Introduction

The concept of humanity seems to have become ubiquitous in international law. From human rights to crimes against humanity and from humanitarian intervention to the common heritage of humanity, international law seems to pivot around notions that, one way or another, invoke humanity. What to make of this? This book sets out to investigate what is at stake in these invocations, especially as they occur within the discourse on the international core or atrocity crimes.[1] Whenever mass atrocities occur, people often turn to the language of humanity and inhumanity to express their grief, claim an injustice or rally others to follow them and resist. This book is born from a fascination with this language and the work it does in the discourse on international criminal law (ICL). What exactly is invoked? How do the law and the politics of humanity work? What is in- and excluded by invoking humanity? How to make sense of the experiences of victims and perpetrators? Is it possible to give voice to those who have been silenced? Such are the questions central to this work.

Theme and Scope

From the beginning, it is important to determine the scope of the project. First, 'humanity' comes in a number of related but separate guises. It would take far more than one book to map all the references within international law.[2] Instead of that gargantuan task, my aim is more modest. The book's field of inquiry is limited to the contemporary uses of 'humanity' in the discourse on international atrocity crimes. To grasp how and why humanity is invoked

[1] This notion is, itself, contested among scholars of ICL; see Christine Schwöbel-Patel, 'The Core Crimes of International Criminal Law', in *The Oxford Handbook of International Criminal Law*, eds. Kevin Jon Heller et al. (Oxford: Oxford University Press, 2018), 768–90, at 771–76. In this book, I will use the notion of core or atrocity crimes to refer to international crimes for which the ICC has jurisdiction, that is, genocide, crimes against humanity, war crimes and the crime of aggression.

[2] For an overview of references to humanity in international law and biolaw, see the contributions to B. van Beers, L. Corrias and W. G. Werner, eds., *Humanity across International Law and Biolaw* (Cambridge: Cambridge University Press, 2013).

requires not only a conceptual analysis, but it also necessitates a look into the normative consequences of the invocation of humanity.

There are specific problems associated with invoking humanity in ICL. Notions such as 'humanity' or 'mankind' are frequently called upon within international law to secure the legal status of a specific territory or area, for example, outer space. In ICL, however, 'humanity' seems to appear without a specific area but refers rather to the entire globe.[3] Hence, ICL's portrayal as global justice by (former) prosecutor at the International Criminal Court (ICC), Luis Moreno Ocampo.[4] At the same time, ICL remains treaty based – the ICC is a good example – and in this way keeps referring to states.

Second, humanity has many meanings in international law. Humanity can be understood both as an entity and as an attitude. As an entity, humanity refers to a class or collective. As an attitude, it signifies benevolence or compassion. The two meanings are related, for compassion is only extended to those who, one way or another, form part of humanity as a collective. This applies to those who we recognise as fellow human beings and to those who, while excluded from humanity, are included in our consideration because it is exactly this attitude that confirms our self-understanding.[5] Furthermore, compassion is mobilised – sometimes in violent ways – by a reliance on the collective, as can be seen in humanitarian interventions with military means.[6] Given this conceptual order, there is, I submit, a primacy of an analysis of the collective level 'We, Humanity' over an analysis on the intersubjective level of individuals. So, there is a conceptual primacy of humanity as a class or collective over humanity as an attitude. Nevertheless, the levels cannot be collapsed into one another.

What interests me primarily is how in the experience of the atrocity crimes humanity is formed but also contested, thus laying bare that the agents are socially situated in a world and related to others. As I will focus on the legal-political context of the atrocities, I will not only analyse the agent from the

[3] Antoine Garapon, 'Judging the Past: Three Ways of Understanding Time', in *Temporal Boundaries of Law and Politics: Time Out of Joint*, eds. L. Corrias and L. Francot (London: Routledge, 2018), 15–32.

[4] L. Moreno Ocampo, 'The International Criminal Court: Seeking Global Justice', *Case Western Reserve Journal of International Law* 40 (2008): 215–26. For a critical view, see Sarah MH Nouwen and Wouter G. Werner, 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity', *Journal of International Criminal Justice* 13, no. 1 (2015): 157–76.

[5] For a thorough investigation of this argument, see Didier Fassin, *Humanitarian Reason: A Moral History of the Present*, trans. R. Gomme (Berkeley, CA: University of California Press, 2012).

[6] There exists a huge amount of literature on humanitarian intervention, when it is allowed, and by which means. For a concise overview of arguments and literature from a philosophical perspective, see Thomas M. Franck, 'Humanitarian Intervention', in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 531–48 and Danilo Zolo, 'Humanitarian Militarism?', in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 549–65.

singular perspective but also from the plural point of view. In other words, I will zoom in on how a reference to the first-person plural of a 'we' plays a pivotal role in the discourse on the atrocity crimes.

Third, taking the atrocity crimes as my starting point entails that humanity appears negatively, that is, as inhumanity. When we turn our attention to the notion of humanity within the founding documents of ICL, we can see that it only occurs a few times. Taking them in chronological order, there is, first, a mention in 1945 in the so-called Nuremberg Charter, part of the Agreement establishing the International Military Tribunal (IMT). In article 6 sub c crimes against humanity were defined. The notion of a crime against humanity is also defined in article 5 of the Statute of the Yugoslavia Tribunal (1993), article 3 of the Statute of the Rwanda Tribunal (1994) and article 7 of the Rome Statute of the ICC (1998). Furthermore, it is defined in article 2 of the Statute of the Special Court for Sierra Leone (2000) and article 5 of the Cambodia Tribunal (2004). Between 1945 and the 1990s, crimes against humanity were also mentioned in the Convention on the Non-Applicability of Statutory Limitations, in article 1 (b) (1968), together with genocide and the crime of Apartheid. Finally, in the 1998 Rome Statute of the ICC, we find the phrase 'the conscience of humanity'.

Moreover, 'humanity' is intimately connected to notions that themselves play a significant role in legal, political, and moral thought. Examples include the notions of (human) dignity and dehumanisation. What transpires when one looks at the 'family resemblances' between these concepts and the way in which they are used in international legal discourse is that lawyers mostly refer to 'humanity' whenever 'it' is violated. In other words, international legal discourse features humanity in a negative guise, or at least the specific sub-field I am focusing on regards 'humanity' from the perspective of the negative.[7] Hence, this book is centred on law and *inhumanity*.

While humanity keeps being invoked in legal and political contexts, critics have pointed out the violence often inherent in these invocations. It is a violence that needs to be acknowledged from the very outset, since it is intimately connected to the colonial and imperial roots of international law but also to the resistance against it.[8] The invocation of humanity is integral to the conception

[7] The same perspective is taken in Avishai Margalit, *The Decent Society*, trans. N. Goldblum (Cambridge, MA: Harvard University Press, 1995); Richard A. Wilson, 'When Humanity Sits in Judgment: Crimes against Humanity and the Conundrum of Race and Ethnicity at the International Criminal Tribunal for Rwanda', in *In the Name of Humanity: The Government of Threat and Care*, eds. I. Feldman and M. Ticktin (Durham, NC: Duke University Press, 2010), 27–57; Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser and Elaine Webster, eds., *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Berlin: Springer, 2011); Andrea Sangiovanni, *Humanity without Dignity: Moral Equality, Respect, and Human Rights* (Cambridge, MA: Harvard University Press, 2017).

[8] Ilana Feldman and Miriam Ticktin, 'Introduction: Government and Humanity', in *In the Name of Humanity: The Government of Threat and Care*, eds. Ilana Feldman and Miriam Ticktin (Durham, NC: Duke University Press, 2010), 1–26, at 8 and 10.

of international law that played a crucial part in the *mission civilisatrice* of Europe. To this purpose, international law – a particular European tradition – was interpreted as possessing a universal scope and validity.[9] While laying down a so-called universal idea of legal order in the name of progress, colonisers also deliberately postponed the eradication of fundamental differences between themselves and the colonised, thus sustaining the dichotomy between the two.[10] Law was not just instrumental in the endeavour of colonialism, it played a constitutive role in conquering and suppressing indigenous peoples.[11] The colony often acted as a laboratory of some sort where new legal instruments could be tried out.[12]

The concept of sovereignty played a particularly significant role in this process. On a domestic level, it was easy to determine who the sovereign authority was. Since the Treaty of Westphalia of 1648, the state emerged as this authority, meaning that it had absolute power over its own territory and was in a relation of equality with other sovereign states.[13] This same doctrine posed, however, a serious question to the discipline of international law: 'how is legal order to be established among equal and sovereign states?'[14] For our purposes, the consequences of this question for the non-European world are of particular importance. For whereas it was taken as an unquestionable truth that the European states were sovereign, the possession of sovereignty by non-European states was not acknowledged. In this way, sovereignty was used to exclude the latter from power.[15] So, the driver of the doctrine of sovereignty has been this 'dynamic of difference', that is, the schism between the European and the non-European, making colonialism a central tenet of international law.[16]

One of the founding documents of the field, Francisco de Vitoria's 'On the Indians Lately Discovered', testifies to this. Arguing from natural law theory, de Vitoria tried to square the conquest and violence of the Spanish in the Americas with the Catholic faith. While he does speak more humanely of what he called 'the Indians' – that is, the indigenous peoples of the Americas, or Native Americans – than some of his contemporaries and acknowledges that their societies constitute a certain kind of order, he nevertheless assigns the Spaniards the task to act as their trustees, thus basically casting the Native Americans as children.[17] Whereas their humanity and duty of obedience to

[9] Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', *The European Journal of International Law* 16, no. 1 (2005): 113–24, at 117.
[10] John L. Comaroff, 'Colonialism, Culture, and the Law: A Foreword', *Law and Social Inquiry* 26, no. 2 (2001): 305–14, at 307–8.
[11] Comaroff, 'Colonialism, Culture, and the Law: A Foreword', 309.
[12] Comaroff, 'Colonialism, Culture, and the Law: A Foreword', 310–11. From a philosophical perspective, see also Achille Mbembe, 'Necropolitics', *Public Culture* 15, no. 1 (2003): 11–40.
[13] Antony Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', *Third World Quarterly* 27, no. 5 (2006): 739–53, at 740.
[14] Anghie, 'The Evolution of International Law', 740.
[15] Anghie, 'The Evolution of International Law', 741.
[16] Anghie, 'The Evolution of International Law', 742.
[17] Anghie, 'The Evolution of International Law', 743.

natural law were recognised, this led to their infantilisation. For de Vitoria, in violating the natural law, the Native Americans show their true face as barbarians and, consequently, the Spaniards are allowed to wage a (virtually) perpetual war to tame them.[18]

When looking at the nineteenth century, when legal positivism was firmly established, the basic picture remains the same. With positivism, a whole range of formal doctrines and procedures that were explicitly based on the dichotomy between civilised and uncivilised states enters the scene.[19] Conquest was a legitimate way of obtaining land and through the doctrine of *terra nullius*, European countries essentially framed the original inhabitants as backward and inferior in order to get hold of territory.[20] When the era of colonisation ended, after the First World War, the ground structure underlying international law did not radically change, since by now European states had managed to put forward their particular standard as a universal one.[21] New was that the difference between the European and the non-European was now understood mainly in economic terms: the 'advanced' and the 'backward'.[22] The League of Nations was given the authority over the territories of the defeated countries and, when it found itself before the task of creating new self-governing and sovereign states, the interests of Western states were advanced.[23] In this way, economic subordination and sovereignty became two sides of the same coin.[24] In many respects, this is part of the explanation of the dominance of the Global North over the Global South.

The violence of the presumably universal category of humanity is born from the practical need to draw distinctions *within* this category.[25] Simultaneously, humanity was also invoked as a species in order to distinguish it from animality, thus inscribing this anthropocentric norm into Western thinking and politics.[26] As Ilana Feldman and Miriam Ticktin convincingly argue, humanity appears in modern legal, political and social theory as both an object of care and sympathy (think of humanitarianism) and a source of threat and insecurity (think of global war and environmental catastrophe).[27] Humanity seems at the same

[18] Francisco de Vitoria, 'Lecture on the American Indians', in *Political Writings*, eds. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), 231–92, at 270–71.
[19] Anghie, 'The Evolution of International Law', 745. See also Brett Bowden, 'The Colonial Origins of International Law-European Expansion and the Classical Standard of Civilization', *Journal of the History of International Law* 7, no. 1 (2005): 1–24.
[20] Anghie, 'The Evolution of International Law', 745.
[21] Anghie, 'The Evolution of International Law', 746.
[22] Anghie, 'The Evolution of International Law', 746.
[23] Anghie, 'The Evolution of International Law', 746–47.
[24] Anghie, 'The Evolution of International Law', 747.
[25] Feldman and Ticktin, 'Introduction', 9.
[26] Allen Feldman, 'Inhumanitas: Political Speciation, Animality, Natality, Defacement', in *In the Name of Humanity: The Government of Threat and Care*, eds. Ilana Feldman and Miriam Ticktin (Durham, NC: Duke University Press, 2010), 115–49, at 117.
[27] Feldman and Ticktin, 'Introduction', 5–6.

time both necessary and impossible. Necessary, for governance within an ethical and political horizon that is faced with transnational and transgenerational problems requires the deployment of a universal category with proven effects upon individual lives.[28] Impossible, not only because the promise of universality is never fulfilled and one keeps encountering violent processes of in- and exclusion but also because humanity has many and often contradictory meanings and is invoked by many different actors.[29] In this cacophony, no final word can be said, no monopoly can be claimed.[30] Accordingly, this book will not attempt to formulate such a final word, either. It will, rather, try to attentively listen to this mesh of voices, trying to capture those that have received less attention.

A Note on Methodology

This is a work in the philosophy of law in at least two senses. On the one hand, it takes its cue from what lawyers say, write and think. While this book is not a study in the positive law of international atrocity crimes, it takes legal thought seriously as a fundamental and fine-grained manner of thinking and an obvious starting point for legal philosophy.[31] On the other hand, while this book is anchored in legal thought, it puts legal concepts in a wider philosophical context to lay bare fissures and cracks covered by what, at first sight, might appear as solid legal ground. Accordingly, the book aims to come to a philosophical understanding of the core or atrocity crimes from the specific perspective of the relationship between law and inhumanity.

Philosophically, the book approaches the relationship between law and inhumanity from a first-person perspective, that is, phenomenologically. A phenomenological approach is characterised by a specific stance or perspective. With Charles Taylor, one may speak of 'the radically reflexive stance': the first-person standpoint of an agent and their own experience of the world.[32] In other words, phenomenology studies the *concrete experiences* of a situated agent *from the standpoint of that agent itself*, that is, from a first-person perspective. That is how phenomenology got its name: it is 'the study of "phenomena": appearances of things, or things as they appear in our experience, or the ways we experience things, thus the meanings things have in our experience'.[33] Accordingly, what phenomenology provides is self-knowledge in the strong sense of 'self-attached

[28] Feldman and Ticktin, 'Introduction', 3.
[29] Feldman and Ticktin, 'Introduction', 1–2.
[30] Feldman and Ticktin, 'Introduction', 1–2.
[31] For this perspective on legal scholarship, see Bert van Roermund, *Legal Thought and Philosophy: What Legal Scholarship Is About* (Cheltenham: Edward Elgar Publishing, 2013), especially Introduction.
[32] Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989), 130–31.
[33] David Woodruff Smith, 'Phenomenology', in *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition), ed. Edward N. Zalta, accessed 23 March 2024, https://plato.stanford.edu/archives/sum2018/entries/phenomenology/.

knowledge', in contrast to mere 'knowledge of the person one happens to be'.[34] Accordingly, throughout this study, I will pay special attention to the experiences and affect of agents involved in atrocity crimes. Attention to experience allows me to focus on the pole of the self and the first-person perspective of humanity. The guiding hypothesis of this book is that referring to humanity is the invocation of a normative community. Any normative community, humanity, too, has its boundaries. Humanity appears under a negative guise in ICL because this legal field's main task is to respond when the normative boundaries of the community are violated. Attention to affect will help uncover the inhuman, for its appearance will always go hand in hand with a disruption of the order, an affective questioning that forces the order to respond.[35]

A normative community in the field of ICL expresses both that a certain behaviour is below a minimum threshold or norm and that this norm is established, enforced and violations are punished on behalf of a community, or public.[36] When that community is a 'we, humanity', what is excluded is both the non-human and the inhuman. ICL, as it exists today, is usually not directly concerned with the non-human (e.g., non-human animals, the environment). Environmental law is. Only in the crime of ecocide do the two fields converge, however this is not (yet) considered one of the core crimes.[37] This book does not deal with the legal relationship between the human and the non-human. It is a study about humanity and inhumanity.[38] If violence is done and legitimised in the name of humanity, resistance takes the form of the inhuman questioning of the boundaries of the order of humanity. Note that the latter comes in two guises.[39] Inhuman is the behaviour that violates the norm. Inhuman is also the suffering that transgresses the legal order of humanity. Both forms of inhumanity question the boundaries of humanity, but the latter in a more fundamental way, for it confronts the legal order of humanity with the inhumanity at its very core.[40] In short, in all its different guises, 'humanity' appears as a bounded concept; that is, as a notion that is not all-encompassing but rather in- and

[34] John Perry, 'Myself and I', in *Philosophie in synthetischer Absicht – Synthesis in Mind*, ed. Marcelo Stamm (Stuttgart: Klett-Cotta, 1998), 83–103.

[35] This is a recurring theme in the work of Bernhard Waldenfels, see Bernhard Waldenfels, *Phenomenology of the Alien: Basic Concepts*, trans. Tanja Stähler and Alexander Kozin (Evanston, IL: Northwestern University Press, 2011).

[36] For a concise version of this more general theory of criminal law in an international context, see Anthony Duff, 'Authority and Responsibility in International Criminal Law', in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 589–604.

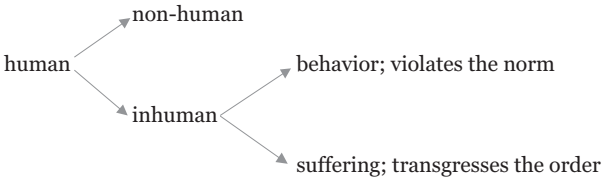
[37] See Chapter 6 for a brief discussion of ecocide.

[38] Interestingly, one may argue that in the Anthropocene, the non-human increasingly presents itself as inhuman, thus questioning the boundaries of humanity. This fascinating theme falls outside the scope of this book. I hope to come back to it in future work.

[39] Here, I am inspired by the double reading of inhumanity developed in Jean-François Lyotard, *The Inhuman: Reflections on Time* (Redwood City, CA: Stanford University Press, 1991).

[40] For this formulation, I am indebted to the work of Hans Lindahl and especially his notion of a-legality; see Hans Lindahl, *Fault Lines of Globalization: Legal Order and a Politics of A-Legality* (Oxford: Oxford University Press, 2013).

exclusive. It is because of these boundaries, and their transgressions, that one may say that humanity is both inside and outside ICL.[41]



Overview of the Chapters

This book consists of six chapters. The first two chapters develop my account of the first-person plural. In Chapter 1, I start by critically engaging with existing academic work that either emphatically argues in favour of or radically dismisses the appeal to humanity within international law. The important critique on the invocation of humanity notwithstanding, I argue that a concept of humanity as a collective subject is necessary to grasp what is at stake in dehumanisation. Chapter 2 delves into the constitution of humanity as a collective subject. Drawing on the debate between ICL scholars about the we-talk in relation to the ICC and their engagement with the work of Durkheim, I develop the thesis that humanity should be understood as a collective subject that is represented as a symbolic order. Moreover, as with any order, the order of humanity is brought about by the process of self-inclusion of a first-person plural. Finally, I turn to the case of Ongwen to show how the inhuman questions the order of humanity.

Chapters 3 and 4 examine the experience of dehumanisation from a first-person singular perspective of the perpetrator and subsequently from that of the victim. Chapter 3 is a close reading of key documents and transcripts of the case of Duch of the Cambodia Tribunal. Interestingly, notions of humanity and inhumanity were used by several parties: prosecutors, attorneys for civil parties but also the defendant's lawyer, and Duch himself declared that the latter was dehumanised. Subsequently, I will put these findings in a philosophical context by bringing them in conversation with the work of Hannah Arendt, thus showing the structure of dehumanisation and rehumanisation. Chapter 4 explores the normative challenge of the experience of dehumanisation. It starts from a paradigmatic case of dehumanisation, as it was described from a first-person perspective, the torture of Jean Améry. This description offers a phenomenology of dehumanisation. To deepen the analysis, the experience of dehumanisation is subsequently confronted with recent work on alienation. This opens the critical potential of the experience of dehumanisation challenging important concepts that figure prominently in debates on (the aftermath) of atrocities.

[41] On humanity and global law, see Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018).

Finally, Chapters 5 and 6 of the book take up normative questions from the first-person plural perspective. Both start from the observation that a political community is never done with inhumanity. Chapter 5 discusses the various timelines involved in the question of the imprescriptibility of atrocity crimes. I distinguish between four timelines involved in imprescriptibility and assess these from the viewpoint of philosophical debates on forgiveness and legal values. Taking the perspective of the judge, the chapter ends by spelling out what is at stake in the judgement on an imprescriptible international crime. Chapter 6 starts from the insight that, despite ICL's focus on individual responsibility, atrocity crimes are often the result of structural violence and ditto injustices: discrimination, social exclusion, exploitation and so on. If the violence is structural, the suffering becomes social, that is, inherent in societal structures. The question remains how the legal order can respond to structural injustice and social suffering. The chapter argues that these forms of injustice register as 'silent claims' at the brink of the legal order, questioning its boundaries. The Epilogue brings together the main themes of the book and sketches some avenues for further research.

1

Atrocity Crimes, the Community of Humanity and the Experience of Inhumanity

1.1 Introduction

International criminal tribunals have frequently referred to humanity, as have prosecutors.[1] Reflecting on this type of references, legal anthropologist Richard A. Wilson points out both the necessity and the problematic nature of the invocation of humanity in international criminal law (ICL).[2] In the eighteenth century, humanity appears as a secular political construct aimed at sustaining republican governance. Wilson argues that the concept can play this role because humanity appears, primarily, as a negative concept, which means that it is used to refer to what constitutes a breach of humanity. In other words, there is a primacy of inhumanity:

> In eighteenth-century European legal and political thought, humanity was largely a negative category. It was created by acts that repel and were considered odious, repugnant, and disgraceful, rather than by human behaviors deemed beautiful or intellectually or morally edifying. 'Humanity' materializes when there is an offense against natural law, the legal and moral basis of human rights in the eighteenth century. From the outset, laws of humanity have been a mirror for human cruelty that can seemingly be applied in any setting. These ideas retain an influence to this day, as evidenced by the category of 'crimes against humanity.' Humanity is still constructed in its breach.[3]

Law plays a vital role in this shift to secular humanity. In their work, scholars divorced the notion of humanity from any religious origins in order to have it act as an alternative ground for international law.[4] This gave rise to secular ideas of human rights, ICL and an ethos of humanitarian intervention.[5]

[1] For examples and an analysis, see: Luigi Corrias and Geoffrey M. Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public', *Journal of International Criminal Justice* 13, no. 1 (2015): 97–112.
[2] Richard A. Wilson, 'When Humanity Sits in Judgment: Crimes against Humanity and the Conundrum of Race and Ethnicity at the International Criminal Tribunal for Rwanda', in *In the Name of Humanity: The Government of Threat and Care*, eds. I. Feldman and M. Ticktin (Durham, NC: Duke University Press, 2010), 27–57.
[3] Wilson, 'When Humanity Sits in Judgment', 28.
[4] Wilson, 'When Humanity Sits in Judgment', 27–28.
[5] Wilson, 'When Humanity Sits in Judgment', 28–29.