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'Cruel Men Can Do Kind Things and Kind Men Can Do Cruel Things'

Reconsidering the Enemy of Humanity in Contemporary International Criminal Trial Discourse

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1 Introduction

The term *hostis generis humani* is an ambiguous one. In his article 'The Enemy of All Humanity,' David Luban illuminates how the term has been deployed in different ways throughout history.[1] These different uses are related, but also denote different classes of criminals and different types of 'heinousness.' Consequently, he analyses three dimensions of ambiguity: is *hostis generis humani* a substantive or a jurisdictional concept? How do we understand the war-talk term 'enemy' in a legal context? And what does 'humanity' actually mean? To resolve these ambiguities and to undo the term from its dehumanizing potential, Luban urges us to reclaim the *hostis generis humani* as a member of humanity, rather than to exclude him.[2] He argues that, despite its intrinsic ambiguity and potential abuse, there is no reason to erase the term from our moral vocabulary as long as we insist that the 'enemy of humanity' is part of and accountable to humanity.

However, even if the term is used carefully and non-inflammatory, and even if its ambiguities are somehow resolved, I still wonder if and why there is a *need* to use the concept of 'enemy of all humanity' in contemporary international criminal justice (hereafter: ICJ) discourse, and specifically in international criminal trials. At first sight, it appears to be a suitable term in the context of unimaginable atrocities, but I wonder if ICJ can perhaps do without it. According to Luban, 'no other term quite captures the twin nature of atrocity and persecution crimes that makes the idea of international criminal justice imperative: that they are radically evil, and that they are everyone's business.'[3] At the same time, he notes that the phrase was never explicitly used at Nuremberg,[4] nor in the Eichmann trial.[5] And, when turning to contemporary trials, Luban says that '[s]urprisingly, the literal phrase *hostis generis humani* almost never appears in the jurisprudence of interna-

1 David Luban, 'The Enemy of All Humanity,' *Netherlands Journal of Legal Philosophy* 2 (2018): 112.
2 Following Luban, I use the male third-person singular pronoun when generically referring to the perpetrator or defendant.
3 Luban, 'Enemy of All Humanity,' 134.
4 Luban, 'Enemy of All Humanity,' 121.
5 Luban, 'Enemy of All Humanity,' 121.

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tional tribunals.'[6] But still he considers it to be an 'unspoken premise' that the defendant in such mass atrocity trials is regarded to be a *hostis generis humani*. This would mean that the term is implicitly present in contemporary ICJ discourse. Is this indeed the case? And if so, is this surprising?

The main aim of this response is to empirically explore in more detail whether explicit or implicit references to the 'enemy of humanity' are present in contemporary trial discourse, and how these references are deployed. Additionally, I briefly speculate about the cause of its presence or absence. In order to do so, I draw on empirical examples from trial transcripts of a variety of contemporary cases before the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court (ICC), the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).[7]

2 The enemy of humanity in the courtroom

Aside from one example, Luban notes that no explicit uses of the term *hostis generis humani* occur in the jurisprudence of international tribunals.[8] He bases this claim on a search through the decisions of the Nuremberg and Tokyo tribunals, the SCSL, the ECCC and the ICC. However, the absence of the term in tribunal decisions does not necessarily mean an overall absence in ICJ discourse. This discourse reaches wider than tribunal judgements. The classification of defendants and, potentially, the conceptualization of the 'enemy of humanity' in ICJ happens in a broader set of legal storytelling moments, for example in the pre-trial proceedings, during the opening and closing statements, in other courtroom sessions, in statements to the press, and in outreach documents and activities.[9] The ICJ discourse includes the views of not only judges but also prosecutors, defense lawyers, victims, defendants and external critics. Thus, the conceptualization of the modern 'enemy of humanity' in ICJ takes different forms and speaks through different voices. In this short response, I would like to draw attention to a few of these instances, specifically opening statements, when the defendant and his 'hei-

6 Luban, 'Enemy of All Humanity,' 123. Luban himself notes that it might not be so surprising because these tribunals did not need to claim universal jurisdiction. Still, Luban argues that substantively, the term is warranted in the contemporary ICJ context, provided that it is used inclusively.

7 For a more extensive analysis of the portrayal of the perpetrator in contemporary international opening statements, see Sofia Stolk, 'A Sophisticated Beast? On the Construction of an "Ideal" Perpetrator in the Opening Statements of International Criminal Trials', *European Journal of International Law* 29 (2018): 677–701.

8 Luban, 'Enemy of All Humanity,' 123-124.

9 Tim Kelsall, 'Politics, Anti-Politics, International Justice: Language and Power in the Special Court for Sierra Leone,' *Review of International Studies* 32 (2006): 587-602; Tim Meijers and Marlies Glasius, 'Expression of Justice or Political Trial?: Discursive Battles in the Karadžić Case,' *Human Rights Quarterly* 35 (2013): 720-52; Darryl Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win,' *Leiden Journal of International Law* 28 (2015): 323-47; Jillian Dobson and Sofia Stolk, 'The Prosecutor's Important Announcements; the Communication of Moral Authority at the International Criminal Court,' *Law, Culture and the Humanities* (2016).

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nous X-factor' are presented to the tribunal's different audiences. As I have argued elsewhere, the opening statement is a unique moment in the trial discourse in which trial participants reach out to a broad audience inside but also outside of the courtroom. It is one of the few moments in trial that is widely covered by the international media, and thus potentially has a wide reach and an important impact on the (re)production of ICJ discourse.[10]

A search through opening statement transcripts of the International Military Tribunal (IMT), ECCC, SCLS, ICTY and ICC confirm Luban's observation that the term *hostis generis humani* or 'enemy of humanity' is largely absent from trial discourse. Implicitly, we may consider a few references to 'evil' that include a universal component. In the opening statement by Justice Jackson at the IMT, he speaks of 'men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.'[11] In the ECCC, the prosecutor describes the court as 'the only instrument we have to address crimes of shocking magnitude that threaten the fragile bonds that unite all of humanity.'[12] In Sierra Leone, the prosecutor opened his first case with the words:

> 'On this solemn occasion mankind is once again assembled before an international tribunal to begin the sober and steady climb upwards toward the towering summit of justice. The path will be strewn with the bones of the dead, the mourns of the mutilated, the cries of agony of the tortured echoing down into the valley of death below.'[13]

In ICC and ICTY statements, the words 'evil' and references to 'humanity' seem to occur less frequently,[14] but words as savagery and barbarism allude to behavior outside of the realm of what we consider human. Similarly, by describing how victims were dehumanized, how the defendants 'treat their fellow men as subhuman,'[15] the humanity of the defendant is questioned.

However, more often than rhetorically resorting to labels of inhumanity or radical evil, the character sketches of defendants in the opening statements describe actual human beings; accountable agents that knowingly and willingly behaved in a way that is highly reprehensible, but human. Additionally, there seem to be different shades of evil. Despite the aim of international criminal trials to only pros-

10 Sofia Stolk, 'A Solemn Tale of Horror: The Opening Statement of the Prosecution in International Criminal Trials,' PhD Dissertation, VU Amsterdam, 2017.

11 Robert H. Jackson, 'Opening Statement before the International Military Tribunal,' The Trial of German Major War Criminals – Proceedings of The International Military Tribunal Sitting at Nuremberg (London: 1945).

12 *Nuon Chea, Ieng Sary, Khieu Samphan* (002/19-09-2007-ECCC/TC), Trial Chamber, 22 November 2011, opening statement of the prosecution, 66.

13 *Norman, Fofana and Kondewa* (hereinafter CDF), (SCSL-04-14-T), Trial Chamber I, 3 June 2004, opening statement of the prosecution, 6.

14 Except of course in the 'crimes against humanity' phrase.

15 CDF, *supra* note 13, opening statement of the prosecution, 15.

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ecute those who are *most* responsible, this 'class' of criminals still includes perpetrators of different ranks and different levels of responsibility. Luban claims that the *hostis generis humani* label in contemporary international law is used 'to denote perpetrators of core crimes, that is, of radical evil,'[16] because 'the crime's gravity and scale offend the international public order.'[17] But do all individuals who commit one of the crimes that have been identified as 'core crimes' indeed belong to the category of radical evil? In reality, there seems to be more than one typical defendant in contemporary international criminal trials, with more than one possible 'heinousness X-factor.' Duško Tadić is not Slobodan Milošević, Morris Kallon is not Charles Taylor, and Dominic Ongwen is not Joseph Kony. This means we can find different elements from Luban's 'Rouges' Gallery of Hostes Generis Humani' occurring in the courtroom, and these elements are not mutually exclusive.

For example, in many statements we can recognize what Luban calls 'the tyrant'; the man who blatantly misuses his power and places himself above the law. In his opening of the case against the leaders of the Civil Defence Forces (CDF) before the SCSL, the prosecutor notes that one of them, Allieu Kondewa:

> '(...) had a high pedestal stool and there was a little boy playing a guitar underneath the seat. (...) "King Kondewa", as he called himself, to show how powerful he was and the authority which he commanded.'[18]

At the ICC, the victim representative notes in the closing statement that Thomas Lubanga is called 'Papa Lubanga' by his child soldiers, as 'some sort of a semi-god whose praise was chanted during training and during the visits he made to the camps, visits which were considered to be major events.'[19] At the ICTY, Vojislav Šešelj is said to refer to himself as 'duke,'[20] and Ratko Mladić is described as 'a man who has no doubts, only a total assurance that he is right, the world wrong, and that his people have been slandered.'[21]

Interestingly, these descriptions resonate more with what Luban introduces as Plato's description of enemies of all the virtuous, rather than enemies of humanity.[22] Self-assigned superhuman qualities do not necessarily make someone inhuman, or against humanity. Rather, these practices of self-indulgence seem to refer to extremely vain human beings.

Another set of features is closely connected to what Luban describes as the class of 'torturers,' the ones who order and commit brutal violence. At the ICTY, the

16 Luban, 'Enemy of All Humanity,' 121.
17 Luban, 'Enemy of All Humanity,' 123.
18 CDF, *supra* note 13, opening statement of the prosecution, 24.
19 *Lubanga* (ICC-01/04-01/06-T-356), Trial Chamber I, 25 August 2011, closing statement of victim representatives, 88.
20 *Šešelj* (IT-03-67-T), Trial Chamber, 7 November 2007, opening statement of the prosecution.
21 *Mladic* (IT-09-92-T), Trial Chamber, 16 May 2012, opening statement of the prosecution, 443.
22 Luban, 'Enemy of All Humanity,' 126.

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prosecution notes that Fatmir Limaj 'was an efficient and zealous commander, and there is no doubt that this man enjoyed the infliction of gratuitous and brutal violence.'[23] Another example is Kaing Guek Eav or 'Duch,' the supervisor of the S-21 prison facility who appeared before the ECCC. The prosecutor calls him 'devoted and merciless,'[24] and notes that:

> '[t]he S-21 interrogators did not independently choose to use such harsh torture techniques, but were taught by the accused. As he detailed in one of his statements, the accused told interrogators to torture prisoners by either beating with a stick, electric shocks, suffocation with a plastic bag, or water boarding – pouring water over a detainee's head after covering his face with a towel. The accused has stated that beating with a stick was used the most because the other forms of torture wasted time.'[25]

These crimes denote a certain disdain for the suffering of the victims, a degree of thoughtlessness, or even a sadistic enjoyment of violence. According to the prosecutor in *Šešelj,* 'the root of this evil is a lack of empathy.'[26] By ignoring the humanity of the victims, one denies his own humanity. This relates to the observations of Hannah Arendt in the *Eichmann* trial.[27] But, does the lack of empathy for other human beings make you an enemy of *all* humanity? Here, the question 'what is humanity' becomes pertinent. Different meanings of the concept appear to coexist in trial discourse; the defendant can be an 'enemy of humanity' because he harmed humanity as a collective, but also because he attacked the human nature of his victims, or even undermined his own human nature. In the careful analysis of Macleod, these different uses of the concept 'humanity' have different implications.[28] But in ICJ discourse, they appear to be conflated. For example, Duch's defense lawyer explicitly wonders whether his client has left humanity and asks:

> '[w]ill we be able at the end of these hearings to have, to be able to return to the victims all of the humanity? But to also be able to allow those or the one who had exited humanity to return to humanity.'[29]

On the other hand, the prosecutor in the same case notes that the trial aims 'to give back to us a bit of the humanity that we all lose in the face of such horrors.'[30]

23 *Limaj, Musliu and Murtezi* (IT-03-66), Trial Chamber, 15 November 2004, opening statement of the prosecution, 344.
24 *Kaing Guek Eav alias 'Duch'* (001/18-07-2007-ECCC/TC), Trial Chamber, 31 March 2009, opening statement of the prosecution, 62.
25 *Duch*, *supra* note 24, opening statement of the prosecution, 36.
26 *Šešelj, supra* note 20, opening statement of the prosecution, 1850.
27 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin: ed. 2006)
28 Christopher Macleod, 'Towards a Philosophical Account of Crimes against Humanity,' *European Journal of International Law* 21 (2010): 281-302, at 286.
29 *Duch*, *supra* note 24, response of the defense, 91-92.
30 *Duch*, *supra* note 24, opening statement of the prosecution, 64.

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So, the commitment of these acts caused the victims *and* the perpetrator to lose (a bit of) their humanity, but also took away some humanity from humanity itself.[31] Humanity is used in a 'human-kind' sense, referring to the collective of human beings, as well as in the 'human-nature' sense, that what makes one human.[32] It is not clear to what kind of humanity an 'enemy of all humanity' in ICJ directs itself exactly.

For the ICJ discourse, the *hosti generis humani* concept is simultaneously too precise and too broad. Too precise, for it cannot account for all the different shades of evil; some shades that fall into the realm of the human, some tending towards inhuman or transcendental evil. On the other hand, the term is too broad, because it encompasses and confuses different meanings of humanity. Moreover, the word 'enemy' lacks entirely in these cases. Due to the multiple interpretations of 'humanity,' it is incredibly difficult to concretely point to the exact locus of such enmity. In these complex situations, ambiguity seems to have a function; it allows for multiple interpretations of humanity and evil to co-exist.

As can be expected, any references to any sort of evil are vigorously dismissed by the defense counsel, who argue for example that doing evil is not what their client is charged with[33] or do these kind of descriptions away as 'pure literature.'[34] But the label 'enemy of humanity' may also explicitly be rejected by the prosecution, especially when defendants are simply too ambiguous to fit into the category. This is most strikingly illustrated by defendants such as low-level perpetrators at the ICTY and in complicated cases such as that of former child soldier Dominique Ongwen. In the latter case, Chief Prosecutor Fatou Bensouda explicitly dismisses labels that put the defendant in a radical amoral category:

> 'People following the case against Dominic Ongwen may do so with mixed emotions. They will feel horror and revulsion at what he did but they will also feel sympathy. The evidence of many of the child victims in this case could, in other circumstances, be the story of the accused himself. The evidence makes it plain that he could be kind. (...) The reality is that cruel men can do kind things and kind men can do cruel things. A hundred percent consistency is a rare thing and the phenomenon of perpetrator victims is not restricted to international courts. (...) This Court will not decide his goodness or badness, nor whether he deserves sympathy but whether he is guilty of these crimes committed as an adult with which he stands charged.'[35]

31 For an analysis of the discourse of dehumanization and humanization in the *Duch* case, see also Luigi Corrias, 'Crimes Against Humanity, Dehumanization and Rehumanization: Reading the Case of Duch with Hannah Arendt,' *Canadian Journal of Law & Jurisprudence* 29, no. 2 (2016): 351-70.

32 MacLeod, 'Towards a Philosophical Account,' 283.

33 *Sesay, Kallon and Gbao* (hereinafter RUF), (SCSL-04-15-T), Trial Chamber I, 5 July 2004, opening statement of the prosecution, 19.

34 *Nuon Chea* et al., *supra* note 12, response of the defense, 23 November 2011, 41.

35 *Ongwen* (ICC-02/04-01/15), Trial Chamber IX, 6 December 2016, opening statement of the prosecution, 36-37.

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The prosecutor in the *Kordić and Čerkez* case at the ICTY make a similar statement about the complexity of circumstances in which human beings commit horrendous crimes:

> 'this is not a case where the Prosecution suggests that these defendants or either of them embarked on what they did with an initial intention to commit crime or monstrous acts. This is a case where people found themselves in conflict, and of course the conflict started by the Serbs, something outside the control of the parties to this particular case. They found themselves in conflict, and it may be that the Court will, in due course, consider whether it was a combination of their individual strengths and weaknesses, perhaps their inadequacies and their ambitions, that led in one case or the other to their having vested in them power and authority that might never have come to them in a well-ordered society.'[36]

In these cases, the label 'enemy of humanity' would not be appropriate. They echo Duff's considerations that in a criminal process where a human being is held to account, exclusionary enemy language is contradictory and potentially dangerous.[37] Moreover, it is not *necessary* to use the *hostis generis humani* label. It does not give us a better understanding of the situation, nor will it facilitate the legal process. To insist on the label could even damage the limited space for nuance that is created here in an otherwise very binary discourse.

Instead of resorting to 'easy' stereotypes of radical evil, these short excerpts confirm that core crimes are indeed committed by a wide variety of *human beings* with complex psychologies, a thesis that has been widely acknowledged in the fields of law, criminology, philosophy and literature alike.[38] Luban suggest a similar view: adopting his *standpoint of humanity* means accepting that the perpetrator of radical evil is one of us. However, by still calling him an 'enemy of humanity' who committed radical evil, he will remain the exception. To depict a humanity

36 *Kordić and Čerkez* (IT-95-14/2-T), Trial Chamber, 12 April 1999, opening statement of the prosecution, 8-9.

37 Antony 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.

38 See for example Alette Smeulers, 'Perpetrators of International Crimes: Towards a Typology,' in *Supranational Criminology: Towards a Criminology of International Crimes*, eds. A. Smeulers and R. Haveman (Mortsel: Intersentia, 2008), 233-266; Alette Smeulers and Wouter Werner, 'The Banality of Evil on Trial,' in *Future Perspectives on International Criminal Justice*, eds. Carsten Stahn, Larissa J. Herik, and John Dugard (Den Haag: TMC Asser Press, 2010), 24-43; Corrias, 'Crimes Against Humanity, 367-69; Luigi Corrias, 'The Inhuman Stain: Representing Humanity in International Criminal Law,' in *Humanity across International Law and Biolaw*, eds. Britta van Beers, Luigi Corrias, and Wouter G. Werner (Cambridge: Cambridge University Press, 2014), 67-86; Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: HarperCollins Publishers, 1992); Jan Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law,' *Finnish yearbook of international law* 12 (2001): 249-67; Saira Mohamed, 'Of Monsters and Men: Perpetrator Trauma and Mass Atrocity,' *Columbia Law Review* 115 (2015): 1157-1216.

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that is capable of 'reclaiming' this enemy gives the impression of an almost gracious act; and act that is performed by an innocent humanity, failing to acknowledge that this darker side of human nature is very much part of it. Moreover, it assumes that we – whoever that may be – are actually capable of deciding on this in- or exclusion, that it is a *choice* to do so.[39] Would it not indeed be fairer to admit that the perpetrator of core crimes *is* part of humanity and to undo the exclusion claim by abandoning the 'enemy of humanity' label altogether? Because even if these perpetrators are not *accepted* as part of humanity, they still are.

3 By way of conclusion

In the international criminal trial discourse, the moment when defendants are described as inhuman or evil are interspersed with character sketches that emphasize the defendant's humanity. No matter how despicable, his acts are those of an accountable human being. This balancing act between the human and inhuman is closely related to the paradox that Duff identified: describing the 'worst crimes' may warrant a radical evil, inhuman perpetrator, but staying true to the principles of criminal law requires a human being that can be held to account.[40] The absence of the 'enemy of all humanity' concept in trial discourse is not coincidental, but a consequence of these two conflicting aims. The paradox that Duff introduces not only reveals the danger of the label, but also the limits of its use.

Once more, I wonder whether the term *hostis generis humani* is useful and necessary in ICJ discourse. Is it true that, as Luban argues, 'no other term quite captures the twin nature of atrocity and persecution crimes that makes the idea of international criminal justice imperative: that they are radically evil, and that they are everyone's business?'[41]? The absence of the term in courtroom discourse seems to suggest something else: the term is not used explicitly, and its implicit use is ambiguous to say the least. In a way, the rhetoric in international criminal trials seems to do exactly what Luban suggest: it excludes the perpetrator of mass atrocity from humanity while simultaneously reclaiming him as an accountable human being. However, it does so without using the *hostis generis humani* label. I agree with Luban this label should never be used to actually exclude the perpetrators of mass violence from the community, but I think that, in practice, it is also possible to insist on the humanity of the perpetrator by staying away from this label all together. The image that it invokes is very powerful, and might exclude even without meaning to do so.

Finally, although I am cautious of the use of the 'enemy of humanity' term, I do not mean to suggest that the current ICJ trial discourse is doing a better job at

39 On the 'we' talk in ICL, see Immi Tallgren, 'The Voice of the International: Who is Speaking?,' *Journal of International Criminal Justice* 13 (2015): 135-55.

40 See Stolk, 'A Sophisticated Beast?'

41 Luban, 'Enemy of All Humanity,' 134.

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fostering non-exclusionary language that is shielded from dehumanizing expressions. The examples above show that, even without the use of the *hostis generis humani* term, the ICL discourse is filled with stereotypes, binary tropes and stigmatizing rhetoric.[42] Such an exclusionary discourse risks the production of an oversimplified morality and produces an understanding of mass atrocity that is reductive and divisional. Luban describes 'humanity' as an aspirational project rather than a fully formed moral community. Humanity does not 'exist,' it is created through invocation,[43] and 'derives meaning from its use.'[44] With this in mind, one can wonder what kind of humanity is aspired and created through the use of certain language in ICJ discourse. In my view, any radically limited way of describing defendants in stereotypical terms contributes to the conceptualization and creation of an exclusive humanity. As such, ICJ's divisive courtroom language contradicts its universalizing aspiration.

42 Fred Mégret, 'Practices of Stigmatization,' *Law & Contemporary Problems* 76 (2013): 287-318, at 302; Christine Schwöbel-Patel, 'Spectacle in International Criminal Law: The Fundraising Image of Victimhood,' *London Review of International Law* 4 (2016): 247-74; Kamari Clarke, 'The Rule of Law through Its Economies of Appearances: The Making of the African Warlord,' *Indiana Journal of Global Legal Studies* 18 (2011): 7-40; Tallgren, 'Voice of the International.'

43 Luigi D.A. 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 (2015): 97-112, at 112.

44 Britta van Beers, Luigi Corrias, and Wouter Werner, *Humanity across International Law and Biolaw* (2014).

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