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State Criminality and the Ambition of International Criminal Law

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THE BANALITY OF EVIL AND THE CRIMINALITY OF STATES

In the discussion of mass atrocity, no phrase is more familiar than Hannah Arendt's "banality of evil" – one of the few coinages by political theorists that has entered the moral vocabulary of the wider world. The phrase has often been misunderstood, but Arendt assigned it a well-defined meaning: "the phenomenon of evil deeds, committed on a gigantic scale, which could not be traced to any particularity of wickedness, pathology, or ideological conviction in the doer."[1] Arendt formulated the banality of evil idea to describe the personality of Adolf Eichmann, and we can most readily understand it as a concept within moral psychology, describing a certain type of wrongdoer.[2] As Arendt diagnoses Eichmann, he is a kind of chameleon who takes on the moral coloration of those surrounding

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[1] "Thinking and Moral Considerations," in Hannah Arendt, *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003), p. 159. The phrase "banality of evil" comes from *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed. (New York: Penguin, 1964), which I henceforth refer to as EJ.

[2] Years before the Eichmann trial, Arendt had identified none other than Heinrich Himmler as a similar personality type: "neither a Bohemian like Goebbels, nor a sex criminal like Streicher, nor a perverted fanatic like Hitler, nor an adventurer like Goering. He is a 'bourgeois' with all the outer aspect of respectability, all the habits of a good *paterfamilias* who does not betray his wife and anxiously seeks to secure a decent future for his children." Hannah Arendt, "Organized Guilt and Universal Responsibility" (1945), in *Essays in Understanding 1930–1954*, ed. Jerome Kohn (New York: Harcourt, Brace & Co., 1994), p. 128.

him and adapts his conscience to the situation he is in. Arendt's observations and speculations mesh well with the powerful line of experimental social psychology associated with cognitive dissonance theory and the "situationist" school – a line represented most vividly by the famous Milgram and Zimbardo experiments.[3]

But describing a specific pattern of moral psychology is only half the story Arendt tells. To understand why a chameleon is a specific color at a given time, you must know the color of its surroundings. Arendt zeros in on the social conditions that induce the "banal" wrongdoer to discount the monstrosity of the crimes he commits: it is a political regime in which exceptions and rules, deviance and normality, criminality and lawfulness, have become inverted. Precisely because those around Eichmann treated mass murder as though it were an ordinary function of government and regarded common human decency as a crime against the state, "this new type of criminal, who is in actual fact *hostis generis humani*, commits his crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong" (EJ, p. 276). In an ordinary regime, gross criminality flies "like a black flag" above atrocious misdeeds, and murderous orders are "manifestly illegal." (Arendt lifts the quoted phrases from an Israeli court decision about war crimes, and "manifest illegality" marks the worldwide legal test for military orders that may not be obeyed: no defense of superior orders avails soldiers who commit crimes in obedience to manifestly illegal orders.) Arendt comments: "in a criminal regime this 'black flag' with its 'warning sign'

[3] I discuss these and other experiments in detail, and connect them with Arendt's view, in "The Ethics of Wrongful Obedience" and "Integrity: Its Causes and Cures," both revised and reprinted in Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007); on the connection between the Milgram experiments and Arendt's diagnosis of Eichmann, see pages 250–52. The most significant difference between the situationist analysis and Arendt's is that where she uses the banality of evil idea to describe one particular kind of person, situationists contend that what she observed in Eichmann is true of all people: situations influence behavior far more than personality does, and thus we are all chameleons. For situationists, theories of personality types commit the "fundamental attribution error" of ascribing behavior to character rather than situation. In the works cited here, I express hesitation about interpreting the experiments as the situationists do: it is difficult for their theory to explain why a significant number of people in (for example) the Milgram experiments do not comply. See *Legal Ethics and Human Dignity*, pp. 247, 282–85. Arendt's less global version of the banality of evil thesis seems more in line with the fact that, as she said, "most people will comply but *some people will not*. . . . Humanly speaking, no more is required, and no more can reasonably be asked, for this planet to remain a place fit for human habitation." EJ, p. 233.

flies as 'manifestly' above what normally is a lawful order – for instance, not to kill innocent people just because they happen to be Jews – as it flies above a criminal order under normal circumstances" (EJ, p. 148). Mark Drumbl, discussing the Rwanda genocide, likewise observes that many of the *génocidaires* were just the opposite of deviants: they were dutiful citizens murdering in fulfillment of civic obligation.[4] Perversely, to spare or save Tutsis at a time when all governmental offices were doing their utmost to enlist the population in massacring them in a supposed war of self-defense, a person had to be a deviant.

Arendt's explanation, like Drumbl's, rests on an important premise: that the Nazi state, like the Hutu Power state half a century later, was in a literal sense criminal to the core. Notice that Arendt begins her remark about the black flag of illegality with the words "in a criminal regime." A state that turns the world upside down and makes the monstrous the centerpiece of civic obligation is a criminal state.[5] The concept "banality of evil" – a fragment of personality theory and moral psychology – travels in tandem with the concept "criminal state" – a fragment of legal theory and political philosophy. Rightly understood, they are cognate concepts within a single theory of radical evil. Both of them pose deep challenges to an understanding of criminal law that centers on the personal responsibility of individuals and that concedes the legal immunity of states. Yet although endless debate and discussion have surrounded the banality of evil, the idea of state criminality has received far less attention. I suggest that part of the reason is that international law fetishizes and idolizes states, so that recognizing a category of state criminality would be as heretical as a religion labeling its own gods criminals. As Drumbl puts it, "International law is deeply paradoxical: it courageously operates in opposition to state interests while stubbornly protecting state interests" by focusing solely on individual perpetrators (APIL, p. 173).

International criminal law is the legal discipline that comes closest to recognizing the category of state criminality, but it never quite gets there: with the exception of one slightly aberrant Nuremberg doctrine that international law never took on board, its framers have insisted that only natural, flesh-and-blood human beings can be tried for crimes against humanity, war crimes, genocide, and aggression – the so-called core international

[4] Mark Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007), pp. 25–26, 173. Henceforth, I refer to Drumbl's book as APIL.

[5] For the moment, I use the terms "state" and "regime" more or less interchangeably. Later in this chapter, it proves essential to distinguish between them.

crimes.[6] It nevertheless comes closer to the truth than any other system of jurisprudence, because it strips away from state officials the defenses of "act of state," "superior orders," and "domestic legality."[7] International criminal law represents a major, if incomplete, effort toward deflating the state-worship that defines public international law as a subject. Deflating the state, even incompletely, is perhaps the most radical ambition of international criminal justice. Its enemies are not wrong to perceive this ambition and the threat it poses to state sovereignty. In its institutional design, the International Criminal Court (ICC) is in fact highly protective of sovereignty, perhaps more than it should be; but the fears of its enemies have little to do with the actual mechanics of the Rome Statute. Statists smell a rat, and the rat is the innuendo that states, far from ultimate objects of dignity "beyond law and lawlessness," can be the world's supreme criminals. As I have suggested elsewhere, this is heresy akin to labeling Abraham's sacrifice of Isaac, which the Bible depicts as a nation-founding act of faith, as nothing more than attempted murder.[8] A full-fledged doctrine of state criminality would similarly blaspheme the sacred order of public international law, in which states are like gods.

THE STATE BEYOND GOOD AND EVIL

Among legal philosophers, Paul Kahn has been foremost in insisting on the religious (I would say idolatrous) character of citizens' connection with their states. Lest this seem like hyperbole, he reminds us that throughout the Cold War, both the United States and the Soviet Union were prepared to annihilate each other rather than let the other impinge on their sovereignty; if the mark of religion is human sacrifice, it is no mere figure of speech to describe states as jealous gods. No state, including

[6] The doctrine allowed groups or organizations to be declared criminal (Nuremberg Charter, Article 9); it was applied to specific organizations of the German state, but not to the state as such. I discuss it later.

[7] Article 7 of the Nuremberg Charter removes immunity from the head of state and other government officials; Article 8 removes the superior orders defense; and the definition of crimes against humanity in Article 6(c) criminalizes the specified misdeeds "whether or not in violation of the domestic law of the country where perpetrated."

[8] David Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law," in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (Oxford University Press, 2010), pp. 577–78.

liberal states that currently have no draft, has ever disavowed its authority to conscript its citizens to die and kill on its behalf.[9]

Tribal rulers had manna, and Egyptian and Roman emperors became gods.[10] European monarchs ruled by divine right, and Chinese emperors enjoyed the mandate of heaven. As Ernst Kantorowicz showed, English lawyers in the early modern period distinguished the king's "body natural" from his "body politic" – a legal fiction derived from the theological distinction between Christ's physical and mystical bodies.[11] The king's body natural is born, becomes decrepit, and perishes; his body politic is immortal. In modern democracies and republics, people like us live and die, but "we the people" perdures outside of ordinary time.

Obviously, divine right has vanished as a political ideology, and the social contract tradition of political theory since Hobbes proclaims that the state is a human, not a divine, construction. Historians of political theory sometimes trace this humanization of the state back to Marsilius of Padua's 1324 *Defensor Pacis*. Siding with the emperor against the pope in a political showdown, Marsilius argued that the state is a human artifact, and "Christ Himself did not come into the world to have dominance over men, nor to judge them with judgement in the third signification [i.e., civil judgment], nor to be a temporal prince, but rather to be subject in respect of the status of this present world."[12]

Although at first glance it may seem that humanizing the state deflates it, political history instead suggests that charisma simply migrated from the mandate of heaven to a fetishized conception of state sovereignty. Hobbes himself called the commonwealth a "mortal god."[13] We find the

[9] Paul W. Kahn, *Putting Liberalism in Its Place* (Princeton: Princeton University Press, 2005), p. 228; Kahn, "Nuclear Weapons and the Rule of Law," *New York University Journal of International Law and Politics* 31 (1999): pp. 379–81.

[10] On the religious status of tribal chieftains and emperors, see Martin van Creveld, *The Rise and Decline of the State* (Cambridge University Press, 1999), pp. 15, 38–39.

[11] Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press, 1957), pp. 193–223.

[12] Marsilius of Padua, *The Defender of the Peace*, ed. and trans. Annabel Brett (Cambridge: Cambridge University Press, 1324/2005), pp. 160–61. Marsilius concedes that all principates derive "from God as the remote cause"; but "in most cases and almost everywhere he established these principates through the medium of human minds, to which he granted the freedom to establish them in this way." Ibid., p. 44.

[13] Thomas Hobbes, *Leviathan*, ed., Michael Oakeshot (Oxford: Basil Blackwell, 1957), p. 112 (ch. 17). Hobbes says that the social contract "is the generation of that great LEVIATHAN, or rather, to speak more reverently, of that *mortal god* to which we owe, under the *immortal God*, our peace and defence." Diane Marie Amann has reminded

fetishism of the state reflected in innumerable features of contemporary international law, both large and small. The largest, of course, is the very nature of international law. The positivist and consensualist theory that became dominant by the early twentieth century holds that the sole and absolute source of international law is the will of states manifested in custom and agreements.[14] Even *jus cogens* is, in standard doctrine, merely super-custom that "can be modified . . . by a subsequent norm of general international law having the same character."[15]

Because international law can, on the consensualist view, have no source outside the will of states as reflected in their customary practices and the agreements they reach, states take on the charisma formerly reserved for kings. A Kantian might say that sovereign states are the transcendental condition for the possibility of international law. This situation has hardly changed in the United Nations era; arguably, the UN system formalizes and augments the *corpus mysticum* of states. Article 2(1) of the UN Charter recognizes the "sovereign equality" of states; Article 51 reserves for states the right of self-defense, and on the basis of Article 51 the International Court of Justice (ICJ) found that it could not even "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[16] That's how important states are: important enough that the law cannot forbid them from blowing up the world if their survival is threatened. This is a far cry from the pragmatic idea that states are merely forms of organization

me that the frontispiece to the first edition of *Leviathan* depicts the sovereign garbed in chain mail made of his subjects' bodies. Of course what is interesting about this image is that chain mail absorbs blows and defends the sovereign, not the other way around.

[14] Martti Koskenniemi has demonstrated that the main line of international lawyers from the 1870s on has been less enamored of positivism than later writers, like Oppenheim, asserted. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002), p. 92. Koskenniemi's history shows that the triumph of positivism over "Grotian" natural law is hard to date precisely, and indeed it may be a twentieth-century creative misreading to push it back to the nineteenth century. I ignore this complication, which I do not think undermines the story I am telling. It seems clear that consensualism prevailed by 1927, when *Lotus* proclaimed that "rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law." The Case of the S.S. Lotus (*France v. Turkey*), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). Available at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus, p. 14.

[15] Vienna Convention on the Law of Treaties, Article 53.

[16] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 263, ¶97. Available at http://www.icj-cij.org/docket/files/95/7495.pdf.

meeting the human need for government given that we are not angels. The UN's member states resemble the Homeric gods on Olympus – quarrelsome, mutually self-congratulatory, and often taking sides in bloody wars waged by mere mortals in which the most powerful Olympians intervene if peace threatens to break out.

International lawyers and political theorists are likely to bridle at the assertion that state sovereignty retains its exalted status in the contemporary system: in obvious respects, legal developments since the end of World War II have qualified and eroded the classical model of Westphalian sovereignty.[17] Small states ceded power to the Security Council by accepting its Chapter VII powers; European states have devolved at least bits of their sovereignty to Brussels and Strasbourg; the World Trade Organization represents a further departure from Westphalia. Yet nationalism persists nearly everywhere, and European electorates rejected the European constitution.[18] For understandable reasons, former colonies jealously cherish their sovereignty and harbor deep suspicions that internationalism is a Trojan horse for Westerners with neo-colonial ambitions. Consensualism remains untouched as the dominant theory of international law. In short, if the deified state is dead, it still casts a longer shadow than cosmopolitans might think or hope.[19]

STATE FETISHISM AND IMMUNITY

In international and transnational law, the state fetishism that I am describing comes out most vividly in doctrines of state immunity from the jurisdiction of other states' courts, a doctrine of considerable significance for international criminal enforcement. As Lord Millett explained in his *Pinochet* speech, the classical theory of international law "taught that states were the only actors on the international plane. . . . States were sovereign and equal: it followed that one state could not be impleaded in the national courts of another; *par in parem non habet*

[17] For useful discussion, see John H. Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006).

[18] See Ulrich Haltern, "On Finality," in *Principles of European Constitutional Law*, eds. Jürgen Bast and Armin von Bogdandy (Oxford Hart Publishing, 2006), pp. 727–64.

[19] "After Buddha was dead, his shadow was still shown for centuries in a cave – a tremendous, gruesome shadow. God is dead; but given the way of men, there may still be caves for thousands of years in which his shadow will be shown. – And we – we still have to vanquish his shadow too." Nietzsche, *The Gay Science*, §108, trans. Walter Kaufmann (New York: Vintage, 1974), p. 167.

imperium."[20] For that reason, a head of state enjoys immunity *ratione personae*: "He is regarded as the personal embodiment of the state itself. It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state."[21] Contemporary heads of state are immune, according to this personification theory of immunity, by a legal metonymy: *l'état c'est moi*. A head of state cannot be prosecuted for crime because that would involve one state prosecuting another in violation of *par in parem*. Notably, although Lord Millett believes that the classical theory "no longer prevails in its unadulterated form," he never doubts that the head of state's immunity *ratione personae* remains a valid rule of customary international law.

Notwithstanding the Latin maxim *par in parem*, the key to this personification theory is not the equality of states but their sovereignty. A rule permitting any state to implead any other in its courts would satisfy equality just as surely as the rule forbidding states to do so. Only because states are not only equal but sovereign would it affront the dignity of a state to be called to account for its acts in another state's courts. State immunity, which for a moment seemed threatened by the *Pinochet* case, has come roaring back in the new century. In its 2001 *Al-Adsani* opinion, the European Court of Human Rights found on the basis of *par in parem non habet imperium* that Kuwait's immunity from judicial process in other states' courts outweighs the *jus cogens* prohibition on torture.[22] In its 2006 *Jones* decision,[23] the U.K. Law Lords backtracked significantly from *Pinochet* and found that official torture is indeed a state act – they had held in *Pinochet* that it is not – and therefore that Saudi Arabian officials are immune from being sued in British courts for torture because of sovereign immunity.

The personification theory according to which the head of state enjoys immunity *ratione personae* because he or she personifies the state in its majesty is not the only possible basis for the immunity. The immunity can be placed on a less occult and more practical basis – namely, the

[20] *Regina v. Bow Street Stipendiary Magistrate, ex rel. Pinochet Ugarte (No. 3)*, United Kingdom House of Lords [2000] 1 A.C. 147 (1999), 2 W.L.R. 827 (H.L.), reprinted in 38 I.L.M. 581, 644 (1999) (speech of Lord Millett). The Latin slogan means "equals have no dominion over equals."

[21] Ibid.

[22] *Al-Adsani v. Kingdom*, [2001] ECHR 35763/97, ¶61.

[23] *Jones v. Ministry of the Interior Al-Mamlaka Al-Arabiya AS Saudiya (The Kingdom of Saudi Arabia) and others* [2006] UKHL 26.

functional requirements of international diplomacy. This was the theory the ICJ relied on in the *Arrest Warrant* case; but even there, the Court concluded that Belgium's arrest warrant for Congo's foreign minister constitutes a "moral injury" to Congo,[24] a phrase with a distinct aroma of *lèse majesté* theology about it.

THE RADICAL AMBITION OF INTERNATIONAL CRIMINAL LAW

Notably, the immunity of heads of state has been abolished in international tribunals. In theory, this abolition is consistent with *ratione personae* immunity in state courts: states are each other's equals, whereas international tribunals are a product of the entire international community. Therefore (the argument goes), *par in parem* has no application to international tribunals and therefore stripping immunity from heads of state and acts of state in international tribunals leaves the customary international law of immunity intact.

However, there remains some conceptual tension, particularly vivid in the ICC. Created by a multilateral treaty rather than by the UN Security Council, the ICC has jurisdiction over specified crimes committed in the territory or by the nationals of its member states. Presumably, it derives this jurisdiction from its member states proxying their own territorial or nationality jurisdiction to it. However, because none of the member states has jurisdiction over rulers of other states, it is not theirs to proxy, and so it is unclear under what theory the ICC can abrogate head-of-state immunity. The answer cannot be that ICC members tacitly waive the immunities of their own rulers. That would explain why member states' rulers have no immunity before the ICC, but it does not explain why the ICC has jurisdiction over the rulers of non-states parties responsible for crimes in the territory of member states.

It seems to me that the termination of head-of-state immunity and abolition of the act-of-state defense before international tribunals are clues

[24] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 31*, ¶75. Available at http://www.icj-cij.org/docket/files/121/8126.pdf. See also *Prosecutor v. Blaškić*, which holds that state officials "are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of a State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act." ICTY Appeals Chamber (1997), 110 ILR 607, 707, ¶38.

that international criminal justice, rather than being a consistent extension of existing international law, actually mounts a dramatic challenge to the prevailing idolatry of the state. An even clearer sign is the actual spectacle of a Slobodan Milošević or Charles Taylor in the dock. There, strikingly, they stand revealed as bodies natural, not bodies politic, just as Charles Stuart and Citizen Louis Capet did in the seventeenth and eighteenth centuries.[25]

Obviously, not all defendants in international proceedings are state officials. They include warlords, militia chiefs, adventurers, rebels, and their underlings. However, defendants also include state officials who used their troops to perpetrate the same atrocities as the barbarians at the gate. In an obvious way, the fact that high state officials are tried for the same crimes, before the same courts, as unofficial thugs makes the proceedings even more deflationary of the dignity of the state. Charles Taylor is accused of crimes equivalent to those of Foday Sankoh; Biljana Plavšić and Jean Kambanda stood in the same dock as Duško Tadić and Hassan Ngeze. This is precisely the phenomenon I noted earlier: deflating official acts to mere criminality is the equivalent gestalt shift to labeling the sacrifice of Isaac mere attempted murder. Bringing about such a gestalt shift is the radical ambition of international criminal law. It aims to reconceptualize political violence, justified in other ages as raison d'état or *Kriegsraison* – therefore beyond good and evil – as mere crime.

THE EXPRESSIVE FUNCTIONS OF INTERNATIONAL CRIMINAL PROCEEDINGS

I am offering an answer to the question "what is the point of international criminal proceedings?" that focuses on the message its trials and punishments convey – specifically, the message that political violence, mystified by states, is nothing but crime. In its form, this is an *expressivist* answer, that is, an answer that focuses not on the tangible consequences of a social practice (like international criminal proceedings) but on the collective attitudes it expresses. Obviously, this is not the only way to answer the question. Instead, one could explain the point of international criminal proceedings consequentially: they are meant to deter atrocities, or to incapacitate dangerous murderers and torturers, or to create an authoritative record of political cataclysms as a bulwark against future liars

[25] See Michael Walzer, *Regicide and Revolution* (Cambridge: Cambridge University Press, 1974).

and deniers. When the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), it invoked its Chapter VII powers and thus implicitly claimed that the tribunals were created to help "maintain or restore international peace and security."[26] Some theorists claim, on the basis of questionable psychological assumptions, that the aim of the proceedings is to provide closure and healing to victims, or closure and healing to posttraumatic societies. The ICTY's *Blaškić* decision, drawing on the German criminological theory of "positive prevention," has stated that an aim of sentencing is to reassure the world "that the legal system is being implemented and enforced," which enhances compliance.[27] All of these are tangible, consequential aims.

Notoriously, there are grounds for skepticism about all these aims.[28] We simply have little reason to believe that international proceedings achieve any of these goals. Incapacitation is the only one of them that imprisonment surely does accomplish; yet even that seems to rest on a false premise – namely, that most international criminals remain dangerous even though the conditions that turned them from good citizens into murderers have disappeared. (This is not to deny that some political leaders should be incapacitated because of their proven talents as conflict entrepreneurs.)

Expressive theories focus on less tangible goals. They rest on the premise that actions can express attitudes and send messages, quite apart from their consequences. A clear example of an expressive aim of international criminal conviction is one of those itemized in the *Blaškić* decision: "public reprobation and stigmatisation by the international community."[29] Even retribution can be understood along expressivist lines, and in my opinion that is the best way to understand it. On Jean Hampton's well-known account of the retributive idea, crimes committed by one person against another have expressive content: they express the moral falsehood that I, the perpetrator, am "high" and you, the victim, are "low" – that I am the sort of person who gets to do things like that to others, or you are the sort of person to whom others get to do it, or both. The aim of retribution, Hampton argues, is to "plant the flag of moral

[26] UN Charter, Article 39.

[27] *Prosecutor v. Blaškić*, ICTY Case No. IT-95-14-A, Judgement (July 29, 2004), ¶678. Theoretically, it does so by treating laws as what game theorists call an "assurance game."

[28] Drumbl, p. 184; Martti Koskenniemi, "Between Impunity and Show Trials," *Max Planck Yearbook of International Law* 6 (2002): 1–35.

[29] *Blaškić*, note 27, ¶678.

truth" by humbling the perpetrator. In Hampton's phrase, the retributive aim of punishment is to inflict an "expressive defeat" on the wrongdoer to reaffirm the equal moral worth of the victim that the wrongdoer has implicitly or explicitly denied.[30]

Expressive theories are not committed to the idea that perpetrators intend their actions to communicate their expressive messages, in which case expressivism would be quite implausible. Expressivists can admit that a mugger's conscious intention and purpose may be simply to steal the victim's wallet and iPod, not to say "I am high up and you are low down." The robber's contemptuous attitude toward the victim is built into the action regardless of whether the robber consciously thinks contemptuous thoughts or means to communicate them.[31] The imperative to take retribution can also be explained in expressivist terms: a society that leaves palpable crimes unpunished or punished with a slap on the wrist has in effect expressed that it accepts the wrongdoer's "I am high up and you are low down." Thus, for example, a university that systematically hushes up rapes committed by star athletes has, like it or not, confirmed the rapist's message that he gets to do stuff like that and undergraduate women have to take it.

I have used the phrase "international criminal proceedings" to refer to a process that includes both trials and punishments. The expressivist accounts of international trials and punishments need not be the same, and I think they are not.

Punishment

In the case of international tribunals addressing mass atrocities, it seems to me that the most plausible among the standard rationales for punishment is retribution (in which I include the "public reprobation" that the *Blaškić* decision lists separately from retribution). When I expressed skepticism earlier about the various consequentialist aims of international punishment, I did not include retribution, because it is not consequentialist, and it seems utterly obvious that at bottom these tribunals exist because

[30] Jean Hampton, "The Retributive Idea," in *Forgiveness and Mercy*, Jean Hampton and Jeffrie Murphy (Cambridge University Press, 1990), especially pp. 122–30.

[31] On this point, see Elizabeth S. Anderson and Richard H. Pildes, "Expressive Theories of Law: A General Restatement," *University of Pennsylvania Law Review* 148 (2000): 1529–30. I do not address the difficult philosophical question of whether the expressive content of practices rests on a network of conventions, or whether some actions express certain attitudes intrinsically.

we believe that atrocities deserve to be punished – or, in an equivalent negative formulation, that letting them go unpunished is a morally deficient response.[32]

Trials

In domestic criminal law, we generally think of the trial as a means to an end – namely, ascertaining whether the defendant should be convicted and punished. The punishment, not the trial, occupies the center of our attention. Matters seem rather different in international and transnational trials of atrocity crimes. Here, it seems to me that the center of gravity lies in the trial, far more than the punishment.[33] That was certainly true in the two iconic trials of the twentieth century, Nuremberg and the Eichmann trial (despite the fact that by all accounts Nuremberg was excruciatingly boring, as prosecutors spent hour after hour reading documents into the record). The trials lie at the heart of the proceeding because the full

[32] In APIL (p. 130) Drumbl points out that the actual sentencing schemes used in the ICTY and ICTR are hard to square with the retributive idea of desert, and I agree. However, I do not think that undermines the claims that retribution lies at the heart of the tribunals or that it plays a role in sentencing. Not the former, because imperfections in sentencing – notably, the totally discretionary sentencing of the ad hoc tribunals – don't speak to whether the purpose of the tribunal is retribution or something else. Not the latter, for two reasons. First, retribution is not the only aim of criminal sentencing, as *Blaškić* makes clear, and therefore we should not expect to find strict correspondence between desert and actual sentence. Second, there is no such thing as a "natural" sentence. Sentences make sense only within systems. See Michael Davis, "How to Make the Punishment Fit the Crime," *Ethics* 93 (1983): 726–52, especially 736–37. There is another reason as well for why retributivists might accept sentences for enormous atrocities that are no greater than those for some lesser crimes. In the case of mass atrocities, proportionate sentences may well be so harsh, cruel, and degrading that morality does not permit them to be inflicted. Hampton argues that the same respect for human dignity that provides the strongest argument for retributive punishment also imposes limits on how harsh the punishment can be. "The Retributive Idea," pp. 135–37. If so, permissible punishments will "max out" long before judgments of heinousness max out. Moreover, precisely because mass atrocities are crimes of a different order than ordinary domestic criminal offenses, the system of punishments for the former may be compelled to shift the scale away from the system of the latter, leaving incongruities when we view them side by side. For example, if a lead defendant in a war crime trial receives a sentence of twenty-five years, it may be justifiable to sentence an accomplice to something less – say, ten years – even though a conventional murderer who killed fewer people than the accomplice could receive more than ten years in the domestic legal system. This result does not mean that the punishment scheme is irrational as a form of retribution. It means only that two punishment schemes, scaled differently because of differences in the nature and context of the crime, have been superimposed one on the other.

[33] Luban, "Fairness to Rightness," pp. 575–77.

dimensions of the human catastrophe are displayed to the world patiently, step by step, for all to see. The facts are not merely laid out in plain sight, however. They are, in the prosecutor's retelling and the tribunal's judgment, labeled as crimes against humanity, war crimes, or genocide. The defense challenges the evidence, of course, but it also challenges the labels. It is the acts of exposing the deeds, categorizing them as crimes, and naming exactly which crime they are that are the central point of the international proceeding.[34]

Of course, from the defendant's point of view, what matters most is the sentence and punishment. Am I going to prison for two years or twenty? For everyone else, the punishment is far less significant than the trial itself and its acts of renaming.[35] What the defendant called "defending the people," "reclaiming the heritage of our nation," "defeating the rebels," or "saving the country" is now stamped and sealed as genocide, torture, sexual enslavement, or forcible transfer of population. Political violence is no longer beyond good and evil, insulated as *raison d'état* or *Kriegsraison*. Now it is crime. The deeds have been translated from the realm of politics to the realm of law, and states are now subordinated to law. That subordination is illustrated by the trappings of the courtroom, with its fussy and exasperating little formalities. We should not let the blandness and boringness of legal process deceive us: the fact that "sacred violence" can be subjected to it is in its own tedious way a revolutionary development.

My view of the importance of the expressive power of the international trial as such is highly sympathetic to that of Mark Osiel, who argues that the mass atrocity tribunal is a "'theater of ideas,' where large questions of collective memory and even national identity are engaged."[36] Osiel observes that for the defense, the theatrical genre is tragedy; for the prosecutors, it is a morality play. In both cases, it is in a literal sense a "show trial." This label is dangerous, because one of its meanings is "sham trial" – an unfair trial designed to legitimize a prearranged outcome. That

[34] Drumbl also notes that the trial, rather than the punishment, is the central event of the international criminal proceeding (see APIL, p. 174) but correctly insists that we must not ignore the punishments.

[35] With one exception: an overlenient sentence may reinforce rather than defeat the expressive assault on the victims' worth.

[36] Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Books, 1997), p. 3. I offered some thoughts on this function of trials in Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994), pp. 379–91.

is not what Osiel means. He insists that a postdictatorship society aiming to establish liberalism must conduct scrupulously fair trials, because fair trials *are* one of the things that the proceeding means to dramatize. What he means by a show trial is rather, quite literally, a trial that is meant to show: a didactic trial, not a pretend trial.

Osiel focuses on trials conducted by a new democratic regime of the crimes committed by its predecessor – his examples were Latin American dictatorships coming to terms with their dirty wars. In Osiel's view, trials would allow a country with a guilty conscience and bloodstains on its collective identity to come to terms with itself and refashion that identity along liberal lines.

I am making a parallel point about the "theater of ideas" character of international tribunals. A pure international tribunal is not a vehicle for a country's self-examination; for self-examination, criminal justice must go local. The ideas an international trial expresses are therefore not vehicles for a state to refashion its own identity. Rather, the expressive character of the trials aims at something different: the projection to the wider world of new norms, norms under which political violence gets relabeled as crime.[37] Eventually, these norms can be incorporated into domestic criminal law as well, and into military policy and training. Hopefully, they will seize the moral imagination of larger societies as well, the way that abolitionist norms gradually replaced tolerance for human slavery. The fundamental message of international criminal norms is that the Great Game of politics, deeply embedded in the human condition, must never again cross moral lines that heretofore it has always crossed. That may be a preposterously utopian ideal, as fanciful as the injunction to beat swords into plowshares and study war no more. Utopian or not, that is the point – the sole point – of establishing courts to examine and punish war crimes, crimes against humanity, and genocide.

Scholars, activists, and diplomats are divided over whether this goal advances or retards peace and reconciliation in the land where the atrocities took place. Consider a recent controversy over sentencing in the Special Court of Sierra Leone (SCSL). The defendants, leaders of the Civil Defense Force (CDF) were convicted of war crimes, but the Trial

[37] Drumbl takes as a "premise . . . that one of the reasons international criminal law falls short is because it treats the extraordinary international criminal like the ordinary common criminal." P. 187. I am arguing that this is the whole point of international criminal proceedings, and if they fall short it is because they fail to drive the point home strongly enough.

Chamber mitigated their sentences because they were "defending a cause that is palpably just and defendable."[38] The CDF fought on the side of the government. Yet critics argued that war crimes are war crimes no matter who commits them, and selective mitigation sends the opposite message.[39] Eventually the Appeals Chamber agreed with the critics.[40] The case raises significant issues. The SCSL is a hybrid court, that is, a mixed national–international court, and in the Trial Chamber it was the Sierra Leonean judges who favored mitigation, reportedly echoing sentiment on the street. The critics tended to be internationalists from outside Sierra Leone. For those who believe that the primary audience must be the people of the afflicted country, this case might serve as an example of what is wrong with international criminal justice: it privileges the standpoint of the so-called international community over that of the victims of the horrific civil war.

The view I am defending sees matters differently. The expressivist emphasizes that war crimes even in defense of the state against a dire threat are, at bottom, war crimes. To mitigate sentences because the war criminals were defending the state would blur that message and shift it in the direction of reason-of-state, or "dirty hands," thinking.

The strength of the expressivist account is its iconoclasm, its smashing of political idols that drink rivers of human blood. The weakness of the expressivist account – and, if I am right, of the international criminal justice project – is a dangerous vagueness about who exactly belongs to the intended audience of its message. Hampton wants to "plant the flag of morality,"[41] but for whom? Is the message that war crimes are merely war crimes intended for the criminal, or his followers, or the victims, or the man and woman on the street in Freetown? Apparently not. Is it, then, a message for the diaphanous international community? Or for humanitarians within the like-minded countries? Is the audience ultimately the Angel of History, who (in Walter Benjamin's image) stands helplessly watching the rubble of history pile up, recording the crimes and

[38] *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment on the Sentencing of Moinina Fofana and Allieu Kondewa (Trial Chamber I, Oct. 9, 2007), ¶86.

[39] See, for example, Human Rights Watch, Political Considerations in Sentence Mitigation for Serious Violations of the Laws of War before International Criminal Tribunals (March 2008). Available at http://www.hrw.org/backgrounder/ij/sierraleone0308.

[40] *Prosecutor v. Fofana*, Case No. SCSL-04-14-A, Judgment (Appeals Chamber, May 28, 2008), ¶¶529–35.

[41] Hampton, "The Retributive Idea," p. 130.

infamies but unable to make repairs?[42] Is it a message in a bottle, thrown into the sea? Or will someone read it somewhere, someday, and turn a page in human history?

THE PRINCE OF DENMARK WITHOUT DENMARK

So far, I have argued that international law and the international order are founded on a fetishism of states, displaced but not wholly deflated in the early modern era. Because states are fetishized, the category of state criminality has been conspicuously lacking from international law. Branding states criminals would violate their dignity, an argument that receives expression in the immunity *ratione personae* of heads of state. International criminal proceedings have the radical aim to further deflate states by putting acts of political violence, including state violence, on trial to relabel these acts as crimes. However, international proceedings have been deliberately limited to flesh-and-blood defendants. We then confront a curious drama: not *Hamlet* without the Prince of Denmark, but rather the Prince without Denmark.

Dropping the metaphor: a Milošević or al-Bashir is not simply a ruthless man giving orders. Although it is untrue that the entire state apparatus is implicated in the crimes that brought them international indictments, a significant portion of the state apparatus is. Further, although many Serbs and Sudanese people simply want to get on with their lives, no political leader can work his will on such a large and violent scale without the support of a party and a significant portion of the country. This is what it means to speak of a criminal state and not simply a criminal leader. To tell the story of their crimes without attributing them in any way to the state or its people is, simply, to falsify the story.[43] That is precisely Hannah Arendt's point: to demonize Adolf Eichmann's motives misunderstands him; to understand him means to understand that he could become a criminal only within a criminal state.

[42] Walter Benjamin, "Theses on the Philosophy of History," in *Illuminations*, ed. Hannah Arendt, trans. Harry Zohn (New York: Schocken Books, 1969), Thesis 9, pp. 259–60. See Luban, *Legal Modernism*, pp. 390–91.

[43] Martti Koskenniemi emphasizes the same point, but draws a diametrically different conclusion from mine. In his view, the falsity of prosecuting political atrocities as individual crimes is a reason not to have international criminal tribunals, not a reason to expand their reach to include states as I propose. Koskenniemi, "Between Impunity and Forgiveness," *Max Planck Yearbook of International Law* 6 (2002): 1–35.

The proposal to add state criminality to legal doctrine raises four questions that I address in the sections to follow. These are, first, what would it mean to describe a state as a criminal? Second, what are the conditions – the "test," as lawyers say – of state criminality? Third, is the proposal a good idea, or would it have destructive practical consequences? Fourth, how do you punish a state? The remainder of this chapter considers these questions in more detail.

HOW CAN A STATE BE A CRIMINAL?

To call a state a criminal sounds like a category mistake. States, one might say, don't murder people; people murder people. A state is an artificial person, and artificial persons cannot commit tangible crimes.

In law, however, long-established rules of agency allow the conduct of one person to be ascribed to another, and agency principles apply even if the latter is an artificial person. A corporate officer who signs a contract on behalf of the company binds the company. The same principles apply when the principal is a state: when the president of the United States signs a treaty, he or she does so on behalf of the United States, and in law, it is the United States that has signed. Conceptually, the agency model expands individual action to organizational action by steps. The first step is establishing conventions for when an agent's acts are ascribed to the principal. The second step expands the notion of principal from single natural persons to collectives of persons. The third step would show how a collective can be regarded as a single artificial person. Each of these raises philosophical puzzles – a point I return to shortly – but for the moment, the only point I wish to make is that if this three-step program can be carried out, the legal model of agency can explain the ascription of human acts to states.

Agency is not the only possible legal model of state criminality. International law contains at least a provisional doctrine on state responsibility for wrongful acts (acts that breach international legal obligations). This is the International Law Commission's 2001 "Draft Articles on Responsibility of States for Internationally Wrongful Acts."[44] It proposes several principles for ascribing acts of humans or groups of humans to states. The principles are straightforward applications of *respondeat superior*,

[44] General Assembly Resolution 56/83 of December 12, 2001, annex, and corrected by document A/56/49 (Vol. I)/Corr.4. Available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

rather than agency: conduct ascribed to the state includes that of all its "organs" (in any branch of government), including individuals holding official positions (Article 4); all people "empowered by the law of that State to exercise elements of the governmental authority" (Article 5); and the "conduct of an organ placed at the disposal of a State by another State" (Article 6). All this is true regardless of whether the person or entity is an agent of the state, and indeed even if "the person or entity . . . exceeds its authority or contravenes instructions" (Article 7).

These Draft Articles have to do primarily with civil breaches of international law, not crimes. They make no mention of criminal responsibility, and no other doctrine establishes state criminality. Interestingly, earlier drafts of the Articles did include state responsibility for "international crimes," a phrase that was replaced by "serious breaches" only in the final version. Nevertheless, even though the Draft Articles ultimately make no mention of criminality, a natural extension of their principles would include criminal as well as civil responsibility.

To see what this extension might look like, let us begin by examining an analogous legal concept, corporate criminality. No such doctrine exists in international law, and some domestic legal systems also do not recognize it. One that does is the United States, and I will use it as a template. In U.S. doctrine, corporations have legal personality, and corporate crime is defined in terms of crime by its employees. As in the Draft Articles, the doctrine is one of *respondeat superior*, and it is very simple: "a corporation is liable for the criminal misdeeds of its agents acting within the actual or apparent scope of their employment or authority if the agents intend, at least in part, to benefit the corporation, even though their actions may be contrary to corporate policy or express corporate order."[45] It follows that corporate crime simply tracks employee crime (in the actual or apparent scope of the employee's duties – a qualification that I henceforth omit, but which should be understood when I refer to employees' crimes). Any time the employee commits a crime intending to benefit the corporation, the corporation commits the crime as well; conversely, any time a corporation commits a crime, it must be that at least one employee has committed the same crime (or a group of employees has together committed the crime).

This means that a prosecutor always has a choice of three possibilities: charge the employee, charge the corporation, or both. In practice,

[45] Julie R. O'Sullivan, *Federal White Collar Crime: Cases and Materials*, 4th ed. (St. Paul, MN: West Publishing, 2009), p. 164.

prosecutors like easy-conviction legal doctrines because they can use them as leverage to elicit cooperation.[46] That makes easy-conviction doctrines useful, but utility does not make the *respondeat superior* doctrine fair or reasonable. For that, the U.S. Attorney's Manual sets out guidance on how prosecutors should make the choice:

> Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees, or by all the employees in a particular role within the corporation, or was condoned by upper management. On the other hand, it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict *respondeat superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.[47]

It is these criteria – the injunction to indict the corporation for pervasive wrongdoing but not for isolated misconduct by rogue individuals – that make the doctrine fair.

All the same things are true if you substitute "state apparatus" for "corporation" – not in existing doctrine but in principle. Governments are corporate organizations, and everything I have quoted from the U.S. Attorney's Manual about corporations could apply to states as well. If wrongdoing is pervasive and carried out by a large number of state functionaries, or all the functionaries in a given role, or condoned by higher officials, then the state is a criminal. This idea is a logical extension of the definitions of crimes in the Rome Statute of the ICC. A crime against humanity requires individual crimes committed "pursuant to or in furtherance of a State or organizational policy," and a war crime requires a plan or policy. In both definitions, the policy element is what makes the crime international.[48] If individuals pursue a state policy to commit widespread or systematic murders, then the state, not just the individuals, is a murderer.

There is one other historical model for the idea of state criminality, one that I mentioned earlier. Article 9 of the Nuremberg Charter states, "At the trial of any individual member of any group or organization the

[46] As the U.S. Attorney's Manual explicitly explains, § 9-28.700, cmt. (2008).
[47] U.S. Attorney's Manual, § 9-28.500 (2008).
[48] William Schabas, "State Policy as an Element of International Crimes," *Journal of Criminal Law and Criminology* 98 (2008): 953–82.

Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." Under this article, the prosecutor indicted seven organizations: the Reich Cabinet, the Leadership Corps of the Nazi Party, the SS, the SD, the Gestapo, the SA, and the General Staff. The aim, clearly, was to pick out the subentities of the German state that were criminal to the core.[49] Article 9 might have paved the way to recognizing that a state as such can be a criminal.

Unfortunately, however, the Nuremberg Charter did one other thing as well: in Article 10, it provided that governments could try individual members of the criminal organizations, and "[i]n any such case the criminal nature of the group or organization is considered proved and shall not be questioned" if the group had been convicted under Article 9.

Using group criminality as a shortcut to individual criminal convictions proved to be more than the Tribunal could stomach. Even low-ranked members of the organization, who had little or no knowledge of or involvement in its crimes, could be convicted and, in theory, receive the death penalty. In its judgment, the Tribunal pared down the groups to "exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of [crimes]."[50] The Tribunal would not tolerate automatic transfer of the criminality of the group to individuals, and – stuck as it was with Articles 9 and 10 – used its discretion to redefine the group as an aggregate of guilty individuals. This in effect eliminates the notion of group criminality, and neither Article 9 nor 10 survived. They were excised when the UN General Assembly adopted the Nuremberg Principles in 1950.

In my view, the General Assembly threw out the baby (Article 9) with the bathwater (Article 10). Had Article 9's conception of criminal organs of the state survived in international law, it would have provided a model for declaring an entire state to be a criminal.

Notably missing from these doctrines are answers to vexing philosophical questions. What kind of a thing is an organization? How can it act? Is it the kind of thing to which acts can coherently be ascribed? Is its action some function of the acts of individuals within it? If the organization can act, can it act responsibly or irresponsibly, or would such

[49] However, the cabinet and General Staff were acquitted, as was the SA (Storm Troopers), which had ceased to exist years before the war.

[50] Judgment of the International Military Tribunal: The Accused Organizations. Available at http://avalon.law.yale.edu/imt/judorg.asp#general.

responsibility ascriptions be crude anthropomorphisms? Can it be judged morally? Is it an appropriate vehicle for reactive attitudes such as anger, indignation, or affection? If the organization is blameworthy, does that relieve the blameworthiness of individual employees or members?

These are intricate questions about which philosophers have had, and still have, a lot to say.[51] I propose to duck them all and simply assume it is possible to work out a coherent theory of organizational action and responsibility. For present purposes, we can settle for a crude version of the Turing Test: if, based on outcomes alone, you can't tell whether the decision maker was a single individual or a group of functionaries deliberating in the organization's name, that is good enough reason to suppose that some doctrine of organizational action and responsibility must make sense. Then the answer to our question "how can an organization be a criminal?" is that its functionaries commit crimes in a way that meets whatever the conditions are for ascribing their acts to the organization.

WHAT IS THE TEST OF STATE CRIMINALITY?

The U.S. Attorney's Manual gives plausible criteria for organizational criminality, but they can be further refined. Consider a provision of the Australian Criminal Code specifying that a culpable *mens rea* may be assigned to a "body corporate" if "a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance with the relevant provision" or "the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision."[52] This adds something important to the U.S. Attorney's Manual test of "pervasive" wrongdoing – namely, that pervasive

[51] For a sampling: Michael Bratman, "Shared Intention," *Ethics* 104 (1993): 97–113 and "Shared Cooperative Activity," *Philosophical Review* (1992): 327–41; Peter French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984); Margaret Gilbert, *Sociality and Responsibility: New Essays in Plural Subject Theory* (Rowman & Littlefield, 2000); Christopher Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: Cambridge University Press, 2000); Larry May, *Sharing Responsibility* (Chicago: University of Chicago Press, 1993); John Dewey, "The Historic Background of Corporate Legal Personality," *Yale Law Journal* 35 (1926): 655–73; Frederick Hallis, *Corporate Personality: A Study in Jurisprudence* (London: Oxford University Press, 1930); Larry May and Stacey Hoffman, eds., *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Savage, MD: Rowman & Littlefield, 1991).

[52] Australian Criminal Code §12.3(2)(c) and (d)(1995). Available at http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/sch1.html. Corporate culture is defined as

wrongdoing results from organizational culture.[53] Organizations develop internal cultures – norms of interaction, articulated values, widely shared attitudes and emotions, canonical stories and histories that explain what the organization stands for. Returning to Arendt's insight that in some settings values become inverted and perverted, so that deviance and normality trade places, the bad corporate culture will turn conscientious employees into criminals.[54] It makes sense in that case to ascribe criminality to the organization. Bad organizational culture adds a qualitative dimension to the purely quantitative concept of pervasiveness of wrongdoing.

When we consider state criminality, I believe that two other conditions should be added as well. The first is the active involvement of upper levels of the state apparatus. Merely condoning wrongdoing is not enough to make a state peopled by criminals into a criminal state. To be a criminal state, the leadership itself must take an active rather than merely passive role.

I don't mean to argue against standards of individual command responsibility based on passive *mens rea* such as negligence, recklessness, or *dolus eventualis*.[55] These, however, are standards of individual criminal liability. My suggestion is that state criminal liability requires actively, not passively, complicit officials.

What about the state's people? As Drumbl tellingly and forcefully argues, innocent bystanders in a criminal state such as Rwanda in 1994 are not entirely innocent (APIL, pp. 25–26).[56] Bystanders who go about

"an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place." Ibid., §12.3(6).

[53] For a proposal to add a similar test to U.S. law, see Pamela H. Bucy, "Corporate Ethos: A Standard for Imposing Corporate Criminal Liability," *Minnesota Law Review* 75 (1991): 1095–184.

[54] Perhaps the best study of this phenomenon in business corporations remains Robert Jackall, *Moral Mazes: Inside the World of Corporate Managers* (New York: Oxford University Press, 1989).

[55] See Amy J. Sepinwall, "Failure to Punish: Command Responsibility in Domestic and International Law," *Michigan Journal of International Law* 30 (2009), pp. 251–303.

[56] This is the theme of Karl Jaspers's *The Question of German Guilt*, as well as Raul Hilberg's *Perpetrators, Victims, Bystanders*; it is one of the issues at play in the debate between Christopher Browning, Daniel Goldhagen, and Goldhagen's critics and defenders. See, e.g., Omer Bartov, "Reception and Perception: Goldhagen's Holocaust and the World," in *The "Goldhagen Effect": History, Memory, Nazism Facing the German Past*, ed. Geoff Eley (Ann Arbor: Michigan University Press, 2000), pp. 33–87. See Laurel E. Fletcher, "From Indifference to Engagement: Bystanders and International Criminal Justice," *Michigan Journal of International Law* 26 (2005): 1013–95.

their ordinary business when they see evildoing and atrocity reinforce the sense of creepy normality that makes good into bad and bad into good. Some bystanders may actually be beneficiaries of the state crimes, taking over houses and property of the disappeared and the murdered. Even the most despotic political leaders always have a substantial number of loyalists – their fellow party members; their clan, tribe, or ethnicity; the clients in their patronage network; their retainers and guards and soldiers. In a criminal state, it is not only the officials who commit crimes pervasively; the evil infects at least some significant portion of the people.[57]

Thus, the test of state criminality I propose includes some combination of the following: pervasive wrongdoing, a bad political culture, active involvement of a significant part of the state's leadership, and the complicity of at least some significant portion of the people.

The analogy of state criminality with corporate criminality is imperfect, because the latter focuses on the organization and its employees. The equivalent in the context of state criminality is the *government* or *regime*, not the state itself. A state is more than a government: it is a government of a territory and its population.[58] The state itself, in law and in political theory, has legal personality – it is, in Hobbes's words, an artificial person – that survives changes in government and even in the form of government, so long as its territory stays more or less intact and its population more or less stable. Thus, we should distinguish the state, the regime (the government viewed collectively), and the particular personnel holding power within that regime. What the nature is of the political relationship binding together the elements of the state is a matter

[57] Jaspers famously distinguished different species of German guilt. In addition to criminal and moral guilt, Jaspers identifies categories of "metaphysical" and "political" guilt. The former is the guilt that attaches to the surviving bystanders simply by virtue of the fact that they survived – in other words, that they did not resist the atrocities unto death – and it is a notoriously speculative category. (I have discussed it in Luban, "Intervention and Civilization: Some Unhappy Lessons of the Kosovo War," in *Global Justice and Transnational Politics*, eds. Pablo de Greiff and Ciaran Cronin (Cambridge, MA: MIT Press, 2002), pp. 96–101). To be clear, the bystander guilt I discuss here is not "metaphysical," but rather something more tangible: passively acquiescing in an inversion of values. This is closer to Jaspers's "political guilt," which follows from his dictum that "Everybody is co-responsible for the way he is governed." *Question*, p. 31.

[58] "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states." Montevideo Convention on the Rights and Duties of States, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S., Article 1. This is more or less the definition of "state" adopted in the *Restatement (Third) of the Foreign Relations Law of the United States*, vol. 1, §201, p. 72.

of debate among philosophers. The state may be, as Hobbes thought of it, "one person, of whose acts a great multitude, by mutual covenants one with another, have made themselves every one the author";[59] it may be Burke's "partnership between those who are living, those who are dead, and those who are to be born";[60] or, as Hume argued, it may simply be the last warlord standing in a battle of warlords to consolidate rule over the territory, who maintains his rule by "obedience . . . so familiar, that most men never make any enquiry about its origin or cause" – or else "by employing, sometimes violence, sometimes false pretences, to establish his dominion over a people a hundred times more numerous than his partizans."[61]

The test of state criminality proposed here rests on an understanding of the state according to which different states may embody different political relationships between the regime and the population. It is closest to Hume's. If Hobbes's definition were accepted, then every criminal regime would automatically be a criminal state, because the population "have made themselves every one the author" of the state's deeds. That would be a useless and unfair legal fiction. To be sure, even a police state starts and – usually – finishes with the political support of a significant part of its people. Otherwise it could never take power in the first place. However, after the police state takes power, it may continue to hold it through violence and terror long after it has lost popular support. Whether crimes should be attributed solely to individuals, or – as in the Nuremberg Article 9 model – to collective entities within the government, or to an entire regime, or, finally, to the state itself will depend on the specific political culture of the state, meaning here not only the organizational culture of the regime but also the level of support for the crimes within the population.

IS IT A BAD IDEA?

The previous three sections have described a legal model of state criminality without considering whether it is a good idea to implement it. Even sympathetic readers may find the prospect of declaring states criminals a mistake.

[59] Hobbes, p. 112.
[60] Edmund Burke, *Reflections on the Revolution in France* (Garden City, NY: Anchor Books, 1973), p. 110.
[61] David Hume, "Of the Original Contract," in *Essays Moral, Political, and Literary*, ed. Eugene F. Miller (Indianapolis, IN: Liberty Classics, 1985), pp. 470–72.

Since Nuremberg, one standard argument for restricting international criminal liability to natural persons has been that otherwise guilty individuals will hide behind the corporate veil of the state, ducking their own culpability by scapegoating the artificial person. Following this line of reasoning, it might be objected that a doctrine of state criminality will simply muddy the waters and provide a shield for flesh-and-blood bad guys.

Despite its surface plausibility, this argument strikes me as one-sided and mistaken. Scapegoating can go in both directions, and it might just as easily be said that guilty organizations hide their rotten culture by shifting all the blame to a fall guy and cutting him loose. The criminologist John Braithwaite, studying corporate crime in the pharmaceutical industry, interviewed executives who referred to themselves as "vice-presidents in charge of going to jail." They explained that if their company ever got caught, they would take the fall, expecting the company to take care of them financially.[62] Not that all organizations resort to this remarkable level of cynical conspiracy; but many will prefer to scapegoat employees rather than admitting the pervasiveness of the rot. After the Abu Ghraib scandal, General Janice Karpinski, who was in charge of U.S. prisons in Iraq, was the only high-level officer to take the fall (she was demoted to colonel), and she bitterly accused the army of scapegoating her; she later offered affidavit testimony implicating her superiors, including the U.S. secretary of defense.

These are familiar arguments from the literature on corporate crime, but it seems that only one side of the argument – the fear of guilty individuals scapegoating the state – has gotten traction in international criminal law; the other side, the argument that a rotten state might scapegoat individuals, has received no attention that I am aware of, presumably because the idea of state criminality is so alien to international law. In any event, state or regime criminality does not exclude individual criminality; both individual leaders and a state or regime as a whole can be indicted in tandem, just as under the *respondeat superior* theory of corporate criminality, both individual employees and corporations can be indicted.

A second argument against criminalizing states is that doing so would in effect blame their people. "We would also make clear that we have

[62] John Braithwaite, "Passing the Buck for Corporate Crime, *Australian Society* (1991): 3. See also Jackall, p. 85.

no purpose to incriminate the whole German people," Robert Jackson proclaimed in his opening address at Nuremberg. He went on:

> We know that the Nazi Party was not put in power by a majority of the German vote. We know it came to power by an evil alliance between the most extreme of the Nazi revolutionists, the most unrestrained of the German reactionaries, and the most aggressive of the German militarists. If the German populace had willingly accepted the Nazi programme, no Storm-troopers would have been needed in the early days of the Party, and there would have been no need for concentration camps or the Gestapo.[63]

This argument played to the German people's rage at the Nazis for the ruin of defeat, but thinking of the German people solely as innocent victims of a Nazi conspiracy was disingenuous. True, the Nazis won "only" 44 percent of the vote in 1933, but that was the largest of any of the parties. Jackson implies that Storm Troopers were necessary in the early days of the Nazi Party because the German public did not want Nazi rule. Even if he was right (and one can readily think of other explanations for the Storm Troopers), that was 1923, not 1933. Both of Jackson's assertions are true only in the most literal and technical sense. In fact, Hitler's popularity rose with his successes and fell only when the war began to fail. In Drumbl's terms, a great many Germans found themselves "beneficiaries" of Hitler's crimes and lost their faith in the Führer only when benefits turned to catastrophe.[64] The political culture of Germany was itself deeply implicated in the crimes of the regime, and on the tests I have proposed, Germany was indeed a criminal state.

This was precisely what Jackson wished to deny, however. Jackson had no purpose to incriminate the whole German people because the occupation aim was to win them over to democracy, and that required commiserating with them rather than alienating them. Apparently, the Allies consciously sought to scapegoat a few individuals because of the political inconvenience of proclaiming the guilt of many.[65] Here, I want

[63] The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg, Germany, Nov. 21, 1945 (1946). The Avalon Project. http://avalon.law.yale.edu/subject_menus/fed.asp.

[64] See generally Friedrich Perzyval Rech-Malleczewen, *Diary of a Man in Despair*, trans. Paul Rubens (London: Macmillan, 1970), one of the most remarkable moral criticisms from within Germany, and one that greatly influenced Arendt.

[65] See, e.g., Diane Marie Amann, "Group Mentality, Expressivism, and Genocide," at p. 21.

to emphasize that culpability in mass atrocity is seldom simple. There are good reasons to restrict individual criminal liability to perpetrators and accomplices, perhaps with the categories suitably broadened.[66] Culpability and liability are not the same, however, and the "reprobation and stigmatization" of those who supported a state that comes from declaring their state to be an international criminal seems justified in the most elemental way: they deserve it.

This answer may not be sufficiently compelling. Alienating a people can simply make the transition from state criminality more difficult. Nationalism is a potent force, and nationalists will inevitably reject the charge of state criminality and attribute it to a political conspiracy of their enemies. This was, of course, Milošević's strategy at his trial. The issue arose again in 2007 when the ICJ decided the *Bosnia v. Serbia* genocide case, the closest thing international law has seen to putting a state on trial for an international crime.[67] (Technically, the case was "civil" – Bosnia accused Serbia of breaching its obligations under the Convention against Genocide and asked for monetary damages.) The ICJ found that the only provable act of genocide in the Balkan Wars was the Srebrenica massacre, that Serbia was insufficiently linked to that massacre to support a finding of state responsibility, and that Serbia was guilty only of sheltering Radovan Karadžić and Ratko Mladić.

As is now well known, the ICJ screened itself from damaging evidence of Serbian government involvement. It chose an especially demanding legal test of state responsibility; and its finding that Srebrenica was the only act of genocide in the Balkan Wars was not credible.[68]

One of the dissenting judges, Algeria's Mahmed Ahiou, speculated that the Court may have feared taking sides in a politically fraught historical

[66] I would include Category I and Category II Joint Criminal Enterprises (JCEs), but I accept the criticisms of Danner, Martinez, Osiel, and others that Category III JCEs are really illegitimate "just convict everybody" prosecutorial conveniences. Alison Marston Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law," *California Law Review* 93 (2005): 75–169; Mark Osiel, "The Banality of Good: Aligning Incentives against Mass Atrocity," *Columbia Law Review* 105 (2005): 1751–862.

[67] Case Concerning the Application of the Convention for the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. General List No. 91 (Judgment of Feb. 26) [henceforth: *Bosnia v. Serbia*].

[68] Marlise Simons, "Genocide Court Ruled for Serbia without Seeing Full War Archive," *New York Times* (April 9, 2007). After Serbia succeeded in persuading the ICJ to screen an archive of documents, "Vladimir Djeric, a member of the Serbian team, told lawyers there that 'we could not believe our luck.'" Ibid. See also Ruth Wedgwood, "Slobodan Milosevic's Last Waltz," *New York Times* (March 12, 2007).

debate or intruding on state sovereignty.[69] There is a far more obvious reason, however, which was laid out to me with great clarity by a Serbian lawyer a few months after the decision. Had the ICJ labeled the Serbian state a *génocidaire*, the nationalist backlash might have toppled the government, empowered the most right-wing nationalist parties, and derailed efforts to bring Serbia back into the fold of normal European states. The lawyer added, "You have no idea what we went through. I was living in Belgrade at the time, and could barely earn enough to eat." This lawyer, I might add, is no nationalist: a former law professor of cosmopolitan convictions who now works for one of the major humanitarian organizations in the world.

The phenomenon is familiar to criminologists who have studied shame sanctions. As John Braithwaite noted in connection with youthful offenders, shaming and stigmatizing them may simply push them deeper into a criminal subculture, such as gang life. Only when the aim is reintegrating the offender into the community can the sanctions actually help reduce crime rather than reproduce it.[70] Serbia was on a path to reintegration, and shaming its people might have driven it off that path.

I have no a priori response to this objection – obviously, there is nothing a priori to be said about a complex prediction of what might happen or might have happened. The lawyer with whom I was speaking may have been right or may (as I suspect) have been wildly overestimating the effect of a declaration in a lawsuit. Perhaps the ICJ's worry was that a finding of genocide would have required a hefty payment of compensation, which the regime may not have been willing to pay, defying the Court and revealing its weakness. (This was another speculation in Judge Ahiou's dissenting opinion.[71]) Perhaps it would have been resented like the Versailles-imposed reparations on Germany in the wake of World War I. On the other hand, it is worth recalling that at the time of the *Pinochet* case, many acute observers worried that it would destabilize the fragile Chilean democracy; instead, it seems to have fortified the resolve within Chile to end the amnesty and come to terms with the past.[72] Which

[69] *Bosnia v. Serbia*, Opinion Dissidente de M. le Juge Mahiou, ¶58. Available at http://www.icj-cij.org/docket/files/91/13706.pdf. Judge Mahiou was referring specifically to the Court's refusal to demand additional evidence from Serbia.

[70] John Braithwaite, *Crime, Shame, and Reintergration* (Cambridge: Cambridge University Press, 1989).

[71] *Bosnia v. Serbia*, Opinion Dissidente de M. le Juge Mahiou, ¶58.

[72] Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005); Ellen Lutz and Kathryn

of these is more likely are political imponderables that I do not hope to address.

HOW DO YOU PUNISH A STATE?

Even supposing that states can be criminals and that the law should recognize that fact, how can a state be punished? Here, I mention some possibilities without addressing details. Again, the treatment of corporate crime can provide examples.

There is, first and most drastically, capital punishment for the state. In the context of corporate crime, capital punishment means ending the corporate charter or imposing a fine that reduces corporate assets to zero. In the context of state criminality, it means conquest and reconstruction, as in Germany and Japan after World War II. Both of these seem to have been successful examples of "reintegrative shaming," although few believe that the Nuremberg and Tokyo trials contributed to it. Germany's project of *Vergangenheitsbewältigung* (mastering the past) ultimately took three generations; Japan's is arguably still a work in progress.

Second, there are fines and reparations, both to outsiders and to victims within the state. It would obviously be perverse to demand internal reparations unless the criminal regime has been destroyed and the new regime is committed to reparations for the victims or their survivors. Compensating victims of atrocity can be a difficult process, particularly if it involves removing benefits from the beneficiaries of state crime. In many instances of transitional justice punishing individual criminals of the ancien régime has proven easier than restoring stolen property to which the thieves feel entitled by a past sense of grievance.[73] International tribunals are obviously not in a position to administer such microlevel reparation, but local institutions may be equipped to do so.

Fundamentally, however, the mechanism for recognizing state criminality is, as in Article 9 of the Nuremberg Charter, purely declaratory. This might be dismissed as a merely verbal flourish – unnecessary given that trying and sentencing the individual state leader implicitly puts the state on trial, and quite possibly a terribly destructive one for the reasons explored in the previous section. However, if we remember that the center of gravity in international criminal proceedings lies in the trial, not

Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America," *Chicago Journal of International Law* 2 (2001): 1–33.

[73] See Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004).

the punishment, then the point of putting the state in the dock becomes more apparent. As many commentators have noted, the criminal trial of an individual must focus on that individual, and bringing in pieces of history that cannot be directly tied to the defendant distorts the meaning of a criminal trial.

If, however, the state is on trial, the inquiry can meaningfully include the questions that Arendt raised. What were the mechanisms by which the state became criminal? How did it invert good and evil, and what were the values it appealed to in doing so? These are questions that strain the methods of a court of law, as the *Eichmann* opinion noted.[74] Such questions are nevertheless inevitable in the trial of highly placed defendants, as can readily be seen in the extensive background sections of ICTR judgments. Orienting the inquiry toward them by asking how the state operated is not beyond the capacity of a law court. Whether it is beyond the capacity of politics to establish or tolerate such an inquest is a question that I cannot answer.

[74] "The court does not have at its disposal the tools required for the investigation of general questions. . . . For example, in connection with the description of the historical background of the Holocaust, a great amount of material was brought before us in the form of documents and evidence, collected most painstakingly, and certainly in a genuine attempt to delineate as complete a picture as possible. Even so, all this material is but a tiny fraction of all that is extant on this subject. According to our legal system, the court is by its very nature 'passive,' for it does not itself initiate the bringing of proof before it, as is the custom with an enquiry commission. Accordingly, its ability to describe general events is inevitably limited. As for questions of principle which are outside the realm of law, no one has made us judges of them." *Prosecutor v. Eichmann*, Criminal Case No. 40/61, District Court of Jerusalem (1961), ¶2.