. In all cases that I studied, a crucial role was played by the existence and exploitation of extreme power imbalances. It did not matter in which context a crime against humanity takes place, or what the exact nature of the perpetrators or victims was: such imbalances appeared omnipresent and acted as both catalyst and motivation for the most extreme acts of violence.

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<sup>38</sup> Virginia Braun and Victoria Clarke, ‘Thematic analysis.’ in H. Cooper et al (eds), *APA handbook of research methods in psychology, Vol. 2. Research designs: Quantitative, qualitative, neuropsychological, and biological* (American Psychological Association 2012) 55.

<sup>39</sup> Virginia Braun and Victoria Clarke, ‘Thematic analysis: a reflexive approach’ <<https://www.psych.auckland.ac.nz/en/about/thematic-analysis.html>> accessed 10 October 2021.

As a result, my approach has shifted. Rather than attempting to formulate a typology based on data that does not seem to yield any well-defined archetypes, I decided to focus on further analysing this notion of extreme power imbalances and how it relates to crimes against humanity. In doing so, it became increasingly clear to me that understanding crimes against humanity in terms of these power imbalances provides a way of building a deep understanding of the dynamics of crimes against humanity, unite key insights of divergent accounts of the special nature of the concept, while achieving a fit with the legal development of the term given that the analysis is based in factual findings contained in legal judgments.

Having departed from the coding approach, the analysis of crimes against humanity and extreme power imbalances offered in this thesis is more within the tradition of the humanities than the social sciences. The claim that extreme power imbalances help us understand and unify competing accounts of crimes against humanity in a way that fits with the concept's legal development will be substantiated by close readings of fact patterns and secondary literature related to these fact patterns, and theoretical engagement with both legal and philosophical literature on the notion of crimes against humanity.

### *1.3 A note on the universality of crimes against humanity*

The legal and theoretical accounts that will be discussed in the following chapters, as well as the notion of crime against humanity that I propose, approach the concept from an internal perspective.<sup>40</sup> That is, they take for granted that the concept exists, and focus their attention on explaining what its content is (or should be). However, there is a growing body of literature within the field of international law that is fundamentally sceptical of the idea that there is some purported universal "humanity". Some critics argue that the use of this concept in international law and international relations is misguided at best, and dangerous at worst. Before continuing with the next chapters, it is important to discuss some of these challenges to the foundations of the concept. These challenges are relevant to my thesis because, although my purpose is not expressly political, it is impossible to write about a subject like crimes against humanity without recognising the political import of the concept.

#### 1.3.1 The political expediency of claiming to speak on behalf of humanity

Humanity is a powerful concept. Whether understood as some metaphysical entity or as the set of all human beings, to assert that one speaks on its behalf means to lay claim to a position of power, to place oneself at the top of the hierarchy of human affairs. This realisation about the concept of humanity has led several theorists to draw attention to its political expediency and the ways in which the notion may serve to establish – or perpetuate – power relations that are favourable to those invoking the concept.

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<sup>40</sup> See Schwöbel's introduction in Christine Schwöbel (ed), *Critical Approaches to International Criminal Law* (Routledge 2014) for a description of the different perspectives taken in scholarship on international (criminal) law, as well as a tentative agenda for a critical approach to international criminal law.

Discussions of this point often start with a reference to Carl Schmitt, whose writings have gone through a revival amongst critical scholars of international law.<sup>41</sup> In *The Concept of the Political*, he writes that 'when a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent.'<sup>42</sup> Schmitt's point is coloured by his understanding of the political realm as fundamentally predicated on the distinction between friend and enemy and the resulting perpetual potential of war,<sup>43</sup> but it can be generalised. Using a universal concept like humanity legitimises hierarchy, because those claiming to speak on behalf of humanity – or, in the context of crimes against humanity, punish on behalf of humanity – place themselves in a position of authority over those who are being punished or subjugated.<sup>44</sup>

A historical example of the concept of humanity's 'political productivity' and of Europe's tradition of 'speaking of its own values as being representative of the universal',<sup>45</sup> is the way canonical international lawyers such as Vitoria, Gentili and Grotius used a 'vocabulary of universal humanity' to justify what they saw as the 'appropriate ordering of a variety of colonial relationships.'<sup>46</sup> The notion of a universal crime – of which a wide range of 'natives' were accused so as to justify their oppression and persecution – provided 'a hinge between a universally inclusive law and an uneven distribution of political authority.'<sup>47</sup>

Two centuries later, King Leopold II continued this tradition by claiming that his exploitation of the Congo Free State was a philanthropic endeavour that 'brought together friends of humanity to open to civilization the only part of the globe where it has not yet penetrated.'<sup>48</sup> And even now, at a time when European 'hard power' has diminished significantly, Europe continues to 'speak the language of universal international law' in order to 'regain [geopolitical] control in a novel configuration of forces.'<sup>49</sup> Throughout recent history, the notion of humanity has been co-opted for geopolitical purposes and employed to perpetuate or establish power relations favourable to those who claimed to act on behalf of humanity.

How do these points apply to the project of international criminal law? Krever starts with a scathing assessment of one of its foundational moments: the Nuremberg trial. He notes that there were serious flaws, succinctly summarised by Fiske Stone's

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<sup>41</sup> See e.g., David Chandler, 'The Revival of Carl Schmitt in International Relations: The Last Refuge of Critical Theorists?' (2008) 37(1) *Millennium: Journal of International Studies* 27, 28.

<sup>42</sup> Carl Schmitt and others, *The Concept of the Political: Expanded Edition* (University of Chicago Press 2008), 54.

<sup>43</sup> *ibid* 53.

<sup>44</sup> Sinja Graf, "'A wrong done to mankind': colonial perspectives on the notion of universal crime' (2017) 31(3) *International Relations* 299, 301.

<sup>45</sup> Martti Koskenniemi, 'International law in Europe: between tradition and renewal' (2005) 16(1) *European Journal of International Law* 113, 114.

<sup>46</sup> Graf, 'A wrong done to mankind' (n 44) 300-301.

<sup>47</sup> *ibid* 304.

<sup>48</sup> Ayça Çubukçu, 'Thinking against humanity' (2017) 5(2) *London Review of International Law* 251, 252.

<sup>49</sup> Koskenniemi, *International Law in Europe* (n 45) 118.

statement that the trial at Nuremberg was a ‘high-grade lynching party’ operating under the ‘false façade of legality’.<sup>50</sup> Important principles of valid law, impartial judges and legally-established jurisdiction were flouted, there was no right of appeal, and there was a ‘distinct air of inevitability’ about the proceedings.<sup>51</sup> This is illustrated by the toast proposed by the Russian Chief Prosecutor during a dinner with the judges, prior to the start of the trial: “To the defendants, they will all hang.”<sup>52</sup>

If not to mete out impartial justice, then what was the purpose of the Nuremberg Trial? According to Krever, its value was above all ‘educational and expressive’. It allowed the tribunal to supply ‘an authoritative confirmation of a certain narrative of historical truth.’<sup>53</sup> The creation of new *ex post facto* crimes such as crimes against humanity and the waging of aggressive war, combined with the blanket impunity of Allied powers, helped to establish a powerful narrative in which the Allies were ‘defenders of peace and humanity.’<sup>54</sup>

Similar dynamics can be seen at the ICC. Moreno Ocampo, the ICC’s first prosecutor, ‘hastened to assure a US official that he could not imagine launching a case against a US citizen.’<sup>55</sup> Indeed, despite being an influential participant at the negotiations on the text of Rome Statute, the United States did not sign it. Other Western states, such as Germany, were reassured that they would not be subject to criminal investigations due to the doctrine of complementarity. This doctrine shields countries with more developed judicial systems from international interference which, in Krever’s words, ‘[reproduces] the colonial international law of the 19<sup>th</sup> century, underpinned by a distinction between civilized and uncivilized states.’<sup>56</sup>

Krever is mainly concerned with the institutional context of international criminal courts and tribunals. His analysis focuses on the way in which the structure and jurisdictional limitations of these institutions combines with a claim to speak on behalf of humanity in order to perpetuate a certain power dynamic. But claiming to speak on behalf of humanity is also an important tool for the court in its judicial proceedings. Corrias and Gordon make this point in their 2015 paper *Judging in the name of humanity*, which examines ‘how international criminal tribunals invoke humanity as a means of supporting the powers they exercise.’<sup>57</sup>

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<sup>50</sup> Tor Krever, ‘Dispensing Global Justice’ (2014) 85 *New Left Review* 67, 68, citing Alpheus Thomas Mason, *Harlan Fiske Stone: pillar of the law* (Viking Press 1956), 715-716.

<sup>51</sup> *ibid* 68.

<sup>52</sup> *ibid* 68, cited in Telford Taylor, *The anatomy of the Nuremberg trials: a personal memoir* (Knopf Doubleday Publishing Group 1992), 21.

<sup>53</sup> *ibid* 69.

<sup>54</sup> *ibid* 69.

<sup>55</sup> *ibid* 81.

<sup>56</sup> *ibid* 81.

<sup>57</sup> Luigi DA Corrias and Geoffrey M Gordon, ‘Judging in the name of humanity: international criminal tribunals and the representation of a global public’ (2015) 13(1) *Journal of International Criminal Justice* 97, 97-98.

International criminal courts and tribunals, they claim, legitimise ‘a particular brand of criminal justice’ by referring to humanity.<sup>58</sup> Including such references to humanity is not a ‘neutral act’. In fact, when an international court claims to speak on behalf of humanity they ‘purport to represent the phenomena on which it relies, namely the will and interests of humanity’.<sup>59</sup> According to Corrias and Gordon, this is a way of ‘establishing authority over a community.’<sup>60</sup>

It is also an act of possession: by referring to humanity an international court attempts to ‘harness the potential power’ of a putative collectivity for which it claims to be a representative. This manoeuvre of claiming to speak on behalf of humanity is combined with an attempt of the court to ‘naturalize’ its power by claiming that ‘it merely made explicit what humanity already entailed’.<sup>61</sup> This ultimately ‘establishes the ground for a mythical consent to actualize such collective powers[.]’<sup>62</sup>

### 1.3.2 The exclusionary potential of “humanity”

Closely connected to the political expediency of the concept, but conceptually separate, is the observation that the use of “humanity” often works to exclude the opinions, norms or experiences of certain groups of people. As Corrias and Gordon note, acts of community formation – such as the ones that international criminal courts and tribunals engage in when they claim to speak on behalf of humanity – simultaneously include and exclude.<sup>63</sup> Despite claims of universality, the “humanity” that is being referred to is a ‘moral object’, from which certain ideas, acts or cultures are excluded.<sup>64</sup>

The content of this moral object is decided by the powers that make the relevant claims. We have seen how this works in the jurisdictional limitations of the Nuremberg Tribunal that ensured Allied crimes went unprosecuted,<sup>65</sup> or in the prosecutorial choices made by the ICTY during the NATO bombing campaigns in the former Yugoslavia. That the moral object which is constructed is not universal, and in fact works to exclude other points of view, is brought out clearly by examples such as the Indian representative’s statement at the Security Council asking ‘what international community’ was behind the bombing of Serbia. The Indian representative certainly did not consider himself part of it.<sup>66</sup> To the slightly cynically inclined, it may seem that the vocabulary of humanity is, at times, simply being employed ‘as an Anglo-American instrument of domination.’<sup>67</sup>

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<sup>58</sup> *ibid* 98.

<sup>59</sup> *ibid* 104.

<sup>60</sup> *ibid* 104.

<sup>61</sup> *ibid* 109.

<sup>62</sup> *ibid* 110.

<sup>63</sup> *ibid* 108.

<sup>64</sup> *ibid* 108.

<sup>65</sup> Immi Tallgren, ‘The Voice of the International: Who is Speaking?’ (2015) 13(1) *Journal of International Criminal Justice* 135, 136.

<sup>66</sup> Koskenniemi, ‘International Law in Europe’ (n 45) 116.

<sup>67</sup> Martti Koskenniemi, ‘Humanity’s Law, Ruti G. Teitel (Oxford: Oxford University Press, 2011)’ (2012) 26(3) *Ethics & International Affairs* 395, 397.

According to Çubukçu, the notion of humanity has the potential to play an additional exclusionary role, particularly when used in contemporary liberal human rights discourse. To set the scene for her critique, she starts with a reference to Malcolm X who, in one of his speeches, calls for black citizens of the United States to 'declare our right on this earth to be a human being and to be given the rights of a human being in this [the US] society.'<sup>68</sup> Çubukçu is struck by this statement, which expresses the realisation that 'being a human being is a status to be brought into existence', rather than a status that attaches to all members of the species *Homo sapiens* by virtue of 'the naked fact of birth.'<sup>69</sup>

Çubukçu notes that this contradicts what is widely held to be a fundamental assumption that underpins the notion of human rights, which is 'that humans are always and already entitled to human rights by virtue of the fact of their birth.'<sup>70</sup> But despite the intuitive appeal of, and the seeming commitment of liberal human rights theories to, this notion of rights-by-birth brings out serious conceptual issues for the liberal notion of human rights.<sup>71</sup> In order to explain human rights, Çubukçu observes, 'many liberal philosophers [...] venture to provide a *substantive* account of the human.'<sup>72</sup> Griffin, for example, focuses on the notion of personhood. Personhood emphasises human qualities such as 'our being agents, deliberating, assessing, choosing and acting to make what we see as a good life for ourselves.'<sup>73</sup> This, of course, goes back to the influential Kantian formula of humanity: one should not use human beings as a mere means, but always as an end in themselves. This formula too relies on rationality: Kant often refers to 'rational beings' or 'rational nature' before referring to humanity.<sup>74</sup>

Çubukçu worries about this tendency in liberal human rights discourse to provide some sort of 'universal anthropology of the human' that justifies why particular rights attach to human beings. Her concern is that the notion of humanity predicated on certain qualities excludes groups of human beings from the category of humanity or includes them in the group of '*potential* humans'<sup>75</sup> – a potential they can realise only by fitting into whatever mould is dominant. These ideas have serious political consequences, as shown by the Malcolm X quote mentioned above. They have meant that certain people were 'deprived of the enjoyment of human rights', because they were included in the order of humanity as *potential* members. This dynamic may have been at the root of the theoretical framework that enabled European jurists to justify colonialism by reference to the 'rationality, perfectibility, and human potential of the native.'<sup>76</sup> Showing how pervasive this way of thinking is, Çubukçu draws attention to the fact

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<sup>68</sup> Çubukçu, 'Thinking against humanity' (n 48) 253., citing George Breitman, *Malcolm X, by Any Means Necessary* (Pathfinder Press 1970), 56.

<sup>69</sup> *ibid* 254.

<sup>70</sup> *ibid* 255.

<sup>71</sup> *ibid* 255.

<sup>72</sup> *ibid* 255.

<sup>73</sup> *ibid* 255.

<sup>74</sup> Immanuel Kant, Pauline Kleingeld (ed), and David Colclasure (tr), *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Yale University Press 2006), 39.

<sup>75</sup> Çubukçu, 'Thinking against humanity' (n 48) 262.

<sup>76</sup> *ibid* 262.

that even Hannah Arendt exhibited racist patterns of thought based on such thinking, for example when she claimed that ‘savages’ ‘have nothing more to fall back upon than the minimum fact of their human origin,’ thereby placing ‘savages’ at the bottom of a ‘hierarchically imagined humanity.’<sup>77</sup>

The final point about the exclusionary potential of the use of “humanity” that will be mentioned here is phenomenological. This is the point that Tallgren makes: using the “we” of humanity is appealing, but it is determined ‘exclusively by horizons, feelings, perceptions of the situation as contemplated by the one viewing it.’<sup>78</sup> She tells us that when we use this type of language, we engage in a ‘humanitarian narrative’ in which the speaker uttering “we” sees “them” – that is, victims of a humanitarian disaster – ‘as if outside the frame of actors.’<sup>79</sup>

According to Mutua, this framing denies agency to the victims, and makes it easy to think about conflicts outside of the West as involving a ‘three-dimensional compound metaphor’ of savages, victims and saviours.<sup>80</sup> This is a symptom of the fact that the ‘human rights corpus, though well-meaning, is fundamentally Eurocentric,’ in that it casts actors into a hierarchy much like it did during the colonial period.<sup>81</sup> But the human rights corpus overlooks ‘the struggle for human dignity’ in those societies that were ‘*subject* to European tyranny and imperialism.’<sup>82</sup> These struggles and the norms that emerged as a result in non-Western societies have been ‘overlooked or rejected’ during the construction of the contemporary human rights narrative. Non-Western actors, it appears, are often framed as “them” in this narrative, excluding their voices from the “we” of humanity. We are reminded of the indignity of speaking for others and the injury of being spoken for rather than being asked to speak for yourself.<sup>83</sup>

### 1.3.3 International criminal justice in the face of fundamental critiques

One of the most vocal contemporary theorists defending the project of international criminal justice against the charges by critical international lawyers is Habermas. He calls on us to ‘defend the explosive political force of a concrete utopia’<sup>84</sup> – a utopia in which a universal concept of human dignity acts as a ‘moral source’<sup>85</sup> from which basic human rights spring. He acknowledges that there is a discrepancy between the idea and reality of human rights, which explains the ‘cynical pose of the so-called realists [i.e., Schmitt and neo-Schmittians].’ But according to Habermas, the Schmittian ‘existentialist idea according to which the political consists merely in the self-assertion

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<sup>77</sup> *ibid* 258. Çubukçu takes these citations from Hannah Arendt, *The Origins of Totalitarianism* (Harcourt, Brace and Company 1951), 300.

<sup>78</sup> Tallgren, ‘The Voice of the International’ (n 65) 151.

<sup>79</sup> *ibid* 151.

<sup>80</sup> Makau Mutua, ‘Savages, victims, and saviors: The metaphor of human rights’ (2001) 42 *Harvard International Law Journal* 201, 201.

<sup>81</sup> *ibid* 204.

<sup>82</sup> *ibid* 205.

<sup>83</sup> Tallgren, ‘The Voice of the International’ (n 65) 135.

<sup>84</sup> Jürgen Habermas, ‘The concept of human dignity and the realistic utopia of human rights’ (2010) 41(4) *Metaphilosophy* 464, 466.

<sup>85</sup> *ibid* 466.



of a collective identity over against other collective identities' is a dangerous one.<sup>86</sup> Refraining from making any universalist claims might make sense in a perfectly peaceful Westphalian equilibrium with generally benevolent states, but 'totalitarian regimes of the twentieth century have repudiated the assumption of innocence found in classical international law.'<sup>87</sup> For Habermas, as a result of the experiences of the Second World War, there is 'no meaningful [normative] alternative' to a transition to 'a state of world citizenry.'<sup>88</sup>

This is not to say that Schmitt is wrong about his descriptive claims regarding the use of universal language. Habermas acknowledges that such language can indeed be used by actors to claim the universal validity of their interests.<sup>89</sup> But this realisation should be an impetus to 'think and act realistically' about human rights 'without betraying the utopian impulse' that underpins them,<sup>90</sup> not to reject human rights and international criminal justice altogether. In addition, Habermas tells us, there is a benefit of the pervasiveness of a universalist discourse: it is a 'vehicle for self-correcting learning processes.'<sup>91</sup> Universalist normative claims, or claims made on behalf of humanity, can (and should) be criticised from *within* this framework, based on competing views of the universal. In Habermas' words, 'moral and legal universalism is self-reflexively closed.'<sup>92</sup>

I agree with this stance. The concept of crime against humanity, while liable to the cynical misuses that others in this section have cautioned about, is nonetheless important. It provides us with a tool to understand the dynamics of particularly horrendous episodes of violence, as well as a means of responding to it. In this context, it is worth noting that the concept of crimes against humanity can also be used for progressive purposes. An example of this is Kalpouzos and Mann's paper assessing the treatment of refugees by Greek and Frontex agents against the yardstick of the concept.<sup>93</sup> A detailed analysis of the content of the concept that is sensitive to the risks that its universalist language brings will help us progress our understanding of the underlying values that the concept expresses and guard against its co-optation by powerful Western states.

The notion of thinking and acting realistically about human rights and international criminal justice with an awareness of the criticisms rather than the wholesale rejection of the endeavour is endorsed to an extent by Koskenniemi. He argues that international lawyers must find a way to 'conceive its universal ambition without the involvement of the civilizing mission or solipsism of Empire.'<sup>94</sup> We must remain aware

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<sup>86</sup> Giovanna Borradori, *Philosophy in a time of terror: Dialogues with Jurgen Habermas and Jacques Derrida* (University of Chicago Press 2013), 38.

<sup>87</sup> *ibid* 38.

<sup>88</sup> *ibid* 38.

<sup>89</sup> *ibid* 42.

<sup>90</sup> Habermas, 'The concept of human dignity' (n 84) 478.

<sup>91</sup> Borradori, 'Philosophy in a time of terror' (n 86) 42.

<sup>92</sup> *ibid* 42.

<sup>93</sup> Ioannis Kalpouzos and Itamar Mann, 'Banal Crimes against Humanity: The Case of Asylum Seekers in Greece' (2015) 16(1) *Melbourne Journal of International Law* 1.

<sup>94</sup> Koskenniemi, 'International Law in Europe' (n 45) 123.

that every choice between different potential conceptions of universal norms is inherently political – it is about ‘my law’ versus ‘your law.’<sup>95</sup> All universalist claims should be critically interrogated, with this realisation in mind. It may perhaps be helpful to think of them as claims about the meaning and scope of a set of *interpretive concepts*, such as “humanity,” “*jus cogens*,” or “universal crime,” which ‘permit, indeed, invite, deep, sharp and pervasive reasonable disagreement.’<sup>96</sup> Which meaning and scope ultimately to accept is often a question of power and politics.

To me, this way of thinking about the project of international criminal justice makes sense. The main constructive value of the critiques discussed in this section is that they clearly bring out the biases that often underpin normative positions taken in a universalist discourse, as well as the inherently political nature and potentially exclusionary power of universal claims. I do not think this is a reason not to study the concept. I do not want to claim that the historical application of the concept is unproblematic, given the aspects of victor’s justice in its emergence and the contemporary focus on crimes committed in African countries while ignoring Western crimes. But we ought to recognise that the notion of crimes against humanity *exists*, and it is, in fact, being used in courts of law. Therefore, if one fears that the application of the concept is a tool for Western powers to impose their “brand of criminal justice” on others, it is even more important to interrogate the concept carefully, cognisant of the troubling aspects raised in this section. This is what I set out to do.

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<sup>95</sup> *ibid* 123.

<sup>96</sup> Oliver Gerstenberg, 'What International Law Should (Not) Become. A Comment on Koskeniemi' (2005) 16(1) *European Journal of International Law* 125, 127. Here, in similar vein, we may also think of the notion of metalinguistic negotiation. The idea of metalinguistic negotiation is that in certain circumstances, by using a term (such as crimes against humanity) in a particular way, or applying it to a particular context, the speaker is in fact trying to make his interlocutor accept his definition of the concept. See David Plunkett, 'Which concepts should we use?: Metalinguistic negotiations and the methodology of philosophy' (2015) 58(7-8) *Inquiry* 828.

## 2. Three types of account of crimes against humanity

### 2.1 Introduction

This first substantive chapter provides a focused survey of existing legal and philosophical accounts of the concept of crimes against humanity, as well as relevant domestic and international case law. Since the concept's inception, both lawyers and philosophers have spent considerable energy trying to formulate what they believe is its essence. The question they set out to answer is what it is that makes a crime against humanity special. In what way is it different from a "normal" murder, for instance? And why is international prosecution justified?

As discussed in the first chapter, these two questions – "conceptual" and "normative" – are conceptually distinct, albeit closely intertwined. . The focus of this thesis is on the first question: what, conceptually, sets a crime against humanity apart from other crimes? This is the lens through which I will approach the existing literature.

In the introduction to this thesis, I have claimed that the concept of crime against humanity is multi-faceted. The literature and jurisprudence bears this out. Legal scholarship, philosophical scholarship, and jurisprudence related to crimes against humanity are all closely connected to each other. They do not operate in a vacuum. Theoretical accounts influence legal decision-making, and vice versa. Because of this, the literature review in this chapter does not follow a clear separation between the law, legal scholarship, and philosophical scholarship. Rather, it will show how the same types of approach to defining the special nature of crimes against humanity can be seen in these seemingly divergent fields.

I have referred to "types" of approach to the concept of crime against humanity multiple times now. What do I mean by that? Without wishing to detract from the richness and nuance of each individual account, I think we can nonetheless usefully categorise them in three groups: victim-based, perpetrator-based, and act-based. Victim-based accounts maintain that there is something particular about crimes against humanity given the selectivity of the people that are victimised, and the reasons for their being targeted. Perpetrator-based accounts focus on the nature of the perpetrator(s) of the relevant acts, for example being a state or pseudo-state. Finally, act-based accounts refer to the especially heinous nature of the acts of violence and humiliation that constitute a crime against humanity.

### 2.2 Victim-based accounts

We start our survey of victim-based accounts with one of the most prominent theoretical accounts of the nature of crimes against humanity: that of Hannah Arendt.

In the epilogue to *Eichmann in Jerusalem*, Arendt considers several fundamental and theoretical issues pertaining to the nature of crimes against humanity. To illustrate the special nature of crimes against humanity, she provides an analysis of the difference between three Nazi policies: discrimination, expulsion, and genocide. Discrimination, she argued, was a national crime. It was of no concern to the 'comity of nations'.<sup>97</sup>

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<sup>97</sup> Hannah Arendt, *Eichmann in Jerusalem* (Penguin 2007), 268.

Expulsion, however, did concern this comity of nations: as a result of policies of enforced emigration, other countries 'were forced either to accept the uninvited guests or to smuggle them into another country'.<sup>98</sup> In a sense, then, expulsion can be said to be 'an offense against humanity, if by "humanity" we understand no more than the comity of nations.'<sup>99</sup>

But a crime against humanity is something quite different again, Arendt says. The Nazi crimes, she writes, 'exploded the limits of the law.'<sup>100</sup> In her correspondence with Jaspers, Arendt expresses the view that no legal system would be able to deal with the guilt attached to these crimes, as they '[overstep] and [shatter] any and all legal systems.'<sup>101</sup> According to Macleod, Arendt's position captures something pivotal about crimes against humanity: that there is a qualitative difference between the concept and the individual acts that are involved. A crime against humanity is not simply the sum of the criminal acts involved, but something different from those regular crimes altogether.<sup>102</sup>

The Nazi crimes clearly qualified as such. Unlike Arendt's example of a familiar crime, – 'a man killing his aunt' – the Nazi crimes were committed for what she called 'non-human reasons.'<sup>103</sup> Factories were built to produce corpses, without any economic or other benefit to be gained.<sup>104</sup> The Nazis attempted to 'make the entire Jewish people disappear from the face of the earth'. This meant that we were faced with a new crime, unlike crimes such as discrimination or expulsion, both of which have a long history.<sup>105</sup> According to Arendt, the Nazi genocide is a crime 'against the very nature of mankind'<sup>106</sup> because one of the key characteristics of the human status is our diversity. Without this diversity, she claims, 'the very words "mankind" or "humanity" would be devoid of meaning.'<sup>107</sup>

From this brief summary it is clear that Arendt's account of the specific nature of a crime against humanity focuses strongly on the victim of this crime. This can be interpreted in two ways. First, she posits that it is essential to the concept is that an entire group was attacked with the purpose of making it disappear from the earth. Jews were attacked not because of any individual reasons, but because they were Jewish – because they were not considered worthy by the Nazis to share this earth. This is an argument about the salience of discrimination. The second interpretation is more abstract: because diversity is a key characteristic of mankind, an attack on an entire

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<sup>98</sup> *ibid* 268.

<sup>99</sup> *ibid* 268.

<sup>100</sup> Norrie, 'Justice on the Slaughter-Bench' (n 7) 194.

<sup>101</sup> Kohler and Saner, *Arendt/Jaspers Correspondence* (n 3) 54.

<sup>102</sup> Christopher Macleod, 'Towards a philosophical account of crimes against humanity' (2010) 21(2) *European Journal of International Law* 281, 291.

<sup>103</sup> Robert Fine, 'Crimes against humanity: Hannah Arendt and the Nuremberg debates' (2000) 3(3) *European Journal of Social Theory* 293, 297.

<sup>104</sup> *ibid* 297.

<sup>105</sup> Arendt, *Eichmann in Jerusalem* (n 97) 268.

<sup>106</sup> *ibid* 268.

<sup>107</sup> *ibid* 268-269. Benhabib suggests that for Arendt, genocide is the only crime that truly deserves the label crime against humanity. Seyla Benhabib, 'On the alleged conflict between democracy and international law' (2005) 19(1) *Ethics & International Affairs* 85, 85.

people is an attack on humanity itself. This means that, quite literally, the victim of a crime against humanity is humanity itself.

Another influential theoretical account of crimes against humanity that is partly victim-based is offered by Larry May. Before putting forward his positive account of crimes that harm humanity, he first rejects two ways of conceptualising harm to humanity. First, he finds it is implausible to argue that humanity is harmed simply because one of its members is harmed. If this were the case, then there would be no conceptual distinction between domestic crimes and international crimes.<sup>108</sup> Second, an approach that would equate harm to humanity with something as extreme as a 'nuclear holocaust that destroys humanity' would be 'useless except in the most extreme of cases.'<sup>109</sup> The third approach, which holds that humanity is harmed because the relevant crimes attack a significant characteristic of humanity, is most promising.<sup>110</sup>

According to May, the types of crime that fall into this category are, in an important sense, group-based. He sees two expressions of such crimes: (i) crimes that target people not because of some individualised feature, but because of the group they belong to; and/or (ii) crimes are committed or facilitated by an agent of a state.<sup>111</sup> This means that May's account is not exclusively victim-based: just one of the two prongs is. With regard to the first prong, the point May makes is that it is an attack on one's humanity if one is targeted because of a group characteristic that is out of one's control. This kind of attack ignores the person's individuality, focusing instead on 'the common characteristics' of the group that is being attacked. According to May, the resulting harm is a group-based harm, of which humanity is a victim.<sup>112</sup> When 'the sufferer merely stands in for larger segments of the population, who are not treated according to individual differences,'<sup>113</sup> humanity itself is harmed. There is also a more pragmatic point to be made that if individuals are attacked based on some common characteristic rather than their individual characteristics, then such an attack is much more likely to spread through a population and reach a significant scale.<sup>114</sup>

This sentiment – that violence against individuals because of their group membership is salient – is at the core of some legal accounts of crime against humanity too. According to Graven, for instance, one must think of the individual victim as 'but one of the blood cells which one expels or destroys to slaughter the body [i.e. the targeted community or group]; but this body is the *actual* object of the perpetrator.'<sup>115</sup> This special status of the victim as means to an end, combined with the specific motive or goal of the perpetrator, sets crimes against humanity apart from domestic crimes and gives it its character as a breach of international law.<sup>116</sup> Sluiter sees this requirement

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<sup>108</sup> May, *Crimes Against Humanity*(n 19) 85.

<sup>109</sup> *ibid* 85.

<sup>110</sup> *ibid* 85.

<sup>111</sup> *ibid* 81, 83.

<sup>112</sup> *ibid* 85.

<sup>113</sup> *ibid* 86.

<sup>114</sup> *ibid* 86.

<sup>115</sup> Jean Graven, 'Les crimes contre l'humanité', *Recueil des cours de l'Académie de Droit International de la Haye* (1950) 546-547.

<sup>116</sup> *ibid* 546.

of discrimination as 'consistent with the general notion of crimes against humanity as a discriminatory crime, attacking individuals because of their membership of a group – based on its proximity to genocide and having its origin in the Holocaust.'<sup>117</sup>

The idea that crimes against humanity must indeed be committed on discriminatory grounds also finds some support in Bassiouni's writings, although he subordinates discriminatory grounds to the element of state policy (which is discussed in more detail in section 2.3 below). He argues that one of the elements of state policy is 'that the action of policy is directed against an identifiable group of civilians within society, usually reflecting a persecutorial motivation but [not] necessarily so.'<sup>118</sup> The discriminatory requirement 'evidences the collective nature of the crime', although 'there should be no quantitative standards for the number of persons to be included in the targeted group.'<sup>119</sup>

Against this view, Sadat Wexler argues that requiring this discriminatory intent 'equates crime against humanity to genocide,' while 'genocide is merely one form of crime against humanity.'<sup>120</sup> The notion of attacking victims not because of their individuality, but because through their destruction it is hoped to achieve destruction of the group they form part of is paradigmatic of genocide – this *dolus specialis* is, indeed, what sets genocide apart from crimes against humanity.<sup>121</sup> The category of genocide becomes meaningless if the same discriminatory intent is required for all crimes against humanity. In the same vein, the crime of persecution – one of the enumerated crimes that can be qualified as a crime against humanity in the appropriate context – loses its *raison d'être* if discriminatory intent is required for all crimes against humanity.<sup>122</sup>

Teleological arguments against requiring a discriminatory intent have also been raised. Ratner, for example, points out that certain acts are 'so heinous and destructive of a person's humanity that they *per se* are crimes.'<sup>123</sup> Similarly, deGuzman stresses that 'widespread inhumane acts deserve severe moral sanction whether or not

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<sup>117</sup> Göran Sluiter, "Chapeau Elements" of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals' in Leila N Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011), 129.

<sup>118</sup> M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011), 21.

<sup>119</sup> *ibid* 31.

<sup>120</sup> Leila Sadat Wexler, 'The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back again' (1994) 32 *Columbia Journal of Transnational Law* 289, 360. See also William A Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press 2006), 185: 'Genocide is often described as an aggravated form of crime against humanity, and while such statements may be an oversimplification, that the two categories of crime [i.e., genocide and crimes against humanity] are cognates can be seen from the indictment policy of the Prosecutors and the judgments themselves.'

<sup>121</sup> William A Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press 2009), 256-257.

<sup>122</sup> Margaret McAuliffe deGuzman, 'The road from Rome: the developing law of crimes against humanity' (2000) 22(2) *Human Rights Quarterly* 335, 368.

<sup>123</sup> Steven R Ratner, Jason S Abrams, and James L Bischoff, *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy* (Oxford University Press 2009), 64.

committed on discriminatory grounds,' and that 'no adequate list of discriminatory grounds could ever be created.'<sup>124</sup>

Debates about the requirement of discriminatory intent are not limited to academic literature. For instance, whether or not this requirement should be included was an important issue in the *Tadić* trial at the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY), both in first instance and on appeal. Despite noting that a discriminatory requirement was not part of earlier legal instruments such as the Nuremberg and Tokyo Charters, Control Council Law 10, or supported by case law, the Trial Chamber in the first instance nevertheless 'felt forced to include' the requirement.<sup>125</sup> It did so on the basis of the Report of the Secretary-General,<sup>126</sup> which mentions that '[c]rimes against humanity refer to inhumane acts of a very serious nature, such as wilful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national political, ethnic, racial or religious grounds.'<sup>127</sup> Additionally, the Trial Chamber took note of statements of members of the Security Council which showed 'that they interpreted Article 5 as referring to acts taken on a discriminatory basis.'<sup>128</sup> This decision, which required a discriminatory requirement for *all* crimes against humanity, was heavily criticised in the literature.<sup>129</sup>

The Trial Chamber's decision was overturned on appeal. The Appeals Chamber held that 'the ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent.'<sup>130</sup> Furthermore, 'a logical construction of Article 5 also leads to the conclusion that, generally speaking, this requirement is not laid down for all crimes against humanity', for that would make the "persecutions" category 'illogical and superfluous'.<sup>131</sup> Finally, an interpretation of Article 5 that does not include a discriminatory intent for all crimes against humanity is consistent with 'the aim of those drafting the Statute [...] to make all crimes against humanity punishable, including those which, while fulfilling all the conditions required by the notion of such crimes, may not have been perpetrated on political, racial or religious grounds.'<sup>132</sup> This last point especially amounts to an explicit rejection of a victim-based account of crimes against humanity.

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<sup>124</sup> McAuliffe deGuzman, 'The road from Rome' (n 122) 368.

<sup>125</sup> Kai Ambos and Steffen Wirth, 'The Current Law of Crimes Against Humanity: An analysis of UNTAET Regulation 15/2000' (2002) 13 Criminal Law Forum 1, 43; *Prosecutor v Tadić (Tadić Trial Judgment)* (Opinion and Judgment) ICTY-94-1-T (7 May 1997) para 651.

<sup>126</sup> Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (3 May 1993) UN Doc S/25704.

<sup>127</sup> *ibid* para 48, 13; *Tadić Trial Judgment* (n 125) para 652; Yoram Dinstein, 'Case Analysis: Crimes Against Humanity After Tadić' (2000) 13(2) Leiden Journal of International Law 373, 391.

<sup>128</sup> *Tadić Trial Judgment* (n 125) para 652.

<sup>129</sup> Ambos and Wirth, 'The Current Law of Crimes against Humanity' (n 125) 43-44; Van Schaack, 'The definition of Crimes against Humanity' (n 17) 837-838.

<sup>130</sup> *Tadić Trial Judgment* (n 125) para 283.

<sup>131</sup> *ibid* para 284.

<sup>132</sup> *Ibid* para 284.

In addition to the ICTY, the element of discrimination also played an important role for the International Criminal Tribunal for Rwanda (ICTR). The chapeau of Article 3 of its Statute states

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds[.]<sup>133</sup>

As O’Keefe observes, ‘the ICTR Statute is alone to date among the constituent instruments of international criminal courts in stipulating [...] that the attack on the civilian population be ‘on national, political, ethnic, racial or religious grounds.’<sup>134</sup> By doing so, the ICTR statute makes a discriminatory requirement relevant for *all* crimes against humanity. This was a departure, at least on a textual interpretation, from the definitions of crimes against humanity in previous international instruments, such as the Nuremberg Charter,<sup>135</sup> Control Council Law 10,<sup>136</sup> and the Statute of the ICTY.<sup>137</sup>

During the appeal of one of its early cases – the *Akayesu* case – the ICTR addressed the question of the nature of the discriminatory intent contained in its Statute. In assessing its own Statute, the Appeals Chamber found that ‘the Security Council decided to limit the jurisdiction of the Tribunal over crimes against humanity solely to cases where they were committed on discriminatory grounds.’<sup>138</sup> This discriminatory requirement could be compared to the war nexus requirement in the ICTY’s Statute, as its purpose is to ‘[narrow] the scope of the jurisdiction, which introduces no additional element in the legal ingredients of the crime as these are known in customary international law.’<sup>139</sup> Thus, the Appeals Chamber in *Akayesu* held that the discriminatory requirement contained in Article 3 of the ICTR’s Statute should be considered a jurisdictional, rather than substantive element of crimes against humanity.<sup>140</sup> That would suggest that the court did not explicitly want to subscribe to a victim-based view of the nature of crimes against humanity; rather, the particularities of their Statute required them to take the discriminatory element into account.

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<sup>133</sup> Statute of the International Tribunal for Rwanda (*ICTR Statute*), art 3.

<sup>134</sup> Roger O’Keefe, *International Criminal Law* (Oxford University Press 2015), 142. See also McAuliffe deGuzman, ‘The road from Rome’ (n 122) 364. But it is worth noting that the hybrid Extraordinary Chambers in the Courts of Cambodia do include this requirement; see Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, art 5.

<sup>135</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, including the Charter of the International Military Tribunal (*Nuremberg Charter*) (1951) 82 U.N.T.S. 280, art 6.

<sup>136</sup> CCL 10 (n 1) art II.

<sup>137</sup> Statute of the International Criminal Tribunal for the former Yugoslavia (*ICTY Statute*), art 5.

<sup>138</sup> *Prosecutor v Akayesu (Akayesu Appeals Judgment)* ICTR-96-4-A (1 June 2001) para 464.

<sup>139</sup> *Ibid* 465.

<sup>140</sup> Larissa J Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law* (Martinus Nijhoff Publishers 2005), 175; Guénaël Mettraux, ‘Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda’ (2002) 43(1) *Harvard International Law Journal* 237, 268-269; Ratner, Abrams, and Bischoff, *Accountability for human rights atrocities* (n 123) 66.



More explicit legal condonement of crimes against humanity as essentially discriminatory comes from French domestic jurisprudence. The *Touvier* and *Barbie* cases are of particular interest. In both cases, the applicable French law was based on the Nuremberg Charter.<sup>141</sup> In *Touvier*, the Court of Cassation held that crimes against humanity 'are ordinary crimes committed under certain circumstances and for certain motives specified in the text that defines them'.<sup>142</sup> That formulation would fit with a conception of crimes against humanity that requires a connection to war (i.e. "certain circumstances") as well as an additional, implicit element of discriminatory intent (i.e. "certain motives").

And indeed, in the *Barbie* case, the Court of Cassation required that crimes against humanity be committed in furtherance of 'hegemonic state action', 'in systematic fashion', and 'against persons because they belong to a racial or religious group, [or because they are] adversaries of this policy'.<sup>143</sup> Thus, the Court very clearly considered discriminatory intent an essential element of crimes against humanity. In doing so, 'the Court has [...] given crimes against humanity an autonomous place among French crimes, as crimes that are, above all, characterized by the intent of the perpetrator to deny the humanity of the victim'.<sup>144</sup> This, of course, is in line with the theorising of Graven, mentioned above.<sup>145</sup>

This jurisprudence of the French courts has been heavily criticised. Sadat Wexler, for example, states that their interpretation of crimes against humanity as requiring discriminatory intent is 'foreign to Article 6(c) [of the Nuremberg Charter] and [...] arguably erroneous'.<sup>146</sup> This erroneous interpretation may have been motivated in part by wishing to 'exonerate [...] the Vichy government from wrong'<sup>147</sup> or 'to shield the French government from responsibility for acts in the Algerian War'.<sup>148</sup> If one adopts this slightly cynical view, then similar motivations may also provide an explanation for the consistent (and consistently unsuccessful) French attempts to include a discriminatory requirement as a substantive element of the definition of crimes against humanity in international legal instruments – for example during the drafting of the Rome Statute of the International Criminal Court, where they received 'virtually no support'.<sup>149</sup> The majority view prevailed, and a general discriminatory requirement was not included in the definition of crimes against humanity in the Rome Statute.<sup>150</sup>

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<sup>141</sup> *ibid* 64-65.

<sup>142</sup> Sadat Wexler, 'The interpretation of the Nuremberg Principles' (n 120) 326; *Judgment of February 6, 1975*, Cass. crim., 1975 D.S. Jur. 386.

<sup>143</sup> Sadat Wexler, 'The interpretation of the Nuremberg Principles' (n 120) 342; *Judgment of December 20, 1985*, Cass. crim., 1986 J.C.P. II G, No. 20 129.

<sup>144</sup> Sadat Wexler, 'The interpretation of the Nuremberg Principles' (n 120) 343.

<sup>145</sup> Sadat Wexler also observes this, see *ibid* 347 at n 241.

<sup>146</sup> *ibid* 359.

<sup>147</sup> *ibid* 355.

<sup>148</sup> *ibid* 355; Phyllis Hwang, 'Defining crimes against humanity in the Rome Statute of the International Criminal Court' (1998) 22 *Fordham International Law Journal* 457, 475.

<sup>149</sup> Hwang, 'Defining crimes against humanity' (n 129) 496.

<sup>150</sup> Darryl Robinson, 'Defining "crimes against humanity" at the Rome conference' (1999) 93(1) *American Journal of International Law* 43, 46.

Based on the legal development of the requirement of a discriminatory intent, it may seem tempting to simply consider its inclusion accidental or pragmatic, done in order to pursue a legal or political goal unrelated to establishing the conceptual core of crimes against humanity. But I think this would be unjustified. As we have seen, indeed, the legal development of crimes against humanity has led to a relatively widely accepted view both in theory and practice that a discriminatory intent is not required for a crime against humanity to exist. However, this does not detract from the continued sway that victim-based accounts have. The writings of Arendt and May, discussed above, provide two prominent examples. The intuitions underpinning these accounts – that there is something special about the types of crime that target individuals because of their (putative) membership of a group – are valid, and widely shared. Criticisms of these intuitions mentioned in this chapter, for instance that a focus on discrimination puts other horrific crimes meriting the label outside of the remit of crimes against humanity, are mostly criticisms of an *exclusive* focus on discrimination. In other words, they are criticisms of *exclusively* victim-based accounts.

I do not want to make any claims around exclusivity. In fact, in this thesis I argue the opposite: no one type of account (victim-based, perpetrator-based, or act-based) can incorporate the myriad of crucial intuitions around the conceptual core of a crime against humanity. A comprehensive account of crimes against humanity should be able to explain and integrate these diverging intuitions, including those underpinning victim-based accounts that have been discussed in this section.

### 2.3 Perpetrator-based accounts

We now turn to an overview of perpetrator-based accounts. Such accounts claim that the special nature of the concept of crimes against humanity is best explained by reference to the particular type of perpetrator who commits those crimes.

Let us start with Vernon's account. Unlike Arendt, Vernon does not subscribe to the view that humanity itself, understood as humankind and 'imagined as an entity of some kind', should be considered a *victim* of crimes against humanity.<sup>151</sup> He takes issue with Arendt's formulation of the harm that crimes against humanity causes to humankind, that is, that it attacks human diversity which is an essential characteristic of humanity. According to Vernon, 'to make one's human status depend on one's difference from others is [to] miss the unconditional wrongness of the injury suffered.'<sup>152</sup> At the same time, Vernon does not want to define crimes against humanity in terms of the acts themselves. Act-based accounts, in his view, fail because they cannot sufficiently discriminate between particularly severe or sadistic "domestic crimes" and crimes against humanity. Both are inhumane, and it is not feasible to create some sort of hierarchy or calculus of evil. What is required to explain the special nature of crimes against humanity is a different *kind* of crime.<sup>153</sup>

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<sup>151</sup> Vernon, 'What is Crime against Humanity?' (n 11) 239.

<sup>152</sup> *ibid* 241.

<sup>153</sup> *ibid* 238.

If not their inhumaneness or the fact that they somehow victimise humankind itself, then what is it about crimes against humanity that makes them distinctive? Vernon offers a strongly perpetrator-focused explanation. He argues that we should conceptualise crimes against humanity 'as an abuse of state power involving a systematic inversion of the jurisdictional resources of the state.'<sup>154</sup> A crime against humanity, according to Vernon, 'is a particular complex of events, reflecting three central features of state power, that undermines legitimacy in an especially radical way', thereby satisfying the conditions that trigger this mental scheme.<sup>155</sup>

These three features are the state's 'large-scale administrative capacity', its 'local authority', and its ability to wield power over a territory.<sup>156</sup> As a result, malicious states can use their authority to manipulate citizens to 'morally exclude' certain groups of people and their territorial control and administrative capacity to prevent these groups from fleeing, and ultimately to attack them. These are all 'features of the clearest cases of crime against humanity.'<sup>157</sup> The perverted crux of a crime against humanity is that state features are corrupted through what Vernon calls a 'systematic inversion.'<sup>158</sup> Instead of using them to pursue legitimate goals of a state, they are employed in an attack 'upon the guiltless' – that is, the civilian population.<sup>159</sup>

A similar view of crimes against humanity is offered by David Luban. He commences his account by noting 'five defining features of crimes against humanity' as defined by law and applied by courts. These five features are: (i) they are inflicted on victims based on group membership, not individual characteristics; (ii) they are committed against the own citizens of the perpetrator state; (iii) they are international in the sense that state sovereignty is no barrier to their prosecution; (iv) they are committed by political groups acting in pursuance of a policy; and (v) they include 'the most abominable acts of violence and persecution.'<sup>160</sup> A successful conception of the salient characteristic of humanity attacked by crimes against humanity must account for these five features, Luban claims.<sup>161</sup>

Luban posits that a key characteristic of human beings is that we are *political* animals rather than *social* animals. Our nature requires us to live in groups, yet these groups also pose a threat to 'our individuality and individual interests'.<sup>162</sup> This is a tension we must perpetually negotiate, which we do in the political realm. The existence of this split nature leads Luban to criticise Arendt's account of crimes against humanity. We have seen above that Arendt's conceptualisation of crimes against humanity rests on the view that the essential nature of humanity is its diversity. Crimes

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<sup>154</sup> *ibid* 242.

<sup>155</sup> *ibid* 243.

<sup>156</sup> *ibid* 243.

<sup>157</sup> *ibid* 243.

<sup>158</sup> *ibid* 245.

<sup>159</sup> *ibid* 245.

<sup>160</sup> David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *The Yale Journal of International Law* 85, 109-110.

<sup>161</sup> *ibid* 91.

<sup>162</sup> *ibid* 113.

against humanity, in her view, harm humanity itself because it attacks this essential nature.

But, Luban observes, this is only half of the story. It is true that *part* of our “humaneness”, represented through the idea of us being political animals, consists in group diversity. It is a mistake, however, to ‘lump together’ our *individual* differences with our group diversity. These, according to Luban, are of a different kind.<sup>163</sup> The idea that we derive our individual identities from our group memberships is a mistake: ‘our nature as political, rather than social, animals derives from the fact that our groups often pose an existential threat to individual identity.’<sup>164</sup> Glossing over our individual identity (as Arendt does) obscures the other – individuated – half of our nature as political animals. Luban speculates that their focus on the collective element of identity can be explained by the fact that Arendt was concerned with the specific crime of genocide, rather than the more generic category of crimes against humanity. We have seen this same point made by legal authors as a criticism of the inclusion of a discriminatory intent in the legal definition of crimes against humanity.

Luban claims that the two defining characteristics of being a political animal explain the five features of the law and practice of crimes against humanity mentioned above. He considers them in turn. First, Luban notices that crimes against humanity are generally ‘inflicted on victims based on their membership in a population rather than their individual characteristics’<sup>165</sup> This is borne out in the “against any civilian population” requirement. Such an attack, which is launched against people because of a certain group membership or because they form part of a targeted population, violates both tenets of being a political animal. On the one hand it violates our need to be part of a collectivity, by attacking us for that very reason. On the other, it denies us our individuality by attacking us not because of personal characteristics, but simply because we form part of a group.<sup>166</sup>

In addition to the fact that crimes against humanity are often perpetrated against groups and their members, they are also often perpetrated *by* groups. According to Luban, this means that crimes against humanity are political crimes: they are, in his words, ‘politics gone cancerous.’<sup>167</sup> ‘As political animals,’ he writes, ‘we have no alternative to living in groups; and groups have no alternative to residing in territories under someone or another’s political control.’<sup>168</sup> A state or organisation that engages in a crime against humanity perverts the resources it has available to manage the multitude of groups within its territory and uses them in order to attack these groups instead.<sup>169</sup> This state or organisational involvement and the perversion of its resources explains characteristics (ii)-(iv). It explains why it is often the state’s own citizens that are targeted, why the state’s sovereignty must be pierced if one wishes to prosecute

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<sup>163</sup> *ibid* 115.

<sup>164</sup> *ibid* 115.

<sup>165</sup> *ibid* 116-117.

<sup>166</sup> *ibid* 116-117.

<sup>167</sup> *ibid* 117.

<sup>168</sup> *ibid* 117.

<sup>169</sup> *ibid* 117.

those responsible, and that they are usually committed in furtherance of some policy. All these characteristics follow logically, according to Luban, from the notion of a crime against humanity as an attack on our nature as a political animal – as ‘politics gone cancerous’. Like for Vernon’s account, the notion of perversion plays an important role for Luban too.

This idea of ‘politics gone cancerous’ is borne out, according to Zysset, by a legal-empirical analysis of the ICC case law of the circumstances in which crimes against humanity have been perpetrated. He suggests that there are three so-called ‘preparatory conditions’, or PCs, that can be observed in the ‘preparation of and/or in conducting’ the relevant attack.<sup>170</sup> These are the ‘systematic and persecutory control,’ the ‘extra-ordinary material and human resources’ that a state or state-like entity can muster, and ‘the State or organizational policy’ which ‘remains an important indicator of preparatory dimension of crimes against humanity.’<sup>171</sup> According to Zysset, the prototypical conditions (empirically speaking, based on an analysis of ICC cases) that have enabled the perpetration of crimes against humanity are

‘the systematic and persecutory exercise of physical control (or coercion) over an entire civilian population with the help of extra-ordinary (including lethal) resources (material and human) by an agent enjoying *de facto* authority over a large portion of territory in the name of a particular policy or ideology.’<sup>172</sup>

Another theorist who emphasises the salience of the types of perpetrators of crimes against humanity is May. We have seen above that one of the prongs of his account of crimes against humanity are group-based in the sense that victims are targeted because of their group membership. But May claims that there is a second aspect to the group-based nature of crimes against humanity: the *perpetrators* are also group-based. His account, therefore, can be said to be a hybrid account that has both victim-based (as discussed in the previous section) and perpetrator-based elements.

May asserts that the involvement of a state, or another, similar type of group, in the perpetration of the relevant crimes makes them ‘systematic rather than random.’<sup>173</sup> The ‘systematic and invidious’ nature of crimes that are perpetrated by a state, or perpetrated under its sponsorship or acquiescence, raise them above the domestic level onto the international plane.<sup>174</sup> As the state itself is behind, or at least complicit in, the crimes in question, May claims that there is a clear rationale for international intervention: the perpetrators of the crimes are unlikely to be prosecuted in any serious sense domestically.<sup>175</sup> And when a state adopts a policy of causing systematic harm,

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<sup>170</sup> Alain Zysset, ‘Refining the structure and revisiting the relevant jurisdiction of crimes against humanity’ (2016) 29(1) Canadian Journal of Law & Jurisprudence 245, 258.

<sup>171</sup> *ibid* 258-260.

<sup>172</sup> *ibid* 261.

<sup>173</sup> May, *Crimes Against Humanity* (n 19) 88.

<sup>174</sup> *ibid* 88.

<sup>175</sup> *ibid* 88.

it means that people are targeted based on ‘the characteristics picked out’<sup>176</sup> by this policy rather than their individual characteristics. As such, the threat of violence or crime spreading through a population and affecting ‘the larger community’ provides a basis for international intervention.<sup>177</sup>

Debates around the relevance of the perpetrators of such crimes are not limited to philosophical literature. Perhaps the most controversial contemporary disagreement about the legal elements of crimes against humanity concerns the inclusion of a so-called “policy element.”<sup>178</sup> This controversy is directly linked to the importance placed on the nature of the perpetrator of crimes against humanity.

Legal arguments about the policy element seem to revolve around two main questions. First, at the most general level, the question is whether a policy element is required at all. Secondly, if one does hold that this is the case, then what are the requirements as to the authorship of the policy: must it be a (pseudo) state, or could non-state organisational policies also satisfy the policy element?

*Tadić* was the first case in which a court addressed the requirement of a policy element. In its trial judgment, the Chamber noted that ‘traditionally [...] there must be some form of policy to commit [crimes against humanity]’, referring to the Dutch *Menten* case as well as the *Barbie* case in France, which both took that position.<sup>179</sup> In doing so, the Trial Chamber departed from the text of its Statute, which does not mention a policy element. Referring to both the 1991 and 1996 ILC Draft Articles, the *Tadić* Trial Chamber further ruled that ‘although a policy must exist to commit [crimes against humanity], it need not be the policy of a State.’<sup>180</sup> It added that this was a departure from the traditional “Nuremberg Conception” of crimes against humanity, which *did* require state involvement, but that customary international law had since developed a wider definition that included non-state actors.<sup>181</sup>

But not long after the *Tadić* judgments, the ICTY started taking a slightly more critical stance towards the inclusion of the policy requirement for all crimes against humanity.<sup>182</sup> In *Kupreškić*, for example, the court did adhere to the *Tadić* requirements but included the following, rather cryptic, passage:

With regard to the “form of governmental, organisational or group policy” which is to direct the acts in question, the Trial Chamber has noted that although the concept of crimes against humanity necessarily implies a

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<sup>176</sup> *ibid* 88.

<sup>177</sup> *ibid* 88.

<sup>178</sup> Robert Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2014), 236; Mohamed E Badar, 'From the Nuremberg Charter to the Rome Statute: defining the elements of crimes against humanity' (2004) 5 *San Diego International Law Journal* 73, 112; Charles C Jalloh, 'What makes a Crime against Humanity a Crime against Humanity' (2012) 28 *American University International Law Review* 381, 382.

<sup>179</sup> *Tadić Trial Judgment* (n 125) para 653.

<sup>180</sup> *ibid* para 655.

<sup>181</sup> *ibid* para 654.

<sup>182</sup> Ambos and Wirth, 'The Current Law of Crimes against Humanity' (n 125) 29.

policy element, there is some doubt as to whether it is strictly a *requirement*, as such, for crimes against humanity.<sup>183</sup>

It is not entirely clear what the Trial Chamber is trying to do here, as the combination of upholding the *Tadić* requirements on the one hand and creating doubt as to its legal status on the other can only result in a sense of unproductive confusion. Shortly afterwards, *Kordić* took this line of reasoning further. As in *Kupreškić*, the *Kordić* Chamber noted that the requirement of some form of policy is ‘not uncontroversial’.<sup>184</sup> The *Kordić* Trial Chamber used it to conclude that ‘the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity,’<sup>185</sup> rather than a legal element of all crimes against humanity. The *Kunarac* Trial Chamber amplified the concerns first raised by *Kupreškić* and *Kordić* by emphasising – in a footnote – that ‘it is open to question whether the original sources often cited by Chambers of this Tribunal and of the ICTR support the existence of [a policy] requirement.’<sup>186</sup> The Trial Chamber refrained from answering its own question, stating that it ‘does not have to decide that point because even if there is such a requirement, it has been fulfilled in this case.’<sup>187</sup>

Thus, the ad-hoc tribunals reached a point where the initial relatively clear position propagated by the *Tadić* judgment had come under serious pressure, but without having been explicitly and authoritatively overruled. This finally happened in the *Kunarac* appeal, which was the pivotal event in the development of the ad hoc courts’ position on the issue. The relevant paragraph is copied here in full:

98. Contrary to the Appellants’ submissions, neither the attack nor the acts of the accused needs to be supported by any form of “policy” or “plan”. There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes. As indicated above, proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.<sup>188</sup>

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<sup>183</sup> *Prosecutor v Kupreškić et al (Kupreškić Trial Judgment)* (Judgement) IT-95-16-T (14 January 2000) para 551.

<sup>184</sup> *Prosecutor v Kordić & Čerkez (Kordić Trial Judgment)* (Judgement) IT-95-14/2-T (26 February 2001) para 181.

<sup>185</sup> *ibid* para 182.

<sup>186</sup> *Prosecutor v Kunarac et al (Kunarac Trial Judgment)* (Judgement) ICTY-96-23-T & ICTY-96-23/1-T (22 February 2001) para 432 at note 1109.

<sup>187</sup> *ibid* para 432.

<sup>188</sup> *Prosecutor v Kunarac et al (Kunarac Appeals Judgment)* (Judgement) ICTY-96-23-A & ICTY-96-23/1-A (12 June 2002), para 98, footnote omitted.

The reasoning behind this position was – ‘astonishingly’, according to one author – relegated to a footnote.<sup>189</sup> In this footnote, the Appeals Chamber took up the glove offered by the Trial Chamber’s unanswered question and answered it in the negative. It stated that

[t]here has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity. The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law.<sup>190</sup>

The Appeals Chamber then cited several authorities purportedly supporting the non-inclusion of a policy element and discussed and rejected several authorities that *prima facie* seemed to support its inclusion. However, the Chamber refrained from any serious substantive reasoning on the matter, which is unfortunate given its importance for the development of the concept of crimes against humanity. Unsurprisingly, this decision and the way it was presented by the Appeals Chamber was met by strong criticism. The ICTY was accused of engaging in ‘results-oriented, superficial reasoning rather than profound analysis’<sup>191</sup> and of having ‘waved the magic wand’ to ‘wish away’ the policy element.<sup>192</sup> The Chamber’s reliance on ‘customary international law’ without a comprehensive analysis of the sources it cites is not in line with what one would expect a decision regarding the content of customary international law to look like.<sup>193</sup> Irrespective of the strengths or weaknesses of these arguments, the ad hoc courts have followed this precedent since.<sup>194</sup> The *Tadić*-based low-threshold policy, with a wide potential authorship thus became obsolete for the ad hoc courts.

But the fate of the policy element at the ICC was a different one. The unease of some delegations regarding the disjunctive “widespread or systematic” criterion led to the provision laid down in article 7(2)(a) of the Rome Statute. The article states:

‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack[.]

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<sup>189</sup> William A Schabas, ‘State policy as an element of international crimes’ (2007) 98 *Journal of Criminal Law and Criminology* 953 959.

<sup>190</sup> *Kunarac Appeals Judgment* (n 188) para 98 at note 114.

<sup>191</sup> Schabas, ‘State policy as an element’ (n 170) 959.

<sup>192</sup> Jalloh, ‘What makes a Crime against Humanity’ (n 178) 400.

<sup>193</sup> Cryer and others, *An introduction to International Criminal Law* (n 178) 237.

<sup>194</sup> See for a relatively recent example *Prosecutor v Mladić (Mladić Trial Judgment)* (Judgment) ICTY-09-92-T (22 November 2017) para 3025. See also e.g., Guénaël Mettraux, ‘The Definition of Crimes Against Humanity and the Question of a “Policy” Element’ in Sadat, *Forging a Convention for Crimes Against Humanity* (Cambridge University Press 2011), 168; Jalloh, ‘What makes a Crime against Humanity’ (n 178) 397, speculating that this mass adoption may be due to the clarity of the Appeals Chamber’s conclusion rather than the strength of its reasoning).



What we are interested in here is the phrase “pursuant to or in furtherance of a State or organizational policy to commit such attack.” This phrase makes the ICC the ‘first legal instrument to include a requirement of state or organizational policy’.<sup>195</sup> The inclusion of this policy element was a way of ensuring that the disjunctive test would not be overinclusive: without it, delegates feared, a spontaneous and widespread wave of crime could, under the right conditions, theoretically be classified as a crime against humanity.<sup>196</sup> This was in line with the *Tadić* judgment, which was delivered prior to the agreement of the Rome Statute and which, as we have seen, argued that a policy element was part of customary international law.<sup>197</sup> But even before the *Kunarac* judgment overturned the policy requirement for the ad hoc courts, some authors already argued that the ICC’s definition of crimes against humanity, requiring a policy element, is in fact more restrictive than customary international law.<sup>198</sup>

With the most general question – whether a policy element is required at all – clearly answered in the affirmative by the Rome Statute,<sup>199</sup> the ICC had the task of specifying what exactly “State or organizational policy” means. As feared by some authors after the agreement of the Rome Statute,<sup>200</sup> initial PTC decisions took diverging views, with some of them setting a very high threshold.<sup>201</sup> In *Katanga*, for example, the PTC referred to the policy element as a way to ensure that the relevant attack is ‘thoroughly organised and follow[s] a regular pattern’.<sup>202</sup> As Cryer points out, this interpretation seems to imply that all crimes against humanity must ultimately be systematic – changing the disjunctive nature of the phrase “widespread or systematic”.<sup>203</sup> Later PTC decisions took less stringent positions.<sup>204</sup>

The debate about the potential authorship of a policy, which one author refers to as the ‘newest and most interesting controversy’,<sup>205</sup> was brought into sharp focus by the *Kenya Authorization Decision*.<sup>206</sup> In this decision, the PTC considered whether non-state entities committing violence, such as gangs of young men engaging in violence surrounding elections with support of political parties or businessmen, could satisfy

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<sup>195</sup> McAuliffe deGuzman, ‘The road from Rome’ (n 122) 368; Jalloh, ‘What makes a Crime against Humanity’ (n 178) 408.

<sup>196</sup> Robinson, ‘Defining “crimes against humanity”’ (n 150) 47. See also Bassiouni, *Crimes against Humanity* (n 118) 23.

<sup>197</sup> Cryer and others, *An introduction to International Criminal Law* (n 178) 237.

<sup>198</sup> McAuliffe deGuzman, ‘The road from Rome’ (n 122) 372.

<sup>199</sup> Schabas, ‘State policy as an element’ (n 170) 962.

<sup>200</sup> McAuliffe deGuzman, ‘The road from Rome’ (n 122) 372.

<sup>201</sup> Cryer and others, *An introduction to International Criminal Law* (n 178) 239; Leila N Sadat, ‘Crimes against humanity in the modern age’ (2013) 107(2) *American Journal of International Law* 334, 335.

<sup>202</sup> *Prosecutor v Katanga (Katanga Confirmation of Charges)* (Decision on the confirmation of charges) ICC-01/04-01/07 (30 September 2008), para 396. It is not required according to this decision that the policy be authored by a state or state-like body; instead, the PTC takes a wide approach to the question of potential authorship.

<sup>203</sup> Cryer and others, *An introduction to International Criminal Law* (n 178) 239.

<sup>204</sup> *Situation in the Republic of Kenya (Kenya Authorization Decision)* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09 (31 March 2010) paras 85-87. See also William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2016), 157-164.

<sup>205</sup> Cryer and others, *An introduction to International Criminal Law* (n 178) 240.

<sup>206</sup> Sadat, ‘Crimes against humanity in the modern age’ (n 201) 335.

the policy element.<sup>207</sup> The majority of the PTC came to the conclusion that ‘the formal nature of a group and the level or its organization should not be the defining criterion’<sup>208</sup> in assessing whether a group qualifies as an “organization” pursuant to article 7(2)(a) of the Rome Statute. What matters, instead, is ‘whether the group has the capability to perform acts which infringe on basic human values.’<sup>209</sup>

In a ‘compelling’<sup>210</sup> dissent which has ‘attracted much scholarly attention’<sup>211</sup>, Judge Kaul disagreed fundamentally with the reasoning of the majority in the *Kenya Authorization Decision*. The thrust of Kaul’s dissent is his historical-teleological interpretation of the concept of crimes against humanity. He argues that the contextual element of crimes against humanity requires a more specific wrong than the ‘simple’ infringement of basic human values, as the PTC majority held.<sup>212</sup> The *raison d’être* of crimes against humanity, according to Kaul, required that the authorship of a policy according to article 7(2)(a) must be of an organization that is at least state-like.

It is clear that Kaul’s dissent and the majority opinion propagate two very different conceptions of the requirements that the policy element imposes, and that they are motivated by ‘contrasting normative visions’ about the purpose of ICL.<sup>213</sup> The majority opted for a capability-based interpretation, perhaps in order to ensure protection of ‘basic human values’ in all relevant cases.<sup>214</sup> Kaul, by contrast, took a more formal approach and focused on the characteristics and structure of the relevant group rather than their capabilities.

These two positions, while taken in the context of a formal legal argument, are examples of competing types of account being put into service in order to argue for a particular interpretation of the law: act-based on the one hand, and perpetrator-based on the other. What matters for the act-based account is that the attacking group had the *capacity* to carry out the widespread and horrifying acts that they did. This is, in a sense, tautologous: clearly, when these acts happened, the capability must have been there: the most interesting part is the acts themselves. On Kaul’s view, in contrast, the structure of a group matters: in fact, it is the nature of the attacking group that contributes to the “specific wrong” of a crime against humanity.

One of the most authoritative advocates within the legal literature for the idea that crimes against humanity are characterised, in essence, as being a state crime, was Bassiouni. He posited that the nature and scale required to raise a body of crimes above the required threshold for crimes against humanity implies the involvement of

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<sup>207</sup> Claus Kreß, ‘On the outer limits of crimes against humanity: the concept of organization within the policy requirement: some reflections on the March 2010 ICC Kenya decision’ (2010) 23(4) *Leiden Journal of International Law* 855 857.

<sup>208</sup> *Kenya Authorization Decision* (n 204) para 90.

<sup>209</sup> *ibid* para 90.

<sup>210</sup> Jalloh, ‘What makes a Crime against Humanity’ (n 178) 410.

<sup>211</sup> Sadat, ‘Crimes against humanity in the modern age’ (n 201) 335.

<sup>212</sup> Kreß, ‘On the outer limits of crimes against humanity’ (n 207) 864.

<sup>213</sup> Jalloh, ‘What makes a Crime against Humanity’ (n 178) 410.

<sup>214</sup> Kreß, ‘On the outer limits of crimes against humanity’ (n 207) 589.

government institutions and resources.<sup>215</sup> This is borne out by historical examples of crimes against humanity. But he added that governmental involvement is not just a practical necessity which could be done away with if there are other ways in which perpetrators could reach scale of crime required for a crime against humanity. He argues that 'crimes committed by virtue of state policy alter the nature and character of their singular parts.'<sup>216</sup> It is this state policy that is the difference between domestic crimes of similar scope and crimes against humanity.<sup>217</sup>

His argument for this view is very similar to the philosophical accounts of Luban and Vernon discussed above. The fact that a group of perpetrators '[instrumentalize] the social system' and '[overcome] legal limitations by curtailing the rule of law and by placing those in power beyond the reach of law' in preparation of and in conjunction with the commission of large-scale atrocities, is an integral part of the concept of crimes against humanity.<sup>218</sup> There is a particular type of wrong related to this instrumentalisation of systems to use them against the people these systems are supposed to serve, done by a particular class of perpetrator.

A similar historical-teleological argument for the inclusion of a state policy element is put forth by Kaul in his dissenting opinion in the *Kenya Authorization Decision*. Kaul explicitly posits the key question about the concept of crimes against humanity that we have become so familiar with: 'what is the object and purpose of crimes against humanity? What is [its] *raison d'être* [...]? What makes it different from other common crimes which fall solely under the jurisdiction of States?'<sup>219</sup>

The answer to these questions is, according to Kaul, a matter of history and purpose. He starts his investigation by recapitulating the emergence of the category of crimes against humanity as a response to the mass crimes 'of unimaginable magnitude and atrocity' of the 20<sup>th</sup> century.<sup>220</sup> As a result of these crimes, the international community

has recognized that mass crimes committed by sovereign States against the civilian population, sometimes the State's own subjects, according to a State plan or policy, involving large segments of the State apparatus, represent an intolerable threat against the peace, security and well-being of the world, indeed a threat for humanity and fundamental values of mankind. Such values were considered fundamental by the international community as evidenced in international instruments prior to the establishment of the Military Tribunals.<sup>221</sup>

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<sup>215</sup> Bassiouni, *Crimes against Humanity* (n 118) 14.

<sup>216</sup> *ibid* 17.

<sup>217</sup> *ibid* 17.

<sup>218</sup> *ibid* 17.

<sup>219</sup> *Prosecutor v Ruto, Kosgey, and Sang (Kaul Dissent)* (Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang") ICC-01/09-01/11 (15 March 2011), para 56.

<sup>220</sup> *ibid* para 59.

<sup>221</sup> *ibid* para 59.

The reason for the involvement of the international community and, by extension, the formulation of this new category of crime, was not simply 'the fact that crimes had been committed on a large scale', but rather that they were committed 'in furtherance of a particular (in-humane) policy.'<sup>222</sup> Such a policy, especially when pursued by a State, is 'fundamentally different in nature and scale' such that 'it concerned the entire international community.'<sup>223</sup> Kaul asserts that the historical experience shows that the adoption of a state policy is the decisive factor 'which leads to [a] very grave, if not enormous risk and threat of mass crimes and mass victimization'.<sup>224</sup> These risks are 'intolerable' for all of humanity, and therefore appropriately criminalised on the international plane.<sup>225</sup> This character has not changed with the advent of modern conflicts: it is still a 'fundamental rationale' of crimes against humanity to 'protect the international community against the extremely grave threat emanating from [state] policies' in order to 'control and repress this threat to the peace, security and well-being of the world.'<sup>226</sup>

The position that Kaul propagates locates the distinctiveness of crimes against humanity in the fact that the attacks within its scope are more than the mere infringement of 'basic human values'.<sup>227</sup> Act-based accounts, in other words, do not suffice. More so than the aggregate of individual human suffering, what is at stake is a collective value: the peace, security and well-being of the world. And this value is threatened especially gravely when states adopt inhumane policies in order to attack their own citizens.<sup>228</sup> Like Bassiouni, Kaul is willing to entertain the theoretical possibility of a non-state entity reaching the same level of 'systemic injustice', but only under strict conditions and only if the entity in question is at least state-like.<sup>229</sup>

#### 2.4 Act-based accounts

Proponents of act-based accounts are not satisfied with explanations of the special nature of crimes against humanity that are based on the specific type of victim or perpetrator. According to act-based accounts, what really matters most is the horrific acts themselves that are committed in episodes of crimes against humanity.

Norman Geras' account provides a clear formulation of this view. He starts by rejecting several ways of conceptualising the nature of crimes against humanity. Some authors hold that crimes against humanity are distinctive in that they diminish the human race, a view proposed by Geoffrey Robertson. They do so, Robertson claims, 'because [of] the very fact that a fellow human being could conceive and commit them[.]'<sup>230</sup> For Geras this is not discriminating enough. There are many acts, he argues, that diminish certain groups. He gives the 'frivolous' example of the saying 'Those who can, do;

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<sup>222</sup> *ibid* para 60.

<sup>223</sup> *ibid* para 60.

<sup>224</sup> *ibid* 61.

<sup>225</sup> *ibid* 61.

<sup>226</sup> *ibid* 63.

<sup>227</sup> Kreß, 'On the outer limits of crimes against humanity' (n 207) 864.

<sup>228</sup> *ibid* 864.

<sup>229</sup> *Kaul Dissent* (n 219) para 66.

<sup>230</sup> Cited in Norman Geras, *Crimes Against Humanity: Birth of a Concept* (Manchester University Press 2015) 41.

those who can't, teach', which can be said to diminish teachers. The point is that there are many things that may diminish a group, including humanity, and that using that as a criterion does not distinguish crimes against humanity from many other acts. Additionally, it would be absurd to claim that the mere fact that something diminishes a group (say, the aforementioned saying that diminishes the group "teachers") should be punishable as a crime at all.<sup>231</sup>

A second approach Geras considers lacking is the claim that a crime against humanity threatens the peace and security of mankind, thereby offending against humanity, understood as the international community.<sup>232</sup> According to Geras, there is a fundamental flaw in this conception. He states that even genocide, the most archetypal and stringently defined form of a crime against humanity, may not threaten the peace and security of mankind. If it is 'localized within a particular national territory' and 'left to run its course', it might well be the case that apart from the obvious threat to the targeted group, everyone else – mankind at large – is safe.<sup>233</sup> In fact, he continues, intervention in the on-going genocide might even *jeopardise* the peace and security of the wider international community.<sup>234</sup> Of course, Geras objection is based on a particular – perhaps relatively thin – understanding of the security of mankind. If one would take an Arendtian view, for example, and hold that the essential characteristic of mankind is diversity, then it would be plausible to argue that a genocide would in and of itself threaten the security of mankind.

According to Geras, the core of the concept of crimes against humanity comprises two 'fundamental' components.<sup>235</sup> First, crimes against humanity are 'inhumane acts [...] of beyond a certain level of seriousness.'<sup>236</sup> They are often referred to as 'grave', 'atrocious', or a range of other adjectives, in order to emphasise their seriousness.<sup>237</sup> The simple notion that crimes against humanity are inhumane acts must be modified: crimes against humanity are 'inhumane acts of and beyond a certain threshold of gravity of seriousness.'<sup>238</sup> Geras uses 'inhuman acts' – as opposed to 'inhumane acts' – as a shorthand for this formulation.<sup>239</sup>

Of course, this 'certain threshold of gravity' must be further defined. What kind of acts would qualify as inhuman? This is where the second fundamental component comes into play. According to Geras, inhuman acts are those which are crimes 'against the human status or condition.'<sup>240</sup> We should be careful not simply to equate this notion with crimes against human dignity, especially when we understand dignity in Kantian

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<sup>231</sup> *ibid* 42.

<sup>232</sup> *ibid*. This explanation of crimes against humanity's distinctiveness is mentioned, for example, in Robertson, *Crimes Against Humanity* (n 18) 330 and Egon Schwelb, 'Crimes against humanity' (1946) 23 *British Yearbook of International Law* 178, 195.

<sup>233</sup> Geras, *Crimes Against Humanity: Birth of a Concept* (n 230) 43.

<sup>234</sup> *ibid* 43.

<sup>235</sup> *ibid* 49.

<sup>236</sup> *ibid* 49-50.

<sup>237</sup> *ibid* 50.

<sup>238</sup> *ibid* 51.

<sup>239</sup> *ibid* 51.

<sup>240</sup> *ibid* 51-52.

fashion, requiring that human beings never be treated as mere means.<sup>241</sup> Doing so would, again, be too indiscriminate: human beings are constantly treated as mere means by one another in myriad situations.<sup>242</sup>

A combination of this notion of a crime against the human status and the requirement that they be above a certain threshold of gravity is more promising. Geras claims that the types of acts that exhibit these two characteristics harm the ‘fundamental interests as a human being *just as such*’ of those who are victimised.<sup>243</sup> These are acts that cause ‘severe, or (as frequently) irreversible, damage to their well-being and their lives.’<sup>244</sup> This idea corresponds to the notion of ‘basic human rights’, which Geras holds to be universal and to apply ‘across all the cultural and other specificities that make individual human beings as different from one another as they are.’<sup>245</sup> This account is fundamentally different from accounts we have seen so far, in that it focuses on the fact that we all have fundamental interests – basic human rights – that deserve protection. The status of the victim, or the type of perpetrator, is not relevant. What is relevant is the acts themselves.

How can we square this approach with the fact that all legal formulations of the concept have included at least some sort of contextual requirement for acts to qualify as crimes against humanity? For Geras, as well as a number of scholars he cites,<sup>246</sup> it makes sense to think of the concept of crimes against humanity as a correlative of human rights.<sup>247</sup> He posits that the idea that fundamental human rights must be protected, even against a citizen’s own state, was the driving force behind the inclusion of the notion of crimes against humanity in the Nuremberg Charter.<sup>248</sup> But this emergent notion contradicted, at least to an extent, the equally important notion of state sovereignty which, as Geras observes, was *also* a ‘vehicle and guarantor of the very same human rights [...] because there is no other or safer route to the mutual protection of human beings than through their living together in self-determining political communities.’<sup>249</sup>

Consequently, the history and development of the concept of crimes against humanity – as we have seen – shows an on-going attempt to demarcate it from domestic crimes. Without some sort of demarcation, it is difficult to understand why international prosecution is justified according to Geras’ act-based account. A single particularly horrific crime, for example, may well be an inhuman act, which blatantly violates the victim’s basic human rights, but not many people would think that these crimes are appropriately tried on the international plane.

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<sup>241</sup> Kant, *Toward Perpetual Peace* (n 74) 38: “The practical imperative will therefore be the following: So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”

<sup>242</sup> Geras, *Crimes Against Humanity: Birth of a Concept* (n 230) 53.

<sup>243</sup> *ibid* 53.

<sup>244</sup> *ibid* 53.

<sup>245</sup> *ibid* 54.

<sup>246</sup> *ibid* 76. Citing Van Schaack, Luban, deGuzman, Lippman, and Zoller.

<sup>247</sup> *ibid* 75-76.

<sup>248</sup> *ibid* 75-77.

<sup>249</sup> *ibid* 78.

But, Geras tells us, trying to formulate the right demarcation is a problematic venture given the 'human rights groundwork' that he believes undergirds the notion of crimes against humanity. This is because many of the proposed demarcations are, in his words 'insensitive to human rights constraints'.<sup>250</sup> The war nexus – which played a significant role in the early development of crimes against humanity – is 'logically extrinsic to what the offence of [crimes against humanity] aimed to prohibit.'<sup>251</sup> While it is true that the presence of war increases the likelihood that basic human rights will be violated, it is by no means a necessary condition. Second, to demarcate crimes against humanity from other crimes by requiring the involvement of a state is liable to 'exactly the same kind of worry.'<sup>252</sup> Theoretically, it might make sense to require state involvement, as this involvement is a neat justification for international involvement overriding the perpetrator state's sovereignty. It is also true that 'state delinquency [...] provides a facilitating context for extreme human rights violations'; but again, Geras tells us, this is not a *necessary* condition for their occurrence.<sup>253</sup> The final attempt at demarcation Geras rejects is also familiar to us: it is the view that crimes against humanity are different because they include a discriminatory element.<sup>254</sup> For Geras, the idea of an attack on one's human status has little to do with attacking someone for their group membership as, for example, it does for Arendt or May. What matters is that the attack violates the victim's basic human rights. Whether or not this is done for discriminatory reasons is irrelevant.<sup>255</sup>

With three potential limitations on the scope of jurisdiction over crimes against humanity – a war nexus, state involvement, and discriminatory element – rejected, is there any limitation that Geras does accept? Is there a way to feasibly demarcate crimes against humanity from domestic crimes without, as the other attempts do, doing injustice to the human rights framework underpinning them? Geras claims that the only criterion 'that has secured widespread and lasting agreement' is that of scale.<sup>256</sup> This corresponds to the legal requirement that the relevant attack must be widespread or systematic. Pragmatically, Geras agrees that there is a justification for limiting international prosecutions for crimes against humanity to crimes above a certain threshold of scale.<sup>257</sup> He does so for two reasons. First, it is likely that smaller-scale violations of basic human rights can be dealt with by municipal law and law enforcement. Therefore, there is no need for international intervention in such cases. Secondly, even if there *were* a need for international intervention in each case of a violation of basic human rights, there are not nearly enough resources to do so under the present constellation of international organisations and courts. In that light, it makes sense to apply a criterion of scale to select which cases to hear.<sup>258</sup>

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<sup>250</sup> *ibid* 79.

<sup>251</sup> *ibid* 84.

<sup>252</sup> *ibid* 85.

<sup>253</sup> *ibid* 85.

<sup>254</sup> *ibid* 86.

<sup>255</sup> *ibid* 87-88.

<sup>256</sup> *ibid* 92.

<sup>257</sup> *ibid* 93.

<sup>258</sup> *ibid* 93.

However, Geras emphasises that he believes this criterion should only be considered 'an operational trigger'.<sup>259</sup> It has nothing to do with what he calls the 'pure definition' of a crime against humanity which defines them are inhuman acts – inhumane acts beyond a certain threshold of gravity. This pure definition does not require a particular scale on which these inhuman acts occur. In fact, on Geras' conception of crimes against humanity, a single act that meets this threshold qualifies for this pure concept. This, he claims, is in keeping with 'the ambition of the relevant body of international law' that all 'violations of the integrity of the human person' are proscribed, and that those who commit such violations are branded criminals against humanity.<sup>260</sup> If one were to make scale an integral part of the concept, Geras warns, then the law and theory pertaining to crimes against humanity is at risk of descending into some sort of 'charnel-house casuistry', a 'blood-curdling calculus of murder, torture and enslavement.'<sup>261</sup>

A similar though perhaps slightly more radical view is offered by Renzo. These acts – such as murder, or rape – 'constitute a serious attack on the human dignity of [their] victims' and, as such, '*deny their status of human beings*'.<sup>262</sup> They do so by virtue of violating one or more basic human rights. Such violations can be understood as an attack upon the humanity of the victim, 'and it is in this sense that they are to be considered against humanity.'<sup>263</sup>

Like Geras' account, the notion of (basic) human rights does a lot of work here too. Renzo makes explicit several commitments underpinning the 'traditional' notion of human rights he employs.<sup>264</sup> According to this notion, the purpose of human rights is 'to protect the dignity attached to the status of human being.'<sup>265</sup> The rights that emanate from this dignity belong to all human beings, irrespective of geographical location, economic or social status, or domestic legislation of the state they reside in. These are the two key features of this notion of human rights: they are justified by reference to human dignity, and they are pre-institutional in that they have an existence independent of whether they are enshrined in law.<sup>266</sup>

All human beings, according to Renzo, have a right to 'live a life of dignity', which is possible only if they are not treated in ways that prevent this from happening. Human rights protect us against such treatment, guaranteeing a 'minimally decent life.'<sup>267</sup> Crimes against humanity, then, are exactly the types of treatments that human rights aim to protect us against – they are violations of our 'most important human rights.'<sup>268</sup> If these rights are violated, the victims' humanity is denied because they are treated

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<sup>259</sup> *ibid* 93.

<sup>260</sup> *ibid* 94.

<sup>261</sup> David Luban, 'The Legacies of Nuremberg' (1987) 54(4) *Social Research* 779, 788-790.

<sup>262</sup> Massimo Renzo, 'Crimes against Humanity and the Limits of ICL' (2012) 31 *Law and Philosophy* 443, 449.

<sup>263</sup> *ibid* 449.

<sup>264</sup> *ibid* 450.

<sup>265</sup> *ibid* 450.

<sup>266</sup> *ibid* 450.

<sup>267</sup> *ibid* 451.

<sup>268</sup> *ibid* 451.



'as if [they] did not have those basic protections that all human beings are entitled to' – they are, in other words, treated 'as if [they] were not human.'<sup>269</sup> These basic human rights should be distinguished from human rights in a wider sense, which may also include such rights as 'paid holiday'.<sup>270</sup> The difference is that basic human rights are required for a minimally decent life, whereas non-basic human rights are involved in flourishing or leading a happy life.<sup>271</sup>

This approach to the distinctiveness of crimes against humanity is summarised well by Yovel: crimes against humanity are crimes that 'obliterate (permanently or temporarily) or attempt to obliterate the person *qua* human.'<sup>272</sup> This view is appealing because of its conceptual simplicity: because it is an act-based account, it establishes the special nature of crimes against humanity without having regard to the motives behind them or the context in which they occur. However, we have seen that many scholars writing on the subject have rejected the view that crimes against humanity are simply inhuman(e) acts, because they did not think this would be distinctive enough. After all, is a single, domestic murder not also inhuman(e)? Does that not also obliterate its victim *qua* human? And, if so, what is the difference between such a murder and a crime against humanity?

Geras' answer to these questions was to introduce an "operational requirement" of scale. This allowed him to claim that there is no *conceptual* difference, but that there are good reasons to keep isolated inhumane acts outside of the remit of international law. Renzo wants to move away from the notion that certain type of harm is required in order to involve the international community. Instead of harm, he wants to ground the justification for international intervention in the idea of accountability.<sup>273</sup> On this view, perpetrators of crimes against humanity may justifiably be prosecuted internationally not because they have harmed humanity, but because – for reasons to be explained in what follows – they are accountable to the international community for such crimes.

Renzo's use of accountability rather than harm 'relies on a conception of criminal law defended by Antony Duff.'<sup>274</sup> According to this conception, crimes are considered public wrongs because they 'are the kind of wrongs for which we are accountable to the members of our political community.'<sup>275</sup> Duff claims that we should think of accountability as a three-point relationship. It entails being answerable for something, to someone, and by virtue of occupying a particular role.<sup>276</sup> That means that we are answerable for different things to different people, based on different relationships and roles. Renzo gives the example of a person being answerable to colleagues within her

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<sup>269</sup> *ibid* 451.

<sup>270</sup> *ibid* 453.

<sup>271</sup> *ibid* 453.

<sup>272</sup> Jonathan Yovel, 'How Can a Crime Be against Humanity? Philosophical Doubts concerning a Useful Concept' (2006) 11 *UCLA Journal of International and Foreign Affairs* 39, 55.

<sup>273</sup> Renzo, 'A Criticism of the International Harm Principle' (n 20) 454.

<sup>274</sup> *ibid* 454.

<sup>275</sup> *ibid* 454.

<sup>276</sup> *ibid* 455; Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart Publishing 2009), 23.

academic department for a missed funding application deadline, by virtue of her duties as an academic, but not to her parents for missing that same funding deadline. Her role of academic is irrelevant in the relationship with her parents – there, the role of child is salient.<sup>277</sup>

In a domestic setting, the idea that we are answerable for something, to someone, and by virtue of a particular role, can justify criminal responsibility if we claim that all members of society occupy the role of citizen.<sup>278</sup> That role means that we are answerable to other members of the political community that we are a citizen of for the wrongs that ‘violate [its] foundational values.’<sup>279</sup> Call these ‘public wrongs’.<sup>280</sup> But not all public wrongs are necessarily criminal wrongs. We can be justifiably held answerable for behaviour that may be criticised by our political community, or for which we can be censured, without incurring criminal liability. Only a subset of public wrongs – those that ‘cross a given threshold of seriousness’ – should be included in the criminal law.<sup>281</sup>

These are the conceptual tools Renzo wants to apply to international criminal law, and in particular to crimes against humanity. He claims that, like answerability to a political community by virtue of being a citizen, it also makes sense to think of being answerable for certain actions ‘to our fellow human beings’ by virtue of our identity, or role, as a human being.<sup>282</sup> Once we are answerable to all fellow human beings for behaviour that crosses the abovementioned threshold of seriousness, international punishment will be justified.<sup>283</sup>

The crux of crimes against humanity’s international relevance can be found in the community to which perpetrators are answerable. The distinction between domestic crimes and crimes against humanity maps onto the distinction between criminal behaviour for which we are answerable to a domestic political community, and criminal behaviour for which we are answerable to humanity.<sup>284</sup> This latter mode of answerability arises, according to Renzo, from crimes that fit his conceptual mould of crimes against humanity; that is, crimes that violate basic human rights.<sup>285</sup>

Recall that Renzo’s view of basic human rights relies on the idea that they are pre-institutional. Therefore, we are under an obligation to refrain from violating them regardless of the political community we are part of. This would hold even in a state of nature, because the obligation emanates from our role as a human being, not from our role as a citizen.<sup>286</sup> It is not contingent on any other factors. This is the reason why I referred to Renzo’s account as “perhaps more radical”. Unlike Geras, he does not see

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<sup>277</sup> Renzo, ‘Crimes against Humanity’ (n 262) 455.

<sup>278</sup> *ibid* 456.

<sup>279</sup> *ibid* 456.

<sup>280</sup> *ibid* 456.

<sup>281</sup> *ibid* 456.

<sup>282</sup> *ibid* 456.

<sup>283</sup> *ibid* 457.

<sup>284</sup> *ibid* 457.

<sup>285</sup> *ibid* 458.

<sup>286</sup> *ibid* 458.

a role for a certain magnitude or scale in order to justify international treatment of crimes against humanity. For Renzo, the acts themselves by their very nature make the perpetrators answerable to the community of humanity, as a result of their being an attack on pre-institutional human rights.

The arguments made in this section might appear to be slightly further removed from the legal realities of the concept of crimes against humanity than those surveyed in the sections on victim-based and perpetrator-based accounts. However, the notion of there being something special about the acts themselves that are committed during episodes of crimes against humanity also plays a role in the legal literature and case law. Act-based views on the nature of crimes against humanity are often at the root of criticisms of elements of legal definitions – such as a war nexus, discriminatory intent, or policy element – that appear extraneous to the conceptual core according to some legal authors and courts.

Let us start with the war nexus, to which we have referred in passing several times when discussing the various accounts. The first time crimes against humanity were formally recognised in a legal instrument and made justiciable, was in article 6(c) of the Nuremberg Charter. The relevant passages of article 6 are as follows:

#### *Article 6*

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:–

- (a) *Crimes against peace* [...];
- (b) *War crimes* [...];
- (c) *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war,<sup>287</sup> or persecutions on political racial or religious grounds in execution of or in connection with any crime within

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<sup>287</sup> It is worth noting that the initial text of article 6(c) had a semicolon between “before or during the war; or persecutions on political racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal” which seemed to indicate that the requirement of being connected to another crime within the jurisdiction of the Tribunal applied only to persecutions. To remove any ambiguity and confirm that this connection was required for all crimes against humanity, the semicolon has been replaced by a comma as a result of the Berlin protocol (1945). See e.g., Schwelb, ‘Crimes against humanity’ (n 232) 193-194; Dinstein, ‘Case Analysis: Crimes Against Humanity After Tadić’ (n 127) 383.

the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>288</sup>

In its Nuremberg Judgment, the IMT confirmed that crimes against humanity had to have a connection to the war and interpreted this connection strictly. As Schwelb writes:

the [IMT], in interpreting the notion of crimes against humanity, lays particular stress on that provision of its Charter according to which an act, in order to come within the notion of a crime against humanity, must have been committed in execution of or in connexion with any crime within the jurisdiction of the Tribunal[.]<sup>289</sup>

The legal nature of the war nexus at Nuremberg is contested. It is not clear from the wording in the Nuremberg Charter whether it forms part of the substantive definition of crimes against humanity, or whether it is a jurisdictional limitation specific to the Nuremberg Charter.<sup>290</sup> The IMT itself did not address this issue.<sup>291</sup> If the former is true, then one of the essential characteristics of the legal concept of crimes against humanity as formulated at Nuremberg, is that the enumerated crimes must be committed during, or in connection with, war. Similar crimes that lack such a connection simply are not crimes against humanity. If, however, the war nexus was purely jurisdictional, then the legal concept of crimes against humanity may apply to a much wider range of conduct. Under that conception, the IMT simply was given jurisdiction over a narrow and incomplete set of crimes against humanity rather than the full range of such crimes.<sup>292</sup>

Since Nuremberg, subsequent developments in the legal definition and interpretation of crimes against humanity have led to the war nexus being removed as an element of the crime. One of the early international cases in which the nature of the war nexus was addressed the *Tadić* case at the ICTY. The Trial Chamber referred to the war nexus as peculiar to Nuremberg, adding that it was not part of customary international law anymore. In doing so, it relied on the *Einsatzgruppen* case, as well as on the scholarly authority of Oppenheim and Thiam.<sup>293</sup> On appeal, the chamber held that 'the armed conflict requirement is a jurisdictional element' which is 'satisfied by proof that *there* was an armed conflict; that is all that the Statute requires, and in so doing, it

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<sup>288</sup> *Nuremberg Charter* (n 135) art 6.

<sup>289</sup> Schwelb, 'Crimes against humanity' (n 232) 205. Schwelb also notes that in the case of Streicher (one of the two defendants who were solely indicted for and convicted of crimes against humanity and not of crimes against peace or war crimes) a '*causal nexus* has been pointed out between his activities and the crimes committed on occupied Allied territory and against non-German nationals', linking them to crimes against peace and war crimes.

<sup>290</sup> Ratner, Abrams, and Bischoff, *Accountability for human rights atrocities* (n 123) 53.

<sup>291</sup> Badar, 'From the Nuremberg Charter to the Rome Statute' (n 178) 92; McAuliffe deGuzman, 'The road from Rome' (n 122) 352.

<sup>292</sup> Badar, 'From the Nuremberg Charter to the Rome Statute' (n 178) 91-92.

<sup>293</sup> *Tadić Trial Judgment* (n 125) paras 30-31.

requires more than does customary international law.<sup>294</sup> The ICTR's statute did not include a war nexus at all.

The final step in the incremental abolition of the war nexus was the drafting of the Rome Statute of the ICC. At the drafting stage, the picture of customary international law concerning the war nexus had changed markedly from when the ICTY Statute was being drafted. The *Tadić* judgments had been delivered, the ICTR Statute had omitted the war nexus altogether,<sup>295</sup> and the ILC's 1996 Draft Code explicitly argued for the absence of a war nexus due to the now-established autonomy of crimes against humanity.<sup>296</sup> Yet a significant number of delegations at the Rome Conference still felt that crimes against humanity could only be committed if they were connected to an armed conflict.<sup>297</sup> In the end, however, a large majority of states ensured that the war nexus was not included in the Rome Statute.<sup>298</sup> It was widely felt that if the war nexus 'were to be included, crimes against humanity could well be subsumed within the jurisprudence of war crimes and, thus, would be a redundant category of crimes.'<sup>299</sup>

The Rome Statute is evidence that the war nexus had decisively become obsolete from the perspective customary international law.<sup>300</sup> Legal scholars have called this 'logical,' as 'the international criminal dimension of crimes against humanity does not depend on their commission in the context of an armed conflict, but on the intensity of the violation of individual human rights.'<sup>301</sup> This, of course, is an act-based view of crimes against humanity that was pressed into service against the war nexus. In doing so, the legal definition of crimes against humanity was better able, in the language of Meron, to consider 'the tangled meshing of crimes against humanity and human rights'

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<sup>294</sup> *Prosecutor v Tadić (Tadić Appeals Judgment)* (Judgement) ICTY-94-1-A (15 July 1999), paras 249, 251. See also Ambos and Wirth, 'The Current Law of Crimes against Humanity' (n 125) 12.

<sup>295</sup> Russell, in Cameron C Russell, 'The Chapeau of Crimes against Humanity: The Impact of the Rome Statute of the International Criminal Court' (2011) 8(1) *Eyes on the ICC* 25, notes that this difference between the ICTY and ICTR statutes may have been due to the very different nature of the crimes perpetrated in Rwanda.

<sup>296</sup> ILC, 'Draft Code of Crimes against the Peace and Security of Mankind with commentaries' UN Doc A/51/10, 47-50. The commentary to article 18 – which defines a crime against humanity – refers to the fact that CCL 10, ICTR Statute, and the Genocide convention did not have a war nexus and that the *Tadić* jurisprudence qualified the ICTY's war nexus as being more than is required by customary international law.

<sup>297</sup> Robinson, 'Defining "crimes against humanity"' (n 150) 45; Hwang, 'Defining crimes against humanity' (n 148) 495. The other side equally, and more successfully used customary international law to argue that the war nexus should *not* be included. Russell, 'The Chapeau of Crimes against Humanity' (n 274) 53; Badar, 'From the Nuremberg Charter to the Rome Statute' (n 178), 95-96. See generally William A Schabas, *The International Criminal Court* (n 204) 168-170.

<sup>298</sup> Russell, 'The Chapeau of Crimes against Humanity' (n 295) 53.

<sup>299</sup> *ibid* 53.

<sup>300</sup> McAuliffe deGuzman, 'The road from Rome' (n 122); Antonio Cassese and others, *Cassese's International Criminal Law* (Oxford University Press 2013); although Schabas adds that it is not inconceivable to argue otherwise, based on the fact that a significant number of delegates at Rome Conference thought (or at least asserted) that the war nexus was part of customary international law: William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press 2011), 109.

<sup>301</sup> Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (Oxford University Press 2014), 332.

– a meshing that we have seen play an important role in accounts such as Geras’ and Renzo’s above.

Act-based views have also been used in legal literature to criticise approaches to crimes against humanity that are exclusively victim-based or perpetrator-based. We have seen this in the section above, where deGuzman and Ratner pointed out, in response to the debate about the inclusion of a discriminatory intent, that the certain acts *per se* are so heinous that they ought to be considered crimes against humanity, regardless of motive.

Similar arguments can be found in the legal literature on the policy element. Authors critical of such an element argue that the historical fact that most prosecutions for crimes against humanity to date are concerned with cases of state or quasi-state policies does not pertain to what the nature of crimes against humanity *ought* to be. Mettraux, for instance, calls the existence of state policies in previous cases of crimes against humanity a ‘factual coincidence’, and treats it descriptively rather than normatively.<sup>302</sup> He acknowledges this historical reality, but adds that it ‘says little’ about the role of a policy element in the concept of crimes against humanity.<sup>303</sup> Similar views are held by deGuzman, and Werle and Burghardt: the ‘particularities’ of certain historical conflicts does not make a state policy a ‘normatively necessary characteristic’ of crimes against humanity.<sup>304</sup>

Based on Antonio Cassese’s ‘human-being-oriented approach’, Werle and Burghardt argue that the role of the state is subordinate to a number of more important considerations.<sup>305</sup> The crux, when it comes to crimes against humanity, is not the type of perpetrator but the ‘individual’s need for protection’.<sup>306</sup> The ‘normative message’ of crimes against humanity is ‘that violations of fundamental human rights on a great scale are a threat to the peace, security, and well-being of the world if they occur intentionally, systematically and on a large scale.’<sup>307</sup> A state policy, according to Werle and Burghardt, does not make such human rights violations worse.<sup>308</sup> The acts themselves are quintessential; not who commits them.

## 2.5 Conclusion

In this chapter we have seen that we can usefully categorise approaches to defining the essential characteristics of crimes against humanity using three types. There are accounts that are victim-based, perpetrator-based, and act-based. Victim-based accounts argue that crimes against humanity are different from other types of crime based on the specific nature of the victims: they are targeted because of a (putative) membership of a target group, rather than because of their individual characteristics.

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<sup>302</sup> Mettraux, ‘The Definition of Crimes Against Humanity’ (n 194) 146, 152.

<sup>303</sup> *ibid* 146.

<sup>304</sup> McAuliffe deGuzman, ‘The road from Rome’ (n 122) 369-370; Werle and Jessberger, *Principles of International Criminal Law* (n 301) 1161.

<sup>305</sup> Werle and Jessberger, *Principles of International Criminal Law* (n 301) 1152.

<sup>306</sup> *ibid* 1153.

<sup>307</sup> *ibid* 1160.

<sup>308</sup> *ibid* 1160.

Perpetrator-based accounts hold that what makes crimes against humanity special is the nature of the perpetrators: they are state or state-like entities. Act-based accounts, finally, seek to establish the essential nature of crimes against humanity by reference to the acts of violence themselves.

Despite the nuances of each individual account, the survey of the three types of approach to the nature of crimes against humanity has surfaced several recurring themes. These are the common intuitions that seem underpin the different views of what makes a crime against humanity special.

Victim-based accounts emphasise the collective element of crimes against humanity; they are crimes not against victims are individuals, but as members of a targeted group. This indiscriminate targeting of people based on their group membership, and, in Arendt's words, the refusal to share the earth with them and therefore the desire to limit human diversity, is morally salient and raises crimes against humanity onto the international plane.

A recurring theme in perpetrator-based accounts is the notion of perversion. Several authors focus on the idea that the involvement of state or state-like entities in the commission of the types of violence seen in crime against humanity is a perversion of politics. The resources available to a state apparatus in order to allow it effectively to govern and keep its citizens safe are inverted such that they become tools in order to attack these same citizens using this incredible resource asymmetry. This fact makes crimes against humanity morally worse than other types of crime.

Act-based accounts revolve around the idea that there are specific rights – call them basic human rights – that crimes against humanity violate. The specific moral wrong here is not so much the context in which this violation occurs, but the violation itself: crimes against humanity are particularly horrifying because they are an attack on the basic humanity of the victims.

In this chapter, we have seen that victim-based, perpetrator-based, and act-based accounts have often been placed in opposition with each other. Philosophical authors present them as competing theoretical views of the essential character of crimes against humanity, and legal scholars use these types of account to propose what they believe is the correct way to interpret the developing legal norms that define a crime against humanity.

As I said in the introduction to this thesis, I do not think that considering victim-based, perpetrator-based and act-based accounts to be mutually exclusive is most productive thing to do. Instead, I believe that the intuitions that underpin these types of account are all worth taking seriously and studying in depth. There is no good reason to think that they cannot *all* be part of a comprehensive understanding of crimes against humanity. They are by no means logically exclusive; in fact, it is entirely possible – even plausible – that they all contribute to why we consider crimes against humanity to be especially morally reprehensible. In the chapters that follow I will propose and

develop an account of crimes against humanity that integrates these divergent intuitions.



### 3. Extreme power imbalances

#### 3.1 Introduction

In the previous chapter we have seen that answers to the question of what sets apart a crime against humanity from other crimes can be categorised into three types of account: victim-based, perpetrator-based, or act-based. I have claimed that each of the three types of account discussed touches on important intuitions we hold about the concept of crimes against humanity, but that an exclusive focus on one of these three types of approach does not yield a sufficiently rich account of the nature of a crime against humanity.

In this chapter I propose that an analytical framework that is better able to make sense of crimes against humanity is to conceive of such crimes in terms of the violent creation, proliferation, and exploitation of extreme power imbalances. These power imbalances have three dimensions: societal, inter-group, and interpersonal. In this chapter, I explore this conception and explain how a focus on extreme power imbalances may reconcile the divergent intuitions underpinning the types of account of crimes against humanity surveyed.

In the subsequent three chapters, I will assess the three dimensions of extreme power imbalances in more detail based on a close reading of factual findings, in order to demonstrate how the notion of extreme power imbalances operates in practice.

#### 3.2 The nature of power

Before turning to the notion of extreme power imbalances, it is important to start with a brief discussion of the notion of power itself and how it relates to crimes against humanity. There are multiple, seemingly competing, conceptions of what “power” means. Whilst my purpose here is not to offer an account of the nature of power, it is useful to discuss briefly some prominent accounts of the concept. A good starting point is notions of power that Heiskala calls “resource approaches”.<sup>309</sup> Weber’s formulation is a classic example of such an approach. According to his definition, power, existing within a given social relationship, should be understood as the ‘probability that one actor will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests.’<sup>310</sup> This type of power is about ‘forcing one’s own will on the behavior of others’.<sup>311</sup> This can apply to individual relationships, or to relationships between groups.<sup>312</sup>

The use of force or coercion to attain one’s goal is not ruled out in this conception of power; influencing the “will” of another, therefore, may simply mean forcing them to act, or to refrain from acting, in a particular way. As Heiskala points out, Weber’s conception of power can be considered a “distributive” approach. Power is something

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<sup>309</sup> Risto Heiskala, ‘Theorizing power: Weber, Parsons, Foucault and neostructuralism’ (2001) 40(2) *Social Science Information* 241, 245.

<sup>310</sup> Max Weber, *Economy and Society. An Outline of Interpretative Sociology* (G Roth and C Wittich eds, University of California Press 1978), 53.

<sup>311</sup> Jürgen Habermas, ‘Hannah Arendt’s Communications Concept of Power’ (1997) 44(1) *Social Research* 3, 3.

<sup>312</sup> *ibid* 3.

to be distributed: its possession is a zero-sum game. My having the power to influence or coerce you to do or refrain from doing something, means that you must not have that same power. A person, or group of persons, can only be powerful in a relationship with another person, or group of persons, to the extent that the other party lacks that same power.

Other authors argue that power is not something that exists in nature, and which can be taken possession of to the exclusion of others. Instead, power is a social phenomenon that 'has to be divided or allocated, but [also] has to be produced and it has collective as well as distributive functions.'<sup>313</sup> Collective power can emerge, for example from the cooperation between two parties.<sup>314</sup> Given that cooperation can create power, power cannot merely be a zero-sum game – at least not in relation to the people or groups whose power derives from cooperation.

Arendt for example, make a distinction between power and “force”, or “violence.”<sup>315</sup> For Arendt, power is not about 'the instrumentalization of another's will, but [about] the formation of a common will in a communication directed to reaching agreement.'<sup>316</sup> Power is the ability to converge upon a common goal.<sup>317</sup> Unlike Weber's conception, Arendt's power is not a zero-sum game, for there is no necessary relation between one group's ability to converge upon a common goal and another groups *inability* to do so.

In contrast to approaches such as Weber's or Arendt's, there are “structural approaches” to the concept of power, of which Foucault's analysis is perhaps the most famous example.<sup>318</sup> This approach to power is key to understanding the dynamics of crimes against humanity. Like Arendt, Foucault distinguishes power from violence. Violence may be an instrument of power, or a result of power, but in itself it does not constitute power.<sup>319</sup> According to Foucault, a relationship of power is 'a mode of action which does not act directly and immediately on others. Instead, it acts upon their actions: an action upon an action, on existing actions or on those which may arise in the present or the future.'<sup>320</sup> This is different from violence, which 'acts upon a body or upon things.'<sup>321</sup>

This Foucauldian notion of power is perhaps more diffuse than the approaches discussed above. It is a complex of relations present between people, groups, or within larger structures that affects the 'whole field of responses, reactions, results, and possible interventions' available to those who are at the 'receiving end' of that power relationship.<sup>322</sup> Understood in this relational manner, power is not something that

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<sup>313</sup> Talcott Parsons, 'The Distribution of Power in American Society' in Talcott Parsons (ed), *Structure and Process in Modern Societies* (Free Press 1960), 220-221.

<sup>314</sup> Heiskala, 'Theorizing power' (n 309) 243.

<sup>315</sup> Habermas, 'Hannah Arendt's Communication Concept of Power' (n 311) 3.

<sup>316</sup> Hannah Arendt, *On Violence* (Harcourt Brace Jovanovich 1970) 44.

<sup>317</sup> *ibid* 44.

<sup>318</sup> Heiskala, 'Theorizing power' (n 309) 245.

<sup>319</sup> Michel Foucault, 'The Subject and Power' (1982) 8(4) *Critical Inquiry* 777, 789.

<sup>320</sup> *ibid* 789.

<sup>321</sup> *ibid* 789.

<sup>322</sup> *ibid* 789.

*exists* in the world and can be taken possession of. Instead, it is something that is *produced*, as a result of 'the interplay of nonegalitarian and mobile relations'.<sup>323</sup>

This relational notion of power as something unstable that is being *produced* plays an important role in my study of crimes against humanity. We shall see that, in episodes of crimes against humanity, many of the acts and bodies of acts perpetrated by individuals and groups in the context of a certain societal constellation, can be understood as acts whose purpose is to constitute a state of domination or extreme power imbalances. These relationships feed off each other: perpetrators engage in 'relationships of force' with their victims at the same time as other perpetrators do the same with *their* victims. From these acts, then, larger and more structural power relationships start to emerge, which in turn enable more relationships of force. In this way, a vicious circle of increasingly asymmetrical power relations takes hold, fuelling the bodies of acts seen in crimes against humanity.

Above, I referred to extreme power imbalances within a relationship and a state of domination as though the two concepts may be interchangeable. For Foucault, however, this is not so. In fact, he emphasises that there is a qualitative difference between being in a power relationship, however asymmetrical this relationship might be, and the existence of a state of domination. The crux of this conceptual difference is that in power relationships there must always be a potential for resistance: it is a relationship that is in flux, the dynamic of which can be altered by the actions of both parties to the relationship. In the words of Foucault, "where there is power, there is resistance."<sup>324</sup> In a state of domination, 'the power relations, instead of being mobile, allowing the various participants to adopt strategies modifying them, remain blocked, frozen.'<sup>325</sup>

But where is this tipping point? What does it mean for power relationships to stop being mobile? There is some ambiguity within Foucault's work as to the bar that needs to be met for a power relationship to turn into a state of domination. At one point, for instance, he writes that a state of domination may exist where 'an individual or social group succeeds in blocking a field of power relations, immobilizing them and preventing any reversibility of movement by economic, political, or military means[.]'<sup>326</sup> That looks like a high threshold: a state of domination exists when any reversibility of movement within a relationship is prevented. During episodes of crimes against humanity, as we shall see, this is commonplace: individual victims and targeted groups usually do not have resources available to them that can help them reverse the extreme power imbalance that characterises the relation between attacker and victim.

Several pages later, however, Foucault seems to employ a significantly different view of what the threshold for a state of domination is. He reiterates that power relationships are mobile and that in order for there to be a power relationship, the subjects to that

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<sup>323</sup> Michel Foucault, *The History of Sexuality: An Introduction* (Robert Hurley tr, Penguin Books 1984), 94.

<sup>324</sup> *ibid* 95.

<sup>325</sup> Michel Foucault, 'The Ethics of the Concern for Self as a Practice of Freedom' in Paul Rainbow (ed), Robert Hurley and others (tr), *Ethics: Subjectivity and Truth (The Essential Works of Michel Foucault, vol 1)* (The New Press 1997), 283.

<sup>326</sup> *ibid* 283.

power relationship must at least have a certain degree of freedom: 'if one of them were completely at the other's disposal and became his thing, an object on which he could wreak boundless and limitless violence, there wouldn't be any relations of power.'<sup>327</sup> Yet this 'certain degree of freedom' can be extremely thin and almost theoretical, according to Foucault. Even in a power relationship where one side appears to have 'total power', it is still possible for the other side to kill themselves or attempt to kill the person wielding power over them.<sup>328</sup> This appears to set a significantly higher bar for a state of domination: rather than requiring the balance of power relationship to be reversible, it requires that the dominated party cannot even end the power relationship by means of suicide.

In any case, in the face of episodes of crimes against humanity, the distinction between these two notions of where a power relationship becomes domination seems of little practical import. Asking whether a victim was caught in a state of domination because they had no means or reversing the power relationship, or whether they were in fact still within a power relationship (albeit an extremely asymmetrical one) because they could technically still kill themselves seems inappropriately academic and divorced from the reality of the situation. After all, having the theoretical possibility of killing yourself does not seem like a serious means of resistance to a power relationship.

Given this fact, and given the ambiguity within Foucault's work about where exactly a power relationship becomes a state of domination, my use of the term 'extreme power imbalance' is not meant to make a claim about a relationship being a power relationship or a state of domination.

But that does not mean that the distinction is entirely without meaning for our analysis. For there is an insidious dynamic present during many acts of violence and humiliation within a crime against humanity, whereby attackers appear consciously to play with this notion of resistance, freedom and domination. This is most apparent in cases where victims are "made complicit" in their own suffering, often by being forced perform humiliating and debasing acts under threat of death or harm befalling their loved ones. In those cases, a victim is made to confront the question of whether they could (should) have refused to perform the acts that they were coerced to perform, because they had the theoretical possibility to do so.

For the purposes of my research, the main point I want to make is that the type of power I refer to when I talk of extreme power imbalances is essentially relational. It is created through acts and dynamics between individuals, groups, or within a society, and it shapes the possibilities for action. It fuels violence insofar as many of the most extremely violent acts that are performed during episodes of crimes against humanity seem to have as their purpose to strengthen and proliferate imbalances within power relationships. This is the lens that is used in the analysis that follows.

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<sup>327</sup> *ibid* 292.

<sup>328</sup> *ibid* 292.

### 3.3 *Extreme power imbalances*

Let us now move to the notion of extreme power imbalance itself and the role it plays in episodes of crimes against humanity. Based on a close reading of fact patterns of judgments in which a finding of crimes against humanity has been made, I contend that one of the most salient characteristics of crimes against humanity is the pervasive and multifaceted role played by extreme power imbalances. These extreme power imbalances operate between individual victims and perpetrators, victim-groups and perpetrator-groups, or within a society. Conceiving of crimes against humanity as the violent creation, proliferation, and exploitation of such extreme power imbalances enables us to capture what is special about crimes against humanity, while integrating the insights expressed by the types of account mentioned above and avoiding their pitfalls.

These extreme power imbalances have multiple dimensions: societal, inter-group, and interpersonal, which combine to create the specific nature and dynamics of crimes against humanity-related violence.

The societal dimension refers to the pervasive and wide-ranging power imbalances that are present within a society, and the structural effects that these have.

The inter-group dimension exists denotes situations where there is violence committed by one relatively well-defined group against another, in the context of an extreme power imbalance between these groups. This inter-group dimension is concrete and specific, rather than structural: it applies to specific groups, in a specific location, at a specific time and during a specific episode of violence. This is a key difference with the more diffuse and structural societal dimension. The involvement of groups should not be confused with state involvement. While the groups and institutions implicated are, in fact, often closely connected to a (pseudo) state, it is not *necessarily* limited to such formal institutions.

Finally, the interpersonal dimension denotes the relationship and interactions between individual perpetrators and individual victims. This may be in the context of a larger attack where there are many individual perpetrators and individual victims. Despite the presence of many such perpetrators and victims all taking part in an attack, every discrete act of violence or subjugation that forms part of that attack takes place in the interpersonal dimension.

The relationships between these three dimensions are mutually reinforcing. It is not simply a matter of a top-down establishment of extreme power imbalances, starting at the societal level and trickling down to the interpersonal. Interpersonal interactions affect the behaviour of groups, and their behaviour in turn affects the societal stance towards the people or groups of people that are targeted. The power relationships on the interpersonal plane and the acts committed in the context of these relationships are key in creating the structures of larger power imbalances between groups and within a society.

In fact, in many cases of crimes against humanity, it is possible to recognise a key point made by Foucault: that power 'comes from below'.<sup>329</sup> That is, there is no top-down domination that brings power into existence. Rather, it is through 'the manifold relationships of force'<sup>330</sup> in interpersonal or inter-group relationships that major dominations emerge. Extreme power imbalances act both as *cause* and *effect* of increasingly cruel violence and the emergence of further extreme power imbalances.<sup>331</sup> We may say that extreme power imbalances beget atrocities and that atrocities, in turn, beget extreme power imbalances. Through the interplay of these manifold relationships of force and the amplification that each of these lends to the others, a situation of domination is forged that is sustained by the actions and power relationships between people and groups of people.<sup>332</sup>

That is not to say that extreme power imbalances never display characteristics of the zero-sum approach to the notion of power. Often, through a combination of previous acts of violence that have established a power relationship and the presence of extreme measures of control, such as detention and physical restraint of victims, a situation arises where an almost absolute power exists of one party to do to the other as they please. Yet this power is still relational and, in that sense, produced by the relationship of perpetrators and victims within the context of physical control.

When we move from the interpersonal dimension to the inter-group or societal dimensions, the same observation applies: there, too, the relationship between individuals and groups combines with a context of control and societal structures to produce a power that is near-absolute. This "production" is twofold: there is the Arendtian notion of a group aligning on a purpose (that is, to subjugate another group), as well as the relational production of power when this group then interacts with the target group in order to make this power imbalance materialise.

At this stage of introducing the notion of extreme power imbalances, the observations made are still abstract and a perhaps even a little vague. In the sections that follow, these observations will be explained in more detail and the subsequent chapters will show the dynamics discussed here at work in practice. Some common themes permeate these chapters: the deliberate dehumanisation of victims, the desire to deprive victims of their potential for action (and to *confront* victims with this fact, making them complicit), and the combination of often extremely cruel violent acts and acts of control committed against victims as a result – and in pursuit – of extreme power imbalances.

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<sup>329</sup> Foucault, *The History of Sexuality* (n 323) 94.

<sup>330</sup> *ibid* 94.

<sup>331</sup> This is true for the cases under consideration, although it is conceivable that the individual level may be absent in the perpetration of the relevant crimes, for example with an 'impersonal' weapon, like a non-precision bomb, to attack a group of people.

<sup>332</sup> Foucault, *The History of Sexuality* (n 323) 94.

### 3.4 The three dimensions of extreme power imbalances

#### 3.4.1 The societal dimension

Of the three dimensions, the study of the societal dimension of extreme power imbalances is the most closely aligned to the approaches found in existing legal and philosophical accounts of the notion of crimes against humanity. Such accounts frequently focus on large-scale policies, the widespread nature of violence, and involvement of a society's highest authorities: these are all themes that will be touched on in the study of this dimension of extreme power imbalances.

At its core, a societal extreme power imbalance is present when, within the boundaries of a given society, a relationship of extreme domination exists between a subset of society over one (or multiple) others. In cases of crimes against humanity, as we shall see in what follows, such a societal extreme power imbalance will exist in combination with widespread interpersonal and group-based violence and force relationships. Or, in my terminology: in combination with the exploitation of interpersonal and inter-group extreme power imbalances, with which it is in a mutually reinforcing relationship that continuously produces these extreme power imbalances.

Often the emergence and amplification of the societal dimension of extreme power imbalances is the result of the deliberate actions of those who have the influence to fundamentally alter a society's moral conscience. It is clear that a societal constellation in which extreme and targeted violence and domination is endorsed or even encouraged forms a departure from the normal moral norms that apply in societies around the world.<sup>333</sup> These norms must somehow undergo a change until an entire society, or at least a critical mass within it, adopts a radicalised view in which atrocity becomes possible or even called for.<sup>334</sup> Following Morrow, I will refer to this process as the process of 'norm transformation.'<sup>335</sup>

Anderson, who analyses this process in the context of periods leading up to genocidal violence, points out that such norm transformations often occur as a result of a particular interplay between discourse and violent acts.<sup>336</sup> This point is similar to that made by Klusemann that in periods leading up to atrocity 'assassinations, rumors about minor atrocities or perceived threats, and agitation by elites create conflict identities.'<sup>337</sup> According to him, this is all part of a 'well-known dynamic of conflict escalation.'<sup>338</sup> The purpose of this dynamic is the 'social construction' of the enemy, which ultimately leads to a change in societal norms so that violence against, and subjugation of, the enemy group becomes morally acceptable within a given society.

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<sup>333</sup> Kjell Anderson, 'Mainstreaming Atrocity' in ED Jacob (ed), *Rethinking Security in the Twenty-First Century* (Palgrave Macmillan 2017), 143.

<sup>334</sup> *ibid* 144.

<sup>335</sup> Paul Morrow, 'Mass Atrocity and Manipulation of Social Norms' (2014) 40(2) *Social Theory and Practice* 255, 255; Paul Morrow, 'The Thesis of Norm Transformation in the Theory of Mass Atrocity' (2015) 9(1) *Genocide Studies and Prevention: An International Journal* 66, 67.

<sup>336</sup> Anderson, 'Mainstreaming Atrocity' (n 333) 144-145.

<sup>337</sup> Stefan Klusemann, 'Massacres as process: A micro-sociological theory of internal patterns of mass atrocities', (2012) 9(5) *European Journal of Criminology* 468, 471.

<sup>338</sup> *ibid* 471.

This often happens in what Collins refers to as a 'lull', comprising a period of rumour, a contagious mood, and widespread nervousness and weariness. During such a lull, a 'mass public mood' is established, full of fear and tension.<sup>339</sup> Propaganda, frequently formulated in terms of what Anderson calls 'survival discourse,' often plays a key role in the generation of this mass public mood.<sup>340</sup> Survival discourse is the type of discourse that claims the existence of an existential threat against a dominant group within society, against which this group is justified, or even required, to protect itself. Some examples of this dynamic can be seen in claims made by Bosnian Serbs that a genocide was being prepared against them, or by Hutu extremists that Tutsi had infiltrated the Rwandan state with evil intentions.<sup>341</sup> Such claims became increasingly widespread and extreme, leading to a societal atmosphere that became gradually more polarised and open to violence against the targeted groups.

But it is not just language that is used to constitute an enemy group within a society. Acts of violence, and the societal responses to such acts, are another vital aspect. Actual acts of violence, according to Anderson, make the victim group's dehumanisation, a process which is kicked off by propaganda and rumours, 'self-evident.'<sup>342</sup> Often, especially in the early phases of atrocity or in the lead-up to it, acts of violence are committed against "weak targets,"<sup>343</sup> and take on a symbolic nature - what Anderson calls 'propaganda of the deed.'<sup>344</sup> Klusemann, too, refers to this type of "preparatory" violence against weak targets or inanimate objects and livestock.<sup>345</sup>

Societal inaction in the face of such acts of violence shows - and confirms - that the targeted person or group has an utter lack of political power, and that the dominance of the attacking person or group is, if not actively encouraged, at least aided and abetted within a society. The resulting impunity 'lowers the risk of [...] attacks and also communicates the normative message that such attacks are acceptable or even lawful.'<sup>346</sup>

These circumstances may end up 'mainstreaming' acts of 'radical violence' against the perceived enemy group.<sup>347</sup> While this may not occur instantaneously, the power and legitimacy of state or territorial authorities, or the normative power of societal forces, might push reluctant individuals to 'converge toward a new radical norm.'<sup>348</sup> This new radical norm ends up, in the words of Foucault, structuring the potential for action. More specifically, it structures the range of actions that are open to a would-be perpetrator or group of perpetrators, as well as those of their victims. In combination with the myriad force relationships between individuals and groups within a society, this transformation fuels the societal dimension of extreme power imbalances.

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<sup>339</sup> Randall Collins, *Violence: a micro-sociological theory* (Princeton University Press 2008), 118.

<sup>340</sup> Anderson, 'Mainstreaming Atrocity' (n 333) 144-145.

<sup>341</sup> Section 4.2.1.

<sup>342</sup> *ibid* 145.

<sup>343</sup> Collins, *Violence: a micro-sociological theory* (n 339) 120.

<sup>344</sup> Anderson, 'Mainstreaming Atrocity' (n 333) 146.

<sup>345</sup> Klusemann, 'Massacres as process' (n 337) 472, 474.

<sup>346</sup> Anderson, 'Mainstreaming Atrocity' (n 333) 151.

<sup>347</sup> *ibid* 151.

<sup>348</sup> *ibid* 152.



As Morrow states, the successful transformation of norms that structure social and political life at least partially explains individual and group participation in large-scale crimes.<sup>349</sup> This transformation creates a situation that enables and encourages the creation and exploitation of relationships of interpersonal or inter-group domination and the extreme violence they engender. It is a situation in which victims, in addition to being powerless in the face of their immediate attacker or the discrete group of which that attacker is part, are also powerless in the face of society.

This is morally salient. Even if, practically, they would manage to escape the clutches of their immediate attackers, there would be no protection forthcoming. Society has turned its back on them and has branded them legitimate targets. They have ceased to be moral agents in the eyes of the society or territory they are part of.<sup>350</sup> There is a structural quality to their impotence. It is the pinnacle of hopelessness, and it is an important means of amplifying the effect of acts of violence in the interpersonal or inter-group dimension. This is an important theoretical distinction between the 'mere' existence of interpersonal extreme power imbalances, as might be the case in situations of child abuse or spousal battery,<sup>351</sup> and the presence of a complex of extreme power imbalances operating within each of the three dimensions.

A second important notion is perversion. The study of the societal dimension of extreme power imbalances lays bare how something quintessentially human, such as association in a society, creates the preconditions for the horrific violence, suffering, and domination involved in crimes against humanity. It is especially offensive that societal institutions, to whom resources are allocated for the purposes of governing a territory, use those resources in order to attack and exclude a subset of the relevant society. This is a clear perversion of resources and duty.

In addition to these points there is another, more abstract, reason why this norm transformation may be considered particularly morally wrong. This reason is related to Kantian moral philosophy and has to do with the thwarting of human agency. Norm transformations, Morrow claims, are often the result of intentional manipulation.<sup>352</sup> For example, much of the norm transformations we have been discussing are achieved by way of spreading rumours or propaganda, which are both clear examples of intentional manipulation. A core feature of manipulation, according to Morrow, is the 'intentional

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<sup>349</sup> Morrow, 'The Thesis of Norm Transformation' (n 335) 70.

<sup>350</sup> See for a study related to this phenomenon Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press 1998).

<sup>351</sup> It should be noted here that Claudia Card makes the argument that child abuse and spousal battery are, if not encouraged, then at least tolerated by the way in which Western societies organise relationships between men and women along patriarchal lines. She might disagree with the distinction made here, in that societal institutions in her view are complicit in sustaining institutions like motherhood and marriage, which in turn enable these types of interpersonal extreme power imbalances to persist. See e.g., Claudia Card, *The Atrocity Paradigm: A Theory of Evil* (Oxford University Press 2002), 140, 153. If she is right about this, then perhaps there are indeed fundamental similarities between crimes against humanity and widespread crimes like spousal battery and child abuse, at least in respect to the interpersonal and societal dimensions. Rather than taking away from the analytical power of extreme power imbalances, this would confirm their importance in sustaining and enabling large-scale commission of crimes which should under normal circumstances be morally reprehensible in a healthy society. See section 3.6.3 below for further discussion on this subject.

<sup>352</sup> Morrow, 'Mass Atrocity and Manipulation of Social Norms' (n 335) 258.

disruption of an agent's capacity to guide his or her actions according to relevant considerations.<sup>353</sup> In terms of the relational concept of power that we have been using, this means that manipulation impacts the "potential for action" of an agent. When this capacity is disrupted, an agent's autonomy is undermined: he or she is no longer able to 'detect particular normative considerations,' or to 'gauge the relevance of the various considerations they have detected.'<sup>354</sup> In the creation and proliferation extreme power imbalances, this is precisely the goal.

The societal dimension of extreme power imbalances clearly helps us incorporate intuitions from victim-based and perpetrator-based approaches to the concept of crimes against humanity discussed in the previous chapter. The process of norm transformations generally is usually the result of a societal dynamic that is fundamentally discriminatory. Through a combination of deliberate propaganda, carefully planned disenfranchisement, and the lack of response to violent incidents committed against members of the targeted group, a subset of society is branded as a legitimate target of violence. Society becomes a trap for whomever is deemed to be part of the targeted group, simply by virtue of their group membership.

As to the perpetrator-based accounts, the process of norm transformations generally involves societal institutions endorsing or even orchestrating the gradual exclusion and targeting of a group within the relevant society. The key insight of perpetrator-based accounts is that this perversion of duty is morally salient and contributes to the sense that there is something special about crimes against humanity. Additionally, there is a causal observation to be made: the type of norm transformations involved in mass atrocities are not easy to achieve without the involvement of societal institutions with sufficient reach to influence the public opinion and mark a given group out as having a degraded status.

The acts themselves are salient too. I have shown that one of the elements that contributes to the norm transformations that establish a societal extreme power imbalance is the lack of response to, or encouragement, of violent acts. This leads to the growing sense that the targeted group is just that: a target, which can be attacked with impunity. The more public and cruel the acts of violence involved are, the larger their impact on a societal atmosphere will be.

A final point to note is that while it may seem that there is a hierarchy in which establishing a societal extreme power imbalance is a logical precursor to the emergence of extreme power imbalances in interpersonal and inter-group relations, this would be a simplification of reality. As will become clearer in what follows, societal norm transformation is itself dependent on the commission of violence by individuals and groups – and thus dependent on the existence of interpersonal and inter-group extreme power imbalances too. The three dimensions on which extreme power imbalances act are intimately connected: rather than operate in a vacuum, they amplify

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<sup>353</sup> *ibid* 259.

<sup>354</sup> *ibid* 261. See for an account of responsibility for actions based on similar salient characteristics John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press 1998).

each other and work together to form the dynamics in which crimes against humanity occur.

### 3.4.2 The inter-group dimension

Let us move to the analysis of the inter-group dimension of extreme power imbalances. This role this dimension plays in the occurrence of crimes against humanity is multifaceted: first, there is literature to suggest that extreme power imbalances between groups play a causal or, at least, enabling role in crimes against humanity-related violence. Secondly, the presence of extreme power imbalances in inter-group relationships fuels the commission of the cruellest types of violence. Finally, I will argue that there is a particular moral salience about the violence that is committed in the context of extreme power imbalances in the inter-group dimension.

Let us start with the first point. Randal Collins, a contemporary sociologist working on the issue of violence, claims that, fundamentally, 'people are tense and fearful' about violence, including their own.<sup>355</sup> We are not just scared of being hurt, but also to 'face the other person down, to put them under one's violent control against their resistance.'<sup>356</sup> In other words, it is not easy to be violent. In order to be violent, there are barriers that must be overcome. According to Collins, this overcoming of barriers against violence is often the result of 'emotional tension' surrounding a violent or potentially violent situation turning into 'emotional energy'. This, he states, happens when one side to the situation 'appropriates the emotional rhythm as dominator' while the other 'gets caught in it as victim'.<sup>357</sup>

This is a dynamic that we see in many instances of crimes against humanity, too. Using the terminology of extreme power imbalances, we may rephrase this dynamic thus: when this shift between emotional tension and emotional energy occurs – that is, when one side 'appropriates the emotional rhythm as dominator' – an extreme power imbalance rears its head in the inter-group dimension. The relationship of dominance is established. This power relationship then structures the way in which the participating groups interact with each other, severely curtailing the possible actions of the targeted group and rousing violence from the attacking group. We will see this more concretely in the chapter dealing with the interpersonal dimension of extreme power imbalances.

Let us look at these points in some more detail. Klusemann notes that 'successful violence' requires that tension and fear surrounding a violent confrontation be overcome. This is a point that is often not considered: many explanations of crimes against humanity-related massacres focus on ethnic hostility, polarisation or other motives such as superior orders. These may, of course, play a significant role. However, the precipitation of mass atrocities also 'depends on establishing a strong emotional momentum and emotional dominance locally', that is, at the site of atrocity.<sup>358</sup> But before this dominance is reached, there often is a prolonged period of

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<sup>355</sup> Collins, *Violence: a micro-sociological theory* (n 339) 8.

<sup>356</sup> *ibid* 89-90.

<sup>357</sup> *ibid* 19.

<sup>358</sup> Klusemann, 'Massacres as process' (n 337) 470.

building up of tension; a process of 'dramatic shape[,] striving toward a climax.'<sup>359</sup> The closer the persons or groups in the conflict come to each other, the more this confrontational tension builds up.<sup>360</sup> When, for whatever reason, at the height of this confrontational tension, the opposing person or group ceases to be a threat and ends up in powerless position, the fear and tension disappear, and the 'opportunity [...] to be fully active' arises.<sup>361</sup> The sudden collapse of long built-up fear and tension causes an emotional rush and frenzied behaviour.<sup>362</sup>

The frenzied behaviour and the emotions that come with it constitute what Collins refers to as a "forward panic": a situation in which a 'mixture of aggressive energy, anger, and ebullient cheering' erupt.<sup>363</sup> Those who are in a forward panic are 'highly aroused,' and 'steamed up'.<sup>364</sup> They are swept up by an emotion that is 'rhythmic and strongly entertaining' - which is why groups or individuals who are in the midst of a forward panic keep repeating their violent acts. They do not want the state of arousal to stop.<sup>365</sup> Within the group, this emotion becomes, in a sense, collective: every member's emotional state feeds off the arousal of other members of the group, which keeps the group as a whole 'locked in frenzy and hysterical elation.'<sup>366</sup>

During such episodes of violence, there is rarely any serious resistance to the violent acts and atrocities committed. This is because forward panic only arises in an 'atmosphere of total domination', which is 'fed by the panic and paralysis of the other side.' The mechanisms of atrocities, according to Collins, are those of 'ebullient killers feeding off the hopeless passivity of those who are being killed.' The 'total domination' is not just physical, but also emotional: both parties are aware of it. It is, in other words, an on-going relationship which continually produces an extreme power imbalance. And it is this extreme power imbalance that engenders the 'mood of slaughter'.<sup>367</sup>

One objection should be noted here: there is archetypical crimes against humanity-related violence, for example the widespread and carefully calculated killings of Jewish people during the Holocaust, which cannot plausibly be said to be the result of any realistic fear and tension towards a putative enemy which suddenly collapsed. If this is the case, then how can this theory of forward panic account for an important example of crimes against humanity-related violence? A potential answer to this objection comes from a part in Collins' book where he discusses torture and violence, both physical and psychological, against intimate partners. In such cases, he states, the violence is frequently cool and calculated. There is an absence of a phase of confrontational tension.<sup>368</sup> Instead, the same outcome, the same emotional rush and frenzy, is achieved in a 'truncated' manner. Instead of a long-building confrontational tension which suddenly disappears, the tension builds up from 'the immediate process

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<sup>359</sup> Collins, *Violence: a micro-sociological theory* (n 339) 85.

<sup>360</sup> *ibid* 89-90.

<sup>361</sup> *ibid* 85.

<sup>362</sup> *ibid* 87.

<sup>363</sup> *ibid* 93.

<sup>364</sup> *ibid* 93.

<sup>365</sup> *ibid* 93.

<sup>366</sup> *ibid* 93.

<sup>367</sup> *ibid* 102.

<sup>368</sup> *ibid* 152.

of dominating the victim.<sup>369</sup> This domination is what sets off the trigger that sparks the extreme outburst of violence. A similar dynamic can be observed in cases of crimes against humanity where there is no credible threat of violent confrontation, but where a prolonged process of domination has been at play.

Klusemann applies the theoretical framework sketched here to the analysis of case studies of several atrocities to see how, in practice, this forward panic and emotional dominance might be brought about. He describes the patterns in the lead-up to violence: there is almost always a period of polarization, the construction of conflict identities, and the establishment of 'local emotional dominance'.<sup>370</sup> The first and second of these features will be discussed in the next section. As to local emotional dominance, often-observed 'preliminary acts' that precede atrocities are setting fires to buildings in order to destroy property of the opposing side, killing livestock, and committing violence 'against selected individuals or weak victims'.<sup>371</sup> These types of acts are designed to create a 'tipping point', by increasingly 'constructing' a sense of victimhood in the targets and emotional domination in the perpetrators, while being 'easier' to carry out - both physically and emotionally - than larger-scale atrocious acts.<sup>372</sup>

As I indicated, in addition to the idea that the inter-group dimension of extreme power imbalances plays a causal role in the perpetration of violence, the specific violence committed in the context of such extreme power imbalances is one of the reasons that we believe there is something particularly morally horrific about crimes against humanity. There is a marked 'performativity' to the acts of violence committed in the context of inter-group extreme power imbalances, which is borne by the 'desire on the part of perpetrators to witness the collective dying of victims'.<sup>373</sup> This violence often comprises acts of 'violent mockery', taking place in what Collins calls a 'moral holiday,' whereby their perpetrators have broken 'through the membrane of normal social life' in order to take part in 'a grotesque carnival, a celebration of destruction'.<sup>374</sup> These 'killing games', that is, 'forms of killing embedded in humiliation or carousing rituals', serve to 'keep the emotional arousal alive'.<sup>375</sup> The same goes for other acts like 'harassing, taunting, [or] shouting insults'.<sup>376</sup>

This shocks our moral conscience. It shows us the worst of what human beings are capable of, or are incited to, when they band together. Each perpetrator wants to be seen by the others in his group – wants to *perform*. Weisband explains this as follows:

“Perpetrators” are first and foremost perpetrators who operate at the behest of each other. What they do tends to be filtered through the refracted perceptions of each other on stage and on display. Such behaviors may be

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<sup>369</sup> *ibid* 152.

<sup>370</sup> Klusemann, 'Massacres as process' (n 337) 472.

<sup>371</sup> *ibid* 471

<sup>372</sup> *ibid* 472, 475.

<sup>373</sup> Edward Weisband, *The Macabresque: Human Violation and Hate in Genocide, Mass Atrocity, and Enemy-Making* (Oxford University Press 2017), 173.

<sup>374</sup> Collins, *Violence: a micro-sociological theory* (n 339) 99.

<sup>375</sup> Klusemann, 'Massacres as process' (n 337) 477.

<sup>376</sup> *ibid* 476.

likened to “performances” for the benefits of other perpetrators who constitute a body of witnesses as well as a “command” audience. The macabresque does not cause mass atrocity.<sup>377</sup>

Once mass atrocity breaks out, however, the macabresque becomes an end in itself. Mass atrocity is thus the means toward the staging and the execution of transgressions. Taking performativity seriously thus demands an exploration of the theoretical or explanatory implications of this. And one clue is the tendency to transform collective violence into intense individual personal bodily violation.<sup>378</sup>

This ties the inter-group dimension of extreme power imbalances closely to the interpersonal dimension: while intense individual personal bodily violation is something that is done by a specific perpetrator to a specific victim, it ‘refracts’ in the perceptions of other members of the perpetrator-group, thereby having a direct impact on the inter-group dimension of the relationship of extreme domination. The inter-group dimension of extreme power imbalances thus enables horrific acts of violence (because their existence helps overcome the natural resistance we feel against committing violence), and it is in turn *perpetuated* by such violence (because the continued and increasingly cruel violence keeps the ‘mood of slaughter’ alive within the group, and is designed to be observed by other members of the group).

The same point can be made about the connection with the societal dimension. Whereas interpersonal violence refracts within the inter-group dimension, the inter-group violence in turn is observed throughout the society in which it happens. Stories and images of acts of cruelty travel and permeate the fabric of a society. Paired with the explicit endorsement of such violence by socially powerful people or institutions, or the absence of moral condemnation, these acts then serve to cement the power imbalance on the societal plane.

Thus, the intuitions that are at the core of act-based legal and philosophical accounts of crimes against humanity are highly salient in the context of the inter-group dimension of extreme power imbalances. There is indeed something specific about these acts, in that they are meant to be observed by other group members and designed to keep the emotional arousal of the perpetrators – and subjugation of the victim-group – alive. The resulting acts of violence are often particularly shocking and cruel. We can also recognise tenets of victim-based accounts in the group-based nature of the violence committed is predicated on having a relatively well-defined group of victims. A close study of this violence shows that it is often deeply discriminatory in nature and designed to humiliate the targeted group.

Another important aspect of the inter-group dimension is that although logically speaking the involvement of state or state-like organs is not required for the creation of the extreme power imbalances, in practice the dominating group often consists of, or receives significant assistance from, some sort of (semi-)formal institution. For instance, the magnitude of the power imbalance required to set off the forward panic

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<sup>377</sup> Weisband, *The Macabresque* (n 373) 174.

<sup>378</sup> *ibid* 174.

is often reached when police or military forces, or groups of paramilitaries become involved, tipping the scales of power to such an extent that one party finds itself to be completely and utterly dominant.<sup>379</sup> Similar to their involvement in societal norm transformations, the particular type of perpetrator is morally salient here too: it is a perversion and a flagrant abuse of power and resources.

### 3.4.3 The interpersonal dimension

The next dimension of extreme power imbalances is the interpersonal dimension. Here we move away from most prominent approaches to the theory of crimes against humanity. Most existing accounts of the concept of crimes against humanity analyse it from the perspective of a society or from the perspective or groups within a society. And the accounts that do focus on the acts themselves, such as Renzo's and Geras' act-based definitions of the core of the concept, remain somewhat abstract.<sup>380</sup> The claim that crimes against humanity are acts that violate basic human rights, despite making conceptual sense, does not provide us much insight into the dynamics of those acts and what exactly about them is makes them particularly morally reprehensible and shocking.

One of my goals in this thesis is to demonstrate the value of paying attention to the specifics of the violence committed by an individual perpetrator against an individual victim. Studying the dynamics of such violence and the types of act that occur in detail helps us to understand more about the concept of crimes against humanity and why the violence that forms part of episodes of crimes against humanity is often felt to be especially morally wrong. Crimes against humanity are not just "regular" crimes in a particular context. There is something salient about the discrete acts themselves – over and above the relatively abstract fact that they are breaches of basic human rights.

The interpersonal dimension of extreme power imbalances between the perpetrator and victim in the context of which these acts of violence occur is important. For instance, it is a widely held intuition that if one person is in a position of having near absolute power over someone else, there should be some form of justification for this power, and the power imbalance should be handled carefully and responsibly. This is not just an intuition either: it is a norm that is codified in law, too. A mundane example of this is a situation in which the more powerful or knowledgeable party to a relationship has a fiduciary duty towards the other. The exploitation of extreme power imbalances violates such a moral norm in the most flagrant way. The exploitation and further subjugation of an already powerless and vulnerable person, is cruel.<sup>381</sup>

Episodes of crimes against humanity comprise a great many of such acts of cruelty, where perpetrators abuse. This explains the outrage we feel at hearing about such episodes: we feel that this type of violence perverts the expectations that come with

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<sup>379</sup> Think for example of Zysset's account of preparatory conditions discussed earlier: Zysset, 'Refining the structure' (n 170).

<sup>380</sup> See section 2.4.

<sup>381</sup> Judith N Shklar, 'Putting Cruelty First' (1982) 111(3) *Daedalus* 17, 17.

being in a position of holding power over someone, making use of someone's extreme vulnerability to attack them instead.

But it is not just the mere fact of a vulnerable party being attacked by a powerful perpetrator that is repulsive to our moral sensibilities. It is also the way in which these attacks are being carried out. Many discrete acts of violence that are part of an episode of crimes against humanity use extreme – and often perversely creative – methods to commit that violence and other criminal acts. This point has been made in the context of the inter-group dimension discussed in the previous section. The interpersonal dimension moves away from group-based violence; rather than the aggregate of extremely cruel violence, it offers a more minute study of the individual acts.

The existence of an extreme power imbalance plays a crucial role in the commission of those acts. It is hard to imagine being in a position to employ such horrific means of humiliating and acts of violence against another person, unless there is an extreme asymmetry between the power that perpetrator and victim have in a particular situation. We shall see that a key part of the creation and violent exploitation of the interpersonal dimension of extreme power imbalances depends on the perpetrators employing one or multiple common methods of acquiring unfettered control over their victims. Once they have successfully done so, they are able to do to their victims whatever it is they please, establishing a relationship of domination.

This existence of an extreme power imbalance makes the relevant acts more shocking to an observer: we feel that the depths of human depravity are being put on display when we see such an exploitation of vulnerability. In episodes of crimes against humanity, we often see not just discrete acts of violence committed in the context of an extreme power imbalance, but also that they are committed in an atmosphere that is, at times, almost gleeful. Such acts are indicative of a perpetrator exercising power 'with abandon' - as an expression of the enjoyment of the 'highest gratification of the feeling of power'.<sup>382</sup> Nietzsche describes this as 'the pleasure of being able to vent [...] power without a second thought on someone who is powerless, the enjoyment "*de faire le mal pour le plaisir de la faire*", the pleasure of violation.'<sup>383</sup> The sight of this type of violence within the context of the extreme power imbalances forces us to confront the question of whether there might be some level of truth to these types of claims.

However, despite appearing to be cruel for cruelty's sake, the type of violence described is also a tool of domination, a tool of control. It does not just *exploit* an existing extreme power imbalance, but also works to *establish and perpetuate* extreme power imbalances – and it does so in a particularly morally reprehensible fashion. As is the case for the other dimensions – and for crimes against humanity as a whole – there is a perverted logic to the seemingly senseless violence. This is a logic of control and subjugation. Control over a victim enables violence to be committed, and the commission (and constant threat) of violence itself, especially the type of extreme violence we see in cases of crimes against humanity, also works to further increase

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<sup>382</sup> James Miller, 'Carnivals of Atrocity: Foucault, Nietzsche, Cruelty' (1990) 18(3) *Political Theory* 470, 475.

<sup>383</sup> Friedrich Nietzsche, *On the Genealogy of Morals* (Douglas Smith tr, Oxford University Press 2008), 46.



this control. Domination is continuously produced through the interplay of violence and control until it is near-absolute.

To understand this point, it is useful to return to insights from Sussman's work on torture. Sussman argues that we have an intuition 'that there is something morally special about torture that distinguishes it from most other kinds of violence, cruelty, or degrading treatment.'<sup>384</sup> He claims that there are two elements of the torturer-victim relationship that makes this so. First, there is a 'profoundly asymmetric relation of dependence and vulnerability between parties', and secondly, the 'torture victim must see herself as being unable to put up any real moral or legal resistance.'<sup>385</sup>

The first element maps onto our definition of an extreme power imbalance; we have already seen some moral implications of committing violence within that asymmetric relationship above. But the second element adds another layer on top of that. It is not just the vulnerability of the victim in the face of an attacker who holds all the power in the situation, but also *the realisation of the victim that this is the case* that lends the situation its moral relevance. An extreme power imbalance is a power relationship, and the exploitation of a situation is at the same time a means of imprinting upon the victim's consciousness their impotence and, conversely, the perpetrator's omnipotence. It is about instilling an 'overwhelming sense of helplessness'.<sup>386</sup> The type of violence that perpetrators resort to in order to make this extreme power imbalance explicit is often 'dramaturgical and aestheticized.'<sup>387</sup> As we have seen above, this performativity has ramifications for the inter-group and societal dimensions, too: others may observe these acts and worry that they might be next, or, conversely, be inspired to commit similar violence. The spectacle created by these acts of cruelty is both a threat and a call to action.

The performativity of these acts is often particularly humiliating to the victims. This adds another layer of moral disapprobation. Again, it is useful to think of Sussman's work on torture. Human beings, he states, have an inherent dignity that stems from our nature as rational, self-governing agents.<sup>388</sup> What torture does is to *use* this rational agency and human dignity in an attempt to destroy it. Torture is the 'deliberate perversion of that very value [i.e. dignity], turning [it] against itself in a way that must be especially offensive to any morality that fundamentally honors it.'<sup>389</sup> Sussman mentions the example of prisoners in Abu Ghraib being forced to masturbate in front of their guards, thereby being 'forced into the position of having to put [their] most intimate desires, memories, and fantasies into the service of his torturers[.]'<sup>390</sup>

Another often-used tactic Sussman describes involves forcing people to engage in sex in view of their torturers or forcing victims to watch a family member being abused.<sup>391</sup> On Sussman's view, the fundamental dynamic underpinning these sorts of acts and,

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<sup>384</sup> David Sussman, 'What's Wrong with Torture?' (2005) 33(1) *Philosophy & Public Affairs* 1, 3.

<sup>385</sup> *ibid* 6-7.

<sup>386</sup> Card, *The Atrocity Paradigm* (n 351) 124.

<sup>387</sup> Weisband, *The Macabresque* (n 373) 9.

<sup>388</sup> Sussman, 'What's Wrong with Torture?' (n 384) 19.

<sup>389</sup> *ibid* 19.

<sup>390</sup> *ibid* 22.

<sup>391</sup> *ibid* 22.

by extension, of the institution of torture, is that a victim's physical and psychological pain, shame, (unwanted) arousal, and other aspects of their being are abused in order to establish the most extreme relationship of dominance, in which the victim becomes acutely aware that they are completely at the mercy of their torturer.<sup>392</sup> This insight is also applicable to the discrete interpersonal crimes within an episode of crimes against humanity for the dynamic is often precisely the same. More than "merely cruel", we can also understand many of these acts as serving the purpose of pitting a victim against themselves to establish or perpetuate an extreme power imbalance. In the words of Weisband, they are 'forms of surplus cruelty instrumentalized by means of forced displays of performative human transgression.'<sup>393</sup>

To sum up, the interpersonal dimension of extreme power imbalances is both a catalyst of violence, and an objective of violence. The incredible asymmetry of power between a victim and a perpetrator means that it is possible for perpetrators to commit the most heinous breaches of basic human rights, often in perversely creative ways. At the same time, such breaches are part of a continued effort by a perpetrator to subjugate a victim, and to make this power asymmetry explicit – to ensure that the victim acknowledges it. This dynamic explains in part why the discrete acts of violence we see in episodes of crimes against humanity are especially horrific and cruel. It explains why accounts such as Renzo's and Geras' focus on the violence itself,<sup>394</sup> for there is indeed something particularly terrible about this violence.

### *3.5 Differentiation from other international crimes*

In this chapter, I have proposed an understanding of the concept of crimes against humanity in terms of the violent creation, exploitation, and proliferation of extreme power imbalances across three dimensions: societal, inter-group, and interpersonal. An objection to this account of the concept might be that it seems, at first glance, significantly broader than most legal and philosophical found in the literature. As a result, it is perhaps not immediately clear how the relationship between crimes against humanity and other closely related international crimes such as war crimes and genocide should be understood. Are not all three crimes characterised by extreme power imbalances? If so, the notion of crimes against humanity that I put forth would do little to describe the concept's specific character.

This is not just a theoretical concern. Our ability to distinguish between these crimes is also practically important. Recall, for instance, the notion of fair labelling. The name used to denote a crime matters because of the stigma it attaches to the criminal. Thus, it has been observed that crimes against humanity 'has a more serious feel about it' than war crimes and can be charged by prosecutors in order to 'send a message.'<sup>395</sup> Similarly, genocide is often considered the "crime of crimes" and carries a heavier stigma again.<sup>396</sup> In addition to the issue of labelling and appropriate stigma, there is

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<sup>392</sup> David Sussman, 'Defining Torture' (2005) 37 Case Western Reserve Journal of International Law 225, 227-228.

<sup>393</sup> Weisband, *The Macabresque* (n 373) 10.

<sup>394</sup> See section 2.4.

<sup>395</sup> Patricia M Wald, 'Genocide and Crimes against Humanity' (2007) 6 Washington University Global Studies Law Review 621, 631-632.

<sup>396</sup> *ibid*, 629.

also a tendency for punishment for be more severe as the qualification moves from war crimes to crimes against humanity and finally to genocide.<sup>397</sup>

Let us start by comparing the proposed notion of crimes against humanity against our understanding of war crimes. As noted by Schabas, war crimes are the oldest category of international crime.<sup>398</sup> These crimes require the presence of an armed conflict: this is their 'most fundamental requirement.'<sup>399</sup> War crimes are therefore not considered to cover cases where a state mistreats its own citizens.<sup>400</sup> And unlike crimes against humanity, war crimes do not have a requirement of scale as part of their legal definition.

The core conceptual thrust of war crimes – excessive and illegal violence in the context of an armed conflict – is therefore significantly different from the account of crimes against humanity I propose. Criminal violence in the context of an armed conflict does not require the presence of extreme power imbalances. Consider the example of a missile attack that deliberately targets a civilian residence, killing several people. These crimes do not at all depend on societal, inter-group or interpersonal power imbalances. There is no need for societal norm transformations, group-based domination, or interpersonal control, in order to for war crimes to be committed. This is a clear conceptual difference between war crimes and the notion of crimes against humanity as I conceive of it.

Conversely, imagine a situation where civilians are targeted by their own government on a widespread scale; perhaps they are imprisoned arbitrarily, tortured, and murdered, because of some putative allegiance to political views that are regarded as unacceptable to a given society and its authorities. The context here is very different from the case described above. There is no international or non-international armed conflict, yet a society has turned into a trap for those who are targeted. That is not to say that crimes against humanity cannot occur within the context of an armed conflict: but this is not a logical necessity. Despite the absence of armed conflict, in this scenario there are extreme power imbalances that structure societal, inter-group and interpersonal relations. The violence that is committed in the context of these power imbalances would be considered a crime against humanity – not a war crime. The violent creation, exploitation, and proliferation of extreme power imbalances which I claim is core to crime against humanity is therefore neither a necessary nor a sufficient condition for war crimes.

What about the distinction between crimes against humanity and genocide? The conceptual distance between these crimes is significantly smaller. Of course, genocide as understood in contemporary legal thought requires the intent to destroy a group.<sup>401</sup>

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<sup>397</sup> Frulli, 'Are Crimes against Humanity More Serious' (n 16) 349; Wald, 'Genocide and Crimes against Humanity' (n 395) 629.

<sup>398</sup> William A Schabas, 'Crimes Against Humanity as a Paradigm for International Atrocity Crimes' (2011) 20(3) *Middle East Critique* 253, 254.

<sup>399</sup> Anthony Cullen, 'War Crimes' in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2010), 145.

<sup>400</sup> Schabas, 'Crimes Against Humanity as a Paradigm' (n 398) 254.

<sup>401</sup> See e.g., Art 6 of the Rome Statute.

This is often referred to as the *dolus specialis*.<sup>402</sup> This specific intent is not required for crimes against humanity.

Yet if we look past this specific intent, it becomes clear that the concepts of crimes against humanity and genocide are closely connected. It is telling that at the Nuremberg trial, the perpetrators of the Holocaust – the event generally considered to be the archetype of the crime of genocide – were prosecuted under crimes against humanity.<sup>403</sup> Similarly, Arendt famously defined crimes against humanity in terms of the perpetrator's refusal to share the earth with a targeted group – a formulation that will make contemporary readers immediately think of genocide.<sup>404</sup> In other words, the conceptual closeness is clear.

One explanation of why a subsequent crime of genocide came to be formulated could be that the Nuremberg Charter required the presence of armed conflict in order for crimes against humanity to be charged. The definition of genocide that was contained in the Genocide Convention of 1948 does not.<sup>405</sup> Yet this connection to war is no longer a requirement for crimes against humanity. Perhaps as a result of that, some authors hold that genocide can be understood as a species of crimes against humanity, marked out as different only by its specific intent to destroy a group.<sup>406</sup>

This is the view that I take about the relationship between the account of crimes against humanity that I put forth on the one hand, and the concept of genocide on the other. The perpetration of genocide exhibits the same the dynamics as crimes against humanity: the violent exploitation of extreme power imbalances across the societal, inter-group and interpersonal dimensions. These episodes of violence are not qualitatively different from each other, apart for the specific intent behind the perpetrators' actions. In other words, all genocides are crimes against humanity, but not all crimes against humanity are genocides.

Some authors do argue that genocide differs conceptually from crimes against humanity precisely because of the explicit group-based element that the specific intent requires. Luban, for instance, argues that

whereas genocide is a crime directed at groups viewed as collective entities, with a moral dignity of their own, crimes against humanity are assaults on civilian populations viewed not as unified metaphysical entities but simply as collections of individuals whose own human interests and dignity are at risk and whose vulnerability arises from their presence in the target population.<sup>407</sup>

Yet crimes against humanity also occur in the context of societies that have become a trap for people that have been targeted, and we shall see that this targeting within a society is often group-based. Luban himself recognises that crimes against humanity

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<sup>402</sup> Schabas, *Genocide in International Law* (n 121) 260.

<sup>403</sup> Wald, 'Genocide and Crimes against Humanity' (n 395) 622.

<sup>404</sup> Arendt, *Eichmann in Jerusalem* (n 97) 279.

<sup>405</sup> Compare Art 2 of the Genocide Convention with Article 6 of the Nuremberg Charter. See also Schabas, *Genocide in International Law* (n 121) 12.

<sup>406</sup> E.g., Schabas, *Genocide in International Law* (n 121) 13-14.

<sup>407</sup> Luban, 'A Theory of Crimes against Humanity' (n 160) 97.

'target individuals on a non-individualized or collective basis.'<sup>408</sup> Similarly, as we have seen in the previous chapter, many authors who adhere to victim-based accounts of crimes against humanity emphasise the group-based nature of the victims of crimes against humanity. The importance of groups as collective entities therefore is not specific to genocide, to the exclusion of crimes against humanity.

I should add that considering the concept of genocide to be a species of the genus crimes against humanity does not necessarily mean rejecting the view that genocide is more morally reprehensible and worthy of stigma. It leaves open the argument that the specific intent to destroy a group makes genocide worse than crimes against humanity, as many authors do argue,<sup>409</sup> in the same way that one could argue that an aggravated murder is worse than "regular" murder. This thesis does not take a view on the relative gravity of genocide in comparison to crimes against humanity. The point I want to make is simply that any such enhanced moral reprehensibility need not detract from the conceptual kinship, and vice versa.

### *3.6 Exploring the boundaries of the concept*

Although formulated on the basis of fact patterns found in judgments of international courts and tribunals, the conception of a crime against humanity proposed in this thesis departs from more mainstream definitions found in the legal and philosophical literature. The focus on a more generic concept like extreme power imbalances to describe the specific nature of crimes against humanity means that it may not always be clear which situations and acts do and do not fall within the concept's boundaries. In particular, a concern might be that the concept I propose might be overinclusive. Yet despite the focus on a relatively generic concept like power imbalances, I do not think this is the case.

In order to explore and refine the boundaries of the conception of crimes against humanity proposed in this thesis, it is useful to consider whether or not it would capture events that have at times been claimed to be a crime against humanity, but which are not archetypical instances of the concept.

#### 3.6.1 A single act of torture

Let us start by considering the case of a single act of torture, which is not state-sanctioned and is unrelated to any larger societal or group dynamics. Imagine, for instance, the hypothetical scenario of a sadistic killer who has obtained unfettered control over his victim and exploits this control by committing acts of violence and humiliation.

Some authors, like Renzo, claim that even such a single act of torture constitutes a crime against humanity. In contrast to what he calls a more orthodox view, he presents an account according to which 'any case of rape, torture [...] and so on is a crime

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<sup>408</sup> *ibid* 104.

<sup>409</sup> See Schabas, 'Crimes against Humanity as a Paradigm' (n 398) 256; Wald, 'Genocide and Crimes against Humanity' (n 395) 629; Steven R Ratner, 'Labeling Mass Atrocity: Does and Should International Criminal Law Rank Evil?' (2009) 54 *Wayne Law Review* 569, 571-572.

against humanity, no matter whether committed as part of a wider or systematic attack or not.<sup>410</sup> This is what I have referred to as an act-based account in section 2.4 above

How would a situation like this be perceived through the lens of the three dimensions of extreme power imbalances? Working our way from the bottom up, it is clear that there would be an extreme power imbalance between the perpetrator and victim on the interpersonal level in which the victim does not have the resources to change this power imbalance. They are at the mercy of their tormentor.

Yet in this scenario the extreme power imbalance present in the interpersonal dimension does not extend into the inter-group or societal dimension. The acts of violence committed do not feed into group-based or societal dynamics, nor are they enabled by power imbalances in those dimensions. They stand in relative isolation. In fact, they will generally be abhorred and prosecuted by the society in which they occur.

Because of their lack of connection to extreme power imbalances in the inter-group and societal dimensions, single acts of torture as described in this subsection would not fall within the boundaries of the concept of crime against humanity that I have proposed. This means that the scope of the account I propose is more limited than that of purely act-based accounts such as Renzo's. An understanding of crimes against humanity in terms of extreme power imbalances needs to take the wider context in which acts of violence occur into account.

### 3.6.2 Larger-scale terrorist attack

What about a larger, less isolated act of violence, such as a terrorist attack? Let us use the example of the 9/11 attacks. Given that thousands of people lost their lives in these attacks, the scale here is obviously different from the previous example. This attack far exceeded the interpersonal dimension. As a result of its scale, divergent voices such as Colin Powell and Noam Chomsky held that 9/11 was not just a crime against the United States, but against humanity.<sup>411</sup>

Yet, despite its scale, it is hard to detect the kind of extreme power imbalances that I claim are central to crimes against humanity in the violence that was committed. Let us start by looking at the interpersonal dimension. Although many individuals have lost their lives, it cannot be said that there was an extreme power imbalance – in which one person is dominated by another – between the terrorists who hijacked planes and the people killed. In fact, for those on the ground, it would be tenuous to claim that until the moment of impact there was a relationship between perpetrator and victim at all. And even at the moment of impact, the existence of an interpersonal power relationship was not present – nor is it the goal of this type of violence.

This is perhaps different when looking at the dynamics within the plane cabins. There, it is possible to imagine that an inter-group extreme power imbalance was established between the group of hijackers and the passengers and crew on board, for instance through the use of violence and bomb threats. But even here, as evidenced by the

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<sup>410</sup> Renzo, 'Crimes against Humanity and the Limits of ICL (n 262) 461.

<sup>411</sup> *CNN Larry King Live: Interview with Secretary of State Colin Powell* (broadcast 26 November 2001) <transcript: <http://edition.cnn.com/TRANSCRIPTS/0111/26/lkl.00.html>> accessed 21 December 2022; Noam Chomsky, *9-11: Was There an Alternative?* (Penguin 2011).

attempted uprising of the passengers of United Airlines Flight 93, these power imbalances were likely not so extreme as to prevent any possibility for action on behalf of the less powerful group.<sup>412</sup>

Finally, while the societal impact – both within the US and across the globe – of these terrorist attacks can scarcely be overstated, the result of these attacks was not the creation of an extreme power imbalance within American society in which Americans – who were targeted in the attacks – were in any sense dominated. The attacks were not committed in the context of the exploitation of widespread power imbalances: they were committed by outsiders.

Of course, terrorism instils fear in a society that it hits, often with the purpose to effect some kind of change.<sup>413</sup> But a society that is fearful of further attacks is not necessarily a society in which domination is present. In fact, the aftermath of the 9/11 attacks shows American society to be perfectly capable of asserting its power against those that it considers its adversaries.<sup>414</sup> I would therefore contend that the 9/11 attacks do not exhibit the key characteristics of a crime against humanity, as I conceive of the concept.

### 3.6.3 Domestic abuse and misogyny

The final phenomenon I want to consider in light of the account of crimes against humanity I propose is that of domestic violence which occurs in the context of systemic misogyny. Claudia Card makes the argument that spousal battery is, if not encouraged, then at least tolerated by the way in which Western societies organise relationships between men and women along patriarchal lines. Societal institutions, in her view, are complicit in sustaining institutions like marriage, which in turn enable interpersonal extreme power imbalances to persist.<sup>415</sup>

At first glance, this type of phenomenon might seem very different from the crimes against humanity discussed in this thesis. Even compared to the single murder and terrorist attack discussed above, it may intuitively seem further removed from the concept of a crime against humanity. Yet, when analysed against the backdrop of the three dimensions of extreme power imbalances, pervasive structural violence such as misogyny does seem to share some of its characteristics.

Card defines spousal battery as ‘not necessarily just an individual, datable deed, such as a physical assault, or even a series of clearly datable individual deeds, but a pattern of ongoing behaviors that work together, like the bars of a cage, to produce coercive domination.’<sup>416</sup> Often these acts are “inventive”: abuses are tailored to specifically attack a partner’s vulnerabilities, which are known to the abuser.<sup>417</sup> The explicit goal

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<sup>412</sup> The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon the United States <<https://www.govinfo.gov/features/911-commission-report>> accessed 21 December 2022, 13.

<sup>413</sup> See e.g., Arthur H Garrison, ‘Defining terrorism: philosophy of the bomb, propaganda by deed and change through fear and violence’ (2014) 17(3) *Criminal Justice Studies* 259, 259.

<sup>414</sup> See e.g., 9/11 Commission Report (n 412), 325-334, 361-383.

<sup>415</sup> See e.g., Card, *The Atrocity Paradigm* (n 351) 140, 153

<sup>416</sup> *ibid* 145

<sup>417</sup> *ibid* 145.

of such acts of abuse is for the perpetrator to establish oppressive dominance over their victim. This maps directly onto the interpersonal dynamics that can be observed in crimes against humanity: “creative” acts of cruelty and humiliation are performed in order to establish and proliferate an extreme power imbalance, forcing the victim to confront their own impotence.

Yet the inter-group dynamics of the scenario described fit less clearly with those present in crimes against humanity. The phenomenon of spousal abuse, as described by Card, is not something that is explicitly group-based. There generally is no perpetrator-group or victim-group – at least not in the concrete sense in which I use the term “group” in the inter-group dimension of extreme power imbalances. That is not to say that groups close to the perpetrator and victim might not be somehow implicated: as Card observes, one of the strategies abusers use, is to isolate their victims from their support networks.<sup>418</sup> One consequence of this is that the size of group of people that could come to the victim’s aid is gradually reduced.

Compared to the inter-group dimension of extreme power imbalances, where the fit with the example of spousal battery is limited, the societal dimension is more heavily involved. For the violence and control that is exerted in this scenario on the interpersonal level does not happen in a societal vacuum. The societal dynamics in which this kind of violence is embedded matter a great deal too. Card notes, citing research from the 1990s by Beasley and Thomas, that domestic violence is ‘endemic’, that murderers who kill their wives receive reduced sentences, and that rape frequently remains unpunished – this in contrast to when victims are male.<sup>419</sup> One reason for this might be that ‘sexist socialization [...] rewards men for violent anger, at the same time encouraging female vulnerability and heterosexual dependency.’<sup>420</sup> Misogyny, Card claims, is a significant factor in society’s reluctance to act seriously in response to victims.<sup>421</sup>

This dynamic of being victimised in the context of an interpersonal extreme power imbalance, while having little recourse to a means of exiting this power imbalance because the dynamics in the wider society tolerate your being targeted, is akin to the dynamics that we observe in crimes against humanity. Yet “akin” does not mean “identical”. As Card notes, it is not the *purpose* of societal institutions like marriage to enable the brutalisation of spouses. Societies fail at effectively stamping out this behaviour, or even tolerate it, but on Card’s account they are not *designed* for abuse. In fact, despite the failings of the justice system, punishment *does* occur, and help for women *is* often available. This is a salient difference with the dynamics of extreme power imbalances in crimes against humanity: there, interpersonal violence is deliberately public and performative, such that it may be observed by a wider society,

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<sup>418</sup> *ibid* 144.

<sup>419</sup> *ibid* 141.

<sup>420</sup> *ibid* 146.

<sup>421</sup> *ibid* 146.



and this wider society itself becomes specifically geared towards enabling and encouraging domination and violence.<sup>422</sup>

#### 3.6.4 The specificity of the concept

Even though my proposed conception of crimes against humanity hinges on a relatively generic concept like power, the examples discussed in this subsection show that the resulting conception is not overinclusive. What these examples make clear is that the creation, proliferation, and exploitation of extreme power imbalances across the societal, inter-group, and interpersonal dimensions is a high bar.

As horrific as it might be, purely interpersonal violence such as the example of a single act of torture will not meet this bar. This distinguishes my proposed account from act-based accounts in the literature. Similarly, a larger-scale act of violence such as the 9/11 terrorist attacks, does not meet the criterion of being enabled by or contributing to the societal or inter-group dimensions of an extreme power imbalance: there was no such power imbalance between in American society either before or after these attacks occurred.

The type of violence that, although not generally considered a crime against humanity in the literature, comes closest to meeting the account that I have proposed is structural violence, such as domestic violence that occurs in embedded in a misogynist society that tolerates it. Yet even here, the fit is incomplete. In the interpersonal dimension, the dynamics might be very similar to those seen in crimes against humanity; much like in the case of the single act of torture. However, the group-based aspect – where a concrete group of perpetrators dominates a concrete group of victims – does not feature in this scenario. And while misogyny in Western societies is implicated, and a power imbalance between men and women is present, the dynamics are subtly different from crimes against humanity. In crimes against humanity, there is more intentionality with which extreme power imbalances are pursued, and there is even less recourse for victims – they are deliberately stripped of their moral status in the eyes of society. This makes such a power imbalance more extreme.

I should note that I do not consider this to be a qualitative difference, but rather one of scale. Power imbalances are a continuum, and structural issues like misogyny may at one point lead to societal dynamics that do achieve the “extreme” qualifier, bringing it level with the type of extreme power imbalances that come with crimes against humanity. If this were indeed to happen, then there is no conceptual reason why the account that I propose should not include such crimes.

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<sup>422</sup> I should note here that I am speaking from a Western liberal perspective; there might be places where the treatment of women does in fact satisfy the inter-group and societal dimensions of the definition I propose. I lack the expertise to make a judgment here.

### 3.7 Conclusion

Having defined what an extreme power imbalance means and sketched the way in which they operate in each of the three dimensions and their moral salience, we are now able to see how they may help us make sense of the concept of crimes against humanity. It is useful to summarise the points made in this chapter. Crime against humanity is a legal concept, but also a concept that has been the subject of much philosophical exploration. This is because there is a widespread sense, both within the legal and the philosophical realm, that there is something “special” about the concept. It might be a legal concept, but it is not *merely* a legal concept. This explains why the history of the law surrounding crimes against humanity, with all its changes and fundamental debates, can be understood as a continuous effort to convergence upon some sort of “real” meaning of the notion of crimes against humanity.

My conception of a crimes against humanity is as follows. A crime against humanity is characterised by the violent creation, proliferation, and exploitation of a complex of extreme power imbalances, operating in three dimensions: interpersonal, inter-group, and intra-societal. In the interpersonal and inter-group dimensions, these extreme power imbalances are often numerous: nearly every discrete act of violence exists in the context of an extreme power imbalance in the interpersonal dimension, and many collections of discrete acts of interpersonal violence are in turn embedded in the inter-group dimension. In virtually all cases of crimes against humanity, there is an additional intra-societal dimension, in the context of which interpersonal and inter-group domination and violence becomes possible and flourishes. This continued presence and acceptance of such violence strengthens the societal dimension of extreme power imbalances and ensures that the power asymmetry wholly structures life within the borders of the relevant society.

In the previous chapter I have shown that most existing literature on the concept can be categorised into victim-based, perpetrator-based, and act-based approaches. Conceiving of crimes against humanity in terms of extreme power imbalances has several important benefits in comparison to such accounts. The notion of extreme power imbalances manages to incorporate key intuitions of victim, perpetrator, and act-based approaches, but it does more than that: it provides a richer theoretical account of the interplay between victims, perpetrators, and acts. Understanding crimes against humanity through a relational lens – the lens of power – allows us to see that victims, perpetrators, and acts are inextricably linked in the creation and violent exploitation of power imbalances in episodes of crimes against humanity.

Additionally, a focus on the three dimensions of extreme power imbalances allows us, to an extent, to resolve a tension inherent in the concept of a crime against humanity. This tension is that on the one hand the term “crime against humanity” is expected to have a relatively well-defined content that can be used in legal process and conceptual reasoning, but on the other it is used to refer to situations that are *exceptional* and which we want to mark as such. In the next three chapters, I will demonstrate in the that the application of my proposed analytical framework to a close reading of fact patterns allows us to see that despite the divergent concrete forms of each crime

against humanity, there is nonetheless a perverted logic that unites them. This is the logic of extreme power imbalances.

## 4. The societal dimension

### 4.1 Introduction

In this and the following two chapters, I will analyse in more detail the concrete role played by the societal, inter-group, and interpersonal dimensions of extreme power. It should be noted – we will see ample examples of this throughout this and the next chapters – that it is not always possible to draw strict boundaries around the different levels analysed. In fact, the three levels studied are closely connected to each other, and often a single phenomenon can feasibly be analysed through the lens of more than one of the levels. On many occasions the presence of extreme power imbalances and their violent exploitation on one level fuels the presence and violence of extreme power imbalances on the other levels: they amplify and feed off each other. I have argued that this interconnectedness is a key insight into the dynamics of crime against humanity, which will be further explored in this and the next chapters.

In this chapter, I examine norm transformations connected to the emergence and exploitation of societal extreme power imbalances based on four themes. First, the use of propaganda to create a climate in which violence became possible or even encouraged. Secondly, the deliberate marginalisation of a targeted group within the relevant societal structure. Third, the ways in which society responds and relates to acts of violence against members of the powerless group. Together, these three aspects unite to bring into existence a societal extreme power imbalance in which the powerless group and its members progressively lose their status as members of the moral community, and in which the powerful group and its members are permitted – or encouraged – to unleash whichever acts of violence, humiliation, or marginalisation they please. Finally, I consider the impact that the societal atmosphere described in this chapter has on the individuals or groups of individuals that end up killing: how it enables those who want to kill and encourages those who might be ambivalent.

While analysing these aspects, we should bear in mind that they are not mutually exclusive or even analytically distinct. Often, they are different sides of the same coin. Propaganda, for example, is often a way of furthering the marginalisation of a particular group. And many acts of marginalisation that we will analyse are in turn related to, or enabled by, propaganda. Similarly, violence targeted against the powerless group and a community's positive reaction to such violence can be considered propaganda (setting an example), yet it is also in itself a method of marginalisation. Finally, the acts and individual or group consciousness that emerges throughout the existence of a societal extreme power imbalance in turn contributes to further marginalisation, as attitudes towards the targeted group become increasingly pervasive and ingrained.

### 4.2 Propaganda

An example to introduce the analysis of propaganda and its role in the establishment and proliferation of societal extreme power imbalances is the region of *Krajina*, within

Bosnia and Herzegovina, which throughout part of the early 1990s was governed as an “Autonomous Region”: the Autonomous Region of Krajina (ARK).

This region of *Krajina* was itself embedded within one or even multiple larger societies: within Bosnia and Herzegovina, but also later within the Republika Srpska (RS) and perhaps even within the larger entity of Yugoslavia. As such, the emergence and exploitation of a societal extreme power imbalance within *Krajina* should not be seen in isolation. Even though the societal dimension of extreme power imbalances is perhaps at the top of the hierarchy when it comes to size of human association, this does not mean that every instance of a societal extreme power imbalance is necessarily at the apex of human association within the relevant area. There may be multiple societal structures in place in a certain area, some of which might be governed by a state, and others by other entities. And some, but not necessarily all, of these societal structures may be characterised by the presence of extreme power imbalances.

When we look at the region of *Krajina*, for example, we may say that within that region there was a societal extreme power imbalance (as will be argued in this chapter), which was present at the same time as the larger societal extreme power imbalance which existed in the RS. But *Krajina* can also be seen as part of the societal structure of the whole of Bosnia, at least throughout some periods of the present case study; and in that societal structure, a similar extreme power imbalance was not prevalent.

Before moving to the content and method of propaganda, it is useful to provide some more background to the conflict as summarised by the court in *Brđanin*. Against a backdrop of the disintegration of Socialist Federal Republic of Yugoslavia (SFRY), economic malaise, and armed conflict in neighbouring Croatia, there was, in 1991, an ‘atmosphere of tension’ in the Socialist Republic of Bosnia and Herzegovina (SRBH).<sup>423</sup> This tension existed first and foremost between ‘the three main nationalist parties’, who ‘disagreed on the question of the constitutional status’ of the SRBH: the SDA and HDZ – representing Bosnian Muslims and Bosnian Croats – favoured independence, whereas the SDS – the Serbian Democratic Party – was strongly opposed to this.<sup>424</sup>

The court described how, amidst this political turmoil, a plan formed within the leadership of the Bosnian Serbs, which it dubbed the “Strategic Plan.” The main thrust of this plan was ‘to link Serb-populated areas in BiH together, to gain control over these areas and to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed.’<sup>425</sup> The court was satisfied beyond reasonable doubt that ‘The Bosnian Serb leadership knew that the Strategic Plan could only be implemented by the use of force and fear.’<sup>426</sup>

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<sup>423</sup> *Prosecutor v Brđanin (Brđanin Trial Judgment)* (Judgment) ICTY-99-36-T (1 September 2004) paras 59-61.

<sup>424</sup> *ibid* para 61.

<sup>425</sup> *ibid* para 65.

<sup>426</sup> *ibid* para 65.

On 11 December 1991, the Serbian assembly voted 'to recommend the establishment of separate Serbian municipalities'<sup>427</sup> which then was turned into concrete 'Instructions for the Organisation and Activity of Organs of the Serbian People in Bosnia and Herzegovina in Extraordinary Circumstances' by the Main Board of the SDS.<sup>428</sup> These instructions contained the directive that 'the SDS Municipal Boards should form Crisis Staffs of the Serbian people in their respective municipalities.'<sup>429</sup> In January 1992, the Serbian assembly proclaimed the 'SerBiH' which later was renamed to Republika Srpska (RS). This self-proclaimed republic was 'composed of so-called Serbian autonomous regions and districts, which included the ARK.'<sup>430</sup>

At the outset of its discussion of the implementation of the Strategic Plan in the region of *Krajina*, the court in *Brđanin* makes clear how significant a role it ascribes to the use of propaganda in relation to the crimes that have been committed in the region. The court writes, in the very first paragraph:

Prior to the outbreak of the armed conflict, the SDS started waging a propaganda war which had a disastrous impact on the people of all ethnicities, creating mutual fear and hatred and particularly inciting the Bosnian Serb population against the other ethnicities. Within a short period of time, citizens who had previously lived together peacefully became enemies and many of them, in the present case mainly Bosnian Serbs, became killers, influenced by a media, which by that time, was already under the control of the Bosnian Serb leadership. The use of propaganda was an integral part of the implementation of the Strategic Plan and created a climate where people were prepared to tolerate the commission of crimes and to commit crimes.<sup>431</sup>

Discussions of propaganda are often used to establish a link between the violence 'on the ground', as it were, committed by lower-ranking soldiers, paramilitaries, or even civilians, and those in positions of authority. In that sense, propaganda can be considered a link that ties senior politicians – the main type of perpetrator that is prosecuted by international criminal courts and tribunals – to the commission of violence. This is also the case in *Brđanin*.<sup>432</sup>

However, in addition to establishing this link, the court ascribed a *causal* role to the use of propaganda, claiming that the use of propaganda 'created a climate where people were prepared to tolerate the commission of crimes and to commit crimes.' This goes to the core of what a societal extreme power imbalance is and is part of what makes the crimes against humanity which exploit it so shocking. Those who had up until the outbreak of crimes against humanity-related violence been relatively peaceful neighbours, might throughout the lifetime of a societal extreme power imbalance become each other's killers, or stand by passively while heinous crimes are

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<sup>427</sup> *ibid* para 68.

<sup>428</sup> *ibid* para 69.

<sup>429</sup> *ibid* para 70.

<sup>430</sup> *ibid* para 71.

<sup>431</sup> *ibid* para 80.

<sup>432</sup> *ibid* paras 123-150.

being committed.<sup>433</sup> The intuition that crimes against humanity are something extraordinary indeed must be fuelled at least in part by the magnitude of this fact.

While it is by no means solely propaganda that contributes to this atmosphere, as we shall see, this section will focus on the role of propaganda in creating the societal atmosphere described here. It will do so by analysing two closely connected types of “message” that have been put forth by propaganda in many cases of crimes against humanity: the notion that the target group poses a threat to the dominant societal group, and the notion that the target group consists of people of lesser value. Jointly, these two messages work to create an atmosphere in which the violent domination and subjugation of the target group seems justified, or even required.

#### 4.2.1 The threat narrative

Let us start with an analysis of the message that the target group somehow poses a threat. This message featured heavily in the propaganda discussed by the *Brđanin* court. Throughout the relevant period, SDS politicians regularly appeared in the media to make speeches that had a clear discriminatory purpose; in order, according to the court, to ‘creat[e] fear and hatred amongst the ethnic groups and inciting the Bosnian Serbs against other ethnicities.’<sup>434</sup>

[...] the tenor of the message spread by the SDS through the media was that the Bosnian Serbs were threatened with persecution and genocide by the Bosnian Muslims and Bosnian Croats and that they had to protect themselves in order to avoid the repetition of crimes committed against the Serbs during the Second World War.<sup>435</sup>

But this message was not limited to the *Brđanin* case. Similarly, in *Stakić*, the court notes that

[...] the Serb media propagandised the idea that the Serbs had to arm themselves in order to avoid a situation similar to that which happened during World War II when the Serbs were massacred. Terms like “Ustaša”, “Mujahideen” and “Green Berets” were used widely in the press as synonyms for the non-Serb population.<sup>436</sup>

And in *Karadžić*, we read about another piece of propaganda promoting the notion that the Serbs in Bosnia were under threat: ‘announcements were made on Radio Prijedor that Bosnian Muslim doctors were trying to reduce the birth rate among Serbs in that part of BiH, either by sterilising Serb women or giving pregnant Serb women injections so that they could only give birth to female children.’<sup>437</sup> This tendency to paint the non-Serbs as a threat was not just something that happened in *Krajina* or the

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<sup>433</sup> See e.g., Jan T Gross, *Neighbours: The Destruction of the Jewish Community in Jedwabne, Poland* (Arrow 2003).

<sup>434</sup> *Brđanin Trial Judgment* (n 426) para 82.

<sup>435</sup> *ibid* para 82.

<sup>436</sup> *Prosecutor v Stakić* (Judgement) ICTY-97-24-T (31 July 2003) para 52.

<sup>437</sup> *Prosecutor v Karadžić* (*Karadžić Trial Judgment*) (Judgement) ICTY-95-5/18-T (24 March 2016) para 1582.

municipality of *Prijedor*. It was a practice that was used throughout BiH by the Bosnian Serb leadership:

The threat of genocide against the Serbs was a constant refrain in the rhetoric of Bosnian-Serb officialdom in 1992, as further illustrated by a Ministry of Information proclamation from 16 May 1992, signed by the Minister, Velibor Ostojić: “terror equal to genocide is being conducted against the innocent Serbian inhabitants in this war forced upon the Serbian people in Bosnia and Herzegovina. Day in day out, the hordes of slayers and robbers, under the patronage of the fascist authority of the so-called Republic of Bosnia and Herzegovina, engage in the most brutal actions assaulting the Serbian population at their hearths. Mercilessly, the members of the Serbian people are being eliminated and massacred, their property plundered, their villages burned, their cities destroyed, and the monuments of Serbian culture and history shattered.”

[...]

The bogey of the Serb holocaust was utilized in the usual, predictable ways by Bosnian-Serb politicians, but it also had a deeper ideological significance, as it could be deployed in justification of the recovery of territories which in the beginning of 1992 were populated by Serb minorities. The invocation of genocide thus worked in two directions. It was meant to strike fear, but also to evoke a birthright to historical lands.<sup>438</sup>

This strategy of painting a targeted group as being a threat, justifying or even requiring a violent response, is used in the lead-up of many cases of mass violence. Alvarez, for example, claims that one of the important “techniques of neutralization” that make mass violence possible is the denial of the victimhood of the targeted group.<sup>439</sup> One way of doing so, is by claiming that ‘the victims have caused their own victimization and deserve whatever happens to them, thereby making it easier to murder them.’<sup>440</sup> Anderson, in his study on how atrocities become ‘mainstreamed’ in societies that descend into genocidal violence, agrees: violent radicalisation is often the result of ‘ideological discourses authorizing or even requiring violence’ because of a perceived notion that ‘the survival of the in-group is threatened by the actions or mere existence of the out-group.’<sup>441</sup> A canonical example of this is ‘the depiction of Jews as a mortal threat’, which ‘became a potent rallying symbol for the Nazi power structure and, ultimately, for the German people’.<sup>442</sup>

Considering other episodes of crimes against humanity adjudicated before international criminal courts and tribunals, it is clear how widespread the use of this threat narrative in propaganda is. Des Forges, in her canonical report on the unfolding of the Rwandan genocide, describes the changes in the societal climate that preceded and coincided with the commencement of mass violence. A prominent role in this

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<sup>438</sup> *Prosecutor v Krajišnik* (Judgement) ICTY-00-39-T (27 September 2006), paras 922-923.

<sup>439</sup> Alexander Alvarez, ‘Adjusting to Genocide’ (1997) 21(2) *Social Science History* 139 152.

<sup>440</sup> *ibid* 162.

<sup>441</sup> Anderson, ‘Mainstreaming Atrocity’ (n 333) 145.

<sup>442</sup> *ibid* 163.



change was played by the widespread use of propaganda, both by authorities and media. Particularly notorious is the example of radio broadcasts prior to and during the genocide in Rwanda that called for violence to be committed against Tutsi.<sup>443</sup> Throughout the relevant period, these broadcasts were extremely widespread<sup>444</sup> and became 'for most people the sole source of news as well as the sole authority for interpreting its meaning. At that time, RTLM and Radio Rwanda [the two main broadcasters] collaborated to deliver a single message about the need to extirpate the "enemy."<sup>445</sup>

Much of the content of these exhortations came in the form of warnings: a warning that Tutsi were out to commit genocide against the Hutu,<sup>446</sup> and that Tutsi had 'deviously infiltrated all aspects of Rwandan state and society.'<sup>447</sup> The propaganda went further than just these assertions. Des Forges describes how one feature of the propaganda used in Rwanda was the fabrication of incidents meant to inspire fear and make the violence that was asked from society feel justified. The following passage from the Des Forges report contains several examples of this:

On April 17, MDR leader Karamira informed Radio Rwanda listeners that the RPF soldier "is not a soldier in any obvious way..." He added that many "are not in uniform and are hidden among the people..." In mid-April, the radio intensified this campaign by reporting that not only individual Tutsi but also organized RPF brigades were operating throughout the country and were responsible for alleged attacks, such as on the burgomaster of Runda.

The "enemy" who was everywhere was extraordinarily cruel, according to the propagandists. Announcers on RTLM frequently reminded listeners of the dozens killed at Kirambo the previous November and insisted that the RPF had committed that massacre. Bemeriki charged the RPF with cannibalism, saying they killed people by dissecting them and cutting out their hearts, livers, and stomachs. On the air and in public meetings, officials and political leaders also contributed to this sense of a people besieged by a heartless enemy. In an April 15 broadcast, the minister of defense charged the RPF with "extreme cruelty," saying that it had massacred 20,000 people and had burned people with gasoline at Nyamirambo in Kigali.<sup>448</sup>

Similar dynamics are at play here as we saw above: Tutsi are painted as a threat, deserving of any violence meted out against them and are denied victim status. The putative threat is not any mundane threat either: the propaganda describes Tutsi as nearly supernaturally fearsome. At the same time, they are dehumanised by claims that they are simply heartless enemies. This dynamic what Alvarez refers to as a 'denial-of-victim' technique: claiming that mass violence is simply self-defence.<sup>449</sup>

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<sup>443</sup> Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (Human Rights Watch 1999), 190-192.

<sup>444</sup> *ibid* 58.

<sup>445</sup> *ibid* 60.

<sup>446</sup> *ibid* 64.

<sup>447</sup> *ibid* 62.

<sup>448</sup> *ibid* 177.

<sup>449</sup> Alvarez, 'Adjusting to Genocide' (n 442) 162.

Fuji describes how this process unfolded in three stages in the context of the Rwandan genocide. First, social divisions were created and amplified by the message that the Hutu population may be under threat. Then, there was a stage of producing 'objective evidence' of those threats through staged attacks, as also mentioned by Des Forges. Finally, the 'Tutsi threat' was made to 'appear imminent' so that the Hutu felt that they should take immediate action to ensure self-preservation.<sup>450</sup> This strategy helped to 'transform the normative environment such that actions that were once considered verboten (such as killing thy neighbor) could be viewed as not only legitimate but imperative.'<sup>451</sup>

In Cambodia, during the regime of Pol Pot, propaganda was also rife. There, however, the distinction was not along ethnic lines, as we have seen in the case of Bosnia or Rwanda. Instead, the distinction that was used to organise society into in-groups and out-groups, was the distinction between "old people" (or "base people") on the one hand, and "new people" (who were often seen as potential enemies of the revolution) on the other.<sup>452</sup> "Old" people were mostly rural villagers, whereas "new people" was used to denote 'both longtime urbanites and peasant refugees who had fled to the cities during the civil war[.]'<sup>453</sup>

The way in which "new people" were viewed becomes clear when the court describes how they are treated in the "Revolutionary Flag" magazine:

The DK periodical "Revolutionary Flag" was an important form of communication and was widely circulated among full-rights members of the Party who were obliged to study it. According to Expert Raoul JENNAR, it was believed that all its articles were written by POL Pot. It could contain general instructions concerning agricultural production as well as directives which resulted in intensified purges of "burrowing enemies" with emphasis on "new" people from the cities who were deemed to be inferior to the peasant farmers. The communications were based at least to some degree on reports from Zones to Office, which usually emphasized their activities in searching for enemies often to the detriment of reports on economic and production issues. In a Special Issue of the Revolutionary Flag magazine published in 1977, every level of the Party was exhorted to "adopt the role of leading the army and the people to attack all such enemies, sweep them cleanly away, sweep, sweep and sweep again and again ceaselessly, so that our Party forces are pure, our leading forces at every level and in every sphere are clean at all times."<sup>454</sup>

Again, we see the same narrative of threat paired with the exhortation to go after a putative enemy. The image of the enemy as "burrowing" is particularly striking. It creates a sense of an enemy that is omnipresent but not easy to identify, and it primes

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<sup>450</sup> See Lee Ann Fuji, 'Transforming the Normative Landscape: The Diffusion of a Genocidal Norm in Rwanda' (2004) 6(1) *Journal of Genocide Research* 99, 100.

<sup>451</sup> *ibid* 100.

<sup>452</sup> *Prosecutor v Kaing alias Duch* (Judgment) 001/18-07-2007/ECCC/TC (26 July 2010) para 83.

<sup>453</sup> Alexander Laban Hinton, *Why Did They Kill? Cambodia in the Shadow of Genocide* (University of California Press 2004), 9.

<sup>454</sup> *Duch* (n 455) para 105.

people to be on the lookout for this putative enemy amongst their social circles. The language used around the notion of cleanliness, moreover, has an obvious resonance with the notion of ethnic cleansing: members of a targeted group are painted as dirty, sully the society they form part of, and needing to be removed.

#### 4.2.2 Devaluation and dehumanisation

In addition to presenting a targeted group as a threat, propaganda in episodes of crimes against humanity is often also used to dehumanise and devalue this group in the eyes of the propaganda's audience. For instance, as we saw in the previous section, throughout the relevant period derogatory names were widely used to refer to Bosnian Croats and Bosnian Muslims, often by people in senior leadership positions within the political structures that existed in the area of *Krajina* and Bosnia as a whole.

This had a disastrous effect, as those who are targeted by these types of slurs are devalued in the eyes of the members of their society; and the value that is attached to people who are seen as "other" within a society is of 'profound importance' because '[d]evaluation makes mistreatment likely.'<sup>455</sup> Those are the words of Staub, who cites a study<sup>456</sup> in which

each participant was to be a teacher and administer electric shocks to a learner who made mistakes on a task. When teachers "overheard" a conversation in which the learner was described as one of a rotten bunch of people, they administered much stronger electric shocks. Learners described positively received the weakest shocks.<sup>457</sup>

Another study cited by Staub describes the psychological conditions that make a 'guilt-free massacre' possible. In this study, too, the denial of a victim's humanity – their devaluation – through derogatory terms is considered significant:

The most general condition for guilt-free massacre is the denial of humanity to the victim. You call the victims names like gooks, dinks, niggers, pinkos, and japs. The more you can get high officials in government to use these names and others like yellow dwarfs with daggers and rotten apples, the more your success.<sup>458</sup>

When we turn our analysis to the crimes against humanity committed in Rwanda, we see that there, too, propaganda was used to paint the targeted group as somehow sub-human by using derogatory names; there was a very particular language used to refer to them. In the lead-up to, and throughout the mass violence, Tutsi were referred to as *Inyenzi*: cockroaches.<sup>459</sup> This was not just an 'informal' piece of slang that had found its way into the public consciousness, but a carefully aimed weaponisation of

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<sup>455</sup> Ervin Staub, *The Roots of Evil: The Origins of Genocide and other Group Violence* (Cambridge University Press 2015), 93.

<sup>456</sup> Albert Bandura, Bill Underwood, and Michael E Fromson, 'Disinhibition of aggression through diffusion of responsibility and dehumanization of victim' (1975) 9(4) *Journal of Research in Personality* 253.

<sup>457</sup> Staub, *The Roots of Evil* (n 458) 93.

<sup>458</sup> Troy Duster, 'Conditions for Guilt-Free Massacre' in Nevitt Sanford and Craig Comstock (eds), *Sanctions for Evil: Sources of Social Destructiveness* (Beacon Press 1971), 166.

<sup>459</sup> Des Forges, *Leave None to Tell the Story* (n 446) 61.

language. Thus, for example, in the years leading up to the Rwandan genocide, Mugusera – the then vice-president of the MRND – in a speech 'attacks the "Inyenzi"'— he insists that they must be called Inyenzi, never the more respectful Inkotanyi [...].<sup>460</sup> In the article mentioned earlier, in which it was stated that the 'evilness' of all Tutsi is the same, it is written that

a cockroach cannot give birth to a butterfly. It is true. A cockroach gives birth to another cockroach...The history of Rwanda shows us clearly that a Tutsi stays always exactly the same, that he has never changed. The malice, the evil are just as we knew them in the history of our country. We are not wrong in saying that a cockroach gives birth to another cockroach.<sup>461</sup>

Much like calling victims 'worms, pigs, dogs, animals, beasts, whores', this type of language is dehumanising and enables perpetrators to 'distance themselves' from what they are doing.<sup>462</sup> It is about portraying victims as 'subhuman', in a way that makes us think of the archetypical use of dehumanisation during the Holocaust:

Much of the German propaganda machine focused on depicting Jewish people as subhuman. This excerpt [...] from a pamphlet published by the SS command conveys the typically extreme nature of this material:

"From a biological point of view he seems completely normal. He has hands and feet and a sort of brain. He has eyes and a mouth, but, in fact, he is a completely different creature, a horror. He only looks human, with a human face, but his spirit is lower than that of an animal. A terrible chaos runs rampant in this creature, an awful urge for destruction, primitive desires, unparalleled evil, a monster, subhuman."<sup>463</sup>

The passages cited in the previous subsection pertaining to the distinction between "old people" and "new people" in Cambodia have similar overtones of devaluation and dehumanisation. They are likened to "burrowing enemies", who must be "swept cleanly away" to preserve purity. Like the language used in Rwanda, and the language used during and in the lead up to the Holocaust, here too the notion unworthy, people 'sully' the population plays an important role.

There is an interesting tension to be observed between the two significant strands of propaganda discussed in this section: the same targeted group is at once painted as a threat and as subhuman. Thus, despite the claimed lack of respect towards a target group, and despite the notion that they are unworthy, or foul, or 'lower than an animal', the targeted group is also to be feared. They cannot simply be ignored or brushed off; they must be actively pursued and attacked. Doing so is considered an act of self-preservation. In cases of crimes against humanity, the combination of these two seemingly contradictory judgments about a targeted group creates a potent mix of fear and anger within a society. This maps closely onto some of the intuitions underpinning

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<sup>460</sup> *ibid* 68.

<sup>461</sup> *ibid* 62.

<sup>462</sup> Alette Smeulers, 'Auschwitz and the Holocaust Through the Eyes of the Perpetrators' (1996) 50 *Driemaandelijks Tijdschrift van de Stichting Auschwitz* 23, 31.

<sup>463</sup> Tom Segev, *Soldiers of Evil* (McGraw Hill 1987), 81., as cited in Alvarez, 'Adjusting to Genocide' (n 442) 166.

accounts of crime against humanity that are mostly victim-based. The pervasive discrimination of the targeted group, fuelled by propaganda, fear, and dehumanisation, creates an atmosphere in which mass atrocity becomes possible or even likely.

As we will see in what follows, the societal consciousness that emerges from this combination has a direct impact on those who commit violence. It contributes to an explanation of how so many individuals and groups end up killing so viciously, with such a sense of vengeance: they feel that their targets are worthless, and that they are justified and even required to mete out violence against them as an act of self-protection.

### 4.3 Marginalisation

Marginalisation of a given group within a societal structure is another key contributing factor to the emergence of a societal extreme power imbalance. The point has already been made that propaganda is in and of itself often a strategy of marginalisation. The same applies to violence, which we will study next. However, there are some other particularly insidious means of marginalisation that merit discussion first. Many of the acts discussed in this section are those that would, in the context of crimes against humanity, qualify in law as acts of persecution, for example under Article 5(h) of the Statute of the ICTY or Article 7(1)(h) of the Rome Statute.

One method of marginalisation, which was extremely prevalent in cases held in from of the ICTY, was the deliberate policy to remove non-Serb people living in the region from their jobs. In the *Brđanin* case, the court describes how this worked:

One of the measures taken with a view to implementing the Strategic Plan was the dismissal of Bosnian Muslims and Bosnian Croats from key positions in the army, the police and other public institutions and enterprises.

[...]

The evidence clearly establishes a discriminatory pattern of dismissals of non-Serbs pursued by the Bosnian Serbian authorities. These discriminatory dismissals were in no way justified by the impact that the war in Croatia had on the economy in the Bosnian Krajina.

[...]

In the spring of 1992, all employees in local Public Security Services (“SJBs”) and other public services were required to sign an oath of loyalty to the Bosnian Serbian authorities. Bosnian Muslims and Bosnian Croats who refused to sign the declaration of loyalty were dismissed. Those who accepted to sign could remain within the service. However, by June 1992, the policy changed. To start, all non-Serbs holding managerial positions were fired and replaced by Bosnian Serbs. Bosnian Muslims and Bosnian Croats were dismissed from the judiciary, local enterprises, the media, hospitals, the police forces and the army. By the end of 1992, almost the entire Bosnian Muslim and Bosnian Croat community had been dismissed from their jobs. Many people who showed up for work during this period

were turned back and denied access to their workplace. Generally speaking, people were sent home, told not to come back, and then fired soon thereafter.<sup>464</sup>

The facts of the *Karadžić* case, which deals with all Bosnian regions that were at some point part of the RS, show that this method of marginalisation was widespread indeed. In *Bosanski Novi*, 'Bosnian Muslims who worked in companies, administrative organs, and institutions in Bosanski Novi were required to sign an oath and were also dismissed from their jobs.'<sup>465</sup> In *Kljuc*, 'the Chamber finds that, contrary to Kalabić's assertion, Bosnian Muslims were dismissed from their jobs on account of their ethnicity.'<sup>466</sup>

In *Vlasenica*, another region in which a 'take-over' was organised so that an RS-directed Crisis Staff could take control of it,

[m]uslims working in state-owned companies and other public services in Vlasenica municipality were dismissed from their jobs. Muslim shopkeepers feared keeping their businesses open, and the salaries of the Bosnian Muslim workers of the local bauxite mine were stopped. Their Serb colleagues on the other hand, continued to receive salaries. On 14 May 1992, the local bauxite mine announced that "not a single Muslim should return to work".<sup>467</sup>

And in *Bijeljina*, between April and May 1992,

Bosnian Muslim employees were dismissed from their jobs and Bosnian Muslim members of the local municipal government were dismissed from their positions and expelled from their apartments. Family members of Bosnian Muslim intellectuals and leaders were dismissed from their positions and harassed.

[...]

On 15 June 1992, Mauzer stated that the presidency of SAO Semberija-Majeveca had decided to replace Bosnian Muslims in managerial positions in Bijeljina, and should "the genocide against the Serbian people" in BiH continue, all Bosnian Muslims would be fired from their jobs and expelled from the territory.<sup>468</sup>

The link between propaganda and marginalisation is clearly visible in these dismissals: the societal marginalisation of removing people from their jobs based solely on their ethnicity is justified and made palatable by asserting that it is done in response to the putative threat of genocide that Bosnian Serbs face. In other words, the establishment of an extreme and rigid hierarchy within society – a societal extreme power imbalance

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<sup>464</sup> *Brđanin Trial Judgment* (n 426) paras 84-85.

<sup>465</sup> *Karadžić Trial Judgment* (n 440) para 1437.

<sup>466</sup> *ibid* para 1505.

<sup>467</sup> *ibid* para 1120.

<sup>468</sup> *ibid* paras 629-630.

– based on ethnicity is presented as a necessity or logical response to something the targeted group has purportedly done or is purportedly planning to do.

Dismissing people from their jobs or barring them from having access to professions is a strategy of disenfranchisement and marginalisation used throughout and prior to many of the worst episodes of violence against groups. Often, it is a first step in the progressive tightening of control and removal of the target group from society. Thus, for example, when the Nazi Party seized power, the Nuremberg Tribunal explains that they passed ‘a series of discriminatory laws [...], which limited the offices and professions permitted to Jews.’<sup>469</sup>

In addition to the practice of removing employees from their jobs there are many other means by which the rights of targeted groups have been curtailed in cases of crimes against humanity.

Returning to the ICTY, the *Brđanin* court is succinct in its description of these methods:

Bosnian Serb authorities exerted undue pressure on Bosnian Muslims and Bosnian Croats in an organised manner to make them leave the area. Non-Serbs did not receive the same attention and medical treatment at hospitals as Bosnian Serbs did. Their freedom of movement was severely restricted in the form of checkpoints and curfews, in contrast to the freedom of movement enjoyed by Bosnian Serbs. Non-Serbs were regularly mistreated at Bosnian Serb manned checkpoints. Moreover, they were not protected against harassment and abuse from Bosnian Serb armed individuals. Bosnian Muslims and Bosnian Croats were oppressed and pressurised so that living in the Bosnian Krajina became unbearable for them.<sup>470</sup>

Not only does the court here describe, factually, what it believes has happened in the area; it also imputes a motive to those acts: these curtailments of rights of non-Serb Bosnians were aimed at making it ‘unbearable’ for the victims to continue living in the area. Again, this method of marginalisation was by no means limited to the region of *Krajina*.

Thus, for example, in the area of *Vlasenica*,

[...] The Vlasenica Crisis Staff issued passes for people to move around town and introduced a curfew. In order for Bosnian Muslims to pass checkpoints, move around or leave the municipality they had to be issued a travel pass by the Bosnian Serb municipal authorities. Even if they did have such passes, they were often arrested and detained. On the other hand, Bosnian Serb citizens did not have to obtain movement passes. [...] Transit passes were usually only issued to women, children and the elderly with able bodied men only able to secure such passes if they had connections or had substantial amounts of money to pay for such passes, particularly if they wanted to leave the municipality.

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<sup>469</sup> *Judgment of the International Military Tribunal (IMT Judgment) Trial of Major War Criminals before the International Military Tribunal (1 October 1946)*, 248.

<sup>470</sup> *Brđanin Trial Judgment* (n 426) para 86.

[...]

Bosnian Muslims unlike Bosnian Serbs had limitations on the amount of money they could withdraw from the bank. [...] Members of the Bosnian Serb police selected the houses of wealthy Bosnian Muslims and took away their property. The cars of some Bosnian Muslim detainees were also confiscated by the Bosnian Serb police. Non-Serb intellectuals, political leaders and the wealthy who had not fled before the conflict began were the first to be “forcibly removed” from Vlasenica.<sup>471</sup>

Returning to the Nuremberg judgment, we read about methods of marginalisation and exclusion of Jews in society:

[...] restrictions were placed on their family life and their rights of citizenship. By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organized, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. A collective fine of 1 billion marks was imposed on the Jews, the seizure of Jewish assets was authorized, and the movement of Jews was restricted by regulations to certain specified districts and hours. The creation of ghettos was carried out on an extensive scale, and by an order of the Security Police Jews were compelled to wear a yellow star to be worn on the breast and back.<sup>472</sup>

While looting and arrests among the targeted group are also widespread in almost all cases of crimes against humanity, the regulation of movement is especially characteristic of the particularly vicious and violence-enabling marginalisation of targeted groups. It is at once a way of severely reducing the agency of large groups of people within a society – creating a trap so that when they are targeted, they can be easily found and will be unable to escape. Thus, in Rwanda:

[a]uthorities also revived an earlier requirement that persons wishing to travel outside their communes receive written authorisation to leave (*feuilles de route*). Burgomasters controlled the distribution of these documents which could permit Tutsi to try to flee for their lives. During periods of curfew, burgomasters also decided who must obey the regulations to remain at home. Officials insisted that Tutsi remain in their houses while granting passes to assailants who could then move freely around the commune to attack them.<sup>473</sup>

The methods of marginalisation described in this section combine in order to establish and proliferate a societal extreme power imbalance. Those who are marginalised are, almost by definition, extremely powerless in comparison with those who are not targeted or those who are actively doing the targeting. At the same time, the prevalence of marginalisation is itself a *symptom of the existence* of a societal extreme

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<sup>471</sup> *Karadžić Trial Judgment* (n 440) paras 1118-1119.

<sup>472</sup> *IMT Judgment* (n 472) 248.

<sup>473</sup> Des Forges, *Leave None to Tell the Story* (n 446) 186.



power imbalance. While this may sound circular, this reciprocal relationship between cause and symptom makes sense in the context of extreme power imbalances. Societal extreme power imbalances are created and kept in existence by things like violence, marginalisation, propaganda, while at the same time the widespread nature of these aspects is an indication that a societal extreme power imbalance is already in existence. When it comes to extreme power imbalances, cause and effect are mutually amplifying and locked in a relation of reciprocity.

As Staub puts it, 'discrimination against subgroups combined with cultural images and stereotypes to further ingroup-outgroup distinctions and devaluation.'<sup>474</sup> This dynamic is clearly at work in the cases that we have been discussing in this section: the stereotypes and distinctions peddled by propaganda, and which perhaps were already latently present in the collective consciousness, were exacerbated and made tangible through concrete policies of marginalisation. In many of these cases, the institution of law, as Alvarez points out, was crucially and painfully implicated:

Another important group that often plays a significant role in legitimating the persecution of various groups are legal professionals. Lawyers and Judges throughout Germany, for example, did much to provide the legal foundation for the subsequent holocaust. Not only does the profession of law carry with it a tremendous amount of prestige and status, but the law itself is a powerful vehicle in legitimating policies of persecution. By definition, everything that is legal is legitimate and everything that is illegal is illegitimate. The holocaust happened only after legal initiatives had over the years deprived jews of their professions, their possessions, and their rights.<sup>475</sup>

There is an element of perversion in this marginalisation and the role of societal authorities in effecting it, which adds to our intuition that there is something especially morally reprehensible about crimes against humanity. First, there is the perversion of officials who use their authority, which they are usually considered to have for the benefit of the public good and the governance of the relevant region, in order to deliberately undermine the position of entire groups within the relevant community. Secondly, there is the perversion of the notion of the state, often understood as an entity to which we cede control and which we invest with the exclusive power to enforce laws and act violently in order to *prevent* discord and violence amongst its citizens. This social contract is turned on its head by the pursuit of the establishment or proliferation of a state whose purpose is not to enable the relatively peaceful coexistence of those within its borders, but rather the systematic and fundamental exclusion of some of them.

There is a connection here to victim-based accounts of crime against humanity, as pointed out in the previous subsection. But we may also connect the notion of societal extreme power imbalances to the fundamental insight of accounts of crimes against humanity such as Vernon's or Luban's, which characterises crimes against humanity as being the result of an inversion of the state's powers, using them for purposes

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<sup>474</sup> Staub, *The Roots of Evil* (n 458) 100.

<sup>475</sup> Alex Alvarez, 'Justifying Genocide: The Role of Professionals in Legitimizing Mass Killing' (2001) 6(1) *Idea* <<https://www.ideajournal.com/articles.php?sup=10>> accessed 9 October 2021.

diametrically opposed to their *raison d'être*. Vernon writes of this inversion that it is 'a particular kind of evil',<sup>476</sup> whereby 'powers that justify the state are, perversely, instrumentalized by it, territoriality is transformed from a refuge to a trap, and the modalities of punishment are brought to bear upon the guiltless.'<sup>477</sup> Building on Vernon's work on this point, Luban adds that

the legal category of "crimes against humanity" recognizes the special danger that governments, which are supposed to protect the people who live in their territory, will instead murder them, enslave them, and persecute them, transforming their homeland from a haven into a killing field.<sup>478</sup>

For Vernon and Luban, as discussed in Chapter 2, these observations about perversion and inversion lead them to assert that state involvement in the relevant violence, which they regard as the key perversion, is one of the most salient feature of the concept of crimes against humanity.<sup>479</sup> For us, it is a key – but not exclusive – part of the puzzle that explains at least in part why the presence of societal extreme power imbalances makes cases of crimes against humanity particularly horrifying. When discussing inter-group and interpersonal extreme power imbalances, we will see that the notion of perversion permeates those types of extreme power imbalance too. It is not limited to societal extreme power imbalances, although it does have a specific expression in such extreme power imbalances that aligns closely with existing literature on the moral egregiousness of crimes against humanity. This is clear from the focus by many authors on the involvement of states and state-like organisations, and the existence of a policy agreed by people in positions of authority.

#### 4.4 Violence

For societies in which crimes against humanity occur, violence is often deeply implicated in the emergence and proliferation of a societal extreme power imbalance. Often, violence is the result of propaganda or marginalisation. At other times, violence might itself be a *method* of propaganda or marginalisation: setting a violent example can be a means of communicating the degraded status of a group, and signal to others within a community that they should join in making this degraded status persist. These relationships are, as many of the relationships described so far, mutually reinforcing.

While the occurrence of violence itself is an important marker of the existence or emergence of societal extreme power imbalances, it is not *just* the fact that such violence occurs that is pertinent. It is also crucially important what the *response* is to violence: how do those with influence and authority within a certain society react to its occurrence? Do they denounce it, are they indifferent, or do they sponsor or even organise the violence? Here the focus is not on individual, discrete episodes of violence. In this chapter, what we are interested in is the aggregate of violence, its spread, and the targeted nature of such violence. It is this aggregate of violence that contributes to the extreme power imbalance on the societal level. Of course, it should

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<sup>476</sup> Vernon, 'What is Crime against Humanity?' (n 11) 245.

<sup>477</sup> *ibid* 245.

<sup>478</sup> Luban, 'A Theory of Crimes Against Humanity' (n 160) 117.

<sup>479</sup> See section 2.3.

be noted that each discrete episode of violence contributes to this aggregate and that, in the individual or inter-group dimension, perpetrators or perpetrator-groups may also be motivated by the desire to establish a society-wide dominance of their group over the victim-group.

Returning to the *Krajina* case and other cases from Bosnia, the first focus is on what ICTY judgments often refer to as paramilitary organisations. In *Krajina*, as in other places, these more or less organised bands of violent criminals played an important part in the creation of an atmosphere in which a societal extreme power imbalance could emerge. These were not state forces, although their actions were aligned with the goals of the state-like entities that controlled the relevant territories. The court in *Brđanin* acknowledges this. It writes about 'a number of Serb paramilitary groups' which 'created an atmosphere of fear and terror amongst the non-Serb inhabitants of the Bosnian Krajina by committing crimes against Bosnian Muslims and Bosnian Croats and their property.'<sup>480</sup> These crimes included 'rape, murder, plunder and the destruction of property.'<sup>481</sup> When the armed conflict started, 'the scale of the crimes committed against the non-Serb civilian population in the Bosnian Krajina escalated.'<sup>482</sup> One concrete example was the arrival in one Bosnian Muslim municipality of 'a Bosnian Serb armed formation called "White Eagles"', in April 1992. There, this group 'was responsible for shooting, intimidating the non-Serb population and looting.'<sup>483</sup>

Similarly, in the *Karadžić* case, we read about the municipality of *Bijeljina*, where

[p]aramilitary formations were involved in mistreating and stealing from the population. More specifically, Arkan's men destroyed property of individuals involved with the SDA, engaged in looting, and went to the homes of wealthy Bosnian Muslims demanding money. Bosnian Muslims feared for their lives if they refused the demands of Arkan's men.

[...]

There was also an incident in June 1992 when paramilitaries raped two Bosnian Muslim women and paraded them naked through a town before they took them away by car and raped them again.<sup>484</sup>

Widespread and seemingly random violence (random insofar as it can happen against any member of the targeted groups) is in and of itself enough to create a societal climate in which groups feel targeted and unsafe. A climate in which they are much less likely to thrive. As the courts have noted, there was an atmosphere of fear and terror as violence and intimidations were routinely committed against non-Serbs. When entire groups within a society are perpetually in this state of fear, that is already reason to believe that there is a very serious power imbalance within that society.

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<sup>480</sup> *Brđanin Trial Judgment* (n 426) para 97.

<sup>481</sup> *ibid* 97.

<sup>482</sup> *ibid* para 100.

<sup>483</sup> *ibid* para 107. More examples are offered in the surrounding paragraphs.

<sup>484</sup> *Karadžić Trial Judgment* (n 440) para 631.

What makes this power imbalance even more extreme is the response to (and involvement in) the relevant violence of those with authority, or those with some sort of official capacity. From the highest authority all the way to the local authorities, the policy in Serb-held territories of Bosnia seems to have been the deliberate non-prosecution of crimes committed by Serbs against non-Serbs in the areas controlled by the RS.<sup>485</sup> The court in *Karadžić* reaches this conclusion based on

compelling evidence demonstrating a lack of investigation and prosecution of the serious criminal acts committed against non-Serbs which were brought to the attention of authorities, as opposed to a clear willingness to investigate and prosecute crimes committed against Serbs: [...] in most cases in 1992, absolutely nothing was done to investigate or prosecute the horrific crimes which were known to authorities.<sup>486</sup>

The *Brđanin* court does not mention the lack of prosecution of crimes against non-Serb Bosnians quite as explicitly as the *Karadžić* court. However, it emphasises as we have seen in the section on marginalisation above, that non-Serb Bosnians ‘were not protected against harassment and abuse from Bosnian Serb armed individuals.’<sup>487</sup> Additionally, it makes it explicit that Brđanin had full and detailed knowledge of the crimes being committed within the ARK against non-Serb Bosnians.<sup>488</sup> In his capacity of President of the ARK’s Crisis Staff, which had *de facto* authority over the police and the army, he decided not to prosecute crimes committed against non-Serb Bosnians. This is a clear signal that in *Krajina*, as in other parts of the RS, the violent persecution and domination of non-Serb Bosnians went completely unchecked.

The result of this widespread *laissez-faire* attitude of those with authority within a society to the crimes targeted against non-Serb Bosnians must have contributed significantly to the persistence and spread of a societal extreme power imbalance and the concomitant emergence of the conditions in which mass atrocities became possible throughout Serb-held territories in Bosnia. This radicalisation of norms, as Anderson puts it, is the result of propaganda and marginalisation but also of violence. The exercise of violence, especially when authorities fail to punish it, ‘makes the victims’ degraded status apparent’.<sup>489</sup> In that sense, the continued presence of violence and the consistent failure to protect targeted groups against such violence is supremely marginalising. It could even be seen as a type of propaganda: proving publicly the degraded status of a group and communicating to others that they can be targeted without repercussions. Of course, as we know from the previous chapters, the involvement of people with authority is by no means limited to the *inaction* described in the paragraphs above. In many cases, including many related to the Bosnian conflict, those in positions of authority *plan and commit* violence against targeted groups.

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<sup>485</sup> *ibid* para 3425.

<sup>486</sup> *ibid* para 3425.

<sup>487</sup> *Brđanin Trial Judgment* (n 426) para 86.

<sup>488</sup> *ibid* para 333.

<sup>489</sup> Anderson, ‘Mainstreaming Atrocity’ (n 333) 145.

Extreme examples of this pattern – direct incitement and encouragement from government officials, following a clear policy – can be found in many cases from the ICTR. Take, for instance, the case of *Karemera and Ndirumpatse*. Both men were senior politicians in the MRND party, Karemera as First Vice President and Ndirumpatse as National Party Chairman and Chairman of the Executive Bureau.<sup>61</sup> During part of the period of genocide in 1994, Karemera was the Minister of the Interior for the interim government, in which the MRND took part.<sup>490</sup> Both Karemera and Ndirumpatse clearly were men of authority, both by virtue of their senior positions in a major political party and, in the case of Karemera, by being part of the interim government that took control shortly after president Habyarimana's death.

Much of the court case deals with the role played by Ndirumpatse and Karemera (and, by extension, the interim government) in the enabling and ordering of violence against the Tutsi. Especially interesting for the purposes of this thesis is the relation between societal institutions (of which Karemera and Ndirumpatse are representative) and their actions or inactions, and the mass violence that ensued as a result. The direct perpetrators in Rwanda – those whose hands committed the often lethal and incredibly brutal violence – were most often neither connected to a state or state-like entities, nor to semi-organised bands of paramilitaries. Most were civilians swept up in the frenzy that was deliberately created and curated by societal authorities and other people with influence.

In *Karemera* we see how deliberately the 'radicalization of norms' as Anderson calls it, such as the revision of the prohibition on killing, is put in motion by radical politicians who have assumed positions of power.<sup>491</sup> The first example of this is a meeting held between Karemera, Ndirumpatse, the interim prime minister Kambanda and others, in which several *bourgmestres* from Gitarama as well as the *préfet* of Gitarama expressed their concerns about the violence happening in their area, and requested assistance in helping counter it.

Whereas in the morning Tutsi had been present at this meeting, they were told in the afternoon to leave, leaving only the *bourgmestres* and the *préfet*. The court paraphrases one of the witnesses who described the continuation of the discussions after the departure of the Tutsi interlocutors as follows:

Kalimanzira warned the assembled people, in his capacity as a senior government official, that it was known that the *bourgmestres* of Gitarama préfecture were not performing their duties properly and that some of them were accomplices of the Inkotanyi and not on good terms with the Interahamwe. Karemera spoke, saying that the people of Gitarama had adopted an attitude similar to opposition members which should be condemned and stopped; Hutus should unite to fight the RPF and their accomplices, and staunch support should be extended to the Interahamwe.

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<sup>490</sup> *Prosecutor v Karemera and Ndirumpatse (Karemera Trial Judgment)* (Judgement and Sentence) ICTR-98-44-T (2 February 2012), para 1-11.

<sup>491</sup> Anderson, 'Mainstreaming Atrocity' (n 333) 145.

Nobody contradicted Karemera; the speeches of the national politicians supported each other and used words that caused fear.

[...]

The local authorities were shocked and felt terrorised. Instead of dealing with the problems raised in the earlier meeting, the national leaders now told them that they were not happy with how they were doing their jobs and that they were assisting the enemy. The remaining speakers supplemented each other and the tension continued to rise as more speeches were made.

[...]

After this meeting where local officials realised that they were not going to receive any support from the government, efforts to assist Tutsis diminished, and genocidal acts intensified.<sup>492</sup>

The court reached the conclusion that '[d]uring the meetings, the [national political party] leaders, including Karemera and Ngirumpatse, instigated the Gitarama delegation to stop protecting Tutsis and to allow the *Interahamwe* to continue killing Tutsis'.<sup>493</sup>

Another example concerns the deliberate removal of two *préfets* in Butare and Kibungo because they were not willing to partake in the violence against Tutsi. Having considered the evidence, the court concluded:

The Prosecution has proved the following beyond a reasonable doubt. Habyalimana and Ruzindana were replaced as *préfets* of Butare and Kibungo because they opposed attacks on Tutsis. Nsabimana was installed as Habyalimana's replacement because the Interim Government believed he embraced its genocidal policy. Interim President Sindikubwabo's speech in Butare on 19 April 1994 urged the population of Butare to kill Tutsis. When Karemera and the Interim Government decided to replace Nsabimana, they selected Nteziryayo because they believed that he would implement the government's genocidal policy more effectively.<sup>494</sup>

Witnessing so much unpunished violence and to hear the interim president, in a time of crisis and great uncertainty, *call* for violence against a putative enemy must have had a huge impact on the public consciousness. Morrow, in his work on norm transformations in societies around times of mass violence, emphasises this point.<sup>495</sup> He cites Fuji, who observes that 'the more ambiguous the situation, the more likely people are to rely on norms as guides for behaviour'.<sup>496</sup> In the chaos after the downing of Habyarimana's plane, the newly minted radical government took advantage of that fact by establishing a new norm (or inverting an existing one) that made killing not only allowed, but even required.

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<sup>492</sup> *Karemera Trial Judgment* (n 493) para 769-771.

<sup>493</sup> *ibid* 859.

<sup>494</sup> *ibid* 892.

<sup>495</sup> Morrow, 'The Thesis of Norm Transformation' (n 335) 70

<sup>496</sup> Fuji, 'Transforming the Normative Landscape' (n 453) 100.

As far as societal authorities go, a speech by a president to mark out part of the society (i.e., Tutsi civilians) as the enemy, as a target, makes it abundantly clear that they have a severely degraded status, as Anderson has put it before. Violence against them is not just ignored, but the population is actively called upon to attack them. As said above, this response to violence is itself a means of marginalisation and an important tool in the establishment or proliferation of a societal extreme power imbalance. And it is an extremely effective one. After the replacement of Habyalimana, for example, 'the attacks on Tutsis began immediately.'<sup>497</sup>

In addition to the disastrous impact of the governmental machinations described above, Karemera, being a high-ranking politician and minister for the interim government, took on an even more direct role in inciting public violence. And it was not just him. Even the Prime Minister made sure to take an active role. The court describes this in a section of the judgment called "Meetings with the Population", of which there were three. We will focus on a meeting in Kibuye. To place this meeting in perspective, it is useful to cite the allegations relevant to the meeting as they were formulated in the indictment:

On or about 3 May 1994, Karemera participated in a large meeting called by Interim Government officials at the Kibuye prefectural office. Prime Minister Jean Kambanda addressed the gathering and promoted civil defence as a means to combat the RPF, reporting that the war was in all communes in Rwanda. Eliézer Niyitegeka [the Minister of Information] made comments that characterised Tutsi children as the enemy. Karemera also addressed the gathering and paid tribute to the Interahamwe and called upon them to "flush out, stop and combat the enemy" in collaboration with the youth wings of the other parties.

Through this address, Karemera associated himself with the policies of the Interim Government, which intended to characterize all Tutsis as "the enemy", "accomplices of the enemy" or "accomplices of the RPF". Thereby, Karemera instigated and incited the audience to "fight the enemy" and physically attack and destroy Tutsis as a group. The speeches and some of the commentary from the meeting were re-broadcast to the nation by Radio Rwanda several days later, on or about 9 May 1994.<sup>498</sup>

What was the content of these speeches? As the court observes, it is not just a matter merely of the exact words used; the context in which they were spoken, and the words that *were not* spoken are of great importance too. We have seen this in the failure of authorities to condemn acts of mass violence. This failure to condemn acts as a catalyst and makes the degraded status of victims apparent: the authorities simply do not care about their deaths (or might even be pleased by them). Something similar happened during the speeches discussed here, although they went even further insofar as the silence about previous killings was accompanied by an exhortation to continue 'fighting the enemy' - which was code for Tutsi civilians. This combines elements of victim-based and perpetrator-based accounts: widespread discrimination

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<sup>497</sup> *Karemera Trial Judgment* (n 493) para 884.

<sup>498</sup> *ibid* para 948.

against Tutsi, and the fact that state authorities are encouraging and planning violence rather than combating it, work together to create an atmosphere in which a special type of crime – a crime against humanity – can flourish.

To fully grasp this, let us look at the context in which these speeches occurred. According to Prosecution Witness GK, whose statement is summarised by the court, there was ‘a pestilential stench’ present in Kibuye at the time of the meeting, caused by ‘killings of the civilian population that had occurred approximately two weeks earlier.’<sup>499</sup> The witness added that ‘the mass graves for the victims had only been completed two days before the meeting.’<sup>500</sup> When we combine this witness statement with another paragraph dealing with the same situation, we find out more about the massacre that has occurred. The court describes how it went to the Kibuye *préfecture* as part of a site visit. There, it observed that that the *préfecture* office [where the meeting was held] was only minutes away from the location of the Gatwaro Stadium and Home Saint-Jean massacres, which occurred approximately two weeks before the 3 May 1994 meeting.<sup>76</sup>

The speeches made by Karemera and others came mere weeks after these massacres occurred. As the court observes,

The mass graves for the victims had only been completed two days prior to the meeting and the stench of the bodies was still in the air when the officials spoke.

[...]

Nonetheless, they did not comment on the killings and especially did not urge the population to cease massacring civilians. No reasonable individual who sought peace and wished to end the killings would have squandered such an opportunity to immediately and resoundingly condemn the massacre of innocent civilians.<sup>501</sup>

Instead, Karemera took the opportunity to ‘pay tribute to the *Interahamwe* and called upon them to *continue* [the court’s emphasis] to be vigilant and flush out, stop and combat the enemy.’<sup>502</sup> Given the context at the time of his speech, ‘these words can only be understood as an unequivocal endorsement[.]’<sup>503</sup> Which, of course, it was. These words and this endorsement fit clearly in the pattern of governmental and official action designed to create a societal atmosphere in which killing was no longer prohibited – in which killing became the norm. They *wanted* people to kill their neighbours and played on their fears and long-standing tensions to goad them into violence. By their actions and words, they made clear that it was the right thing to do, and that no-one would be punished for their violence.

Looking at other episodes of crimes against humanity, we can see that there is a similar relationship between violence and the response to it. During the Holocaust one

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<sup>499</sup> *ibid* para 960.

<sup>500</sup> *ibid* para 960.

<sup>501</sup> *ibid* para 990.

<sup>502</sup> *ibid* para 991.

<sup>503</sup> *ibid* para 991.



of countless examples of the Nazis and their allies allowing violence to be committed against Jews and other targeted groups, can be seen in the graphic description of the attack on the Jews in the village of Jedwabne.<sup>504</sup> And, of course, the Holocaust itself is characterised by the extremely efficient state machinery used for industrial-scale killing: it was not just the acceptance or endorsement of violence by civilians against a targeted group, but the concerted effort by a state to eradicate them by the acts of its own officials. In Cambodia, the state and its officials were also heavily implicated in violence, and encouraged them to torture and kill, making it clear that there were no repercussions to violence but that it was, in fact, encouraged.<sup>505</sup> This dynamic between discrimination and state involvement is at the root of the excessive acts of violence that are committed during episodes of crime against humanity. We will see more of this interplay in the chapters that follow.

Finally, in Sierra Leone, where rebels controlled large swathes of the country, violence became increasingly pervasive, brutal and outlandish. We have seen some concrete examples in the previous chapters. Mitton ascribes this in part to 'the active creation of shamelessness,' which was the result of the 'purposeful encouragement and manipulation' by rebel commanders of the often young and drugged-up combatants.<sup>506</sup> Among the rebels there was a 'radically different order', membership of which 'was reinforced through the forced committing of atrocities, with RUF commanders giving direct orders to new recruits to main and kill civilians, often members of their own families and community.'<sup>507</sup> Through these acts, an extremely violent societal extreme power imbalance emerged whereby civilians who found themselves in the way of the rebels were turned into little more than objects upon which the rebels meted out their violence, so that they could establish their dominance both in relation to the civilians they attacked (often under some sort of revolutionary pretence), and each other. Again, violence was not just tolerated, but it became part of an emerging norm that required it.

When the conditions described in the previous sections - propaganda, marginalisation, and the commission and endorsement or encouragement of violence - combine, the relevant society becomes a trap to those who find themselves at the powerless end of the extreme power imbalance that takes hold in it. A vivid example of the effect of this can be found in the *Kunarac* case, dealing with crimes committed around the area of Foça, when one of the witnesses mentioned that it was 'inconceivable that [...] any Muslim girl could have moved around freely and that she herself [i.e. the witness] only felt secure enough to walk about alone at the end of 1993.'<sup>508</sup> This was not just the case because of random crimes being committed, or even merely because of inaction by authorities against the crimes committed by semi-organised groups of criminals or paramilitaries. Another quote from the same case makes this clear:

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<sup>504</sup> See Gross, *Neighbours* (n 436).

<sup>505</sup> Hinton, *Why Did They Kill?* (n 456).

<sup>506</sup> Kieran Mitton, 'Irrational Actors and the Process of Brutalisation: Understanding Atrocity in the Sierra Leonean Conflict (1991–2002)' (2012) 14(1) *Civil Wars* 104, 111.

<sup>507</sup> *ibid* para 115.

<sup>508</sup> *Kunarac Trial Judgment* (n 186) para 85.

FWS-95 was taken to Partizan after about 15 to 20 days at Foča High School. From the day of her arrival, women were taken out from Partizan by soldiers on a regular basis to be raped. She recalled that one of the guards at Partizan tried to stop them from doing so, but was told that the soldiers had the authorisation of the local chief of police, Dragan Gagovic.<sup>509</sup>

In places such as *Krajina*, *Foča*, and many other places throughout Bosnia, Rwanda, Cambodia, the Third Reich, or Sierra Leone, formal and informal structures became geared towards the exclusion of, and violence against, a targeted group or groups, creating an extreme power imbalance. The combination of propaganda, marginalisation, and official planning, encouragement or toleration of violence leads to what Morrow calls 'norm transformations', whereby 'individuals who previously accepted prohibitions on certain actions come to regard those same actions as required [...]'.<sup>510</sup> The fact that large swathes of society acquiesce to or even actively support the violent domination and exclusion of groups within that society is at least partly explained by this transformation. Formal institutions, like local authorities, play an important role in catalysing this process. We have seen Anderson make this point. Staub, too, writes that society's institutions play a key role in creating a societal climate, and that there is 'a sharp turn towards group violence when institutions are created or existing institutions assigned the task to harm a subgroup of society'.<sup>511</sup>

In the examples from Rwanda, we see this clearly. Authorities took decisive action to replace officials who attempted to stop the violence against Tutsi, and they organised speeches and killings, making sure to involve the local civilian population in the attacks on what were previously their neighbours or fellow villagers. The impact of this dynamic is clear from the extraordinary number of victims and the extraordinary cruelty of the violence meted out against them, enabled or even inspired by the societal constellation described above. More than just sheer quantity, members of such a society are affected by the norm transformations that have been postulated in this section.

According to Smeulers:

it became clear that the social order changed completely during the genocide: people no longer went to work, as the new social order was to hunt and kill Tutsis. In a period in which violence was the order of the day, people became brutalized; violence not only seemed legitimized and justified, but even a duty.<sup>512</sup>

This is illustrated by an excerpt from Hatzfeld's collection of interviews with killers from the Rwandan genocide. But before turning to that excerpt there is a caveat to be made. These interviews are with convicted *genocidaires*, raising the question of whether whatever they say about their roles and motivations can be trusted to be completely

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<sup>509</sup> *ibid* para 311.

<sup>510</sup> Morrow, 'The Thesis of Norm Transformation' (n 335) 69.

<sup>511</sup> Staub, *The Roots of Evil* (n 458) 100.

<sup>512</sup> Alette Smeulers and Lotte Hoex, 'Studying the Microdynamics of the Rwandan Genocide' (2010) 50 *British Journal of Criminology* 434, 445.

truthful. They may have reasons to obscure or diminish their own role, to claim that there was little individual agency leading up to the violence.

Hatzfeld himself acknowledges this difficulty, and explains that he dealt with the problem by carefully selecting the people he spoke to:

Dialogue with a killer must also occur at a particular moment in his life as a prisoner: after the judicial inquiry into his case has been closed and he has been condemned to a more or less long sentence—in other words, when he knows his account can no longer affect the judicial decision and he believes he will not be confronting the outside world for quite a while.

He must also have taken the momentous steps of admitting, however guardedly, to more or less voluntary participation in the massacres, and of agreeing to describe some of his criminal actions. No matter what scheming and trickery he may be up to, that the killer acknowledges involvement is in fact indispensable. If he denies everything or automatically shifts his responsibility onto others, if he rejects the slightest individual initiative, if he disowns intellectual support for the project and denies any interest or pleasure in carrying it out, we are right back with the litanies recited by all the families on the hills: “It wasn’t me, it was the others.” “I wasn’t there, I didn’t see anything.” “If the Tutsis hadn’t run away, it wouldn’t have happened.” “I didn’t want to, but they made me do it.” “If I hadn’t done it, someone else would have done it worse.” “I had nothing to do with it, the proof is, I have always had Tutsi friends ...”

Thus the importance of speaking to a group, in this instance a group of pals from Kibungo who were together from the beginning, who accepted and discussed among themselves the conditions of the interviews, who consulted with one another between meetings, and who confronted together their memories as killers.<sup>513</sup>

This gives us some confidence indeed that the accounts offered here may be at least by and large truthful. The people interviewed do not have to fear legal ramifications of their confessions. And given the fact that they were interviewed as a group, it would be difficult for any individual member to blame someone else or downplay their involvement without risking the censure of their fellow group members. And at the end of the day we must also trust, at least to some extent, the judgment of an experienced war correspondent who has written extensively on the Rwandan genocide.

So let us analyse in a bit more detail the interplay between the societal extreme power imbalance and the individual killers and victims. Pancrace, one of the *genocidaires*, explains the way in which mass killing had become a duty:

It was obligatory. A special group of hothead boys was assigned to search the houses of those who tried to hide. We feared the authorities’ anger more than the blood we spilled. But deep down we had no fear of anything.

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<sup>513</sup> Jean Hatzfeld, *Machete Season: The Killers in Rwanda Speak* (Picador 2006), 128.

I'll explain. When you receive a new order, you hesitate but you obey, or else you're taking a risk. When you have been prepared the right way by the radios and the official advice, you obey more easily, even if the order is to kill your neighbors. The mission of a good organizer is to stifle your hesitations when he gives you instructions.

For example, when he shows you that the act will be total and have no grave consequences for anyone left alive, you obey more easily, you don't worry about anything. You forget your misgivings and fears of punishment. You obey freely.<sup>514</sup>

The disastrous impact of propaganda on the ability or willingness to resist orders or refrain from violence is striking. The societal atmosphere that was created by propaganda meant that killers had been 'prepared the right way'. Additionally, it was clear to prospective killers, from the violence that had happened already without repercussions, and the statements and behaviour of authorities, that there would be 'no grave consequences' to their actions. The results of this liberation from worry about the consequences of violence permeates many of the most egregious acts of violence. It liberates perpetrators of any qualms they might have, allowing the most sadistic of them to give into their desires.

#### *4.5 Conclusion*

This chapter has shown that the societal dimension of extreme power imbalances plays an important role in understanding the dynamics episodes of crimes against humanity.

An analysis of fact patterns from several episodes of such crimes, across divergent cultural, historical, and geographical contexts, demonstrates that despite these different contexts there are similar processes at play on the societal plane. These processes plant the seeds for mass – often group-based – violence. A key concept that helps us understand this is the notion of norm transformations. Such norm transformations lead to a shift in societal attitudes, whereby a society becomes a trap for one of the groups within it, in which acts of violence and discrimination that were once unthinkable become increasingly commonplace, endorsed, and even encouraged.

I have presented three elements that feed into this process: propaganda, marginalisation, and violence. Societal norm transformations are often at least partly the result of deliberate attempts to use propaganda in order to dehumanise a targeted group or paint it as a threat. Simultaneously, members of targeted groups are marginalised. They lose their jobs, for instance, and their legal rights and are gradually eroded. And leading up to and during episodes of crimes against humanity, violence committed against members of the target group goes unpunished and ceases to attract moral indignation. Often, as we have seen, this process of norm transformations even leads to the explicit encouragement of violence against the targeted groups. The combination of these factors works to disempower a subset of a

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<sup>514</sup> *ibid* 71.

society, communicating to the rest of that society that this subset is an out-group; that they are a target. The resulting societal constellation is one that is structured by an extreme power imbalance and in which violence against a target group can flourish – or even becomes the norm.

This summary makes it clear that throughout the process of norm transformations, a complex interplay exists between victims, perpetrators, and acts. Neither of these elements by itself can paint the full picture of what happens.

As to the nature of the victims, the processes of propaganda, marginalisation, and violence are all connected to the branding of a target group as an out-group – often using putative and exaggerated negative characteristics of this target group in order to justify their being targeted. This process is fundamentally discriminatory and geared towards excluding people from society's moral consideration based on their group membership.

The involvement of state or state-like authorities and others wielding societal power is salient, too – both morally and practically. Morally, because there is a sense of perversion that comes with the abuse of power by societal institutions in order to foment division and encourage persecution. And practically, because the resources and reach available to socially powerful actors enable them to have the type of impact that is required to transform society-wide norms.

Acts of violence themselves, finally, are both the result of extreme power imbalances within a society and a contributing factor to their continued existence. They become possible in the context of a society that is increasingly hostile against a given group. But they also contribute to the proliferation and strengthening of power imbalances. The more extreme acts of violence are, the larger the societal impact will be of their going unpunished or being endorsed. Violence – and the societal response to it – is a powerful means of expressing and cementing asymmetrical power relationships.

## 5. The inter-group dimension

### 5.1 Introduction

In this chapter, the analysis of extreme power imbalances is moved from the societal to the inter-group dimension.

Before commencing this analysis, it is important to define a bit more clearly what I mean by the inter-group and how it differs from the societal and interpersonal dimensions. In Chapter 3, I introduced the inter-group dimension of extreme power imbalances as referring to power relationships between concrete, well-delineated groups at a given physical location and at a specific time.<sup>515</sup> “Group” in this definition means a concrete, countable collection of individuals, rather than a more abstract entity. This sets the inter-group dimension apart from the societal and interpersonal dimensions. The societal dimension refers to the structural and more diffuse characteristics of power relationships that permeate a society, rather than any discrete “there and then” of group violence. The interpersonal dimension focuses on violence committed by one individual against another without analysis in much detail the collective elements of group violence.

The perpetrator group need not necessarily be connected to a state or state-like entity. The inter-group dimension of extreme power imbalances does not require that the group establishing and exploiting this power imbalance has any sort of official capacity. Having said that, however, we will see that often there is at least some kind of involvement of the authorities that contributes to the emerge of the power imbalance. Where this is the case, I argue that this is morally salient: in addition to the dynamics of inter-group violence and domination, the official status of (part of) a group adds a sense of perversion of duty that forms an important part of our understanding of the wrong of a crime against humanity.

The two case studies that I discuss in this chapter show two different types of perpetrator group. In the *Omarska* concentration camp, violence was committed mostly by camp guards and others who were let into the camp by the authorities that oversaw it. The camp was run at the behest of a state-like entity, the RS, and was thoroughly organised and institutional. The second case study deals with violence committed in Rwanda, mostly by large groups of a hybrid nature. These groups include civilians, swept up in frenzied violence; *Interahamwe*, which had connections to political parties; and politicians and members of the police and military. The two case studies show that despite the quite divergent contexts in which extreme power imbalances are forged, the dynamics and resulting violent eruptions are nonetheless comparable. In other words, there is a shared logic to the dynamics of inter-group violence that happens within extreme power imbalances.

I will show that their establishment and exploitation are often the result of a perversion of duty or at least of the morally repugnant abuse of power. Due to the resources and planning capabilities that perpetrator groups can leverage to dominate other groups, there is often a real sense of entrapment of the powerless group, caught in this inter-

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<sup>515</sup> See section 3.3.

group dynamic. The inter-group dimension of extreme power imbalances also leads to particularly cruel and performative violence that is used to perpetuate the power imbalance by cementing comradery within the perpetrator group and further subjugating the target group. Finally, many inter-group extreme power imbalances and their exploitation are the result of careful planning and preparation, which adds to our sense that these are cases of deliberate cruelty and abuse and therefore deserving of moral approbation.

## 5.2 Omarska

The first case study focuses on the *Omarska* camp, which was in the north-west of Bosnia, near the town of *Prijedor*. Together with the mass executions around the town of *Srebrenica*, *Omarska* has perhaps become one of the most powerful symbols of the cruelties of the Bosnian war.

The institution of the camp is one of the archetypical expressions of an inter-group power imbalance. It is an institution that is entirely and explicitly structured along the lines of power: there are those in a position of authority – camp guards, directors, officials that visit – and those who are deliberately disempowered – the inmates. This case study will show how the camp was geared towards making this power imbalance between the groups explicit; geared towards continuously producing and proliferating it.

Multiple cases held before the ICTY are at least in part related to the crimes committed in *Omarska* camp. Unlike the case studies in the previous chapter, the present case study is not limited to any single court case. Instead, we will consider the situation in and around *Omarska* as our object of study, based mostly on materials found in the factual findings of the *Tadić*, *Kvočka*, *Brđanin*, and *Krajišnik* cases.

While this case study will focus on the camp itself, and the extreme power imbalance existing within and around it, it is useful to begin by providing some immediate context to its creation. Of course, this immediate context is itself embedded in a wider, societal context, which is also described in detail in many of the abovementioned cases.

A good overview of the immediate context of *Omarska* can be found in *Tadić*, which was one of the first cases to be held before the ICTY. The court describes how, during the Bosnian war, Serb Autonomous Regions were formed in Bosnia ‘in areas predominantly inhabited by Bosnian Serbs’, putting into practice the ‘Greater Serbia’ theory.<sup>516</sup> At first, such autonomous regions were ‘a form of economic and cultural cooperation without administrative power,’ but separate police forces and separate assemblies rapidly developed.<sup>517</sup> The area relevant for the *Omarska* cases is the Serb Autonomous Region of Krajina.<sup>518</sup> It was located in the municipality of *Prijedor*, which was located close to the SRA Krajina and of strategic importance.<sup>519</sup> ‘After the [military] take-over of Prijedor and the outlying areas,’ the court explains, ‘the Serb

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<sup>516</sup> *Tadić Trial Judgment* (n 125) para 97.

<sup>517</sup> *ibid* para 97.

<sup>518</sup> *ibid* para 79.

<sup>519</sup> *ibid* para 127.

forces confined thousands of Muslim and Croat civilians in the *Omarska*, *Keraterm* and *Trnopolje* camps.<sup>520</sup>

These camps were run 'either at the direction of, or in cooperation with, the Crisis Staffs [of the Autonomous Region], the armed forces and the police.'<sup>521</sup> The camps were 'guarded by soldiers, police forces, local Serb military or TO units, or a combination thereof, who were dressed in uniforms and generally had automatic rifles and other weapons on their person.'<sup>522</sup> *Omarska*, described by the court as 'perhaps the most notorious of the camps,' consisted 'of two large buildings, the hangar and the administrative building, and two smaller buildings, known as the "white house" and the "red house"'.<sup>523</sup>

It is worth citing the description of the *Omarska* camp given by the *Tadić* court in full:

The hangar was a large oblong structure, running north-south, along the eastern side of which were a number of roller doors leading into a large area extending the length of the building with the ground floor designed for the maintenance of heavy trucks and machinery used in the iron-ore mine. The western side of the hangar consisted of two floors of rooms, over 40 in all, extending over the whole north-south length of the building and occupying rather less than one half of the entire width of the hangar. Access to these rooms could be gained either from a door on the western side or, internally, from the large truck maintenance area described above. The bulk of the prisoners were housed in this building. To the north of the hangar and separated from it by an open concreted area, known as the "pista", was the administration building, where prisoners ate and some were housed, with rooms upstairs where they were interrogated. The white house was reserved for especially brutal treatment of selected prisoners. The other small building, the red house, was also a place to which prisoners were taken for severe beatings, and from which most often they did not leave alive. The administration building was in part two-storied, the single-storied western portion containing a kitchen and eating area. There were two small garages forming part of the extreme northern end of the building. To the west of the hangar building was a grassed area on the western side of which lay the white house, a small rectangular single-storied building, having a central corridor with two rooms on each side and one small room at its end, not wider than the corridor itself. The small red house was on the same side as the white house, and across from the end of the hangar building.<sup>524</sup>

The official order to set up *Omarska* and other camps in the area came from the Prijedor Chief of Police.<sup>525</sup> The security of the camp was provided by the *Omarska* Police Office. In addition to guards, there were also 'investigators' present who could

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<sup>520</sup> *ibid* para 154.

<sup>521</sup> *ibid* para 154.

<sup>522</sup> *ibid* para 154.

<sup>523</sup> *ibid* para 155.

<sup>524</sup> *ibid* para 156.

<sup>525</sup> *Prosecutor v Kvočka et al* (Judgement) ICTY-98-30/1-T (2 November 2001), para 17.



be recognised from their different uniforms.<sup>526</sup> In addition to the security in the camp, there was a second 'security ring [...] established 500-600 metres from the mine complex shortly after the camp was established, with a guard post every 200 metres.'<sup>527</sup> This security ring was meant to ensure that no unauthorised people could enter the camp and to prevent detainees from escaping.<sup>528</sup>

Before continuing the description of *Omarska* and analysing the dynamics inside the camp in more detail, we can already make some preliminary observations based on the description so far. These observations relate to two means of control that can be gleaned already: detention and implicit threats. There is also an interpersonal element to these methods of control, which will be discussed in more depth in the following chapter.

The detention of Muslims and Croats must be seen in the context of increasingly restrictive measures being taken to limit the rights and freedoms of non-Serbians in the *Prijedor* area.<sup>529</sup> An example of this is that after an attempt to regain control by 'a small group of poorly armed non-Serbs', Prijedor was 'cleansed', with the vast majority of men sent to *Keraterm* and *Omarska*.<sup>530</sup> The camp was a way of controlling and dominating non-Serbs from the area; of forcing them into a position of powerlessness in the face of the Serbians who took over.

The second method of control that has already become visible from this brief description is that of implicit threats. In the context of *Omarska*, the group of detainees knew that resistance would be most likely met with (lethal) violence. They found themselves at all times surrounded by armed guards and investigators; as a result, they did not have any resources available to them to affect the fundamental dynamic between them and their captor-group.

But there are more ways in which unfettered control was established over the groups of civilians detained at *Omarska*. As we will see, many acts that were committed in the context of establishing this control were extremely violent, humiliating and controlling. One definition of humiliation, which is suitably broad so as to capture the divergent ways in which humiliations have featured in cases of crimes against humanity, is offered by Margalit: "Humiliation is any sort of behaviour or condition that constitutes a sound reason for a person to consider his or her self-respect injured."<sup>531</sup> In a normative sense, according to Neuhäuser, to humiliate someone is to 'attempt to lower [them] below the status of a human being as a person with dignity through an improper attitude or treatment.'<sup>532</sup>

The lines between control, violence, and humiliations are by no means unambiguous: violence and humiliation are used to control detainees, and control is used to be violent towards detainees or to humiliate them. A clear example of this is the practice of

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<sup>526</sup> *ibid* para 11.

<sup>527</sup> *ibid* para 38.

<sup>528</sup> *ibid* para 38.

<sup>529</sup> See *Tadić Trial Judgment* (n 125) para 147ff.

<sup>530</sup> *ibid* para 151.

<sup>531</sup> Avishai Margalit, *The decent society* (Harvard University Press 1996), 9.

<sup>532</sup> Christian Neuhäuser, 'Humiliation: The Collective Dimension' in Paulus Kaufmann and others, *Humiliation, Degradation, Dehumanization* (Springer 2011), 22.

making new arrivals to the camp 'run a gauntlet of assembled guards', which meant that detainees would have 'to pass between two lines of Serb guards who hit them as they ran towards [the camp].'<sup>533</sup> They were then forced to 'stand with arms outstretched against the wall, using the three finger Serb greeting, while their bodies were searched for valuables that were then taken from them.'<sup>534</sup> This beating is of course an act of violence, but also of control: it instils in this group of new arrivals the realisation that their bodies can be violated at any point of time by their captors. Coercing them to make a Serbian three-finger salute is an act of humiliation, which forces them into a sort of "complicity", forcing the detainees to publicly acknowledge their lack of power as a group in relation to their captors.

Many more instances of acts of humiliation and violence occurred in *Omarska*. Before turning to these acts, however, it is perhaps useful to reflect briefly on the concept of humiliation as it applies to groups. Are group-based humiliations simply the aggregate of individual humiliations; are they the sum of their constituent parts? According to Neuhäuser, humiliating a group through the humiliation of its individual members is only one of three ways of humiliating a group. He calls this 'representative group humiliation', whereby 'a whole group is humiliated through the humiliation of one or more of its members.'<sup>535</sup> The other two ways are 'direct group humiliation', in which 'all members of a group are humiliated *precisely because* they are members of this group'<sup>536</sup> and 'symbolic group humiliation', in which 'a symbol of the group is in some way defiled, which then constitutes a humiliation for all members of this group.'<sup>537</sup>

We know that there is a close connection between humiliation and violence; many acts of humiliation are at the same time acts of violence: rape is a clear example of this. But even for 'bare' acts of violence at least two of the categories described in the previous paragraph – 'representative group,' and 'direct group' – are useful for our analysis. For many of the acts of violence observed in the context of inter-group extreme power imbalances are perpetrated either against a group as a whole (or large parts of it), or to members of the group but with the purpose of hurting the whole group through these individual acts of violence. The latter point is especially true considering episodes of 'spectacular' violence, which is designed to be seen by others and understood by them as an expression and confirmation of the existence of extreme power imbalances.<sup>538</sup>

Many examples of (group) humiliations can be found in descriptions of what the courts refer to as the 'conditions' in the camp.<sup>539</sup> One such description we have already seen: when prisoners arrived at the camp, they were beaten and made to make the Serb three-finger salute. As said, this is both violent and humiliating, in this case in a very direct way (all members of the group were forced to undergo it). One may argue that the humiliation of this group can also be seen as representative, in the sense that

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<sup>533</sup> *Kvočka* (n 528) para 49.

<sup>534</sup> *ibid* para 50.

<sup>535</sup> Neuhäuser, 'Humiliation: The Collective Dimension' (n 535) 25.

<sup>536</sup> *ibid* 22 (emphasis mine).

<sup>537</sup> *ibid* 23-24.

<sup>538</sup> The performative aspect of violence in episode of crimes against humanity will be analysed in further detail in the next chapter on interpersonal violence.

<sup>539</sup> *Tadić Trial Judgment* (n 125) para 157; *Kvočka* (n 528) para 16.

through the humiliation of this relatively small group of new detainees the goal was to humiliate the group of non-Serbs as a whole, at least within the area around *Prijedor*. In addition to these acts during the arrival of new detainees, the conditions of life in the camp itself were also constantly violent and humiliating in a direct group-based sense: they applied ceaselessly to all who were detained in it. As the court in *Kvočka* puts it, '[d]etainees were kept in inhuman conditions and an atmosphere of extreme mental and physical violence pervaded the camp.'<sup>540</sup>

Let us start with the physical act of detention itself. Instead of paraphrasing, it is worth copying the following paragraph describing the circumstances from *Tadić* in full:

Prisoners were held in large numbers in very confined spaces, with little room either to sit or to lie down to sleep. Sometimes 200 persons were held in a room of 40 square metres; and 300 prisoners were confined in one small room. Others spent the time crowded together in the lavatories. There, as well, however, prisoners were packed one on top of the other and often they had to lie in the midst of excrement. The doors of the overcrowded garage were often kept closed even in the heat of the summer. As many as 600 prisoners were made to sit or lie prone outdoors on the pista, some staying there continuously regardless of the weather for many days and nights on end, and occasionally for as long as a month, with machine-guns trained on them.<sup>541</sup>

These conditions are both violent and humiliating: detainees were forced to relinquish all privacy and personal space and had to live in disgusting and painful circumstances. Part of this may have been caused by callousness (there simply was not enough space, but it was decided to ignore that and detain the victims anyway) but packing prisoners on top of each other and locking them up in dirty lavatories is also to confront them with their lack of power and their debasement at the hands of their captors. These acts, while ultimately being committed against individuals, were not *aimed* at individuals. They were aimed at the group of non-Serbs within the camp and therefore directly group-based.

One particularly insidious way in which non-Serbs as a group were humiliated and violated within the camp was related to the basic human need of using the toilet. The court in *Kvočka* described the situation as follows:

58. There were two toilet facilities in the hangar building for use by over a thousand detainees. However, detainees soon understood that they would be beaten by guards if they attempted to use the facilities and accordingly relieved themselves in their clothing. In other locations, such as the garage in the administration building, there were no toilet facilities at all. At first, detainees asked the guards for permission to use the toilets in the canteen area of the administration building, but, as [a former detainee] explained:

The first ten people who went to the toilet came back covered in blood and beaten up, and when the next group of ten was allowed to go to the toilet,

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<sup>540</sup> *Kvočka* (n 528) para 45.

<sup>541</sup> *Tadić Trial Judgment* (n 125) para 159.

they didn't dare go out because they were told that they would all be beaten up and killed. The conditions were impossible.

59. Detainees thus had to defecate and urinate in their clothes or, sometimes, outside on the grass. Even when a detainee opted for a beating in order to use toilet facilities, the conditions were deplorable. Witness AJ described them as follows:

There were three toilets. One of them was stopped up, and then the others would get stopped up too. And sometimes there was faeces 20 to 30 centimetres high. So sometimes bricks would be laid down for us to be able to go to the toilet. It was dreadful.<sup>542</sup>

To understand the moral salience of this type of humiliation and violation, it is helpful to look at Sussman's work on the moral wrongfulness of torture. He writes that denying the use of toilet facilities is an 'ubiquitous form of torture', which consists not just in the 'infantilizing and dehumanizing disgrace of soiling oneself, but the futile struggle against one's own body not to do so.' It is a means of forcing a victim to confront the question of their own complicity to the humiliation to confront 'the question of whether [they were] simply forced to soil [themselves], or whether [they] allowed [themselves] to do so, discovering [themselves] to be willing to purchase some comfort at the price of public or personal humiliation.'<sup>543</sup> These types of humiliations depend on complete and utter control of the most private parts of the lives of the dominated party in order to be possible. It is a type of behaviour that shows the very worst of what human beings and groups of human beings are capable of when they are given free rein over others. In *Omarska*, these acts of violence and humiliation were designed to perpetuate and enhance this free rein, by forcing the dominated group continuously to acknowledge their own subjugation and lack of power.

At this point it is worth returning to the observations made about the role of "forward panic."<sup>544</sup> Forward panic is characterised by the presence of an extreme emotional rush and frenzied, often extremely violent, behaviour. These frenzies are generally laced with rituals (such as violent mockery and killing games) that 'serve to 'keep the emotional arousal alive.'<sup>545</sup> As to the origins of a forward panic, Collins described two modalities. First, there is the sudden collapse of fear and tension after a period of extreme tension when one group all of a sudden 'appropriates the emotional rhythm as dominator' and the other 'gets caught in it as victim'.<sup>546</sup> But forward panic can also be caused by a prolonged period of domination that leads to more and more extreme ways of dominating victims.<sup>547</sup> In both cases, forward panic requires the interplay between a dominating and a dominated group, which feed off each other's emotional energy.

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<sup>542</sup> *Kvočka* (n 528) paras 58-59, footnotes omitted.

<sup>543</sup> Sussman, 'What's Wrong with Torture?' (n 384) 22.

<sup>544</sup> See section 3.2 above.

<sup>545</sup> Klusemann, 477.

<sup>546</sup> Collins, *Violence: a micro-sociological theory* (n 339) 19.

<sup>547</sup> *ibid* 152.

Many of the acts described so far can be understood through this lens. Especially salient is the desire to 'keep the emotional arousal alive' and cement intra-group solidarity. Sometimes this tendency leads to a perverted type of competition amongst perpetrators, who try to outdo each other when it comes to acts of creative cruelty.<sup>548</sup> In our parlance, this can be translated to the desire to keep an extreme power imbalance intact, by constantly confirming the extreme power asymmetry between the powerful and powerless group through acts of violence and humiliation.

A final example from *Omarska* will illustrate the depravity this dynamic can cause. This example concerns the events of 12 July 1992, which was *Petrovdan* or St. Peter's Day, 'an orthodox religious festival.'<sup>549</sup> The judgment in *Kvočka* describes these events as follows:

It is customary to build bonfires on the eve of the holiday in celebration. In 1992, this tradition took on a terrifying aspect in Omarska. A huge fire was made in front of the white house from dump truck tyres. Former detainee Hase Ičić described the events that followed:

At the time, the Serbs, on the eve of Petrovdan, had a real, all-out sort of manifestation rally of civilians and guards. ... As night began to fall, they started to take the people out of the first rooms...

Q. What did you hear after some detainees were taken out?

A. I remember that, and I'll remember it for the rest of my life, the cries of women who were outside or in the first room. I'll never forget their cries and screams. Then I smelt the stench of burning meat. You know when meat begins to burn, it has a specific smell, and this smell of burning flesh was mixed with the smell of the burning rubber from the tyres.

94. This witness heard from other detainees that their fellow inmates had been thrown onto the fire. This terrible incident was corroborated by Witness AM, who watched the massacre from a window. Ermin Striković was able to see people walking round a big fire from the small window in his detention room. He heard screams of pain, although he was not able to see the cause. Zuhra Hrnić testified that the following morning, on her way to the cafeteria, she saw a large "FAP" lorry fully loaded with dead bodies parked in the Omarska camp.<sup>550</sup>

In this example, most of the salient features of the inter-group dimension of extreme power imbalances and its role in crimes against humanity come together. The violence was extremely cruel: people were burnt alive. It was also spectacular, and it happened in the context of group solidarity, during traditional festivities that are of great importance to the attacking group. It was a real festival of cruelty, enabled by the extreme power imbalance that existed within *Omarska* and in the context of which, through continuous

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<sup>548</sup> See e.g., Mitton, 'Irrational Actors and the Process of Brutalisation' (n 509).

<sup>549</sup> *Kvočka* (n 528) para 93.

<sup>550</sup> *ibid* paras 93-94.

acts of violence and domination, this eruption of spectacular group-based violence became possible.

Up to this point, we have very clearly seen three of the four characteristics of the role of the inter-group dimension of extreme power imbalances during episodes of crimes against humanity outlined at the start of this chapter. The extreme power imbalance in *Omarska* was an extreme abuse of power by authorities with effective control over the surrounding area of *Prijedor* and the Serb-ruled autonomous region of which it was part. As such, it was not only an abuse of power but also a perversion of duty. The scale of the power asymmetry was enormous and the discrepancy between available resources staggering. Those detained had no serious chance of changing the dynamic of their detention, as they were guarded by multiple armed guards and the camp itself had a security perimeter around it. They were simply civilians up against a political, military and police apparatus being employed to dominate them.

The final salient characteristic is related to planning. Much of the description so far has been concerned with the frenzied, extremely violent and humiliating behaviour, in which the dominating group engaged. This is an important reason for our intuitions about the cruelty of the violence used in cases of crimes against humanity. But there is often also a measured and careful element present in extreme power imbalances – the element of planning. This element clearly played a significant role in *Omarska*: a camp like this is an institution that is unlikely to come about and remain in operation simply in an ad-hoc and improvised fashion. Instead, it is the result of a string of conscious decisions and allocation of resources with the purpose of enabling exactly the situation described in this case study.

In the *Kvočka* case, the court takes its time to describe in some detail how the camp operated; keen, it seems, to establish the deliberateness and careful planning with which it was created.<sup>551</sup> First, it traces the decision to establish the camp back to an order of Simon Drljaca, chief of *Prijedor's* municipal Public Security Station and member of the *Prijedor* Crisis Staff. As the Court notes in a footnote to this point, the *Prijedor* Crisis Staff was considered 'the highest organ of authority' in the municipality in accordance with a decision made by the Crisis Staff of the Autonomous Region of Krajina.<sup>552</sup> Drljaca's order also stipulated clearly the responsibilities of various actors that were to be involved in the operation of *Omarska*: national, public, and state security services and military investigators.<sup>553</sup> The guard service in *Omarska* was tightly structured 'into three shifts of approximately 30 men who worked for 12 hours at a stretch.'<sup>554</sup> Guards were 'drawn from the ranks of regular police, reserve police, reserve army, and active duty army units in the area.'<sup>555</sup> Finally, the management of the iron ore mine on whose site on the camp was established was directed, in the same order mentioned above, to organize food, drinking water, and the cleaning and maintenance of the facilities, as well as to provide for logistical support.<sup>556</sup> There was

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<sup>551</sup> *ibid* paras 23-44.

<sup>552</sup> *ibid* para 28, at note 53.

<sup>553</sup> *ibid* para 28.

<sup>554</sup> *ibid* para 39.

<sup>555</sup> *ibid* para 42.

<sup>556</sup> *ibid* para 31.

a quartermaster's squad who ran the kitchens<sup>557</sup> and there were also a butcher and a cook.<sup>558</sup>

Zysset's work on the importance of the "preparatory conditions" related to a crime against humanity is relevant. According to him, the prototypical conditions enabling the perpetration of a crime against humanity are

'the systematic and persecutory exercise of physical control (or coercion) over an entire civilian population with the help of extra-ordinary (including lethal) resources (material and human) by an agent enjoying *de facto* authority over a large portion of territory in the name of a particular policy or ideology.'<sup>559</sup>

All these points are present in the case study discussed. Zysset's point was empirical, and to do with crimes against humanity in general. I want to add two further claims based on the discussion. First, these preparatory conditions, at least to some extent, will have to exist for the inter-group dimension extreme power imbalances to be possible. Without this asymmetry in resources, the emergence and persistence of inter-group extreme power imbalances is hard to imagine. It makes us think of Arendt's definition of power as the ability of a group to work towards a joint goal.<sup>560</sup> Under that definition, we see the darkest sides of power at play throughout the planning of this episode of violence.

Second, as I have said before, I believe that these factors add to the moral salience of the role of extreme power imbalances in cases of crimes against humanity. There is something particularly morally reprehensible about the use of this capacity to plan and govern in order to create the circumstances and violence such as those described in this case study. As Luban or Vernon might put it, this is a clear perversion of political and state-like resources. But it is also, in a sense, a perversion of rationality: methods of rational thought – such as planning, considering consequences, allocating resources and delegating work – are being put into service to commit the cruellest violence and subjugation.

### 5.3 Home St. Jean Catholic Church Complex

The second case study in this chapter is the massacre committed against *Tutsi* civilians seeking refuge in *Home St. Jean's Catholic Church Complex* (the Complex).

The massacre was part of the genocide that took place in Rwanda, in which hundreds of thousands of *Tutsi* civilians were killed over the course of a few months, mostly by groups of *Hutu* assailants. In the previous chapter I have discussed the societal dynamics at play in Rwanda during this time and the resulting, carefully stoked, ethnic hatred.<sup>561</sup> The present case study focuses on the concrete inter-group violence that was committed in the context of this societal constellation. The perpetrator-group in this case study had a hybrid character. It consisted of a somewhat loose association

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<sup>557</sup> *ibid* para 32.

<sup>558</sup> *ibid* para 33.

<sup>559</sup> Zysset, 'Refining the structure' (n 170) 261.

<sup>560</sup> Arendt, *On Violence* (n 316) 44.

<sup>561</sup> See e.g., sections 4.2 and 4.4 above.

of Hutu civilians, officials, politicians and *gendarmes*, who came together to create tipping points that led to the commission of extreme violence against Tutsi citizens.

By way of background to the massacre, it is worthwhile to cite one court's description of the background to this case.

According to the Indictment, the massacre site at the Home St. Jean Catholic Church Complex (Complex) is located in Kibuye, Gitesi commune, on the peninsula surrounded by Lake Kivu. A road runs perpendicular to the entrance to the Complex. One can see the Catholic Church but not Home Saint Jean from the road. The Complex, according to Expert witness Sjouke Eekma, is accessible by either the road from the roundabout or from the Prefecture. There were several doors to the Catholic Church.

[...]

During the unrest occurring in the commune soon after the crash of the President's plane, thousands of people sought refuge in places of worship such as the Complex. For instance, witness F testified, that he arrived at the Catholic Church on 15 April and found many other Tutsis who had arrived from other communes such as Mabanza, Rutsiro, Kaivere and Gishiyita as well as Gisenyi Prefecture. Witness B testified that she fled to the Catholic Church "because people like my father who had lived through other unrest as in 1959, when there was an attack against the Tutsi, at that time people took refuge at the (Catholic) Church." Witness T corroborates other witnesses' reason for seeking refuge at the Church. She testified that since the 1959 revolutions, whenever people felt insecure, they would go to churches, parishes and would be protected; that is, they would be "respected in these places."

The conditions inside these places of shelter worsened. In the Catholic Church people were crowded. Witness A testified that when a census was made for purposes of food distribution, the number of those seeking refuge was found to be 8,000 people of Tutsi ethnicity. The census is corroborated by Witnesses T and F. The Tutsis seeking refuge received no assistance whatsoever from the Prefectural Authorities.<sup>562</sup>

The last sentence of this quote foreshadows the fact that here, too, the perversion of duty we saw in the previous case study will play a role. But unlike the last case study, the violence committed in the present one is not only – or even mostly – committed by assailants who had some form of official capacity. Yet the involvement of persons of authority did mean that a "tipping point", a term Klusemann uses in describing the emergence of forward panics,<sup>563</sup> was created. This tipping point was crucial in the explosion of violence and the perpetration of the massacre.

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<sup>562</sup> *Prosecutor v Kayishema and Ruzinda* (Judgement) ICTR-95-1-T (21 May 1999), paras 321-323.

<sup>563</sup> Klusemann, 'Massacres as process' (n 337) 472.



Let us look at the facts of the case first, before proceeding to analyse it further. The first attacks took place on 15 and 16 April.<sup>564</sup> Local officials participated in those attacks, and 'gendarmes simply watched'.<sup>565</sup> However, on these two days, 'those seeking refuge repulsed the attack'.<sup>566</sup> The next day 'a major attack' occurred, which the *Tutsi* refugees stood no chance to repulse.<sup>567</sup> The court cites a number of witnesses to show the wide range of different people, many having a role of authority, involved in this attack:

Witness F, who was standing in front of the Catholic Church, vividly described the various attackers. Witness F and others testified that the attackers were Hutu civilians; Twa civilians; communal police officers; prison guards and local officials such as the Communal Accountant; Rusizera, the Assistant Bourgmestre, Gahima, the Headmaster of the Pentecostal school, Emmanuel Kayihura and Siriaka Bigisimana. Other witnesses identified and corroborated the presence of the local officials. Witness E recognised the conseillers of Gishura Sector and witness C named particular officials such as Conseiller Ndambizimana; Calixte, the Prison Warden; and the Bourgmestre of Gitesi Commune.<sup>568</sup>

These attackers had weapons such as 'machetes, swords, spears, small axes, clubs with nails, the "*impuzamugenzi*" and other agricultural tools'.<sup>569</sup> While closing in on the Complex, they sang "let us exterminate them."<sup>570</sup> With them was Kayishema, the Prefect of the relevant prefecture. He was carrying a sword.<sup>571</sup> There was applause when he got out of his car with a group of *gendarmes*. Quickly afterwards, Kayishema 'ordered the assailants to "begin working"<sup>572</sup> which, in the Rwandan context, means to kill *Tutsis*.<sup>573</sup> He continued to order the *gendarmes* to shoot.<sup>574</sup>

On these orders, they started firing and at the same time other attackers 'began to throw stones at those seeking refuge[.]'<sup>575</sup> A grim collaboration unfolded between Kayishema, the *gendarmes* and the other attackers:

The *gendarmes* shot the *Tutsis* who were in front of the Church. Soon thereafter the *gendarmes* and other Hutu assailants started to attack *Tutsis* inside the Church. They fired grenades and tear gas canisters inside the Church through the doors, and proceeded to fire their guns. Witness F who escaped by climbing a tree nearby, stated that "I could see quite clearly the square or the area in front of the Church. I could see him [Kayishema] with my own eyes." Witness F saw Kayishema walk to the threshold of the

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<sup>564</sup> *Kayishema* (n 565) para 327.

<sup>565</sup> *ibid* para 327.

<sup>566</sup> *ibid* para 327.

<sup>567</sup> *ibid* para 328.

<sup>568</sup> *ibid* para 328.

<sup>569</sup> *ibid* para 328.

<sup>570</sup> *ibid* para 328.

<sup>571</sup> *ibid* para 328.

<sup>572</sup> *ibid* para 329.

<sup>573</sup> *ibid* para 330.

<sup>574</sup> *ibid* para 330.

<sup>575</sup> *ibid* para 331.

Church and send an attacker to bring a jerrican of petrol. The petrol was poured on tires and the doors of the Church, and then set ablaze. According to witness A, the main door of the Church was burnt down. Witness C saw the attackers throw a tire which was doused with petrol, inside the Church. Many witnesses, including Witness F, testified that people were burnt.<sup>576</sup>

After a while, Kayishema led the group of attackers into the church where they 'began to kill the survivors.'<sup>577</sup> All the victims who were identified later were *Tutsi*.<sup>578</sup> As to the way in which they were killed, the following evidence was provided:

Dr. Haglund's written report confirms that many people, men, women and children were killed at the Complex. Of the 493 dead examined by Dr. Haglund, only found one gunshot injury. He estimated that 36% of people in the grave had died from force trauma whereas 33% of the people died from an undetermined cause. Dr. Haglund selected an individual as an example who he identified as a fifty year old man. The man's fibula had been completely severed by some sharp object, which "would have severed the achilles" tendon rendering this individual partially crippled. On the neck region "all the soft tissue from the right side of the neck towards the back would have been cut through" and "a sharp cut mark in the tibia body, and in the inferior border of the scapular shoulder blade, another trauma caused by a blow of a sharp object."<sup>579</sup>

Clearly, then, most of the actual killing had been done by those carrying the weapons described above, but they were enabled by heavily armed *gendarmes*. Their presence and firing power prevented escape and made it possible for the attackers to overrun the church after an earlier failed attempt to do so.

Let us try to unpack and analyse this episode of violence. It is an episode from a conflict on a different continent and in very different circumstances to the conflict in which our previous case study was embedded. Yet, as we will see, there are many similarities between both cases when it comes to the salient dynamics that are at play throughout the relevant violence.

First, there is the nature of the violence itself. Here, too, as we have seen in the *Omarska* case study, the violence was grotesque. Multiple thousand refugees were murdered; many of them as a result of 'force trauma' according to Dr Haglund's evidence. The court does not specifically describe the methods of the violence committed during that massacre, but that is not necessary to understand it. Given the knowledge that the attackers were armed with 'machetes, swords, spears, small axes, clubs with nails, [...] "*impuzamugenzi*" and other agricultural tools', extreme violence must have accompanied the attack. The example given by Dr Haglund of the man whose fibula had been severed is a case in point of this extreme cruelty. Prunier summarises the brutality of the violence as follows: 'the killings were not in any way clean or surgical. The use of machetes often resulted in a long and painful agony and

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<sup>576</sup> *ibid* para 331.

<sup>577</sup> *ibid* para 332.

<sup>578</sup> *ibid* para 325.

<sup>579</sup> *ibid* para 326.

many people, when they had some money, paid their killers to be finished off quickly with a bullet rather than being slowly hacked to death with a *panga*.<sup>580</sup>

In this case study, violence has been committed by perpetrators in close proximity to their victims. As we know from previous chapters, it is not easy to commit such violence. That is why when it happens, especially on a scale as large as in the present case study, it is often in the context of an extreme power imbalance whereby participants are swept up in a self-sustaining frenzy: the forward panic. This is what Klusemann refers to as the idea of 'tipping points' that can enable a massacre.<sup>581</sup> Such a tipping point towards a massacre depends on the attacker-group having 'a strong emotional momentum is achieved that establishes complete emotional dominance.'<sup>582</sup>

The forward panic in this case study is different from the one we saw in the previous case study. Recall that in the *Omarska* case, there was a prolonged period of total domination of non-Serb detainees during which the seeds of the extreme violence in which it ended started to germinate. In the present case, there was no such lengthy period of build-up. Instead, there had been a failed attack which the *Tutsi* refugees repulsed, followed by a renewed attack during which the asymmetry in resources was so massive that all resistance by the *Tutsi* victims collapsed.

Forward panic erupted when groups of attackers went into the church to hack and beat powerless members of another group to death. The creation of the forward panic in which this violence became possible was entirely deliberate and follows a pattern that can be observed on multiple occasions. For instance, there are two other massacres discussed in the same judgment as the present case study, which were enabled in a virtually identical manner. The *Kayeshima* court mentions this at the outset of its factual findings relating to the massacres, describing the shared characteristics of these massacres as follows:

316. At all three sites, gendarmes guarded the entrances or completely surrounded the structure. The gendarmes controlled the congregation, maintaining order or preventing people from leaving. Witnesses testified that *Tutsi* who attempted to exit were killed by armed *Hutu* assailants. Conditions inside the massacre sites became desperate, particularly for the weak and wounded. The authorities did not provide food, water or medical aid and, when supplies were offered, the Gendarmes prevented them from reaching the *Tutsis*.

[...]

318. Testimony reveals striking similarities in the assailants' methods both during the initial gathering of *Tutsis* and later during the execution of the massacres. Some of those seeking refuge assembled at the three sites had done so owing to encouragement by *Hutu* officials. Initially, the gendarmes appeared merely to be maintaining order and allowed people to leave the

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<sup>580</sup> Gérard Prunier, *The Rwanda Crisis 1959-1994: History of a Genocide* (Hurst & Company 1995), 256.

<sup>581</sup> Klusemann, 'Massacres as process' (n 337) 472.

<sup>582</sup> *ibid* 472.

Churches or Stadium to find food or water. Soon thereafter, however, authorities cut off supplies and prevented those seeking refuge from leaving. Those who attempted to leave were either chased back inside the structure or were killed by the armed attackers while the gendarmes watched. At this stage gendarmes and/or the members of the Interahamwe surrounded the Churches and at the Stadium gendarmes guarded the entrances. These conditions of siege soon turned into massive attacks by Gendarmes, communal police, prison wardens, the members of the Interahamwe and other armed civilians. Having surrounded the site, they usually waited for the order from an authority figure to begin the assault. The massacres started with the assailants throwing grenades, tear gas, flaming tires into the structure, or simply shooting into the crowds. Those who tried to escape were killed with traditional weapons. Following these hours of slaughter, the attackers would enter the building or Stadium carrying crude traditional weapons and kill those remaining alive.<sup>583</sup>

The deliberateness is clear: the creation of tipping points, often after failed previous attacks,<sup>584</sup> and the eruption of a forward panic that enabled the close-range slaughter of thousands of *Tutsi* civilians was a result of careful planning, widespread perversion of duty, and the abuse of state or state-like resources. First, control was established by preventing *Tutsi* from leaving the places which had turned from shelters into traps. Then, an order came in from an authority figure after which *gendarmes* and others with access to resources such as firearms and grenades began the attack in earnest. Once they had overwhelmed their victims with their (military) power, and simultaneously roused their own group by this display, the close-range killing with “traditional weapons” followed.

This pattern, whereby ‘large numbers of activists and/or the arrival of soldiers [and gendarmes]’ are deliberately used to enable the commission of massacres was widespread in Rwanda.<sup>585</sup> These episodes were almost always coordinated by people holding formal positions of power within the Rwandan state, and they were carefully planned and carried out according to a policy.<sup>586</sup> As in the previous case study, here too there is a clear element of perversion. Not just because of the perversity of violently exploiting an extreme power imbalance, but also because both the creation and the exploitation of this imbalance was the result of wilful actions and planning by people who, by virtue of their role, are expected to be concerned with the wellbeing of the population in relation to which they have this authority.

As we know from Klusemann’s and Collin’s description of forward panic and the emotional dynamics throughout the commission of atrocities, intra-group solidarity and group-based rituals play an important role too. We have seen these types of rituals in

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<sup>583</sup> *Kayishema* (n 565) paras 316, 318.

<sup>584</sup> E.g., *Prosecutor v Kanyarukiga* (Judgement and Sentence) ICTR-2002-78-T (1 November 2010) para 340; *Prosecutor v Ndindabahizi* (Judgement and Sentence) ICTR-2001-71-1-I (15 July 2004) para 132.

<sup>585</sup> Klusemann, ‘Massacres as process’ (n 337) 474; Des Forges, *Leave None to Tell the Story* (n 446) 374, 530, 533, 541. See also Prunier, *The Rwanda Crisis* (n 583) 254.

<sup>586</sup> Prunier, *The Rwanda Crisis* (n 583) 244.

the previous case study: the commission of spectacular violence in order to rouse onlookers from the in-group, the grim and murderous celebration of a religious festival, or the practice of forcing victims to acknowledge their inferiority to the attackers, for example by making them sing Serb songs. In the present case study, such rituals and intra-group bonding exist too. One of them has already been mentioned: attackers were singing together: “let us exterminate them.” This is not specific to the current case study; there are multiple occasions where, during the Rwandan genocide, attackers sang the same.<sup>587</sup> There are also multiple cases where, after having committed massacres, perpetrators have celebrated together.<sup>588</sup>

Up until this point, the role of extreme power imbalances, forward panics, and the group-based emotional arousal has been mentioned frequently but perhaps without having been made very concrete. In order to remedy this, it is important to try to understand what the effect of an extreme power imbalance really is on an individual who, in the context of this extreme power imbalance, becomes a killer. Hatzfeld’s *Machete Season*, introduced in the previous chapter, provides some concrete examples of the realities of how extreme power imbalances affects the consciousness of individual killers. It shows us on a personal scale how power asymmetries between groups, and the concomitant power asymmetries between individual members of those groups, can bring about the worst instincts in people.

Despite being asked about their individual memories of their first kill, the presence of a more widespread atmosphere of frenzy is emphasised by many speakers. Thus, Fulgence, one of the killers interviewed, writes about killing: “Because of the uproar, I remember I began to strike without seeing who it was, taking pot luck with the crowd, so to speak.”<sup>589</sup> Yet when he slashed his first victim, he was himself struck:

At one point I saw a gush of blood begin before my eyes, soaking the skin and clothes of a person about to fall—even in the dim light I saw it streaming down. I sensed it came from my machete. I looked at the blade, and it was wet. I took fright and wormed my way along to get out, not looking at the person anymore. I found myself outside, anxious to go home—I had done enough. That person I had just struck—it was a mama, and I felt too sick even in the poor light to finish her off.<sup>590</sup>

Similarly, Pancrace did not remember his first kill because he ‘did not identify that one person in the crowd. He says: “I mean, I was striking, and there was screaming, but it was on all sides, so it was a mixture of blows and cries coming in a tangle from everyone.”<sup>591</sup> Until one of the people that found death at the end of his blade looked him in the eye. At that point he found that ‘they [i.e., the eyes of the victim] shake you

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<sup>587</sup> E.g., *Prosecutor v Musema* (Judgment and Sentence) ICTR-96-13-A (27 January 2000), para 462, *Prosecutor v Muhimana* (Judgement and Sentence) ICTR- 95-1B-T (28 April 2005), para 229.

<sup>588</sup> See e.g., *Kayishema* (n 565) para 356. Those celebrating went back the next day to kill off any survivors.

<sup>589</sup> Hatzfeld, *Machete Season* (n 516) 21.

<sup>590</sup> *ibid* 21.

<sup>591</sup> *ibid* 21.

more than the streams of blood and the death rattles, even in a great turmoil of dying. The eyes of the killed, for the killer, are his calamity if he looks into them.<sup>592</sup>

Alphonse remembered his first kill as follows:

A group of Tutsis had retreated into the forest of Kintwi to resist. We spotted them behind clumps of trees—they were standing with stones and branches or tools. Grenades from some of our leaders showered onto them. Then came a big to-do. The Tutsis scattered, and we followed them. In the stampede an old man, not so sturdy anymore, was knocked down as he ran. He fell in front of me. I hacked him across his back with my *inkota*, a sharp blade for slaughtering cattle—I had snatched it up that morning.<sup>593</sup>

A pattern seems to emerge from these accounts. There is a tension between the individuality of the perpetrators and their group membership. The perpetrator as group member is swept up in the forward panic. He strikes without seeing, amidst screams and blows and cries. He kills in a ‘big to-do’, after grenades have called for action. Yet as an individual, he is horrified by the calamity of having looked into his victim’s eyes. Sickened by his murder of a mother, knowing his blade is wet with her blood.

This brings to life the fundamental point made by Collins and Klusemann: violence, especially close-range violence, is not easy. People need the “right” context in order to commit it. Often, as is the case in this and other cases of crimes against humanity, that context is the context of a murderous group, caught up in – relishing in – its violence. Caught up in an extreme power imbalance. The corrupting power of such a power asymmetry and the connected group dynamics is on full display here. It is likely that these dynamics, as pictured so vividly in these interviews, were omnipresent throughout massacres in Rwanda, or other conflicts for that matter. The experiences of Fulgence, Pancrace and Alphonse will be very similar to those of many of the killers who took part in the massacre discussed in this case study. In fact, the murder Fulgence described was also committed as part of a massacre at an (unspecified) church.<sup>594</sup>

When asked about the killing itself, one of the killers, called Pio, gives us another insight into role played by the presence of an extreme power imbalance. His explanation confirms the ideas put forth by Collins and Klusemann about the violence-enabling nature of the inter-group dimension of extreme power imbalances, whereby one group is extremely emotionally dominant – ebullient, even – and the other extremely passive, and whereby these two emotional states are amplified by each other in a feedback loop. Pio explains this as follows:

And then we must mention a remarkable thing that encouraged us. Many Tutsis showed a dreadful fear of being killed, even before we started to hit them. They would stop their disturbing agitation. They would cower or stand stock still. So this terror helped us to strike them. It is more tempting to kill

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<sup>592</sup> *ibid* 22.

<sup>593</sup> *ibid* 22.

<sup>594</sup> *ibid* 21.

a trembling and bleating goat than a spirited and frisky one, put it that way.<sup>595</sup>

As the killing progressed, the emotional dominance and frenzied feeling kept increasing. And so, while, in the words of Pancrace, 'killing is very discouraging if you yourself must decide to do it,' if you are 'properly prepared, if you feel yourself pushed and pulled, if you see that the killing will be total and without disastrous consequences for yourself, you feel soothed and reassured. You go off to it with no more worry.'<sup>596</sup> As this extreme power imbalance persists, and as more and more violence occurs within an ever-increasing asymmetry of power, the killing was not merely "without worry". It fuelled the killers to continue doing so, and to become increasingly cruel in the process.

Jean-Baptiste explains that:

The more we killed, the more greediness urged us on. Greediness—if left unpunished, it never lets you go. You could see it in our eyes bugged out by the killings. It was even dangerous. There were those who came back in bloodstained shirts, brandishing their machetes, shrieking like madmen, saying they wanted to grab everything.<sup>597</sup>

The extreme power imbalance propelled itself onward, fuelled by more and more murders. And it caused those who were swept up in it to do things they would not normally do. Again, this is the corrupting and violent force that is so closely intertwined with the existence of extreme power imbalances. In the words of Joseph-Désiré

it became a madness that went on all by itself. You raced ahead or you got out of the way to escape being run over, but you followed the crowd. The one who rushed off machete in hand, he listened to nothing anymore. He forgot everything, first of all his level of intelligence.<sup>598</sup>

As this dynamic took hold and was perpetuated, Fulgence explains that '[they] became more and more cruel, more and more calm, more and more bloody. But [they] did not see that [they] were becoming more and more killers. The more [they] cut, the more cutting became child's play to [them]. For a few, it turned into a treat [...]'<sup>599</sup> According to Adalbert:

There were some who brutalized a lot because they killed overmuch. Their killings were delicious to them. They needed intoxication, like someone who calls louder and louder for a bottle.

Animal death no longer gave them satisfaction, they felt frustrated when they simply struck down a Tutsi. They wanted seething excitement. They felt cheated when a Tutsi died without a word. Which is why they no longer

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<sup>595</sup> ibid 37-38.

<sup>596</sup> ibid 48-49.

<sup>597</sup> ibid 39.

<sup>598</sup> ibid 50.

<sup>599</sup> ibid 50.

struck at the mortal parts, wishing to savor the blows and relish the screams.<sup>600</sup>

[...]

For some of us, those taunts [calling the Tutsi 'snakes', 'zeroes', or 'dogs'] were just minor diversions. The important thing was not to let them get away. For others, the insults were invigorating, made the job easier. The perpetrators felt more comfortable insulting and hitting crawlers in rags rather than properly upright people. Because they seemed less like us in that position.<sup>601</sup>

Similarities between this dynamic and the one observed in the *Omarska* case can be identified. There, too, many acts of sadistic and spectacular violence were committed while humiliating and taunting the victims of this violence. In both cases, the grim interplay between the interpersonal and the inter-group dimensions when it comes to committing the violence is also clear. At the end of the day, the violence is committed by one person against another in the immediate context of the attacker's power over his victim. Yet the fact *that* this attacker has such power over his victim is almost always connected to the fact that this power imbalance exists between groups, too. Moreover, *how* an attacker uses his power over a victim is also strongly influenced by the dynamics of the extreme power imbalance. An attacker may be swept up in the group frenzy described above. They may want 'bragging rights', or to perpetuate the killing. They may simply have grown to enjoy the commission of violence, as we have seen in the previous chapter. All these individual acts of violence committed contribute to the persistence and growth of extreme power imbalances in all three dimensions.

#### 5.4 Conclusion

The aim of this chapter has been to demonstrate the explanatory power of the inter-group dimension of extreme power imbalances in the analysis of the nature of crimes against humanity. Despite their different contexts, the study of the two case studies discussed brings out shared aspects of their inter-group dynamics. In cases of crimes against humanity, power imbalances between groups play a crucial role in the emergence and proliferation of violence.

Whereas humans generally do not find it easy to commit violence against other human beings, the inter-group dynamics described in this chapter allow people to move past this reluctance. When situations arise in which one group ends up emotionally dominating another, especially if this happens in the context of pre-existing inter-group tensions, the resulting inter-group power imbalance becomes a fertile soil for violence. This overcoming of the reluctance to commit violence by way of inter-group power imbalances has been referred to in the literature as a situation of "forward panic." Interviews with Rwandan *genocidaires* show the effect that this process has on the individual consciousness of perpetrators. These interviews paint a picture of regular

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<sup>600</sup> *ibid* 51.

<sup>601</sup> *ibid* 129.



people who, when swept up in the frenzy of group-based violence, overcome their inner barriers to violence, and become increasingly cruel and bloodthirsty.

There are two main ways in which such forward panic emerges. First, there is the eruption of forward panic as a result of a tipping point: when after a period of tension between groups, this tension suddenly dissipates and one of those groups finds itself overpowering the other. This is what we saw in the *Home St. Jean* case study. After several failed earlier attacks, the massacre took place when *gendarmes* and local politicians became involved, thereby tipping the scales decisively in favour of the perpetrators. A second means by which forward panic can occur is through a period of prolonged domination that leads to increasingly extreme means of domination and control. The *Omarska* case in this chapter has shown us a chilling example of this.

In both case studies, we have seen that the emergence of the relevant power imbalances involved actors with significant resources available to them. While it is not a logical necessity that inter-group power imbalances are the result of the involvement of authorities, in practice this is often the case. And when it is, this adds an additional layer of moral reprehensibility. I have made this point regarding the societal dimension too: the involvement of authorities in the establishment and exploitation of extreme power imbalances is a morally salient perversion of their authority and resources.

The notion of forward panic helps us understand the causal role played by inter-group extreme power imbalances. These power imbalances allow human beings to move past their reluctance to commit violence, letting them be swept up in the frenzied state of emotional arousal that being part of a dominating group inspires in people. The result is the explosion of mass violence, cruelty, humiliations, and “killing games” that we have seen in the cases studied. But the role of extreme power imbalances in the inter-group dimension is not just causal. Power is also a motivating factor for further violence, as perpetrators who are swept up in the intoxication of the power asymmetry want that asymmetry to persist and increase. Violence and power imbalances are therefore locked in a vicious circle. Violent acts emerge from the inter-group dynamics of power imbalances, and at the same time they feed back into the continued existence of these imbalances. The cruelty and performativity of the violence studied in this chapter, and the group-based humiliations that have been meted out to victims, can be explained by this desire to perpetuate the power relation between the perpetrator and victim groups.

The study of the inter-group dimension of extreme power imbalances has shown us that the type of perpetrators, victims, and acts, are all relevant. Inter-group violence is often the result of the involvement of state or state-like perpetrators, the resulting violence is distinctly group-based, and the acts of violence that happen in the context of inter-group power imbalances are often extremely cruel, humiliating, and performative. Yet what this chapter has shown is that while each of these elements is relevant, it is the interplay between them that forms the crucial dynamic of the inter-group violence that is occurs in cases of crimes against humanity.

## 6. The interpersonal dimension

### 6.1 Introduction

After having analysed the societal and inter-group dimension of extreme power imbalances, we now move to the least abstract level of human interaction: the interpersonal. It is important to give a little more detail about what does and does not fall under the notion of interpersonal. Fundamentally, the interpersonal level denotes interactions between individual perpetrators and individual victims. Perhaps the most clear-cut example of an exclusively interpersonal interaction would be a private interaction between only two people, without any observers whose presence or actions could influence the interaction. However, in cases of crimes against humanity, such clear-cut and exclusively interpersonal interactions are mentioned only infrequently.

There are at least three reasons why this makes sense. First, courts and tribunals are generally reluctant to attach probative weight to statements made by victims about such an exclusively interpersonal interaction, given the lack of witnesses and provided there are no further accounts to corroborate what happens. As a result, there are only very sporadic examples to be found in crimes against humanity cases of such interactions. Second, interpersonal extreme power imbalances are closely linked to extreme power imbalances on the other two levels. Interpersonal extreme power imbalances are often enabled by, or committed in the context of, the presence of the other extreme power imbalances. These other extreme power imbalances are easier for courts to focus on, as they are larger in scale and will generally provide enough facts to reach a conclusion on the charges brought in a particular case. Third, prosecutorial discretion means that cases will only be brought if there is an overwhelming amount of evidence and if formal gravity criteria, such as the Rome Statute's article 17 section 1(d), are met. A focus on inter-group and societal elements is more likely to meet those criteria than a focus on the interpersonal. Yet the acts and dynamics that are part of an interpersonal interaction in the context of a crime against humanity are important for our understanding of the special nature of the concept of crimes against humanity, and there is a multitude of examples still to be found and analysed in court case.

The interpersonal dimension of extreme power imbalances during episodes of crimes against humanity is immediate, specific, and often comparatively short-lived. The dynamics of this dimension are, in a sense, *intimate*, for they comprise a specific person doing something to – or having the power to do so – over another specific person. In this chapter, we will analyse the expression of, and role played by, this immediate, specific, and intimate phenomenon of the interpersonal dimension of extreme power imbalances as described in legally recognised cases of crimes against humanity.

Given the subject matter, there is a risk of a certain sensationalism or morbid curiosity in the details of the crimes – more so, perhaps, than in the previous chapters which dealt with a higher level of abstraction. Nonetheless, I think that these details do

matter. In fact, I think that they are key to a comprehensive understanding of the phenomenon of crimes against humanity. One of the main aims of this thesis is to understand more fully what is special about crimes against humanity, and I believe that it is impossible to do so without engaging with the details of their commission as reported in the factual findings of the relevant judgments and other reports. Limiting ourselves to abstract descriptions does not suffice, given that much of the moral outrage we feel in the face of episodes of crimes against humanity is directly related to the methods by which, and circumstances in which, the relevant violence is carried out. This is especially the case for the analysis of interpersonal violence, where the focus is on interactions between people rather than the role of larger groups or societal structures.

In this chapter more so than the previous two, this thesis makes a sharper departure from accounts of crimes against humanity that focus solely on larger structural elements and impersonal roles to explain the special nature of crimes against humanity. I do not consider the individual perpetrators simply cogs in a machine, and the individual acts of violence the logical conclusion of plans drawn up by bureaucrats. crimes against humanity are not merely special because of the way in which individual crimes are aggregated into an organising whole, but also because of the way in which the individual crimes *themselves* are committed. To refer to these individual acts as banal, in the Arendtian sense, ignores the fact that these acts themselves carry significant weight. Let me explain. In the postscript of her report on the *Eichmann* trial, Arendt writes that

Eichmann was not Iago and not Macbeth, and nothing would have been farther from his mind than to determine with Richard III "to prove a villain." Except for an extraordinary diligence in looking out for his personal advancement, he had no motives at all. And this diligence in itself was in no way criminal; he certainly would never have murdered his superior in order to inherit his post. He merely, to put the matter colloquially, never realized what he was doing.

He was not stupid. It was sheer thoughtlessness - something by no means identical with stupidity - that predisposed him to become one of the greatest criminals of that period. And if this is "banal" and even funny, if with the best will in the world one cannot extract any diabolical or demonic profundity from Eichmann, that is still far from calling it commonplace.<sup>602</sup>

Perhaps this was true of Eichmann's particular case. Perhaps it is even true for many of the higher-ranking persons implicated in crimes against humanity; they may indeed have been bureaucrats, mostly interested in fulfilling their "duties" and being promoted. But this banality does not apply to the individual acts of violence committed as part of the countless interpersonal extreme power imbalances that lay at the root of an episode of crimes against humanity. As we will see, these acts of violence are full of

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<sup>602</sup> Arendt, *Eichmann in Jerusalem* (n 97) 287-288.

deliberation, creativity, and a type of perverse joy. If they are banal at all, then only in the sense that human beings have committed such acts against one another since time immemorial. Obscuring the individuality of these acts and the perpetrators committing by focusing solely on the mechanisms that made them possible is to obscure an important aspect of what makes crimes against humanity special.

The structure of this chapter will be as follows. First, it will be shown what is meant by the “control” that forms such an integral part of the existence of an interpersonal extreme power imbalance: what does it mean for someone, in the context of cases of crimes against humanity, to have complete and unimpeded control over a situation and, concomitantly, what does it mean to lack that control? Then, we will see what sorts of egregious acts of violence and cruelty are enabled by the exploitation – and motivated by the pursuit – of interpersonal extreme power imbalances. The analysis of these acts will be based on the violence and cruelty that permeates the factual findings constitutive of legally recognised cases of crimes against humanity.

## 6.2 Control

While control and violence are conceptually different, the notion of control cannot always be neatly separated from the notion of violence. Tying someone up to prevent escape, for example, is an act of control but it may under certain circumstances also be considered an act of violence. This works the other way around, too. An act of violence can be meted out as an attempt to gain control; to break the other person’s resistance. In a sense, therefore, this and the next section describe two sides of the same coin. They should be read not as analyses of two separate phenomena, but as an attempt to describe two aspects of one phenomenon: the role played by interpersonal extreme power imbalances in episodes of crimes against humanity.

On the interpersonal level, as we shall see in the examples that follow, the notion of control is often – but not always – bodily and immediate. This section will consider in turn four modalities of control that are to be found in cases of crimes against humanity, none of which are mutually exclusive: (1) the physical restraint or domination of the powerless party to an extreme power imbalance so that the powerful party has unfettered control over what happens in the situation; (2) detention and ensuring that the powerless party to an extreme power imbalance cannot remove themselves from the situation; (3) severe and credible threats of violence, either physical or mental, in case of non-compliance; and (4) control by virtue of the presence of a wider, non-interpersonal context.

In light of these four areas, we are not talking about “normal” control that ordinary people have in ordinary situations. The control we are analysing in this section is near-absolute. It is akin to what Claudia Card refers to as ‘oppressive dominance’,<sup>603</sup> which is often observed in cases of spousal abuse. In a sense, many of the controlling behaviours discussed here in the context of crimes against humanity have an equivalent in the controlling behaviours that are omnipresent in interpersonal

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<sup>603</sup> Card, *The Atrocity Paradigm* (n 351) 145.

relationships, especially in male-female abusive relationships. The type of absolute control itself, therefore, is not unique to cases of crimes against humanity.

### 6.2.1 Restraint

The first and perhaps “simplest” way in which one person can have full control over a situation with the other person lacking all control over that same situation, is when the powerless party to an extreme power imbalance is physically prevented from acting. This is a dynamic that can be observed repeatedly in cases of crimes against humanity throughout divergent conflicts and in divergent types of situation.

One method, which seems to feature in all sorts of cases of crimes against humanity, is tying up the powerless party to an extreme power imbalance, severely curtailing their physical ability to act. This happened for example in many cases of (mass) executions. The *Blagojević*,<sup>604</sup> *Đorđević*,<sup>605</sup> *Karadžić*,<sup>606</sup> *Krstić*,<sup>607</sup> *Krajišnik*,<sup>608</sup> *Lukić*,<sup>609</sup> *Mladić*,<sup>610</sup> *Perišić*,<sup>611</sup> *Popović*,<sup>612</sup> *Šainović*,<sup>613</sup> *Stanišić*,<sup>614</sup> and *Tolimir*<sup>615</sup> cases at the ICTY all refer to the recovery of ligatures from (mass) graves,<sup>616</sup> often still placed around wrists or ankles of those who perished; ‘still binding bodies’, in the words of one court.<sup>617</sup> These ligatures were placed to ensure that those who were to be executed had their arms and legs immobilised so that they could not fight back, flee, resist, or otherwise exert any control over the situation, while preparations for the murders were being made and the killing was finally carried out. In addition to these cases before the ICTY, there are also occurrences of victims being tied up before being shot and killed, or tied up and beaten to death, in cases before the SCSL.<sup>618</sup> One particularly grotesque act discussed by the SCSL in the *Taylor* case concerns a woman who was tied up by her legs and buried alive, given that the sacrifice of a ‘fair complexion lady’ would increase the chances of success concerning a planned military mission.<sup>619</sup>

In addition to cases of executions discussed above, there are many cases in which victims are tied up in connection to the perpetration of other crimes. In the *Tadić* case,

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<sup>604</sup> *Prosecutor v Blagojević and Jokić* (Judgement) ICTY-02-60-T (17 January 2005), paras 354, 568.

<sup>605</sup> *Prosecutor v Đorđević* (Judgement) ICTY-05-87/1-T (23 February 2011), para 1511.

<sup>606</sup> *Karadžić Trial Judgment* (n 440) paras 5217, 5255, 5379.

<sup>607</sup> *Krstić* (n 9) para 75.

<sup>608</sup> *Krajišnik* (n 441) para 698.

<sup>609</sup> *Prosecutor v Lukić* (Judgement) ICTY-98-32/1-T (20 July 2009), para 53.

<sup>610</sup> *Mladić Trial Judgment* (n 194) paras 2682, 2748, 2813.

<sup>611</sup> *Prosecutor v Perišić* (Judgement) ICTY-04-81-T (6 September 2011), para 720.

<sup>612</sup> *Prosecutor v Popović et al* (Judgement) ICTY-05-88-T (10 June 2010), para 523.

<sup>613</sup> *Prosecutor v Šainović et al* (Judgement) ICTY-05-87-T (29 February 2009), para 1353.

<sup>614</sup> *Prosecutor v Stanišić and Simatović* (Judgement) ICTY-03-69-T (30 May 2013), para 1379.

<sup>615</sup> *Prosecutor v Tolimir* (Judgement) ICTY-05-88/2-T (12 December 2012), para 478.

<sup>616</sup> Most of these cases have to do with mass executions around the Srebrenica area, although there are other cases (e.g., *Krajišnik* (n 441) para 698, *Šainović* (n 616) para 1353, and *Stanišić* (n 617) para 1379) where ligatures are mentioned in reference to other episodes of violence.

<sup>617</sup> *Popović* (n 615) para 523.

<sup>618</sup> *Prosecutor v Sesay, Kallon and Gbao* (Judgement) SCSL-04-15-T (2 March 2009) para 1189,

*Prosecutor v Taylor* (Judgement) SCSL-03-01-T (18 May 2012), para 701.

<sup>619</sup> *Taylor* (n 621), para 864.

we read about a victim being tied to a large tyre before being kicked, beaten and stabbed,<sup>620</sup> and another victim having a noose tightened around his neck while he was being beaten.<sup>621</sup> The *Karadžić* case records the case of a boy being tied to a fence before being beaten with ropes<sup>622</sup> and detainees being tied by chains and belts as they were beaten or cut with a knife.<sup>623</sup> Similarly in *Mladić*, detainees had their hands tied up as they were severely beaten (and later shot).<sup>624</sup> At the ICTR, the *Nzabonimana* judgment writes about a mother being tied up while her children were being beaten and severely wounded.<sup>625</sup> In *Sesay*, a case before the SCSL, victims were tied to mango trees before being flogged and beaten.<sup>626</sup> In *Brima*, before the same court, detainees were made to lie on the floor with their hands tied, after which they were assaulted.<sup>627</sup> Other victims in the same case were tied together, urinated on, and then “covered with a mattress that [was] set on fire with the men lying underneath.”<sup>628</sup> The tying up of victims is also present in cases of rape. In the *Brima* case, a woman who refused to have sex with a particular rebel commander was beaten by him and had her hands tied before he raped her.<sup>629</sup> Another woman, in a case before the ICTR, was undressed, tied up with her own sweater, and subsequently raped.<sup>630</sup>

A final area where the tying up of victims is often mentioned, is in cases before the SCSL concerning the practice of slavery and forced labour. Men captured by rebel factions were tied together by their shirts and forcibly brought to mines, where they were made to work.<sup>631</sup> Similar episodes of civilians being tied up – sometimes with rope, and other times in chains<sup>632</sup> – and forced to work in mines are found in other cases too.<sup>633</sup> In addition to being tied up, civilians were also stripped naked to make it even harder for them to flee.<sup>634</sup> In addition to slavery in the mines, there are several other cases where civilians were tied up and forced to work, for example by carrying heavy loads on their heads.<sup>635</sup>

The practice of tying up is not the only widely used method of control-through-restraint that is present in cases of crimes against humanity. Often, the immobilisation of victims and resulting control (of perpetrators) or lack of control (of victims) comes about through the person-to-person physical subjugation of the victim by one or more perpetrators. This type of physical control over a victim is discussed explicitly by courts

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<sup>620</sup> *Tadić Trial Judgment* (n 125) para 201.

<sup>621</sup> *ibid* para 248.

<sup>622</sup> *Karadžić Trial Judgment* (n 440) para 877.

<sup>623</sup> *ibid* para 900.

<sup>624</sup> *Mladić Trial Judgment* (n 194) para 752.

<sup>625</sup> *Prosecutor v Nzabonimana* (Judgement and Sentence) ICTR-98-44D-T (31 May 2012), para 1614.

<sup>626</sup> *Sesay* (n 621) paras 1173, 1197

<sup>627</sup> *Prosecutor v Brima, Kamaru, and Kanu* (Judgement) SCSL-04-16-T (20 June 2007), para 1196.

<sup>628</sup> *ibid* para 1203.

<sup>629</sup> *ibid* para 1090.

<sup>630</sup> *Prosecutor v Muvunyi* (Judgement) ICTR-00-55-T (12 September 2006), para 383.

<sup>631</sup> *Brima* (n 630) para 1297.

<sup>632</sup> *Taylor* (n 621) para 1742.

<sup>633</sup> E.g., *ibid* para 546.

<sup>634</sup> E.g., *ibid* para 1627; *Sesay* (n 621) para 1094.

<sup>635</sup> *Brima* (n 630) para 1331.

most frequently in cases of rape. We learn of one woman who had been 'held down by several men' while being raped,<sup>636</sup> another being restrained by five men while others raped her,<sup>637</sup> and yet another who was raped 'even though she was crying and other men had to hold her down.'<sup>638</sup> Another harrowing description can be found in *Akayesu*, where a woman was raped while 'one person held her neck, others took her by the shoulders, and others again held her thighs apart.'<sup>639</sup> There is no need to list all further occurrences of such situations, for the modus operandi is clear: a victim's body is controlled by one or more perpetrators and the victim's physical agency taken from them.

While explicit passages about the physical subjugation of a victim occur most frequently in cases of rape, they are not found exclusively in relation to that crime. In *Tadić*, for example, mention is made of a man being held down by his arms while another victim was forced to perform inhumane acts on him.<sup>640</sup> One particular sinister method of physically subjugating victims, which is in itself also a severely violent act, can be seen in cases before the ICTR where some victims had their 'fibula [...] completely severed by some sharp object, which would have severed the Achilles tendon rendering this individual partially crippled.'<sup>641</sup> There are also multiple cases in which victims were made to place themselves in a vulnerable position so that violence could be meted out against them, for instance by being forced to lay prone on the road<sup>642</sup> or to clasp their hands behind their heads - giving attackers free reign.<sup>643</sup>

### 6.2.2 Detention

Another technique of exercising control and diminishing the agency of victims, thereby establishing an interpersonal extreme power imbalance, is to detain them. Like restraint and physical domination, the practice of detention is also found in many legally recognised cases of crimes against humanity. This detention itself can be a very interpersonal affair, but it may also occur in a more institutional context, for example where groups are being detained by other groups. We have seen this in the previous chapter, where detention also played a significant role. However, in both cases the fact that a victim is detained contributes to the existence of an interpersonal extreme power imbalance between the victim and the person who, in the context of the detention, has access to the victim. The detention ensures that the powerless party to the extreme power imbalance cannot remove that access and must undergo whatever it is that the other party wishes to do them. Whether the detention itself is of

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<sup>636</sup> *Karemera Trial Judgment* (n 493) para 1359.

<sup>637</sup> *ibid* para 1397.

<sup>638</sup> *Sesay* (n 621) para 1213.

<sup>639</sup> *Prosecutor v Akayesu (Akayesu Trial Judgement)* (Judgement) ICTR-96-4-T (2 September 1998), para 437.

<sup>640</sup> *Tadić Trial Judgment* (n 125) para 222.

<sup>641</sup> *Kayishema* (n 565) para 326.

<sup>642</sup> E.g., in *Tadić Trial Judgment* (n 125) para 346 and *Sesay* (n 621) para 1007.

<sup>643</sup> *Tadić Trial Judgment* (n 125) para 348.

a small or large scale does not matter; the resulting interpersonal extreme power imbalances are the same.<sup>644</sup>

Detention is not always on a scale comparable to Omarska, the camp discussed in Chapter 5. Sometimes it has a distinctly interpersonal character. We find the first such instance in the *Akayesu* case, where a woman was taken by a certain Rafiki to his house and locked up for two days. During that time, he raped her multiple times. And it was not only he who did so; Rafiki gave the key to 'other young men' so that they, too, could enter the house in order to rape her.<sup>645</sup> Similar things happened in *Katanga*, before the ICC.<sup>646</sup> Another notorious case of detention with an interpersonal character is *Kunarac*. Again, it was mainly women who bore the brunt of the relevant extreme power imbalances, as they were detained in houses owned by local military men, raped repeatedly, and forced to do household chores.<sup>647</sup> The court observed in pithy fashion what the result was of this detention: the women 'could not leave the house and had no choice or control over their fate.'<sup>648</sup> This observation goes to the core of our definition of an extreme power imbalance: the act of detention led to the establishment of an interpersonal extreme power imbalance in which the victim had no control over the situation whatsoever. An equally chilling account can be found in the *Brđanin* case, where the commander of *Trnopolje* concentration camp 'personally arranged for a Bosnian Muslim woman to be detained in the same house in which he had his office,' solely so that he could rape her. When she screamed, he made it clear to her that there was no-one there to help her.<sup>649</sup> She was trapped and could not meaningfully affect the situation.

In addition to the pervasive nature of cases of rape as described, there are many other types of violence that occur in the context of a victim being detained to be found in judgments of crimes against humanity. In some of these cases, like the cases above, the detention also has a strongly interpersonal character. In *Brima*, a small group of people were detained and assaulted,<sup>650</sup> a person was detained and forced to watch a girl being raped,<sup>651</sup> and a group of three who were detained at a police station were shot dead.<sup>652</sup> In another case, one authority figure within a Serbian militia had his "private" jail where five detainees were kept, one of whom was hanging from a freezer hook.<sup>653</sup> And in *Krnojelac*, we read about an old man who was 'brutally beaten' such

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<sup>644</sup> In such cases of widespread detention, interpersonal extreme power imbalances are often closely connected to the inter-group dimension of extreme power imbalances (and indeed the societal dimension). An example of this is the large-scale detention that has been discussed in the Omarska case study – see section 5.2.

<sup>645</sup> *Akayesu Trial Judgment* (n 642) paras 434, 436.

<sup>646</sup> *Prosecutor v Katanga (Katanga Trial Judgment)* (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07 (7 March 2014), para 1008.

<sup>647</sup> *Kunarac Trial Judgment* (n 186) paras 63, 170.

<sup>648</sup> *ibid* para 225.

<sup>649</sup> *Brđanin Trial Judgment* (n 426) para 513.

<sup>650</sup> *Brima* (n 630) para 1196.

<sup>651</sup> *ibid* para 1023.

<sup>652</sup> *ibid* para 834.

<sup>653</sup> *Krajišnik* (n 441) para 305.



that 'his moans were audible to the other detainees', after having been taken to a solitary confinement cell.<sup>654</sup>

### 6.2.3 Threats

The third category of methods of control which are widespread in judgments of crimes against humanity concerns credible threats to commit violence in case of non-compliance. As we will see, these threats can be explicit or implicit. Before commencing our analysis, we should pause for an observation regarding the relationship between threats and violence. For there appears to be something odd about deciding to study threats in the context of crimes against humanity. Is it not the case that the acts constitutive of a crime against humanity are violent *acts*? If so, why would we focus on violence threatened, rather than violence committed? Concomitantly, why would a would-be perpetrator threaten violence rather than commit it?

As we will see in what follows, the purpose of threats of one type of violence is generally to enable a perpetrator to commit *another* type of violence. Often, this other type of violence requires an extent of "cooperation" from the victim. By forcing a victim to make a comparison between potential harms, control is established: a victim is coerced to obey their attacker under the threat of some form of violence that they deem to be worse than the consequences of obedience. Often, but not always, the relevant threat will be death. I should make clear here that when I talk about a "comparison" between potential harms, I do not wish to claim that this is a rationally calculated affair. It is a comparison that is most likely made in a split second, under extreme duress, and in the context of incredible fear. The person who finds themselves in such a situation cannot be held responsible for their choice in any meaningful way; the responsibility for the situation sits squarely with the attacker, who often will have carefully crafted the situation to suit their wishes.

It is clear from the above paragraph that what is being sought through the use threats of violence is control. Once the violence threatened is actualised, the prospect of achieving the control that an attacker wishes to achieve dissipates. The continued unmaterialised threat is required for the control to persist.

We will begin by looking at explicit threats of physical violence. A vivid example of such threats, and their role played in the type of control that we are discussing here, can be found in one of the episodes of violence described in *Tadić*. In this episode, several victims were forced to *partake* in violent acts against fellow detainees of *Omarska* camp (this phenomenon of what I will refer to as "forced complicity" will be discussed in more detail in the following section). In *Tadić*, an explicit threat was used: 'both [your] eyes will be cut out' if you do not do as we say.<sup>655</sup> Another example of a similar situation may be seen in the *Kvočka* case, where one guard, particularly notorious for his wanton violence, 'ordered [...] men to fight amongst themselves,

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<sup>654</sup> *Prosecutor v Krnojelac* (Judgement) ICTY-97-25-T (15 March 2002), para 272.

<sup>655</sup> *Tadić Trial Judgment* (n 125) para 206.

threatening that if they refused to do so, he would assault them.<sup>656</sup> And in *Lukić*, 'several elderly men were ordered [...] to beat one another on the head and sing "Chetnik" songs. If they did not beat one another hard enough, they were beaten[.]'<sup>657</sup> A final situation in which the pursuit of control is clearly a motive may be found in the *Bagosora* case, where the court describes how priests and military observers 'were forced to watch [a massacre], and the gendarmes beat them with rifle butts if they averted their eyes from the killing.'<sup>658</sup>

Another area in which explicit physical threats are often used to coerce a victim is the widespread commission of sexual violence against women and girls in cases of crimes against humanity. Cases report instances of women who were raped eight times under threat of death,<sup>659</sup> forced to choose 'between dying and undressing';<sup>660</sup> told that if they resisted, they would be shot;<sup>661</sup> and coerced at gunpoint to put down a child they were carrying, in order to undress for an attacker.<sup>662</sup> Another woman was forced to 'satisfy [a commander's] desires' in order not to be killed.<sup>663</sup> Another again, threatened with death by several men who then continued to undress, assault, and rape her.<sup>664</sup> And in the *Lukić* case, we read the chilling account of Milan Lukić, a leader of a paramilitary group, putting the barrel of a rifle in a woman's mouth, threatening to 'blow her head off,' and raping her.<sup>665</sup> This is only a small selection of examples of the pervasive practice of using explicit violent threats to enable the commission of sexual violence in episodes of crimes against humanity.

Threats of physical violence need not always be explicit for control to be established. They often remain implicit, unspoken, but clearly understood by both parties to the extreme power imbalance. The women in the *Kunarac* case, for example, had to 'obey every command'<sup>666</sup> as their captors were always armed. Explicit threats were not always necessary: it was clear that there was an implicit threat of lethal violence in case of disobedience. The same case relates the account of a woman who was sexually assaulted after her attacker had put a bayonet on the table.<sup>667</sup> Again, there is no mention of an *explicit* threat, but the threat was clear nonetheless. In fact, the judgment mentions that the bayonet frightened the witness very much, and that attacker was unable to rape the witness because of how rigid she was with fear.<sup>668</sup>

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<sup>656</sup> *Kvočka* (n 528) para 642.

<sup>657</sup> *Lukić* (n 612) para 862.

<sup>658</sup> *Prosecutor v Bagosora et al* (Judgement and Sentence) ICTR-98-41-T (18 December 2008), para 976.

<sup>659</sup> *Karemera Trial Judgment* (n 493) para 1349.

<sup>660</sup> *Prosecutor v Gacumbitsi* (Judgement) ICTR-01-64-T (17 June 2004), para 202.

<sup>661</sup> *Muhimana* (n 590) para 379.

<sup>662</sup> *Sesay* (n 621) para 1171.

<sup>663</sup> *Kunarac Trial Judgment* (n 186) para 219.

<sup>664</sup> *Katanga Trial Judgment* (n 649) para 993.

<sup>665</sup> *Lukić* (n 612) para 701.

<sup>666</sup> *Kunarac Trial Judgment* (n 186) para 210.

<sup>667</sup> *ibid* para 259.

<sup>668</sup> *ibid* para 259.

In the *Kajelijeli* case, a witness explained that she could not resist 'because the Interahamwe [who raped her] were armed.'<sup>669</sup> The consequences of resisting did not have to be made explicit: they were understood by all parties. The victim knew that, faced with a large group of people who were armed, resistance meant certain death. She was extremely vulnerable. Her attacker, conversely, knew that he was faced with an extremely vulnerable victim, terrified by him and members of his group, and unable to put up any resistance without risking her life. The threat was clear to all.

#### 6.2.4 Context

Interpersonal control is not always just the product of the actions of a particular perpetrator. The creation of an extreme power imbalance between two individuals can also depend on the context in which the relevant events occur. Rather than establishing control through a person-to-person interaction, for by example restraining, physically overwhelming, or threatening, in certain cases control is established by the exploitation of other factors at play at a particular moment and place.

This impact of a wider context on the interpersonal power relationship between a given perpetrator and victim brings out the interconnected nature of the three dimensions studied in this thesis: the societal, inter-group, and interpersonal. I have made the point about this interconnectedness in the previous chapters: the societal atmosphere plays a role in the emergence of inter-group and inter-personal violence, and this violence in turn feeds back into the group and societal dimensions of emerging extreme power imbalances. In this section, I will show that these societal and group dynamics also affects the consciousness of individual victim.

We start by looking at a brief passage from the *Sesay* case, before the SCSL. One of the factual findings describes a woman whose daughter was captured by a rebel and turned into his "wife". On one occasion described by the court, she was raped by him even though she was crying, and other rebels had to hold her down. Her mother, in response, told her 'to be patient because "this is the war" and there was nothing that the women could do about it.'<sup>670</sup>

The sentiment expressed in this sentence is what I am trying to capture by referring to interpersonal control being established through non-interpersonal factors. Challenging the control of rebels over her daughter (and herself) seemed futile against the wider backdrop of the context this mother and her daughter found themselves in. This reminds us of the discussion of the *Kunarac* case as part of the section on the societal dimension of extreme power imbalances, where one of the witnesses mentioned that it was 'inconceivable that [...] any Muslim girl could have moved around freely and that she herself [i.e., the witness] only felt secure enough to walk about alone at the end of 1993.'<sup>671</sup>

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<sup>669</sup> *Prosecutor v Kajelijeli* (Judgement and Sentence) ICTR-98-44A-T (1 December 2003), para 654.

<sup>670</sup> *Sesay* (n 621) para 1213.

<sup>671</sup> *Kunarac Trial Judgment* (n 186) para 85.

A similar scenario played out years later in the *Katanga* case, dealing with crimes against humanity committed during a conflict in the *Ituri* province of the Democratic Republic of the Congo. In the aftermath of an episode of mass atrocity, one victim who had hidden 'in the bush' was flushed out by several rebels. In describing what happened to her (she was raped), the ICC makes it a point to note that 'as the witness had heard that other persons who had taken flight were being killed and was convinced that death was looming, she was in a state of complete submission at that moment.'<sup>672</sup> This is the court describing clearly what we have defined as an interpersonal extreme power imbalance: the victim was in complete submission, and attackers had full and unfettered control over the situation. Yet the court also emphasises that the context of which the victim was aware contributed significantly to the interpersonal dimension of the extreme power imbalance.

A third example can be found in the *Kvočka* case, where the ICTY's Trial Chamber attempts to make explicit the context in which those detained in the *Omarska* concentration camp found themselves. In the camp, 'an atmosphere of sweeping impunity and terror prevailed.'<sup>673</sup> One witness stated that detainees 'feared a guard could kill anybody he liked for any reason, at any time.'<sup>674</sup> And 'detainees were kept in inhuman conditions and an atmosphere of extreme mental and physical violence pervaded the camp.'<sup>675</sup> The multiple violently exploited interpersonal extreme power imbalances that continuously emerged and dissipated throughout the history of *Omarska* must be, at least in a substantial number of cases, the result of this non-interpersonal context of the extremely violent and oppressive nature of the camp.

Recall that I have claimed in the previous chapter that extreme power imbalances on one level are likely to be intertwined with extreme power imbalances on the other levels. While they may be analysed separately, in practice, as we have seen (and will see) in this section, a clean distinction is hard to maintain. Many interpersonal extreme power imbalances, while shaping a distinctly interpersonal interaction, are at least partly the result of extreme power imbalances on the other two levels, or of a salient wider context as perceived by the parties to the interpersonal extreme power imbalance. The three cases discussed in this subsection serve to make tangible this intertwined nature of extreme power imbalances. It also shows that, for these types of scenarios, an exclusive focus on victims, perpetrators, or acts does not provide a comprehensive understanding of the dynamics. Rather, characteristics of all three elements are required in order to grasp fully what happened.

This section has shown but a relatively small sample of the role played by methods of control in relation to the commission of crimes against humanity-related crimes, ranging from more to less immediate. The practices of tying up or otherwise physically subjugating a victim are some of the most immediate and direct interactions meant to

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<sup>672</sup> *Katanga Trial Judgment* (n 649) para 989.

<sup>673</sup> *Kvočka* (n 528) para 42.

<sup>674</sup> *ibid* para 43.

<sup>675</sup> *ibid* para 45.

establish an extreme power imbalance. They are acts that require close physical proximity to the victims, and a level of callousness on the part of the perpetrators. They perpetrators must be willing to physically dominate and restrain someone they can look in the eye, with the specific motive of rendering them unable to resist or withstand whatever it is that perpetrators wish to do to their victims.

Yet even in the other methods discussed here, which are perhaps less immediate and physical, this intimate nature is present when a relation of unfettered control is established on the interpersonal level. Control over someone physically close to you, sometimes perhaps even *known* to you. This unfettered control, combined with the sense of intimacy of the interpersonal relationship between attacker and victim, goes to the core of what an interpersonal extreme power imbalance is about and what makes their exploitation so morally repulsive. It is worthwhile to recall, in this context, the way in which Sussman describes one of the morally salient elements of the wrongness of torture: that victims are ‘forced to be passive before the infliction of suffering, their avenues of response limited to those narrowly defined by their tormentors.’<sup>676</sup> This is exactly what is achieved through the control that is present in so many cases of crimes against humanity. And it is achieved, ultimately, on the interpersonal level.

### 6.3 Violence

Like Chapter 4,<sup>677</sup> this chapter also has a section on violence. The perspective on violence taken in this section is significantly different. In the analysis of the societal dimension of extreme power imbalances, we were interested in how the commission of violence affects the atmosphere of the society in which it is committed – how the lack of response to violence, or the explicit endorsement by those in powerful positions, contributes to the increasingly degraded status of those who are targeted.

By contrast to the analysis of the role of violence in a wider context, this section will study the discrete acts of interpersonal violence themselves, in relative isolation, as they are found in factual findings in judgments of crimes against humanity. This focus on fact patterns, especially when it comes to interpersonal acts of violence, is rarely found in legal and philosophical scholarship. Both areas of inquiry are heavily focused on the explanation, interpretation, and synthesis of abstract concepts and definitions. To an extent, they have shied away from the details of the acts. This makes sense: these details are often not required for legal exegesis or abstract philosophical thought. It may even come across as being in bad taste to use them if not strictly necessary.

But abstracting these details away will only get us so far in understanding the realities of crimes against humanity, as the court cited at the start of this chapter recognised. The particularly egregious acts of violence themselves, in addition to the context in which they are committed, also play a key role in how we respond to episodes of

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<sup>676</sup> Sussman, ‘What’s Wrong with Torture?’ (n 384) 6.

<sup>677</sup> See section 4.4.

crimes against humanity the way we do. We are horrified, speechless, shocked, and – though this is uncomfortable to admit – intrigued. That response is likely to contribute to the intuition that there is indeed something special about crimes against humanity. Understanding the details of the acts of violence and the way they relate to interpersonal extreme power imbalances will help us connect the intuitions underpinning act-based accounts of the special nature of crimes against humanity to the realities of legally recognised cases of crimes against humanity.

As I have said, control and violence are intimately connected. Some of the acts of control described above, are inherently violent. Some may even be considered a crime against humanity in their own right, irrespective of the violence that follows the establishment of control. This is the case for detention, for example. And we saw that the establishment of the type of control characteristic of an interpersonal extreme power imbalance almost always leads the commission of violence. Hence the observation that acts of control are very closely related to acts of violence. The same, in reverse, is true of the acts of violence that will be discussed here. Many of these violent acts are also acts of control, or acts meant to make the existing interpersonal extreme power imbalance explicit. As alluded to earlier, this dynamic is well-known in many cases of interpersonal control and violence. Thus, in relation to intimate partner violence, we have seen Card refer to the notion of *oppressive dominance*, which is created through a 'pattern of violent and coercive behaviors'.<sup>678</sup> She lists a number of such behaviours:

It includes acts ranging from throwing one's partner against a wall, hitting with and without weapons, choking, burning, stabbing, confining physically, robbing a partner of sleep and necessary physical aids (such as eye-glasses), violent property damage, and threats with guns, to less clearly or less immediately physical abuse, such as threats to significant third parties (including animal companions), threats to reveal secrets to employers or family, creating unauthorized credit card debts, humiliation, violent accusation, and character assassination.<sup>679</sup>

This idea of oppressive dominance is present in interpersonal aspects of crimes against humanity-related violence too in a shockingly visceral way. We have seen many of these behaviours in the previous section, and we shall see many more in the current. Most of them are at the same time controlling and violent. As I said, they are two sides of the same coin. The difference is in the emphasis we place. Some acts strike us as being mostly controlling, some as mostly violent. That does not mean that they are *only* controlling, *or only* violent. Hence while we are discussing violence in this section, I will not refrain from making explicit the connections there are between violence and control. In fact, analysing these connections is one of the key aims of this

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<sup>678</sup> Card, *The Atrocity Paradigm* (n 351) 145.

<sup>679</sup> *ibid* 145.

section, for they play a vital role in tying crimes against humanity-related violence to the existence of interpersonal extreme power imbalances.

In the section above we surveyed a wide range of examples that showed how different methods of control have been used throughout many different cases of crimes against humanity. The main purpose of this broad-brush approach was to establish how pervasive these methods of control are; to show that they are by no means exceptional. And the methods of control themselves were relatively straightforward: they did not need as much in-depth analysis in order to be understood.

In order to make the dynamics in concrete acts of violence clearer, this section will focus on several relatively brief case studies instead of providing a survey. These case studies will be vignette-like, in that they will discuss only on the immediate context of the violence and the violence itself, isolating the episode of violence from a wider context as well as from its aftermath. The purpose of each of these vignettes is to explore the interpersonal dynamics of the violence, the nature of the specific acts committed, and the motives of the perpetrators.

There is a potential problem with this approach, which is as follows: how can we trust that these case studies capture something salient about cases of crimes against humanity in general, rather than about the specific case that is being analysed? They are but a small selection of cases. Moreover, I could well have picked situations that are exceptional even by the standards of cases of crimes against humanity. If that were true, then it would be unjustified to apply the insights gained from them to the concept of crimes against humanity.

There are two responses to this issue. First, we should acknowledge that explicit and detailed descriptions of interpersonal violence are relatively scarce in judgments of crimes against humanity. The relative scarcity of factual accounts of an interpersonal nature makes sense: such accounts often depend on witnesses being able to recount in some detail what has occurred. The likelihood of this happening is low, for a cynical reason. If a witness had been so close to this interpersonal violence, either as onlooker or as victim, it is unlikely that they have survived to tell the tale. One exception to this is in cases of rape: this explains why many of the detailed accounts of interpersonal violence are related to this crime.

Secondly, the relatively small number of detailed accounts of interpersonal violence is not a bar to generalising per se. As I have argued before, one of the benefits of an account based on extreme power imbalances is that it allows us to recognise shared tenets between cases, even though they might be expressed differently in the context of the circumstances of the relevant episode of crimes against humanity.

### 6.3.1 The “Doctors’ Trial”

The first case study concerns a case found in the so-called “Doctor’s Trial”, which was held before an American tribunal operating under CCL 10. In this trial, twenty-two defendants were charged with (forming part of a conspiracy to commit) war crimes

and crimes against humanity; and membership in a criminal organisation.<sup>680</sup> The specific crimes which formed the basis of this case are related, by and large, to medical experiments carried out on inmates of concentration camps without their consent. These experiments included experiments designed to study the behaviour of the human body at extreme altitudes<sup>681</sup> or extremely low temperatures;<sup>682</sup> deliberate infections of victims to study the course of a disease or test the efficacy of experimental anti-infectious treatments;<sup>683</sup> experiments with poison and poisonous gases;<sup>684</sup> experiments for mass sterilisations;<sup>685</sup> and experiments related to the transplantation or regeneration of bone, nerves, and muscles.<sup>686</sup>

This case study will look at an instance of the last category of experiments mentioned. We will focus on excerpts from the oral testimony, given during the trial, by Ms Karolewska. Ms Karolewska was a prosecution witness and had been personally subjected to such medical experiments while incarcerated in concentration camp *Ravensbrück*. But before starting our discussion of these excerpts, I should note that Ms Karolewska had been a member of the Polish resistance movement – she worked as a messenger – when she was initially arrested in Poland.<sup>687</sup> In that light, one might argue that she was an enemy combatant and that whatever happened to her could not, therefore, be classified as a crime against humanity – it would have been a war crime instead.

The court in this case does not explicitly distinguish between war crimes and crimes against humanity. We have seen, in the chapter on the legal development of crimes against humanity, that there were historical reasons for trying to categorise crimes as war crimes rather than crimes against humanity where possible. As was common around the time of the Nuremberg trials, the court treated crimes against humanity as a sort of fallback category when war crimes could not be charged, encompassing essentially the same types of acts. This tendency is clear from the repeatedly used sentence in the judgment discussing the guilt of individual defendants: ‘To the extent that these criminal acts did not constitute war crimes they constituted crimes, against humanity.’<sup>688</sup> This suggests that the acts discussed by the court were considered to be both constitutive of war crimes and crimes against humanity, and that there was no need to delineate explicitly between these crimes.

I would also argue that on the modern legal conception of crimes against humanity, the crimes committed in the present case studies could be considered part of a crime

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<sup>680</sup> *United States of America v Karl Brandt et al (Doctors’ Trial)*, Extracts from Argumentation and Evidence of Prosecution and Defense, I Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law 10 (1949), 10-17.

<sup>681</sup> *ibid* 92ff.

<sup>682</sup> *ibid* 198ff.

<sup>683</sup> E.g., *ibid* 278ff and 354ff.

<sup>684</sup> E.g., *ibid* 314ff and 631ff.

<sup>685</sup> *ibid* 694ff.

<sup>686</sup> *ibid* 391ff.

<sup>687</sup> *ibid* 410.

<sup>688</sup> See e.g., *ibid* 198, 207, 217, 222.



against humanity rather than a war crime. Even though Ms Karolewska had been arrested as a member of the resistance, by the time the crimes discussed here were committed she had been in custody for over two years, had been transferred into Germany, and had spent a long period of time in *Ravensbrück*. To consider her a combatant, even one *hors de combat*, seems tenuous at best.

Finally, it should be noted that the current case study is based on one of relatively few available testimonies given by individual victims who have survived their ordeal. Even if we were to accept, for the sake of argument, that the circumstances of the arrest of this victim mean that she could still be considered a combatant *hors de combat* and that therefore the crimes committed against her could not be part of a crime against humanity, those crimes and the dynamics she describes must have occurred in dozens of nearly identical situations where medical experiments were carried out on non-consenting civilians. They, too, have been at the receiving end of an individual extreme power imbalance; and they, too, have been subjected to the violence of medical experiments enabled by this extreme power imbalance. They just have not had the opportunity to testify about these crimes.

Let us now turn to the case. Karolewska arrived in *Ravensbrück* in September 1941.<sup>689</sup> The first time she was subjected to a medical experiment was nearly a year later, in August 1942. Together with eight other women, she was called into the hospital. Initially, she 'thought [she] was going to be executed because some girls had been shot down before,' and they were called 'at a time when executions usually took place.'<sup>690</sup> However, when Karolewska got to the hospital, she was 'put to bed' in a locked ward, together with the other women.<sup>691</sup> When one of the women asked why they had been brought to the hospital, 'she got no answer but an ironical smile.'<sup>692</sup> Soon after, a nurse administered an injection in Karolewska's leg that made her sick and weak. In that state, she was brought to an operating room, where she was given a second intravenous injection in her arm.<sup>693</sup> She lost her consciousness, and woke up with severe pain in her leg, which was 'in a cast from the ankle up to the knee' and 'swollen from the toes up to the groin.'<sup>694</sup>

In mid-September 1942, Karolewska was called to the hospital again, at that point unable to walk and having to be carried by her fellow detainees.<sup>695</sup> Again, her first thought was that she was going to be executed.<sup>696</sup> But instead, she was given an injection after which she was operated for the second time. When she woke up, she

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<sup>689</sup> *ibid* 410.

<sup>690</sup> *ibid* 412.

<sup>691</sup> *ibid* 412.

<sup>692</sup> *ibid* 88.

<sup>693</sup> *ibid* 412.

<sup>694</sup> *ibid* 412

<sup>695</sup> *ibid* 413.

<sup>696</sup> *ibid* 413.

'felt a much greater pain and had a higher temperature.'<sup>697</sup> It took until June 1943, nine months later, for the pus to finally stop flowing from her leg.<sup>698</sup>

This was not the last time Karolewska was operated on against her will. The third instance needs a little bit of context. Before describing her experience, Karolewska recounts hearing one of the doctors, in February 1943, referring to her and other women as 'guinea pigs'.<sup>699</sup> It was at that point that it became clear that they were used for medical experiments, and Karolewska and several other women decided to protest, in writing, against this practice; they lodged a complaint with the camp commander.<sup>700</sup> Unsurprisingly, their complaint was never answered and they were not allowed to see the commander.<sup>701</sup> Instead, sometime later, Karolewska and nine other prisoners were told follow a guard to the hospital. When they refused, the guard went to confer with some of the SS men present in the camp. When she returned, Karolewska and the others were put in "the bunker" as punishment for having disobeyed the orders.<sup>702</sup> After having been locked in the bunker for two days, Karolewska was brought to a certain Dr Trommel, who asked her to 'follow him upstairs.'<sup>703</sup> He brought her to a cell and asked her 'whether [she] would agree to a small operation.'<sup>704</sup> She did not. Then, he asked her twice to lie down on the bed, which Karolewska also refused. He took her to another cell, where she noticed men in operating gloves and a nurse ready to administer an injection. Karolewska 'decided to defend [herself] to the last.'<sup>705</sup> But to no avail:

Dr. Trommel took me by the left wrist and pulled my arm back. With his other hand he tried to gag me, putting a piece of rag into my mouth, because I shouted. The second SS man took my right hand and stretched it. Two other SS men held me by my feet. Immobilized, I felt somebody giving me an injection. I defended myself for a long time, but then I grew weaker. The injection had its effect; I felt sleepy. I heard Trommel saying, "That is all." I regained consciousness again, but I don't know when.

Then I noticed that a German nurse was taking off my dress, I then lost consciousness again; I regained it in the morning. Then I noticed that both my legs were in iron splints and were bandaged from the toes up to the groin. I felt a severe pain in my feet, and had a temperature. On the afternoon of the same day, a German nurse came and gave me an injection,

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<sup>697</sup> *ibid* 413.

<sup>698</sup> *ibid* 414.

<sup>699</sup> *ibid* 414.

<sup>700</sup> *ibid* 414-415.

<sup>701</sup> *ibid* 415.

<sup>702</sup> *ibid* 415.

<sup>703</sup> *ibid* 416

<sup>704</sup> *ibid* 416.

<sup>705</sup> *ibid* 416.

in spite of my protests; she gave me this injection in my thigh and told me that she had to do it.<sup>706</sup>

The control exhibited here is not unlike the control we have seen in cases of restraint during rape.<sup>707</sup> Multiple men immobilised her and she was gagged, before another man forced something inside her against her will. In this case, an injection with an anaesthetic. Karolewska was never told what the purpose of the operations was, and whenever she was being assessed by doctors after her operations she was blindfolded.<sup>708</sup> As a result, it is not fully clear from Karolewska's testimony what exactly happened during the three forced operations. But there are some clues. Karolewska describes seeing her leg one time when the bandage was taken off after an operation, and noticing 'the incision went so deep [she] could see the bone.'<sup>709</sup> Further information as to the type of acts likely committed during the operations can be found in an affidavit that was submitted during the trial, written by Dr Zofia Maczka, who was herself a prisoner made to work as a ward attendant and in charge of doing all X-ray photographs.<sup>710</sup> She describes two broad types of operation that were carried out: operations with the purpose of infecting a patient so as to test methods of combating the infection, and experimental operations to do with regeneration of bone, muscle, or nerve tissue.<sup>711</sup>

The truth is that Karolewska underwent *both* types of medical experiment during her incarceration at *Ravensbrück*.<sup>712</sup> I will describe these experiments in some more detail. As to infections, it appears that Karolewska was part of a group of twenty-four women who were subjected to Dr Gebhardt's 'new series of experiments', designed to 'more accurately simulate battlefield conditions [i.e. bullet wounds] without shooting the women.'<sup>713</sup> The way this was achieved, was through interrupting blood circulation through the muscles in the relevant area by tying them off on both ends, and then inoculating the area with bacterial strains<sup>714</sup> (i.e. spreading them into the wound.)<sup>715</sup> Different treatments, as well as a lack of treatment, were then administered to the victims, putatively in order to assess their efficacy. The bone regeneration experiments of which Karolewska was a victim most likely consisted in harvesting bone grafts from her tibia or fibula and either implanting them in other victims<sup>716</sup> or sending them to the nearby *Hohenlychen* sanatorium, perhaps in order to be used in its orthopaedic clinic.<sup>717</sup>

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<sup>706</sup> *ibid* 416-417.

<sup>707</sup> See section 6.2.1 above.

<sup>708</sup> *ibid* 412, 414.

<sup>709</sup> *ibid* 413.

<sup>710</sup> *ibid* 401-404.

<sup>711</sup> *ibid* 403.

<sup>712</sup> Erdem Bagatur, 'Nazi Medicine—Part 1: Musculoskeletal Experimentation on Concentration Camp Prisoners During World War II' (2018) 476 *Clinical Orthopaedics and Related Research* 1899, 1903.

<sup>713</sup> *ibid* 1901.

<sup>714</sup> *ibid* 1901.

<sup>715</sup> *ibid* 1900.

<sup>716</sup> *ibid* 1903.

<sup>717</sup> *Doctors' Trial* (n 683) 404.

All these acts of which Karolewska has been a victim have been committed in the context of an interpersonal extreme power imbalance. Throughout the entire period during which the relevant acts of violence occurred, she was detained. This detention took two forms: detention in the camp, but also a type of detention-in-detention when she was locked on a ward within the camp. This detention meant unfettered access to her person by camp personnel, and in the latter case also by nurses and doctors with the support of camp personnel where necessary. Of course, the camp is an environment in which the distinction between control and violence has collapsed almost completely. The camp is fundamentally controlling, and it is fundamentally violent – not just in the interpersonal extreme power imbalances that live within it, but also in the inter-group dimension of extreme power imbalances that exists within the camp. Think, for example, of the *Omarska* camp discussed at length in the previous chapter. It makes little sense to try to distinguish cleanly between these two notions – the inter-group affects the interpersonal, and vice versa.

This context highlights Karolewska's and her fellow victims' extraordinary courage, as well as perhaps their fundamental misunderstanding of the character of the camp, when they protested in writing about their operations. Third, Karolewska was physically restrained. Before the last operation described here, this restraint took the form of Dr Trommel and three unnamed SS-men gagging her and physically subjugating her before administering an injection with an anaesthetic. But in the other two cases described, I would argue that the use of an anaesthetic can be classified as physical restraint in and of itself; at the very least, it can be considered a method of control.

The violent medical experiments and the acts related to those experiments that were carried out on Karolewska's body are an example of what can happen when an interpersonal extreme power imbalance exists. One of the features of this set of acts that is most striking to me, is the supremely invasive nature of what has occurred. It starts with the injection, which is not only an act of control, but also an invasive and violent act, forcibly putting a foreign substance into the victim's blood stream. The operations themselves exhibit the same characteristic. They, too, are not only acts upon the victim's body, but acts *in* the victim's body. Karolewska's body was surgically opened so that the perpetrators of the crimes could commit their violence inside it, by removing or grafting pieces of bone, or by spreading bacterial strains into the opened cavity. This latter act adds another layer of invasiveness, by making Karolewska's body fight itself from within. The violence meted out is not just temporally limited and external, but it is continuous, and, in a sense, it can be said that the *locus* of the violence is within herself. This is reminiscent of the notion discussed in the previous chapter that one salient characteristic of torture is that it often attempts to pit a victim against themselves.

The existence of an interpersonal extreme power imbalance plays a causal role in the occurrence of the violence described. First, it plays a role in creating the environment and interpersonal dynamics in which such violence can take place. I do not wish to

argue that the mere existence of an extreme power imbalance will *cause* such violence to happen, but such invasive violence could not be committed *without* the existence of such an extreme power imbalance. Put more formally, the interpersonal dimension of extreme power imbalances is a necessary (but not a sufficient) condition of this violence to occur.

Second, there is some evidence in this case to suggest that perpetuating the existing interpersonal (and likely also the inter-group or even societal) extreme power imbalances may have been a motivating factor to those committing the crimes – at least on some occasions. As Bagatur, a professor of orthopaedic surgery and researcher of Nazi medical experiments, points out, the bone grafting experiments of which Karolewska was a victim were ‘senseless.’<sup>718</sup> He writes:

By the time they were being performed in Ravensbrück, sufficient experimental histologic data, as well as surgical and clinical experience had already accumulated. Indeed, SS physicians performed bone grafting experiments even though such surgical procedures had already been proven to work more than a decade earlier, making it clear that the victims of these experiments were being tortured for no plausible scientific purpose. From his affidavits we know that Prof. Gebhardt was aware of the advances around the world about this subject.<sup>719</sup>

Zofia Maczka, introduced above, made a similar point in her affidavit used during the trial. It is worth quoting from it at some length:

The operations were to be carried out for scientific purposes, but they had nothing to do with science. They were carried out under horrible conditions. The doctors and the assisting personnel were not trained properly medically. Conditions were neither aseptic nor hygienic. After operations, the patients were left in shocking rooms without medical help, without nursing or supervision. The dressings were made according to the whim of the doctors with unsterilized instruments and compresses. Dr. Rosenthal, who did most of the dressings, excelled himself in sadism. In the summer of 1943 the last operations were carried out in the "bunker". "Bunker" is the name of the horrible prison in the camp. The victims were taken there because they resisted, and there in the cell their dirty legs were operated on. This was the "scientific atmosphere" in which the "scientific" operations were carried out.<sup>720</sup>

[...]

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<sup>718</sup> Bagatur, ‘Nazi Medicine’ (n 715) 1904.

<sup>719</sup> *ibid* 1904, footnotes omitted.

<sup>720</sup> *Doctors’ Trial* (n 683) 402-403.

The results of the treatment were not checked, or if they were, it was done in such an inadequate and superficial manner, that it was of no value.<sup>721</sup>

[...]

What problem did Professor Gebhardt and his school wish to solve by these experiments? The problem of the regeneration of bones, muscles, and nerves.

Was the thing carried out? No. It was not checked at all, or only insufficiently. I do not know what was done at Hohenlychen with those pieces of bone, muscle, and nerves which were cut out and taken there.<sup>722</sup>

All of this suggests that this was not “merely” a sickening abuse of power in order to experiment on non-consenting human subjects, but that something more sinister was at play: a combination between a desire to hurt, and, at least in the case of Karolewska’s last operation which occurred in the “bunker”, a desire to punish and establish further control. One of her fellow victims describes this in her testimony, when she states, referring to the letter of objection that the women submitted to the camp commander, that

[t]he camp commandant said that there had never been a revolt in the camp and that this revolt must be punished. She believed that we would reform and that we would never repeat it. If it were to happen again, she had SS people with weapons. My comrade, who knew German, answered that we were not revolting, that we didn't want to be operated on because five of us died after the operation and because six had been shot down after having suffered so much. Then Binz [an officer and supervisor at the camp] replied: "Death is victory. You must suffer for it and you will never get out of the camp." Three days later, we learned that our comrades had been operated on in the bunker.<sup>723</sup>

In this light, the acts of violence that have occurred during Karolewska’s last operation described seem to have an element of wishing to (re)establish or perpetuate the control required for an extreme power imbalance, by way of deliberately operating on her (despite her clear objection) in even worse circumstances than before, with little reason to believe that there was any real scientific goal. It was punishment. Of course, as noted above, this punishment has both an interpersonal and an inter-group character. While the result was the unfettered power of a doctor over a woman who did not consent to any of the things he wished to do, it was also an act that fortified the control of the group that ran the camp.

In addition to this causal role played by the extreme power imbalance, the existence of this interpersonal extreme power imbalance also adds a layer of moral

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<sup>721</sup> *ibid* 403.

<sup>722</sup> *ibid* 404.

<sup>723</sup> *ibid* 384.

repulsiveness to the acts in question. This is the case because we expect a certain behaviour from someone who wields extreme power over someone else. That is why I called the crimes committed a “sickening abuse of power”: to see violence committed against someone who is *already* in a state of submission, and who therefore poses no threat, causes particular outrage. Such acts are the height of cruelty, which is, in Judith’s Shklar’s definition, ‘the willful [sic] inflicting of physical pain on a weaker being in order to cause anguish and fear.’<sup>724</sup> Of course, in our examples a “weaker being” should be understood as the person lacking power over a particular situation and therefore, in the context of that same situation, “weaker”.

Duff, in his work on responsibility in criminal law, makes a similar point. Whereas ‘it is commonplace that responsibility involves a dyadic relationship: an agent is responsible for something’,<sup>725</sup> he claims that this view of responsibility is lacking a key element. That is, I am not just responsible *for* something. To be responsible, Duff writes, ‘is to be answerable; answerability is answerability to a person or body who has the right or standing to call me to account; and I am thus answerable in virtue of some normatively laden description, typically a description of a role, that I satisfy.’<sup>726</sup>

This intuition – the salience of one’s role – is important to understand some of the most morally reprehensible aspects of the interpersonal dimension of crimes against humanity. Physicians are, because of their profession, often placed in a position of extreme power over their patients. This power imbalance is even more pronounced when a patient is anaesthetised. Clearly, these power imbalances in and of themselves are not necessarily wrong. We expect doctors to care for us, to be knowledgeable, and to have our best medical interests at heart. We expect them to be aware of the power they may hold over patients and to use that power responsibly. In this context, such power imbalances may be justified.

In our case study, however, none of these justifications for the power imbalance is present. In fact, the expectations we hold about the way in which a physician will wield their power are turned upside down. Instead of caring for the person in their control, taking action to alleviate suffering, and take decisions that are in the interest of the medical wellbeing of the person over which they hold power, the physicians in this case study deliberately cause harm and suffering; they deliberately work to *deteriorate* the health of the persons under their power.

This perversion is as morally relevant on the interpersonal level as it is on the previous levels discussed. For it seems, in a sense, *even more wrong* to commit such a flagrant and cruel abuse of power when a perpetrator should, by virtue of their role, be used to having such power and when there are clear expectations about how and with what purpose such power should be used. And it is an inversion that is seen over and over again in cases of crimes against humanity: the powerful party to an interpersonal

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<sup>724</sup> Shklar, ‘Putting Cruelty First’ (n 381) 17.

<sup>725</sup> Duff, *Answering for Crime* (n 276) 23.

<sup>726</sup> *ibid* 23.

extreme power imbalance is often a policeman, a prison guard, a powerful (local) politician, or a soldier.

All these roles come with the ability to wield power over other individuals, which is justified because of the acceptable purposes for which that power is expected to be wielded. Yet in crimes against humanity, these powers are often at the root of the violent abuse of a great many interpersonal extreme power imbalances. This idea resonates with the important insight of the perpetrator-based accounts of crimes against humanity put forth by Vernon and Luban in the context of societal extreme power imbalances. They too observe the moral salience in the notion of an inversion. But instead of discussing this inversion in the context of an interpersonal relationship, they do so with regard to the use of a state's resources and power. Thus, Vernon writes of this inversion that it is 'a particular kind of evil'<sup>727</sup>, whereby 'powers that justify the state are, perversely, instrumentalized by it, territoriality is transformed from a refuge to a trap, and the modalities of punishment are brought to bear upon the guiltless.'<sup>728</sup> Building on Vernon's work on this point, Luban adds that

the legal category of "crimes against humanity" recognizes the special danger that governments, which are supposed to protect the people who live in their territory, will instead murder them, enslave them, and persecute them, transforming their homeland from a haven into a killing field.<sup>729</sup>

For Vernon and Luban, these observations about perversion and inversion lead them to assert that state involvement in the relevant violence, which they regard as the key perversion, is the most salient feature of the concept of crimes against humanity. As we have seen, this maps quite neatly onto some of the most defining characteristics of the inter-group and societal dimensions extreme power imbalances. But this case study has made clear that this dynamic of perversion or inversion is prevalent on the interpersonal level, too. Often, there is not *just* a sickening abuse of power, but a sickening abuse of power by someone of whom we feel we have an even stronger reason to expect other behaviour. Many, if not most, of the interpersonal extreme power imbalances that exist throughout an episode of crimes against humanity share this feature. This is a key reason why we are so particularly appalled by the violence committed during a crime against humanity.

### 6.3.2 Kayishema

The second case study of interpersonal extreme power imbalance-related violence we will discuss comes from the *Kayishema and Ruzindana* case, which was held before the ICTR. The episode of violence we will analyse is perpetrated by Ruzindana, a 'successful businessman' from a local well-respected political family<sup>730</sup> who led *Interahamwe* during an attack at *Nyiramuregro Hill*.

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<sup>727</sup> Vernon, 'What is Crime against Humanity?' (n 11) 245.

<sup>728</sup> *ibid* 245.

<sup>729</sup> Luban, 'A Theory of Crimes Against Humanity' (n 160) 117.

<sup>730</sup> *Kayishema* (n 565) paras 10-11.



Several *Tutsi* refugees had fled to a mine on the hill. A ‘young Hutu boy’, who knew about these refugees and their hiding place, ‘brought the attackers to this site.’<sup>731</sup> There, ‘the assailants began to uncover the mine entrances and kill those hiding within.’<sup>732</sup> The method of these killings is not further described, apart from in the case of two young women who were discovered and whom Ruzindana ordered to be brought to him. The witness describes in detail what happened to one of these women:

One of these young women, named Beatrice, a former schoolmate of Il’s [the witness providing the account], was approximately sixteen years old. Ruzindana tore open her blouse and then slowly cut off one of her breasts with a machete passed to him by an [sic] members of the *Interahamwe*. After he finished, Ruzindana cut off her other breast while mockingly telling her to look at the first breast as it lay on the ground. He then tore open her stomach. Beatrice died as a result of the assault. A member of the *Interahamwe*, following Ruzindana’s lead, immediately proceeded to kill the second young woman while Ruzindana watched.<sup>733</sup>

Our first step is to assess the existence of an interpersonal extreme power imbalance. Is one party in full control over the situation to the exclusion of the other party’s control? And if so, how is that control established? In this case, the existence of an interpersonal extreme power imbalance between Ruzindana and Beatrice is clear and many of the methods of control described in this chapter are present. She is ‘brought’ to Ruzindana, which implies that she is under control or even restrained by the *Interahamwe* who brought her from her hiding place. In addition to this physical restraint, there is also the implicit threat (which very quickly becomes reality) of Ruzindana having a machete; and there is the context in which she has just seen many other *Tutsi* murdered by the same people who are bringing her to Ruzindana, who is their leader. In that context, disobedience or resistance is futile.

But this control is perhaps not what is most shocking about this case. It is the violence itself, which is carried out with a kind of perverse creativity. The violence committed is clearly not just about killing a member from a perceived enemy group; the violence is too elaborate and too specific to simply be “functional”. Some might refer to this type of excessive violence as senseless, but the widespread nature of such acts of excess in cases of crimes against humanity suggests there is some sort of common pattern underpinning these acts. In order to figure out what these reasons behind this pattern might be, and how they are related to interpersonal extreme power imbalances, we will analyse the actions of Ruzindana in more detail.

The first point to make in relation to this case study is that, as was the case in the previous one, the existence of an interpersonal extreme power imbalance is instrumental in enabling the violence to be committed. This type of violence depends

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<sup>731</sup> *ibid* para 446.

<sup>732</sup> *ibid* para 446.

<sup>733</sup> *ibid* para 446.

on the perpetrator being in complete control of the situation. It is qualitatively different from lashing out in an equal or relatively equal fight; it is calculated and slow in a way that is only possible when there is a large power asymmetry. It is very hard to imagine such violence to occur outside of the context of an extreme power imbalance. In that sense, it can be said that the existence of an interpersonal extreme power imbalance plays a role in the causal chain leading up in this type of violence; not because it directly *causes* it, but because without it, the violence would not have occurred.

Again, like the previous case, the existence of an interpersonal extreme power imbalance has moral ramifications. The point about the inversion of roles made before applies here also, although with less force. Although Ruzindana did not have a specific role by virtue of which he was particularly expected to take his victim's interests at heart, in a way that a doctor or a policeman would, his acts clearly meet Shklar's definition of cruelty as mentioned above. He abused his power over someone who, in relation to the situation they find themselves in, is significantly weaker. Someone who clearly does not pose a threat. His victim was already in a state of submission, yet he used that state of submission to commit the most heinous violence. This sickening abuse of power, as we have seen, is morally salient and adds a layer of perversity to the violence itself.

However, while this case study shares these features – i.e., the existence of an interpersonal extreme power imbalance, and the inversion of morally expected behaviour – with our previous case study, these features are not what stand out most. It is the violence itself, the method by which these acts of torture and murder are committed, that we should analyse. Such horrific episodes of violence, and the fact that they are widespread in cases of crimes against humanity, contribute to our intuition that there is something particularly odious about crimes against humanity. The analysis of the violence in this case study will focus on three notions: spectacle, humiliation, and pleasure. These notions feature heavily in this case and many others like it, and they play a significant part in constituting the specific nature of the violence committed in the context of interpersonal extreme power imbalances during episodes of crimes against humanity.

## **Spectacle**

Let us start with the notion of spectacle. Reading the description of the violence meted out to Beatrice, as recounted by the witness during the *Kayeshima* trial, and quoted above, we notice a sort of perverse theatricality permeating the entire episode. Perhaps to a small extent, this feeling may be caused by the contrast between this explicitly described episode of violence, with an individually named perpetrator and victim, and the more impersonal descriptions of murders that are much more widely present in the judgment. Reading about any episode of interpersonal violence, regardless of the methods, we are made to feel like a spectator to something that we are not used to seeing. In that sense, we may come to regard the thing we have seen as having a theatrical element to it.

However, the violence in this case is different. It is *deliberately* theatrical. It is not just interpersonal violence that, for whatever reason, happened to have become visible. It is violence that, despite occurring between two individuals, is *designed* to be visible. It demands an audience. It started by Beatrice being brought to Ruzindana, who was there with ‘members of the *Interahamwe* and soldiers.’<sup>734</sup> One of the members of the *Interahamwe* passed him a machete.<sup>735</sup> Then the spectacle begun. In front of his audience, Ruzindana tore open Beatrice’s blouse and cut off a breast. He made sure to do it slowly, undoubtedly for dramatic effect and in order that everyone could see clearly what happened. He then proceeded to cut off her other breast, while providing his audience with the twist of the victim being made to look at own already-cut-off breast lying on the ground. The final act of this grim spectacle was the tearing open of Beatrice’s stomach, which killed her.

This perverse theatricality permeates acts of violence throughout all sorts of episodes of crimes against humanity. Read in isolation, they may seem the product of deranged people placed in a situation where they have unbridled power over potential victims. It may seem that they are not worthy of analysis, because they are the exception – because they are acts of excess. But this would be a mistake. While in normal circumstances they would be acts of excess indeed, in episodes of crimes against humanity they are not. They are at the core of this crime.

These acts of theatrical cruelty contribute to our sense that there is something special about cases of crimes against humanity. Each act of theatrical violence draws our attention, forces us to engage with it, and ultimately horrifies and repulses us. In fact, they are specifically designed to do so. This is the case with all types of particularly cruel and theatrical interpersonal violence of which people become aware, not just for cases of crimes against humanity. But what *is* different in cases of crimes against humanity, is that such cruel and theatrical acts of violence are no longer an excess. In the context of crimes against humanity, they are so widespread that they have become part of a perverted “normal” course of things. The concept of crimes against humanity captures these situations in which these perversions have become prevalent. And, as I have shown in the previous chapters, the widespread nature of these perversions

Thus, in *Akayesu*, one rapist, when pleaded with by a mother to kill her daughters rather than rape them in front of her, confessed that ‘the principle was to make them suffer.’<sup>736</sup> In *Bagosora*, a major who worked for UNAMIR recounts hearing from witnesses to atrocities that ‘[t]he killing that was done was not done, in their opinion, to kill the people immediately; it had been done to kill them slowly.’<sup>737</sup> In *Krstić*, when a mortally wounded man pleaded with a soldier to be ‘finished off’, the soldier responded by saying ‘slowly, slowly’.<sup>738</sup> In the same case a survivor recounts ‘[hearing]

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<sup>734</sup> *ibid* para 446.

<sup>735</sup> *ibid* para 446.

<sup>736</sup> *Akayesu Trial Judgement* (n 642) para 430.

<sup>737</sup> *Bagosora* (n 661) para 243.

<sup>738</sup> *Krstić* (n 9) para 68 at note 132.

one man crying for help. He was begging them to kill him. And they simply said “Let him suffer. We’ll kill him later.”<sup>739</sup> In *Muhimana*, *Interahamwe* were instructed before killing their victims to ‘take time to see [their] guts’, which meant to disembowel them before killing them.<sup>740</sup> And finally, in the *Duch* case, we learn about the CPK’s (Communist Party of Kampuchea) policy of ‘smashing’ their perceived enemies, which meant

not merely a physical smashing but also a psychological smashing, and the regime of prisoner treatment inside S-21 was ideally suited to this sort of dehumanization and debasement of the individual psyche [...] [S]mash means something more than merely kill.<sup>741</sup>

Other authors have also noticed this tendency in cases of crimes against humanity or genocide towards spectacular acts of cruelty and violence, speculating and theorising about what might motivate perpetrators to commit such acts. Anderson, for example, likens genocidal violence to terrorism with regard to this aspect, claiming that the theatrical element of the violence is often meant to have a symbolic effect. He calls this ‘propaganda of the deed’, in which an act of violence ‘becomes a statement.’<sup>742</sup> Such a statement is designed to cement the power imbalances on the societal and inter-group levels and to continuously mark out the victim group as targets. Milton, in relation to cruelties committed in Sierra Leone, discusses several competing explanations of such behaviour, for example treating extreme violence as ‘savage and mindless’,<sup>743</sup> or as the ‘dramaturgical expression of deep-seated anger and grievance.’<sup>744</sup> To these approaches, he adds his own which uses the idea of a ‘shame-free zone’ caused by a ‘perverse moral universe.’ In this shame-free zone, hierarchies are established based on the ‘particular brutality or inventive cruelty’ that its members are willing to exact on others.<sup>745</sup>

In my view, another plausible explanation for the theatrical nature of much of crimes against humanity-related interpersonal violence has to do with a perpetrator’s relationship to extreme power imbalances. On the interpersonal level, it is about the confirmation of a perpetrator’s absolute and unfettered power over their victim. To commit violence in such a cruel and theatrical manner is to force others to acknowledge that your victim is completely under your control, and that you can do with them whatever it is that you please. It is a means to make your interpersonal extreme power imbalance public; to announce it to the world. Additionally, it is a way of *prolonging* the existence of the interpersonal extreme power imbalance. If you shoot and kill your victim, the extreme power imbalance dissolves. Doing it in a slow and

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<sup>739</sup> *ibid* para 235.

<sup>740</sup> *Muhimana* (n 590) para 199.

<sup>741</sup> *Duch* (n 455) para 100.

<sup>742</sup> Anderson, ‘Mainstreaming Atrocity’ (n 333) 146.

<sup>743</sup> Milton, ‘Irrational Actors and the Process of Brutalisation’ (n 509) 107.

<sup>744</sup> *ibid* 107.

<sup>745</sup> *ibid* 114.

theatrical manner postpones this moment, while at the same time amplifying the power imbalance with each new act.

As to the inter-group dimension, the spectacle may serve to signal the existence of an extreme power imbalance to the relevant groups. In that sense, the victim is used as a message to all onlookers, both from the perpetrator's and the victim's group, which proclaims or attempts to bring about, an extreme power imbalance between them.

Finally, on the societal level, interpersonal acts of violence, especially if they are theatrical and cruel, serve to make it clear that the targeted person is part of a denigrated group. Combined with the fact that there is no prosecution or even denouncement of these acts, this will fuel the emergence of further societal extreme power imbalances in which the group within society of which the individual victim is part becomes increasingly subjugated.

### **Humiliation**

A second that emerges from these case studies is that of humiliation. Like the notion of spectacle, humiliation, too, permeates many cases of crimes against humanity, and not only on the interpersonal level. We have seen humiliations in the previous two chapters too; recall, for example, the group-based humiliation discussed in the context of inter-group extreme power imbalances. There will be significant overlap between the notions of spectacle and humiliation. For the very act of being put 'on display' as a victim of egregious violence is in and of itself potentially humiliating. Often, therefore, the acts that are acts of humiliation are simultaneously acts of spectacular violence. Yet to focus solely on violence *qua* violence, ignoring the element of humiliation or simply considering it part and parcel of such violence, leaves out an insidious aspect of the crimes committed during episodes of crimes against humanity -- an aspect which, like the spectacular character of these crimes, also contributes to our intuition that there is something particularly horrific about crimes against humanity.

Let us return to the case study under discussion in this section. There are at least two elements in the description of the violence cited above that indicate the clear intention to humiliate the victim, Beatrice. First, the method by which Ruzindana committed the violence focused on her breasts. By doing so, the violence took on sinisterly sexual overtones. She was forced to expose her breasts in front of all those who were looking on as her blouse was torn open. Then her breasts were amputated, an act which took symbols of Beatrice's femininity and sexuality and turned them against her. The second element of humiliation consisted in coercing Beatrice to look at her amputated breast as it lay on the ground. Through that act, Beatrice was forced to acknowledge her humiliation, simultaneously being mocked by her tormentor and watched by many. This forced acknowledgment, as well as the mocking behaviour surrounding it, form an important thread in the notion of humiliation.

The case study discussed in this section is far from an exception. A great number of acts of humiliation are to be found in the factual findings of judgments of crimes against humanity. Most of these, if described in detail and in an interpersonal context, are of

a sexual nature. Rape, for example, is extremely widespread. In addition to rapes, there are many other instances of sexual violence clearly meant to humiliate victims. In *Sesay*, for example, there is an episode of violence in which rebels forced a couple to have sex in front of other captured civilians and rebels. During the same episode they forced a girl to wash her father's penis.<sup>746</sup> In *Tadić*, we read that detainees were forced to bite off the genitals of other detainees.<sup>747</sup> In *Brđanin*, mention is made of guards trying to force 'an elderly Bosnian Muslim to rape a female detainee'.<sup>748</sup> In *Stanišić* we read testimony of a witness stating that 'paramilitaries abused the prisoners by cutting off a penis or ear and forcing other prisoners to ingest it'.<sup>749</sup> In *Krajišnik*, detainees were 'repeatedly forced to engage in degrading sexual acts with each other in the presence of other detainees'.<sup>750</sup> And throughout all of the judgments of crimes against humanity related to the genocide in Rwanda, the practice of killing women by forcing sharpened sticks into their vaginas and sexually mutilating them in other ways is extremely widespread.<sup>751</sup>

How should we interpret such acts of humiliation? And what is their connection to (interpersonal) extreme power imbalances. In relation to rape, Bergoffen states that the 'war time rapist uses [his victim's femininity] to humiliate her' by using her 'body[,] coded as passive and useful for two purposes: giving pleasure and birthing babies,' to destroy her self-respect by forcing her to '[give] pleasure to and [beget] children from the wrong men'.<sup>752</sup> This act not only stigmatizes a woman and her body, but also 'the men who failed to protect her.' This explains why, on multiple occasions, men were forced to watch their wives being raped.<sup>753</sup> Such rapes are 'intended to carry a message to the men of her [i.e., the victim's] community – "You are not men. Like your women who are now ours, you too are subject to our power."' <sup>754</sup> The humiliation is designed to be shared by many.<sup>755</sup> Again, this shows the interconnectedness between the interpersonal and the other dimensions.

The general dynamic here is that a victim is coerced into turning something private, such as their body, attention, and actions, *against* themselves. We recall the work of Sussman who argued that one of the most salient characteristics of torture is that a victim's physical and psychological pain, shame, and other aspects of their being are abused in order to establish the most extreme relationship of dominance, in which the victim becomes acutely aware that they are completely at the mercy of their torturer. Victims of humiliation are coerced into a position of complicity to their ordeal.

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<sup>746</sup> *Sesay* (n 621) para 1205.

<sup>747</sup> *Tadić Trial Judgment* (n 125) para 222.

<sup>748</sup> *Brđanin Trial Judgment* (n 426) para 516.

<sup>749</sup> *Stanišić* (n 617) 1599.

<sup>750</sup> *Krajišnik* (n 441) para 304.

<sup>751</sup> See e.g., Des Forges, *Leave None to Tell the Story* (n 399) 150.

<sup>752</sup> Debra Bergoffen, 'Exploiting the Dignity of the Vulnerable Body: Rape as a Weapon of War' (2009) 38(3) *Philosophical Papers* 307, 315.

<sup>753</sup> E.g., *Brima* (n 630) para 991, *Krajišnik* (n 441) para 656.

<sup>754</sup> Bergoffen, 'Exploiting the Dignity of the Vulnerable Body' (n 755) 317.

<sup>755</sup> See also Card, *The Atrocity Paradigm* (n 351) 126.

The purpose of humiliation, like the purpose of spectacle, is intimately connected to extreme power imbalances. By focusing on extremely intimate areas of a victim's life, often for example their genitals or sexuality in general, the extreme power imbalance between attacker and victim is confirmed time and time again. And it is not only confirmed, but with each act of humiliation, and each act through which a victim is forced to be unwillingly complicit to their own suffering, it becomes more potent. The power imbalance becomes more absolute. On several occasions, this dynamic and desire for interpersonal extreme power imbalances comes out in the open for us to observe. Thus, in *Kunarac*, a woman who was being raped put her hands across her eyes from shame and fear. At that point, her rapist threatened to kill her son and to cut off her head if she did not look at him while he raped her. He wanted her to confront her powerlessness in relation to him.<sup>756</sup> And in *Karemera*, a killer confessed that before killing a woman he 'enjoyed her favours', given that she had previously 'refused his love.'<sup>757</sup> He wanted to overturn the power relationship that had existed between them before, when he had been rejected, and subjugate his victim by humiliating her.

Insofar as these humiliations are at the same time spectacular, in the sense that they are designed to be seen by others, they are also an external confirmation of the relevant extreme power imbalance. In such cases, the public humiliation serves to show the world that an attacker can make their victim do whatever they like; that they have unfettered control over the most private areas of their lives. As such, these public humiliations are closely related to the inter-group and societal dimensions of extreme power imbalances: they can be a call upon others to establish similar interpersonal extreme power imbalances, as well as a message that one group is able to dominate another to such an extent that these humiliations are possible.

## **Pleasure**

The final thread to follow from our case study relates to pleasure: the pleasure that attackers take in the exploitation and affirmation of the interpersonal extreme power imbalance between them and their victim. This is another aspect of interpersonal extreme power imbalances in the context of crimes against humanity that shocks us to the core: to see the perverse glee with which revolting abuses of power are exacted upon victims.

In our case study, this glee can be inferred from the fact that the violence was committed slowly and mockingly. Ruzindana relishes in the in the power he had over Beatrice; he wanted to savour it. In the previous chapter, we referred to Nietzsche's assertion that one of the most powerful perks of being in a position of power vis-a-vis someone else is 'the pleasure of being allowed to vent [one's] power freely upon one who is powerless, the voluptuous pleasure '*de faire le mal pour le plaisir de la faire*.'<sup>758</sup>

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<sup>756</sup> *Kunarac Trial Judgment* (n 186) para 342.

<sup>757</sup> *Karemera Trial Judgment* (n 493) para 1420.

<sup>758</sup> Miller, 'Carnivals of Atrocity' (n 382) 475.

The highest gratification of the feeling of power is, according to him, to practice cruelty: to enjoy the pain, suffering and agony that this cruelty causes.<sup>759</sup>

In her analysis of wartime rape, MacKinnon makes a similar point. She notes that rape may 'be seen and heard and watched and told to others: rape as spectacle.'<sup>760</sup> But it is more than this. Wartime rape 'is also rape made sexy for the perpetrators by the power of the rapist, which is absolute, to select victims at will.'<sup>761</sup> And it is also 'rape made especially exciting for the perpetrators by knowing that there are no limits on what they can do, by knowing that these women can and will be raped to death.'<sup>762</sup> She continues:

Although the orders [to rape] provide motivation enough, the rapes are made sexually enjoyable, irresistible even, by the fact that the women are about to be sacrificed, by the powerlessness of the women and children in the face of their imminent murder at the hands of their rapists. This is murder as the ultimate sexual act.<sup>763</sup>

This sense of perpetrators relishing in cruelty permeates cases of crimes against humanity. It is present in the laughter and the little jokes made by perpetrators that accompany crimes against humanity-related violence, and in the deliberateness with which people pursue interpersonal extreme power imbalances and manoeuvre themselves in a position of power over another human being only to then abuse them. Its essence is captured by Charles Graner, one of the men who orchestrated torture and humiliations of US prisoners of war in *Abu Ghraib*, quoted in a 2004 Washington Post article:

He [Darby, the interviewee] said that he asked Graner, a Pennsylvania prison guard in civilian life, about the photographs. Graner replied: "The Christian in me says it's wrong, but the corrections officer in me says, 'I love to make a grown man piss himself.'"<sup>764</sup>

Observing this pleasure in cruelty may account for statements referring to the barbarity or senselessness of the violence that occurs during episodes of crimes against humanity: seeing such wanton violence and the joy with which it is committed is extremely shocking, and it makes us want to distance ourselves from it. In fact, the legal category of crimes against humanity itself can be said to brand some types of violence as exceptional and therefore fundamentally different from what ordinary human beings do. Were we not to do so, then we would have to consider the possibility

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<sup>759</sup> *ibid* 475.

<sup>760</sup> Catharine A MacKinnon, 'Rape, Genocide, and Women's Human Rights' (1994) 17 *Harvard Women's Law Journal* 5, 12.

<sup>761</sup> *ibid* 12.

<sup>762</sup> *ibid* 12.

<sup>763</sup> *ibid* 12.

<sup>764</sup> Scott Higham and Joe Stephens, 'Punishment and Amusement' *Washington Post* (22 May 2004) <<https://www.washingtonpost.com/archive/politics/2004/05/22/punishment-and-amusement/05330f14-861b-41a8-a03e-51bd27c78d6a>> accessed 9 October 2021.



that we, too, might in the right (or wrong) circumstances be able to enjoy this extreme feeling of power and relish in its abuse.

#### 6.4 Conclusion

Despite the appeal of the claim that interpersonal violence in crime against humanity is the result of sadism or unreason, in this chapter I have argued that the humiliations and performative violence that occur in the context of interpersonal power imbalances serve a twisted purpose. These are not simply excessive acts that are committed for their own sake by deranged attackers. Rather, they are designed to make a victim to confront their impotence in the face of their attacker. To acknowledge that they are subjugated. In carefully thought-out ways, perpetrators of crimes against humanity attempt to make their victim complicit in their own suffering. And this suffering is, as the case studies in this chapter have shown, often deliberately drawn out – deliberately maximised. The goal of this disturbing dynamic is to make the extreme power imbalance between an attacker and a victim explicit; to perpetuate and strengthen it.

We have seen that in interpersonal violence the concepts of control and violence are closely linked. The unfettered access and control that a perpetrator has over their victims allows them to commit the most heinous acts of violence, and those acts in turn lead to the proliferation and strengthening of the extreme power imbalance that exists between them. This process – the establishment of control over a victim, and the subsequent abuse of that control through the cruellest and most humiliating violence – is one of the key reasons why we think of crimes against humanity as especially morally reprehensible. To see the commission of violence in a situation whereby a perpetrator has complete control over their victim, who is incapable of any meaningful resistance, is shocking. Moreover, we are drawn in by the performativity of the violence and thereby forced to confront the excesses of human depravity. This is exacerbated by the sense that perpetrators of such violence appear to take a sort of perverted pleasure in the way they get to wield their power of a defenceless victim.

This salience of the acts themselves is recognised in the existing literature, particularly in accounts that are act-based. Yet their main argument – that crimes against humanity can be defined *exclusively* in terms of the nature of the acts – does not recognise the importance of the interplay between multiple factors that contribute to such crimes.

One of the main claims that I have repeated throughout this thesis is that conceiving of crimes against humanity in terms of a single dimension obscures the fact that the nature of the perpetrators, victims, and acts are deeply intertwined. This chapter's analysis of the interpersonal dimension of extreme power imbalances and its connections to the other dimensions again shows this to be true. The violent acts discussed may have been committed by an individual perpetrator against an individual victim, but they do not happen in a vacuum.

As we have seen, for instance, the existence of a societal atmosphere of discrimination against the group of which a victim was part led to her being subjugated in the context of an interpersonal power relationship with an attacker. And in the Karolewska case, the inter-group power imbalance within the camp and the incredible resource asymmetry available between the state-sponsored group of perpetrators and the

detained group of victims was also highly salient in helping establish the extremely asymmetrical interpersonal power relation in which the violence could occur.

Yet the connection between the societal, inter-group, and interpersonal dimensions is not a simple top-down relationship, in which extreme power imbalances trickle down from the societal to the inter-group dimension, and then again from the inter-group to the interpersonal. Interpersonal violence helps *produce* these extreme power imbalances. The violence discussed in this chapter, as I have emphasised, is designed to be observed. And when it is, it has an impact on the other dimensions of extreme power imbalances. For instance, when a society ignores, endorses, or encourages the extreme interpersonal violence that occurs against a given group, the degraded status of this group becomes increasingly cemented in its collective consciousness. And when performative and cruel interpersonal violence occurs in the context of wider group-based violence, it feeds back into the continued frenzy of the forward panic that characterises the inter-group dimension of extreme power imbalances. This continuous interplay between the three dimensions leads to the vicious circle of power and violence that goes to the core of episodes of crimes against humanity.

## 7. Conclusion

### 7.1 *Crimes against humanity and extreme power imbalances*

The conceptual core of crimes against humanity is difficult to pin down. Philosophical and legal literature, as well as case law, describe the specific nature of crimes against humanity in divergent ways. What is shared, however, is the sense that crimes against humanity have a special nature that sets them apart from other crimes. Indeed, it is this specialness or exceptionality that makes the kind of generalisation implied in legal doctrine and philosophical analysis difficult.

In this thesis, I have claimed that crimes against humanity are characterised by the violent creation, proliferation, and exploitation of extreme power imbalances. There are three interconnected dimensions in which these extreme power imbalances operate: societal, inter-group, and interpersonal. I have argued that understanding the interplay between these three dimensions is crucial to a comprehensive analysis of the nature of the concept. A conception of crimes against humanity based on extreme power imbalances provides a rich account of the dynamics of such crimes, fits with the legal development of the concept, and incorporates key intuitions we hold about what makes crimes against humanity special.

Let me summarise the claims of my account in more detail. As discussed in Chapter 3, the first important point to clarify is what I mean by “power” in the phrase “extreme power imbalances”. The type of power that is most salient to my analysis of crimes against humanity is relational, and closely related to the Foucauldian definition of power. It is something that is *produced* in the context of relationships. It emerges from the interplay of relations between individuals or groups and within a context of larger societal structures. This relational nature of power goes to the core of my conception of crimes against humanity. The desire to produce and exploit extreme power imbalances leads to a vicious circle of increasingly cruel violence and increasingly asymmetrical power relations between groups and within a society. These two phenomena amplify each other.

In Chapter 4, which concerns the societal dimension, I have shown that the emergence of extreme power imbalances within a society is closely connected to the notion of norm transformations. This is the process by which, through a range of conscious and unconscious processes, societal norms undergo a change until a society becomes a place in which atrocities against targeted groups and individuals becomes possible or even encouraged. Examples of such processes that I have discussed are the use of propaganda to dehumanise a targeted group or paint them as a threat; the deliberate marginalisation of targeted groups within a society, for example through barring its members from certain jobs or otherwise curtailing their legal rights; and the lack of response to, or even encouragement of, acts of violence committed against members of a targeted group. The resulting atmosphere creates a trap: a society becomes geared towards the exclusion and persecution of certain groups of people. This contributes to our sense that crimes against humanity are a particular kind of evil that merits international concern.

While not logically necessary, in practice we have seen that the norm transformations observed in cases of crimes against humanity generally involve the actions of a state or state-like entity. This introduced a second theme that plays an important role in understanding why we consider the category of crimes against humanity special: the notion of perversion. There is a clear abuse of power and role reversal involved when a socially influential entity like a state or pseudo-state uses its power in order to turn a society into a trap. This is the key insight from perpetrator-based doctrinal and philosophical accounts.

Chapter 5 analysed the inter-group dimension of extreme power imbalances. The notion of emotional arousal and domination plays a key role in how this dimension relates to crimes against humanity. When a perpetrator-group achieves a situation of domination over a victim-group, there is often an explosion of violence. I have argued that this violence serves two purposes: it is a way of perpetuating the state of emotional arousal within the immediate perpetrator-group, but it is also a means of strengthening extreme power imbalances by communicating the degraded status of the targeted group. The type of violence committed in this context often includes explicitly group-based humiliations. The connection to the societal dimension is clear: the lack of response to violence and the increasing persecution within a society of members of the targeted group is a catalyst for group-based violence. At the same time, this group-based violence feeds back into the societal dimension of extreme power imbalances in order to intensify the wider persecutorial atmosphere.

Perversion is an important theme for the inter-group dimension too. The study of factual findings shows that more often than not, a state or state-like organ, or other groups with significant resources available to them such as a paramilitary organisation, is involved in creating the situation in which the perpetrator-group is able to dominate the target-group. Examples include military personnel, camp guards, police officers, or (local) politicians. The fact that this is generally the result of careful planning makes the sense of perversion even more pronounced.

By comparison to the societal and inter-group dimensions, the more immediate interpersonal aspects of crimes against humanity are not generally studied in much detail. In Chapter 6, I have claimed that this is somewhat of an oversight. A comprehensive understanding of crimes against humanity requires us to analyse the dynamic between an individual perpetrator and an individual victim. This means having to engage with the details of the particularly cruel and sadistic acts that are committed against victims of crimes against humanity.

At times, doing so felt voyeuristic. I have argued that this feeling of voyeurism is relevant, insofar as it points to an important insight into the interpersonal dimension of extreme power imbalances. The violence is designed to make a victim confront their impotence, and to be observed by others. It is deliberately performative. It is *meant* to make us watch; to make us acutely aware of the extreme power imbalance that structures the relationship between perpetrator and victim and, by extension, perpetrator-group and victim-group. This explains why the violence committed in episodes of crimes against humanity strikes us as having a particular moral salience: as observers we are equally drawn in and disgusted, and we are shocked by the

sadistic pleasure perpetrators take in meting out their boundless and perversely creative violence on defenceless victims.

I should note here that the version of the concept of crimes against humanity I have proposed has a wider reach than the orthodox, doctrinal view. This comes with a risk. Defining crimes against humanity in terms of a relatively general notion like “extreme power imbalances” may mean that the concept becomes overinclusive or swallows up other concepts of international criminal law. In particular, it might subsume the concepts of war crimes and genocide, even though many wish to consider these conceptually distinct from crimes against humanity.

As I have argued in sections 3.5 and 3.6, I do not believe that this risk materialises. Despite its more generic nature, the exploitation of extreme power imbalances within each of the three dimensions (societal, inter-group, and interpersonal) is a very high bar which is not easily met. Isolated acts of torture or a terrorist attack like 9/11, for instance, do not satisfy this criterion. This means that the account I have proposed is more discriminating than act-based accounts of crimes against humanity.

The requirement of the exploitation of extreme power imbalances also delineates crimes against humanity clearly from war crimes. In contrast to crimes against humanity, there is no logical requirement that a war crime be committed in the context of extreme power imbalances. A single long-range rocket attack on a hospital, committed by armed forces that do not have military control over the country they are attacking, might serve as an example of such a war crime.

As for genocide, the conceptual similarities to the notion of crime against humanity I have proposed are much greater. In both crimes against humanity and genocide, widespread extreme power imbalances play an important role. In my view, this need not be problematic. I have argued that genocide can be usefully conceptualised as a species of the more generic concept of crime against humanity. This does not imply that we must consider the two concepts to be equivalent in gravity: it is entirely possible to consider a species of a genus to be worse. In the same vein, the kinship between crimes against humanity and genocide by no means implies that the *dolus specialis* required by genocide is conceptually unimportant.

## 7.2 Contribution to the literature

As I have shown in Chapter 2, existing accounts of crime against humanity can be broadly categorised into three archetypes: victim-based, perpetrator-based, and act-based accounts. Victim-based accounts argue that crimes against humanity are characterised by the specific nature of their victims. Such accounts often focus on the fact that people are attacked because of their membership of a targeted group. Perpetrator-based accounts claim that what makes crimes against humanity special is the nature of the perpetrators of such crimes: they are state or state-like entities. Act-based accounts explain the crux of a crime against humanity by reference to the particularly heinous nature of the acts that are committed.

In contrast with such accounts, the conception proposed in this thesis is significantly more relational. I have shown that prioritising just one frame of reference – the victim, perpetrator, or act – is inadequate for a rich understanding of the dynamics of crimes

against humanity. Such a narrow, exclusive focus obscures the fact that crimes against humanity are characterised by the complex interplay of the societal, inter-group, and interpersonal dimensions. These dimensions are not just different perspectives that can be studied in relative isolation. They are inextricably linked.

This thesis has shown that the same applies to the perspectives of victims, perpetrators, and acts. Whereas a blended account might claim that we should look at the concept from more than one perspective, the conception offered in this thesis recognises that this is not enough. The way in which victims, perpetrators, and acts interrelate is itself a key building block of a comprehensive understanding. The relational lens provided by the theoretical framework of extreme power imbalances makes this explicit.

Although we should not exclusively privilege the nature of victims, perpetrators, or acts, we ought to recognise that the divergent intuitions that underpin such focused accounts do play an important role in describing salient characteristics of crimes against humanity. I have argued that an understanding of the concept in terms of extreme power imbalances is able to incorporate and explain these intuitions.

First, the nature of victims of crimes against humanity is highly salient in the context of extreme power imbalances. As I have shown, the societal dimension of extreme power imbalances is characterised by norm transformations. In virtually all cases, these norm transformations explicitly target a well-defined group, whether it be through propaganda, legal disempowerment, or the endorsement and encouragement of violence against this group. A similar point can be made regarding the inter-group dimension. The group-based violence studied in this thesis is generally highly discriminatory. Victims are targeted solely by virtue of their group membership, and the acts of violence themselves highlight this fact by attacking some characteristic of the targeted group. Even the discrete interpersonal acts of violence are frequently structured by the group membership of a victim. There have been ample examples of this: racial slurs used during beatings, journalistic reports showing how killers had thoroughly dehumanised their victims because of their ethnicity, and the extreme cruelty that is the result of the explicit desire to subjugate a group by means of attacking its individual members.

Equally relevant is the nature of the perpetrators of crimes against humanity: they are most frequently a state or state-like entity. This is particularly borne out by fact patterns that deal with the societal and inter-group dimensions. The involvement of state or state-like entities in the establishment of societal and inter-group dominance over a targeted group points at an incredible perversion of duty and resources. This is morally salient and adds to the intuition that crimes against humanity are a special kind of evil. Second, the fact that perpetrators of crime against humanity generally have at their disposal vastly superior resources compared to their targets means that extreme power imbalances are much more likely to emerge, leading to the excessive violence described above.

Finally, as to act-based accounts, I have shown that the exploitation of extreme power imbalances is heavily implicated in the commission of particularly horrifying acts of violence. Extreme power imbalances act as a catalyst for egregious breaches of basic

human rights. They create a situation in which a perpetrator can wield nigh-unlimited power over their victim, and they also motivate perpetrators to abuse that power by meting out extremely cruel and performative violence that is meant to affirm and proliferate the power imbalance.

A final important aspect of the account I have proposed is found in the data on which it is based: factual findings from legal judgments. In the legal realm, approaches to the concept of crime against humanity are generally doctrinal, focusing their analyses on the legal merits of relevant cases and exegesis of the legal definition of the concept. Most philosophical accounts reason from first principles to formulate what is distinctive about crimes against humanity. In both areas, the concrete fact patterns that constitute a crime against humanity are often overlooked.

Yet there is great value in studying these factual findings. A detailed analysis of the facts of cases of crime against humanity helps us resolve – or at least ease – the tension inherent in a concept like crime against humanity, which tries to capture situations that are defined by their exceptionality. Despite the divergent contexts in which crimes against humanity occur, a close study of factual findings shows that there is, in fact, a sinister logic that unites them. This is the logic of the pursuit and exploitation of extreme power imbalances. While the expression of these imbalances and the way in which they are exploited varies with each concrete case, the underlying mechanisms are uncannily similar. This is an insight about the nature of crimes against humanity that would not have been reached by an exclusively doctrinal or theoretical analysis of the concept, as such accounts generally operate at a level that is too abstract to bring out the relational dynamics of the crime – especially in the inter-group and interpersonal dimension.

Another benefit of using factual findings from legal judgments as a point of departure also ensures that the analysis of crimes against humanity proposed in this thesis pays heed to the legal pedigree of the concept. Even though my study of the concept is not doctrinal, it is nonetheless based on artifacts produced by the legal process. That means that the bodies of facts upon which the analytical framework of extreme power imbalances is built are, by definition, legally relevant. I have referred to them before as ‘anthologies of multiply-filtered, privileged facts.’<sup>765</sup> Using these facts as data has allowed me to formulate a theoretical account of crimes against humanity that nonetheless remains tethered to the concept’s legal origins. Doing so means that the resulting account is cognisant of the split nature of crimes against humanity, straddling the legal and philosophical realms.

### *7.3 Extreme power imbalances and critiques of the crimes against humanity*

The main purpose of my thesis has been to propose a substantive account of the nature of crimes against humanity. The resulting account is presented as mostly descriptive: it formulates an analytical framework based on fact patterns of historical occurrences of crimes against humanity, without engaging explicitly with the politics of such a project.

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<sup>765</sup> Section 1.2.1, 7.

However, the critiques of crimes against humanity discussed in the introduction make it clear that a study of a putatively universal concept cannot exist in a political vacuum. Attempting to describe the content of a concept that aspires to universal validity – such as the notion of a crime that is “against humanity” – is in and of itself a political act, even if it is done in the context of a theoretical analysis. Therefore, even though my aim has not been to take an explicit political position, I think it is nonetheless appropriate to reflect on the political implications of the analytical framework I have constructed. In particular, it is worthwhile to assess the extent to which it can stand up to scrutiny in the face of the fundamental concerns raised by a variety of critical scholars regarding the concept.

Let me begin by recapitulating the thrust of those concerns. The critiques of the concept of crime against humanity surveyed in the introduction to this thesis can be divided into two closely connected categories: the potential for political (mis)use of making claims on behalf of humanity, and the exclusionary potential of the term humanity.

The first point is based on the Schmittian insight that political actors tend to utilise universal language, such as the language of humanity, in order to place themselves in a position of authority. Claiming to speak on behalf of humanity is to claim a position of power and to legitimise a hierarchy in which those who are deemed not to abide by the putatively universal concept are punished or subjugated. The institution of colonisation is one of the excesses that was based on a sinister use of such universal language by politically powerful states. We have seen in the introduction that lawyers like Vitoria, Gentili and Grotius employed a universalist vocabulary to justify colonial relationships, and that the notion of a “universal crime” was a means of oppressing “natives” who were accused of committing such crimes.<sup>766</sup>

This tendency is not something of the past. In more modern times, we may recognise a similarly geopolitically motivated use of universalist language in the way the Nuremberg trial was conducted. The Allied Powers ensured that they had blanket impunity when they created the legally operable definition of crimes against humanity, allowing them to establish a narrative in which they were considered defenders of humanity. Similarly, the Rome Statute of the even more contemporary institution of the ICC is the result of negotiations in which the United States played a crucial role, although the United States itself refuses to be bound by the jurisdiction of the Court. Other Western states were reassured that their “more developed” legal systems would ensure that the ICC would not have to intervene in their domestic affairs.<sup>767</sup> The upshot of all this is that once again the notion of humanity is used to define a crime according to a definition that suits powerful political actors who are not themselves at risk of being prosecuted for their actions.<sup>768</sup>

How does an understanding of crimes against humanity in terms of the violent creation, proliferation and exploitation of extreme power imbalances fare in light of these fundamental critiques of universalist language? The first thing to note is that if

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<sup>766</sup> See section 1.3.1.

<sup>767</sup> See section 1.3.1.

<sup>768</sup> *ibid.*



one is uncomfortable with the principle that some behaviour is universally deplorable and worthy of the label “crime”, then one will likely be uncomfortable with the account I offer. This is because I have taken the concept of a crime against humanity seriously: rather than providing a fundamental critique that argues that the notion should be abandoned, I have set out to interrogate how we might better understand its content.

However, I do believe that a conception of crimes against humanity based on the notion of extreme power imbalances is less liable to the charge of cherry-picking behaviours and leaving others out in order to accommodate the worldview of politically powerful actors. Compared to other accounts found in the legal and philosophical literature which, as we have seen, privilege the nature of victims, perpetrators, or acts in order to define the nature of a crime against humanity, the account that I offer is more wide-ranging and general. I claim that what is special about a crime against humanity is the violent abuse of extreme power imbalances within multiple dimensions of human association. Although this understanding of the concept is based on specific case law that *is* a result of the geopolitical realities that influence which situations do and do not get prosecuted, the theoretical framework I have proposed does not require any specific acts of violence, specific type of victim, or specific type of perpetrator. It applies wherever abuse of extreme power imbalances exists.

Take the example of colonisation by European powers and the violence committed in furtherance of that goal. The history of colonisation is rife with examples of extreme and cruel violence that appears specifically designed to establish and proliferate extreme power imbalances between colonisers and colonised. A society is shaped in which the colonised are subjugated, often as a result of greatly asymmetrical resources available to the colonisers and the colonised; and these power imbalances trickle down to the inter-group and interpersonal levels where they lead to cruel and performative violence aimed at proliferating and making explicit the carefully established power of the coloniser over colonised. A harrowing and well-known example is the practice of cutting off limbs in The Congo under Belgian rule as a punishment for disobedience or failure to provide enough rubber. This type of violence was cruel and deliberately highly visible – designed to be observed by others, and to be interpreted as an expression of the extreme power imbalance that structured this colonial society in favour of the Western coloniser. Understanding crimes against humanity in terms of the relational and power-based account offered in this thesis allows the concept to subsume such episodes of colonial violence.

I also think that a focus on extreme power imbalances, especially within the societal and inter-group dimensions, allows my theoretical framework to account for the type of diffuse and more subtle structural violence that is often committed and perpetuated by states in the Global North. Take, for example, the treatment of minorities in the United States around the time of the Nuremberg Trial, which they were keen to place outside of the purview of the definition of a crime against humanity.<sup>769</sup> Whereas picking and choosing a specific approach to crimes against humanity – say, one that is act-based or perpetrator-based – might allow one to argue that the relevant discriminatory policies and acts of violence did not qualify as crimes against humanity, a focus on the

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<sup>769</sup> Schabas, *An Introduction to the International Criminal Court* (n 230) 108.

exploitation and proliferation of extreme power imbalances would perhaps have placed them within the theoretical reach of the concept.

A more contemporary example of the same point can be found in Kalpouzos and Mann's paper on the mistreatment of refugees in Greece. They note that prosecutions at the ICC focus on "radical evil": situations in which 'political violence is paradigmatically wielded for its own sake.'<sup>770</sup> This focus on radical evil overlooks crimes that are considered 'normalised occurrences, understood as rooted in social and economic processes rather than in politics',<sup>771</sup> such as the inhumane circumstances of detention of asylum seekers. If we were to assess this treatment against the analytical framework of extreme power imbalances, it would be feasible to argue that the structure of the society to which these asylum seekers have fled deprives them of the possibility to be a full participant. This enables their continued mistreatment: because they are not considered worthy participants of a Greek or European society, they are therefore not afforded the rights that those same societies extoll as "human".

The second point of concern raised by critiques of crimes against humanity is that there is an inherent danger in making rights or protections contingent upon some sort of notion of what it means to be human. If we are to make the notion of humanity contingent on certain qualities of being-human, then we risk excluding some human beings from the category of humanity.<sup>772</sup> We have seen this risk materialise in the writings of European jurists to justify colonisation by reference to the 'rationality, perfectibility, and human potential of the native.'<sup>773</sup>

I believe that an account of crimes against humanity based on extreme power imbalances is less at risk of this type of exclusion. The presence of abuses of power within a societal, inter-group, or interpersonal context does not depend on the qualities of the human beings who are at the receiving end of those abuses. The analytical framework I have proposed does not postulate any metaphysical prerequisites that must be satisfied before a human being or group of human beings can be considered a target or victim of a crime against humanity. Therefore, it does not lend itself to the exclusion of some humans based on the absence of some putative quality that makes one a worthy recipient of human rights. In fact, societies that routinely exclude some human beings from the moral consideration that it does afford to others can be said to perpetuate an extreme power imbalance between their ordinary members and the people they exclude.

#### *7.4 Closing reflection*

I want to end with a brief reflection on one aspect of the analytical framework that I have proposed. The crux of this reflection is the realisation that power imbalances are everywhere. They are not exceptional; if anything, they are usually quite banal. To use Foucault's definition again, power is constantly produced through interactions between humans. For better or worse, therefore, power relationships are part and parcel of

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<sup>770</sup> Kalpouzos and Mann, 'Banal Crimes against Humanity' (n 93) 1-2.

<sup>771</sup> *ibid* 2.

<sup>772</sup> Çubukçu, 'Thinking against humanity' (n 48) 262.

<sup>773</sup> *ibid* 262.

human relationships, and these power relationships are often in a state of flux and imbalance. Does understanding crimes against humanity in terms of power imbalances therefore problematise an utterly mundane phenomenon?

One response to this question would be to emphasise the qualifier *extreme*. I could point out that my account does not problematise power imbalances as such, but only *extreme* power imbalances, present across multiple dimensions, and in particular circumstances: where they are violently created, proliferated, and exploited. However, I am not sure that extreme power imbalances are indeed qualitatively different from more mundane power imbalances. Perhaps it is more accurate to say that power imbalances exist on a continuum. The more pronounced the imbalance becomes, the more likely it is that a dynamic arises within which marginalisation and violence can thrive.

But even at the extreme end, not all such cases of marginalisation of violence are considered shocking in the sense that a crime against humanity is considered shocking. One may think, for example, of the kind of structural power imbalances caused by misogyny and racism, in the context of which many concrete acts of violence occur.<sup>774</sup> The structural nature of this type of violence might mean that there is little that is shocking about this violence, or about the power imbalance that underpins it. On a cynical view, it might even be considered business as usual. Yet the societal and interpersonal dynamics in the context of which such violence occurs do not seem qualitatively different from those found in crimes against humanity at all.

I think this is an important observation, which is worth further research. While the types of crimes against humanity studied in this thesis are, thankfully, relatively rare, the dynamics that underpin them are not. Our societies and relationships are rife with power imbalances that can be placed somewhere on a continuum from mild to extreme. We ought to be aware of the potential for such power imbalances to turn sinister, to become and end in and of themselves, and to be exploited.

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<sup>774</sup> See section 3.6.3 above.

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