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Citation: Kalpouzos, I. & Mann, I. (2015). Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece. Melbourne Journal of International Law, 16(1), pp. 1-28.

This is the draft version of the paper.

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BANAL CRIMES AGAINST HUMANITY: THE CASE OF ASYLUM SEEKERS IN GREECE

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In recent years, Greece has inflicted widespread inhuman and degrading treatment on asylum seekers. The European Union border agency Frontex has knowingly exposed asylum seekers to such treatment in Greek detention centres. This article argues that acts of Greek and Frontex agents may lead to individual responsibility for crimes against humanity under Rome Statute of the International Criminal Court *arts 7(1)(e), (h) and (k). Investigation of such acts remains unlikely, not due to the relevant doctrine, but due to a popular imagination of crimes against humanity as radically evil acts. But international criminal law should not only aim to punish radically evil acts. Equally important is seemingly banal violence that appears as an inevitable by-product of global social and economic structures. Such is the violence currently wielded against asylum seekers. Confronting the latter category requires the International Criminal Court Prosecutor to realise the political nature of his or her judgement.*

CONTENTS

I Introduction 1
II The Inhuman and Degrading Treatment of Asylum Seekers in Greece 5
III Crimes Against Humanity 9
A A Widespread and Systematic Attack Directed against Asylum Seekers 10
B Through Unlawful Imprisonment, Persecution and Other Inhumane Acts 14
1 Imprisonment 14
2 Persecution 16
3 Other Inhumane Acts 18
4 Some Observations on Mens Rea 20
C With the Complicity of Frontex 21
IV Gravity 24
V Conclusion 28

I INTRODUCTION

'[I]t is in the nature of a wrong not to be established by consensus'.[1]

The International Criminal Court ('ICC') prosecutes spectacular examples of 'radical evil'.[2] In such prosecutions political violence is paradigmatically

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[1] Jean François Lyotard, *The Differend: Phrases in Dispute* (University of Minnesota Press, 1988) 56.

wielded for its own sake. But alongside these horrendous acts, there is another far less visible category of international crimes which also merits attention. Acts in this second category are normalised occurrences, understood as rooted in social and economic processes rather than in politics. Their perpetrators may be well-intentioned. But doctrinally, these banal acts fit within the ICC's mandate, and their gravity should not be dismissed a priori as lesser than that of the radically evil acts the ICC has so far prosecuted.[3]

The concrete example of such banal international crimes analysed below is violations of asylum seekers' rights in Greece.[4] While these practices are perceived as egregious in the context of human rights law ('HRL'), they become banal in comparison with the radical evil that is often the subject of international criminal law ('ICL'). HRL requires states to protect the rights of refugees and asylum seekers. Should ICL have a role in enforcing these rights by holding individuals accountable for flagrant cases of their violation?[5] Rampant inhuman and degrading treatment ('IDT') of asylum seekers in detention centres around the world demands enquiry into such a doctrinal possibility. Such treatment is often recorded in developed states, where many of the detainees are migrants who clandestinely entered from the developing world. We chose to study Greece because it is at the fault lines between developed and developing worlds, and the main entry point to sought after migration destinations in the European Union. In such a setting, and for around a decade, migrants have been victims of particularly heinous HRL violations.[6]

The legal category of crimes against humanity, widely seen as of central importance in ICL, allows the prosecution of IDT through the jurisdiction of the ICC.[7] Article 7(1)(e) of the *Rome Statute of the International Criminal Court*

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2 Hannah Arendt defined 'radical evil' as evil that makes human beings superfluous, reducing them to 'bare life', or life not worth living: Hannah Arendt, *The Origins of Totalitarianism* (Harvest, 1973) 459. See also Richard J Bernstein, *Hannah Arendt and the Jewish Question* (Polity, 1996). For the development of the concept from Kant to Arendt, see Richard J Bernstein, *Radical Evil: A Philosophical Interrogation* (Polity, 2002). On the notion of a spectacle generally, see G Debord, *The Society of the Spectacle* (Black & Red, 2000). See Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, 2009) 15. In defence of the 'spectacular' aspect of international criminal justice, see also Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers, 2000) 200.

3 See Hannah Arendt, *Eichmann in Jerusalem: Report on the Banality of Evil* (Penguin, 2006) 200.

4 According to the United Nations High Commissioner for Refugees ('UNHCR'), an asylum seeker is 'someone who says he or she is a refugee': United Nations High Commissioner for Refugees, *Asylum-Seekers* (2015) <http://www.unhcr.org/pages/49c3646c137.html>.

5 For further reading on articles making related arguments to our own, see Jaya Ramji-Nogales, 'Questioning Hierarchies of Harm: Women, Forced Migration, and International Criminal Law' (2011) 11 *International Criminal Law Review* 463; Sonja B Starr, 'Exraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations' (2007) 101 *Northwestern University Law Review* 1257.

6 The recent elections in Greece and the change of government, at the time when this article was being finalised, do provide some cause for optimism. This includes a Deputy Minister for Migration as well as certain statements and actions towards the reversal of some of the policies described below. Irrespective of whether this optimism will be vindicated, however, this does not affect the period under review in this paper, nor the wider theoretical argument.

7 Leila Nadya Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 107 *American Journal of International Law* 334.

('*Rome Statute*')[8] maintains that 'widespread' '[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law' constitutes a crime against humanity. Article 7(1)(h) criminalises the 'persecution' of groups or collectivities and art 7(1)(k) further criminalises 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. As discussed in more detail below, the conditions under which asylum seekers are held in Greece appear to fulfil the definitions of these offences. Moreover, individual liability may attach not only to Greek officials, but also to employees of the EU's border control agency Frontex deployed in Greek camps.

However, the decision as to whether the ICC Prosecutor should investigate allegations of violations of asylum seekers' rights in Greece is not only one of doctrine. It depends on a process of selection, central to which is the 'gravity' of the alleged crimes. The vagueness of the term, often criticised as problematic, reflects the political nature of the judgement as to which human rights violations are 'grave' enough to merit the Prosecutor's attention.[9] These judgements demand that the Prosecutor decide whose rights ICL prioritises.

Our purpose here is to challenge the underlying assumptions that construct some actions as 'radically evil', and worthy of investigation, and others as 'banal' in terms of ICL. We thus seek to correct the ICC's prioritisation of radical evil over such banal crimes against humanity. Through correcting such harmful prioritisation we could also begin to address a deeper critique of ICL. In recent years, a growing body of critical scholarship has argued that the expansion of criminal prosecution, whether domestic or international, served powerful governments as a way of avoiding a real response to structural human rights violations.[10] This argument is important. It largely focuses on the marginal effect — or even the legitimation effect — of singling out a necessarily limited number of 'bad apples' instead of addressing underlying socio-economic injustices.[11] This article offers a qualified response to the critique. Though this dynamic may in fact sometimes occur, there is nothing in criminal law doctrine that makes it inherently or necessarily true. Through an alternative critique internal to the discipline of ICL, we demonstrate how criminal prosecution can be employed to address structural human rights violations rooted in global socio-economic inequality. Clearly, ICL cannot provide a solution to such injustice, but it can, if

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8 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

9 Samuel Moyn, 'Judith Shklar versus the International Criminal Court' (2013) 4 *Humanity* 473.

10 See Tor Krever, 'International Criminal Law: An Ideology Critique' (2013) 26 *Leiden Journal of International Law* 701. See also Christine Schwöbel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge, 2014); Vasuki Nesiah, 'The Trials of History: Losing Justice in the Monstrous and the Banal' in Ruth Buchanan and Peer Zumbansen (eds), *Law in Transition: Human Rights, Development and Transitional Justice* (Hart, 2014) 289.

11 This argument has indeed been extended beyond international criminal law ('ICL') to transitional justice. See Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 *International Journal of Transitional Justice* 266.

applied in good faith, be part of a larger necessary reorientation of international law towards such issues.[12]

Finally, the analysis below admittedly invites a 'flooding of the gates' of the ICC with a large number of potential cases, which taken together may be beyond its institutional, as well as financial, capacity. Ignoring asylum seekers in Greece and in other regions, however, runs another risk. It reflects a legally unwarranted preference to defend the rights of some and not the rights of others. Indeed, such an approach constructs ICL as a law that, from the entire universe of prohibited acts falling under its *doctrinal* mandate, only criminalises those not committed by 'Western' states.

This article proceeds in three parts. Part I ('The Inhuman and Degrading Treatment of Asylum Seekers in Greece') examines the situation of asylum seekers in Greece from the point of view of HRL. It surveys the widespread violations of asylum seekers' rights and briefly introduces Frontex's role in transferring asylum seekers to IDT in Greek detention facilities.[13]

Part II ('Crimes against Humanity') provides the doctrinal backbone of the argument. It argues that the legal transition from human rights violations to international crimes can be supported by doctrine. It aims to concisely set out the contextual elements and specific prohibited acts, as well as offering brief observations on Frontex's liability. This is an exercise limited to suggesting reasonable grounds justifying a preliminary investigation by the ICC Prosecutor. This paper's necessary limits are even more pronounced with respect to the treatment of mens rea and selected avenues for individual liability: while we think it crucial to suggest that 'banal' crimes *can* be linked to particular individuals with particular intentions, the nature of a scholarly paper is not to prove and apportion individual guilt.

Part III ('Gravity') situates our chosen case study in the debate surrounding *gravity* and lays out this article's contribution to the theory of ICL. It suggests that, while so far the gravity test has tended towards a quantitative and spectacular orientation — that of mass atrocity or radically evil acts — this test requires qualitative judgement.[14] Alongside investigating mass atrocity, the prosecutor should seek to investigate those crimes that fall under her legal mandate, but remain unacknowledged as grave violations of human rights. Banal international crimes are those whose gravity emanates precisely from the fact that they normally cannot be seen from the perspective of their victims. They are grave *because* the current world order somehow conceals their adverse consequences on the populations they target.

In considering banal crimes against humanity, the Prosecutor's judgement must take into account the desired political role of the ICC. In that context, the

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[12] Indeed, while this article focuses on the prioritisation by ICL of violations of civil and political rights embedded in global economic and social inequalities, scholarship can also focus on the criminalisation of the violation of economic and social rights. See Evelyn Schmid, *Taking Economic, Social and Cultural Rights Seriously in International Criminal Law* (Cambridge University Press, 2015).

[13] Itamar Mann, 'The EU's Dirty Hands: Frontex Involvement in Ill-Treatment of Migrant Detainees in Greece' (Report, Human Rights Watch, September 2011) 1 <http://www.hrw.org/reports/2011/09/21/eu-s-dirty-hands-0> ('*HRW Report*').

[14] Judgement is Arendt's antidote against 'banal' evil. See especially Hannah Arendt, *Responsibility and Judgment* (Schocken Books, 2003) 45–6.

Prosecutor should aim to prevent the possibility that international criminal prosecution will become a mode of domination of the rich and powerful against the poor and weak. Investigating violations of asylum seekers' rights in Greece is only one of potentially numerous cases that may allow the ICC to realise a broad notion of complementarity: the Prosecutor aims to protect populations that no state is willing or able to protect. The case selection process should have no built-in preference for spectacular, radically evil crime.

II THE INHUMAN AND DEGRADING TREATMENT OF ASYLUM SEEKERS IN GREECE

Since the 2000s Greece has seen an increase in migration and arrests of irregular migrants.[15] In recent years, international legal actors have repeatedly accused Greece of violations of asylum seekers' rights. These violations date back at least to 2005. The most important findings came from the European Court of Human Rights ('ECtHR'). In a number of cases, the ECtHR has found that the treatment of asylum seekers in Greece reaches the level of IDT under *European Convention on Human Rights* ('*ECHR*') art 3.[16] The principal case for the present purposes is *MSS v Belgium* ('*MSS*').[17] The Court reviewed a vast array of reports by governmental, intergovernmental, and non-governmental organisations on the conditions in Greek migration detention centres.[18]

The cumulative picture was alarming. Greek detention centres held migrants in extremely poor sanitary conditions, often in enormously overpopulated cells, with little or no access to medical services. The duration of incarceration in such conditions varied, but could be as short as a few hours and as long as over 18 months.[19] During such detention access to asylum is almost entirely non-

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15 See Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on His Mission to Greece (10–20 October 2010)*, 16th sess, UN Doc A/HRC/16/52/Add.4 (21 April 2011) annex 9 [24]: '[I]n 2008, some 50 per cent of all arrests of aliens in the EU took place in Greece. This number has increased to 75 per cent in 2009 and almost 90 per cent in 2010'. This increase in irregular migrant arrivals has led to a national crisis within the Greek detention system.

16 See, eg, *AA v Greece* (European Court of Human Rights, Chamber, Application No 12186/08, 22 July 2010); *Rahimi v Greece* (European Court of Human Rights, Chamber, Application No 8687/08, 5 April 2011); *RU v Greece* (European Court of Human Rights, Chamber, Application No 2237/08, 7 June 2011); *Mathloom v Greece* (European Court of Human Rights, Chamber, Application No 48883/07, 24 April 2012); *Mahmundi v Greece* (European Court of Human Rights, Chamber, Application No 14902/10, 31 July 2012); *Ahmade v Greece* (European Court of Human Rights, Chamber, Application No 50520/09, 25 September 2012); *AF v Greece* (European Court of Human Rights, Chamber, Application No 53709/11, 13 June 2013); *Horshill v Greece* (European Court of Human Rights, Chamber, Application No 70427/11, 1 August 2013); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

17 *MSS v Belgium* [2011] I Eur Court HR 255 ('*MSS*').

18 Among these were the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT'), the UNHCR, Amnesty International, Médecins Sans Frontières Greece ('MSF') and Human Rights Watch ('HRW'). As the European Court of Human Rights ('ECtHR') explained, the Greek Government did not dispute the factual findings of these reports: ibid 293 [159], 293–4 [160], 311 [229].

19 *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008* [2008] OJ L 348/98 ('*Returns Directive*'). Under art 15 of this *Returns Directive*, detention for the purpose of removal may not exceed 18 months.

existent. Few detainees are aware of their right to claim asylum,[20] and some 'expressed fears that if they requested asylum, they would remain detained in such conditions for longer periods'.[21] Moreover, detention can potentially be extended indefinitely, in the case of rejection of the asylum claim and refusal of the asylum seeker to be repatriated.[22] This lack of access to asylum has led to numerous ECtHR judgments finding a violation of the individual's right to effective remedies. In *MSS* the Court recounts numerous hurdles on access to protection under the *Convention relating to the Status of Refugees*,[23] and consistent violations of the right to *non-refoulement*.

In addition to the virtually complete lack of access to asylum and open-ended periods of detention, the inhumanity of the conditions has posed serious threats to the detainees' physical and mental health. The cells have often been repurposed cement boxes designed originally for freight storage. They often lacked lighting, had little or no access to toilets, and mixed men, women and children of many nationalities.[24] This sometimes resulted in complaints of rape, disease, hunger and sleep deprivation.[25] In 2008, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ('CPT') described the conditions in the Pagani detention centre in the island of Lesbos as 'filthy beyond description' and as a health hazard for staff and detainees alike.[26] Here is a CPT description of another detention centre, in 2011:

> Police and border guard stations continued to hold ever greater numbers of migrants in even worse conditions. For example, at Soufli police and border guard station, in the Evros region, members of the Committee's delegation had to walk over persons lying on the floor to access the detention facility. There were 146

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20 According to the Council of Europe, '[t]he vast majority of detained persons … appeared to have no understanding of their legal situation': Council of Europe, 'Report to the Greek Government on the Visit to Greece Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 16 April 2013' (Report No CPT/Inf (2014) 26, 16 October 2014) 49 [88] ('*CPT Report 2014*').

21 *HRW Report*, above n 13, 36.

22 This was the effect of Opinion No 44/2014 of the State Legal Council, adopted by the Interior Ministry and which extended detention beyond 18 months in such cases: State Legal Council, Opinion No 44/2014 <http://www.nsk.gov.gr/webnsk/gnwmodothsh.jsp?gnid=1868995>. This has now been found unlawful, by the judgment of the Administrative Court of First Instance of Athens: Administrative Court of First Instance (Athens), No 2255, 23 May 2014 <http://infomobile.w2eu.net/tag/court-decision/>.

23 *MSS* [2011] I Eur Court HR 255, 54–64 [265]–[322].

24 A large percentage of the intercepted migrants and asylum seekers fled from civil war, widespread persecution or risks of malnutrition. Eritreans, Iraqis, Somalis, Sudanese and Syrians have been some of the represented groups. Syrians in particular have appeared in particularly high numbers in recent years in Greece and are estimated to represent a quarter of the total number of unauthorised migrants. See Frontex, 'Annual Risk Analysis' (Report, 2014) 30 <http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2014.pdf>. According to the CPT, 'several Syrian nationals … had … been detained for periods of up to several months': *CPT Report 2014*, above n 20, 36 [60].

25 *HRW Report*, above n 13. In 2001 an intercepted migrant was raped and tortured in detention by a member of the Greek Coast Guard. See *Zontul v Greece* (European Court of Human Rights, Chamber, Application No 12294/07, 17 January 2012).

26 Council of Europe, 'Report to the Government of Greece on the Visit to Greece Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 29 September 2009' (Report No CPT/inf (2010) 33, 17 November 2010) 35 [64].

> irregular migrants crammed into a room of 110m^2, with no access to outdoor exercise or any other possibility to move around and with only one functioning toilet and shower at their disposal; 65 of them had been held in these deplorable conditions for longer than four weeks and a number for longer than four months. They were not even permitted to change their clothes.[27]

Around the same time, Human Rights Watch ('HRW') reported from a detention centre in the town of Fylakio that '[s]ewage was running on the floors, and the smell was hard to bear. Greek guards wore surgical masks when they entered the passageway between the large barred cells'.[28]

The conditions in a small detention centre in the town of Igoumenitsa led the local court to acquit 15 detainees from the crime of escape from lawful custody[29] as the local court held that 'they escaped to avoid a serious and unavoidable … danger [to] their health'.[30] In other words, escape was an act of self-defence.

Due to such conditions, these environments sometimes grew hopeless or even violent. At times migrants threw excrement to express their protest. In other instances migrants resorted to mass hunger strikes[31] or sewed their mouths closed.[32] Greek police sometimes quelled protest with anti-riot gear, including water-hosing and tear gas.[33] In the *MSS* judgment, the ECtHR cited a 2007 report by CPT discussing frequent ill-treatment in Greek detention cells, including slaps, punches, kicks and blows with batons: '[i]n several cases, the delegation's

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27 Council of Europe, 'European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT): Public Statement Concerning Greece' (Statement No CPT/Inf (2011) 10, 15 March 2011) 3 [7] <http://www.cpt.coe.int/documents/grc/2011-10-inf-eng.htm>.

28 *HRW Report*, above n 13, 3.

29 *Penal Code* (Greece) art 173.

30 Criminal Court of First Instance (Igoumenitsa), No 682/2012, 2 October 2012 <https://revdh.files.wordpress.com/2013/01/tribunal-correctionnel-digoumenitsa-2-octobre-2012.pdf> (unofficial UNHCR translation available at <http://www.refworld.org/docid/51b5d3536.html>). See also Antonios Tzanakopoulos, 'Greek Court Acquits Immigrants Who Escaped Appalling Detention Conditions' on European Journal of International Law, *EJIL: Talk!* (12 January 2013) <http://www.ejiltalk.org/immigrants-who-escaped-appalling-detention-conditions-acquitted/>.

31 The most recent one was initiated by 200 migrants at the time of writing this article: 'Greece: Migrants on Hunger Strikes at Corinth Detention Center', *ANSAmed* (online), 13 June 2014 <http://www.ansamed.info/ansamed/en/news/sections/generalnews/2014/06/13/greecemigrants-on-hunger-strike-at-corinth-detention-center_5a87525d-cc3f-4b6c-a626-f4a0583f4a42.html>. Damian Mac Con Uladh, 'Migrants on Hunger Strike at Corinth Detention Centre', *EnetEnglish* (online), 12 June 2014 <http://www.enetenglish.gr/?i=news.en.article&id=2008>:

> In an audio recording uploaded to YouTube by anti-racism group Keerfa, one of the protesters says detainees are being kept in deplorable conditions, suffer ill-treatment from police officers and guards and are being kept for more than 18 months in detention. The male voice says: We say 'good morning' and they [the police/guards] say 'motherfucker, faggot'. We are human, too! We don't have clean food nor clean water here ... nothing. We are human, not sheep ... It's very difficult, we'll continue this strike until we get out. If you don't let us free, we will die inside ... If we don't have that, we will stay inside to die …

32 Anna Giralt Gris, 'On Location: Why Refugees to Greece are Sewing Their Mouths Shut' on *I Can't Relax in Greece* (24 February 2014) <http://icantrelaxingreece.wordpress.com/2014/02/24/on-location-why-refugees-to-greece-are-sewing-their-mouths-shut/>.

33 Karolina Tagaris, 'Greek Police Clash with Migrants at Detention Centre', *Reuters* (online), 23 November 2012 <http://www.reuters.com/article/2012/11/23/us-greece-migrants-protest-idUSBRE8AM0KA20121123>.

doctors found that the allegations of ill-treatment by law enforcement officials were consistent with injuries displayed by the detained persons concerned'.[34]

Similar incidents are reported in the CPT's latest report.[35] Greek immigration detention, explained Manfred Nowak, UN Special Rapporteur on Torture, 'creates an environment of powerlessness for victims of physical abuse and may perpetuate a system of impunity for police violence'.[36] As a recent Médecins Sans Frontières report exposed, the situation in Greek immigration detention centres has not significantly improved since.[37]

The *MSS* judgment held that both Greece and Belgium were liable for violating *ECHR* art 3. Greece was liable because of the way asylum seekers were treated in its detention centres, but also because of the poor living conditions and the lack of access to effective remedies. Belgium violated *ECHR* art 3 because, while *knowing* of the horrendous situation asylum seekers are exposed to in Greece, it chose to deport the applicant to Greek territory. In doing so, Belgium acted under an EU regulation ('the *Dublin Regulation*'),[38] which allows EU states to deport asylum seekers to the first country they set foot in within the EU. The Court held that states were obliged to apply the *Dublin Regulation* only in accordance with asylum and HRL.[39] The protection of fundamental rights allows the Court to cut through a network of multiple actors and prima facie incompatible legal obligations. It barred Belgium from 'hiding' behind a set of rules and actors without preforming its own judgement on the human rights implications at stake.

The above suggests that the exposure of asylum seekers to IDT in Greek detention centres is not purely a Greek matter. The IDT of asylum seekers cannot be seen outside a European (Union) context. Indeed, Frontex border guards

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34 *MSS* [2011] I Eur Court HR 255, 32 [163], quoting Council of Europe, 'Report to the Government of Greece on the Visit to Greece Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 27 February 2007' (Report No CPT/Inf (2008) 3, 8 February 2008) 11 [13].

35 *CPT Report 2014*, above n 20, 38 [64]. *CPT Report 2014* notes that in some detention centres, 'most police officers acted correctly'. In addition, 'abusive and, at times, racist language … [was reported] in all the centres and holding facilities visited'. Detainees were also 'handcuffed to the fence overnight … as punishment', in some cases because they had committed self-harm.

36 *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Addendum — Mission to Greece*, 16th sess, Agenda Item 3, UN Doc A/HRC/16/52/Add 4 (21 April 2011) 1–2.

37 Médecins Sans Frontières, 'Invisible Suffering: Prolonged and Systematic Detention of Migrants and Asylum Seekers in Substandard Conditions in Greece' (Report, 1 April 2014) <http://cdn.doctorswithoutborders.org/sites/usa/files/attachments/invisible_suffering.pdf> ('*Invisible Suffering*'). The *CPT Report 2013* confirms this: Council of Europe, 'Report to the Government of Greece on the Visit to Greece Carried Out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 16 April 2013' (Report No CPT (2013) 35, 25 July 2013) <http://cm.greekhelsinki.gr/index.php?sec=192&cid=3858> ('*CPT Report 2013*'). The Greek Government initially did not publicise it and only consented to do so after repeated requests from members of Parliament. The report is not available on the CPT website. The overall picture is more mixed in *CPT Report 2014*, where some improvement in some facilities was observed. See *CPT Report 2014*, above n 20, 29 [47].

38 *Council Regulation No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National* [2003] OJ L 50/1.

39 *MSS* [2011] I Eur Court HR 255, 12–17 [62]–[87].

knowingly transferred asylum seekers to to be subjected to IDT in Greek detention centres. Like Belgium, they too attempted to 'hide' behind a thick web of transnational mandates that purport to allow them to avoid liability.[40]

On 10 October 2010, Frontex agents first arrived at the Greek border with Turkey, examining the possibility of a land deployment in the north-eastern region of Evros. High ranking officials toured the detention centres in the border region of Evros and saw the squalid conditions.[41] By 2 November, 175 Frontex 'guest officers' were deployed on the Greek–Turkish border, in a temporary emergency measure. The deployment was authorised under *Regulation (EC) No 863/2007*,[42] giving the agency power to provide 'Rapid Border Intervention Teams'. Thus, border guards from almost all other European member states patrolled in Greece, wearing their own national uniforms.

The Rapid Border Intervention Teams shared the Greek Government's border enforcement mission in a number of ways. The most relevant one is that Frontex border guards apprehended migrants on Greek territory, and transferred them to Greek detention facilities.[43] Both high ranking Frontex officials and operational agents knew about IDT in the facilities they took migrants into.[44] In at least one of the worst detention facilities the agency set up offices.[45]

The *MSS* judgment was released at the height of Frontex's emergency intervention in Greece. As the Court explained, Belgium violated the prohibition on IDT, by deporting one Afghan migrant to Greece, 'knowingly exposing' him to the possibility of ill-treatment in Greek detention facilities.[46] The opinion could have changed Frontex's actions, if Frontex officers would have felt they are put on notice for participating in IDT. During Frontex's presence in Greece, many thousands of migrants were knowingly exposed to such treatment with the assistance of its agents or 'guest officers'.[47]

III CRIMES AGAINST HUMANITY

The extensive human suffering caused by the lack of access to asylum and the detention conditions imposed on asylum seekers is widely agreed to be IDT under HRL. It is another question whether these breaches of HRL amount to crimes against humanity.[48] We attempt to provide an answer in this section.[49]

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40 See Itamar Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013' (2013) 54 *Harvard International Law Journal* 315, 351–2.

41 *HRW Report*, above n 13, 20–3.

42 *Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 Establishing a Mechanism for the Creation of Rapid Border Intervention Teams and Amending Council Regulation (EC) No 2007/2004 as Regards that Mechanism and Regulating the Tasks and Powers of Guest Officers* [2007] OJ L 199/30.

43 Ibid 2.

44 Ibid 23.

45 Ibid 32.

46 *MSS* [2011] I Eur Court HR 255, 343 [367].

47 Between 2 November 2010 and 2 March 2011, nearly 12 000 migrants entering Greece at its land border with Turkey were arrested and detained. But this of course represents only a fraction of the phenomenon described here, which started much earlier and continues today, and spans over a larger part of the country. See *HRW Report*, above n 13, 48.

48 See more generally, Olivier de Frouville, 'The Influence of the European Court of Human Rights' Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment' (2011) 9 *Journal of International Criminal Justice* 633.

Even though ICL, as traditionally interpreted and applied, focuses on spectacular/radical evil and has not prioritised such cases, we aim to show that ICL does provide the necessary categories to articulate these *and* to suggest that there is reasonable ground to support a preliminary investigation in this case. This individual case study will contribute to the wider point: that social and economic crimes can be crimes against humanity with no necessary change to the *Rome Statute*; and that the ICC should generally give them more priority.

A *A Widespread and Systematic Attack Directed against Asylum Seekers*

Article 7(1) of the *Rome Statute* requires that crimes against humanity be 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.

The term 'attack' is associated with aggressive, even quasi-military, behaviour and may not seem fully compatible with a state's *reaction* to migration flows. Confining the term 'attack' only to a military context reflects a radical evil or mass atrocity view of crimes against humanity, excluding 'banal crimes' such as the ones discussed here. However, doctrine indicates that the term has a wider scope.

An 'attack' is a 'course of conduct', composed of policies, actions and omissions. This is supported by the *Rome Statute*,[50] ICC case law,[51] other courts and tribunals,[52] as well as commentators.[53] Such a non-military understanding of the term 'attack' is part of an extension or evolution of the category of crimes against humanity away from a necessary nexus with an armed conflict.[54] What the notion of 'attack' requires is a multiplicity of acts, which, as a whole, constitute the attack. Such acts do not have to be exclusively 'violent' in the

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49 See also Clare Henderson, 'Australia's Treatment of Asylum Seekers: From Human Rights Violations to Crimes Against Humanity' (2014) 12 *Journal of International Criminal Justice* 1161.

50 Article 7(2)(a) of the *Rome Statute* states: 'a course of conduct involving the multiple commission of acts'. Such acts can, of course, be committed by omission. See, eg, Elies van Sliedregt, 'Modes of Participation' in Leyla Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011) 223, 228–230.

51 Most recently, see the analysis on what such a course of conduct may entail in: *Prosecutor v Gbagbo* (*Decision on the Confirmation of Charges against Laurent Gbagbo*) (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 12 June 2014) [208]–[221] ('*Gbagbo PTC*').

52 See, eg, *Prosecutor v Tadić (Opinion and Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [644] ('*Tadić TC*'); *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) [581] ('*Akayesu TC*'); *Prosecutor v Taylor (Judgement)* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03 -01-T, 18 May 2012) [506]: '[a]n "attack" … may encompass any mistreatment of any civilian population'.

53 See Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (Oxford University Press, 3rd ed, 2013) 91. Antonio Cassese and Paola Gaeta speaks of a 'practice that either forms part of a policy by a government, a *de facto* political authority, or an organized political group, or is tolerated, condoned, or acquiesced in by the aforementioned'. See also Schmid, above n 12, 77–80.

54 The nexus is not required in the *Rome Statute*. For the position in custom, see *Tadić TC*, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94 -1-T, 7 May 1997) [627].

strictest, physical, sense of the term.[55] As the elements of crimes against humanity stipulate, what is required is 'the multiple commission of acts referred to in article 7, paragraph 1',[56] namely the prohibited acts discussed below.[57] These may range from acts of physical violence, eg beatings, to the subjection of individuals to certain physical conditions,[58] to persecution and to the legislative and administrative measures[59] establishing, maintaining and, therefore, constituting the overall attack. These are the acts, described above, which constitute Greece's detention policy. They include the acts of individuals working in the detention centres, providing the necessary administrative and political decision-making, and establishing the relevant legal/institutional framework. To the extent that these acts, which are part of the overall detention policy, expose asylum seekers to IDT, while denying them any actual recourse in challenging the legality of their detention, they can only be seen as 'a course of conduct involving the commission of acts of violence'.[60] Finally, and crucially, in order to see the state's detention policy as (containing) an 'attack' it is not necessary that every single aspect of it and every individual act associated with it is a prohibited act. It is sufficient to identify IDT and denial of detention review as inherent and systematic features of said detention policy, as the ECtHR, indeed, repeatedly has.[61] The fact that this line of conduct constitutes and is contained in what is prima facie a state's overall right to manage immigration flows does not preclude it of the character of attack, even though it contributes to its perception as 'banal'.

This multiplicity of acts provides the necessary 'scale'. Both this and the necessary 'minimal level of collectivity',[62] which is required through the 'state

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55 In this sense the statement in *Prosecutor v Kaing* requiring 'the multiple commission of acts of violence' can be seen as misleading: *Prosecutor v Kaing (Judgment)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber (ECC), Case No 001/18-07 -2007/ECCC/TC, 26 July 2010) [298].

56 *Report of the Preparatory Commission for the International Criminal Court: Addendum 2*, UN Doc PCNICC/2000/1/Add.2 (2 November 2000) 9 ('*ICC Elements of Crimes*'). See also at 9 [3], 9 n 6, which clarifies that '[s]uch a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action'.

57 See also *Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the* Rome Statute *on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [75] ('*Bemba PTC*'): '[t]he commission of the acts referred to in article 7(1) of the *Rome Statute* constitute the "attack" itself and, beside the commission of the acts, no additional requirement for the existence of an "attack" should be proven'.

58 According to *Prosecutor v Kunarac*, '[i]t is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity': *Prosecutor v Kunarac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-23-T, 22 February 2001) [419].

59 See also William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) 153.

60 *Prosecutor v Naletilić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-34-T, 31 March 2003) [233].

61 In this context the distinction drawn by the recent ECtHR Grand Chamber decision in *Tarakhel v Switzerland* between the likelihood of inhumane treatment for the specific applicants in Italy with the overall conditions in Greece (in the context of the *MSS* judgment), justifying a blanket ban on expulsion, is telling. See *Tarakhel v Switzerland* (European Court of Human Rights, Grand Chamber, Application No 29217/12, 4 November 2014) [101].

62 Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 3rd ed, 2014) 236.

or organisational policy' criterion of *Rome Statute* art 7(2)(a), are satisfied. The conditions of detention and the lack of procedural safeguards do not constitute random and isolated acts. The ascription of responsibility for inflicting IDT to Greece by the ECtHR, and the finding in *MSS* that the infliction of IDT on asylum seekers in Greece is generalised to the extent that it justifies a blanket ban on deportation *to* Greece, clearly suggests that such a course of action consists of a multiplicity of acts united by a thread and is attributable, as policy, to the state and its agents.

This 'attack' is directed against a great number of people who, by virtue of their status, form a vulnerable collectivity. Indeed, the meaning of the 'civilian' nature of the victim is not limited to relevant distinctions in armed conflict.[63] The concept requires an element of multitude[64] and a feature which identifies them as a collectivity and distinguishes them from the attacker.[65] Together with the understanding of the 'attack' as containing a multitude of acts mounted by a (state) organisation, the structure created is one of a vulnerable collectivity subject to crimes committed by a powerful organisation. This is in accordance with a well-established legal[66] and philosophical[67] understanding of crimes against humanity, which highlights the disparity of power between the attacking and attacked collectivities. The vulnerability, multitude and geographical delimitation of detained asylum seekers seems to unfortunately fit this paradigm.

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63 However, such distinctions still play a role over the interpretation of both 'civilian' and 'directed'. Discussing especially the International Criminal Tribunal for the former Yugoslavia ('ICTY') case law, see Göran Sluiter, '"Chapeau Elements" of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals' in Leila Nadya Sadat (ed), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011) 102, 117–20.

64 Importantly, not all members of the civilian population in the geographical entity need to be targeted. See *Tadić v Prosecutor* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [305] ('*Tadić AC*'); *Kunarac v Prosecutor (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case Nos IT-96-23 and IT-96-23/1-A, 12 June 2002) [90]; *Blaškić v Prosecutor (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [105] ('*Blaškić AC*'). This means that the existence of detention facilities less exposed to prohibited acts does not negate the overall attack on asylum seekers.

65 The distinction is purely meant to delineate them as the attacked collectivity and does not need to be based on any racial, ethnic, religious or national characteristics. See *Prosecutor v Katanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/07, 30 September 2008) [399] ('*Katanga PTC*'). The 'civilian population' can also be identified through their geographical position, either in terms of where they are crossing or where they are detained. See *Prosecutor v Semanza (Judgement and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [330] ('*Semanza TC*').

66 See M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press, 2011) ch 1. See a challenge to this understanding in: *Prosecutor v Katanga (Judgment Pursuant to Article 74 of the* Statute*)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07, 7 March 2014) [1117]–[1122]; and criticism in Judge Van den Wyngaert's dissenting opinion: *Prosecutor v Katanga (Judgment Pursuant to Article 75 of the* Statute*)* (International Criminal Court, Trial Chamber II, Case No ICC-01/04-01/07-3436-AnxI, 7 March 2014) [269] (Judge Van den Wyngaert).

67 See David Luban, 'A Theory of Crimes Against Humanity' (2004) 29 *Yale Journal of International Law* 85; Richard Vernon, 'What is Crime Against Humanity?' (2002) 10 *Journal of Political Philosophy* 231.

Finally, the 'attack' needs to be 'widespread or systematic'. The test is disjunctive and either criterion can be met. A 'systematic' attack has been variously defined as requiring organisation, patterns of behaviour[68] and the existence of a common policy formulated at a high level.[69] A state's asylum policy, dysfunctional as it may be, clearly qualifies. The implication of high level authorities, including the state's interior ministry, and EU agencies, the use of significant resources[70] and the extensive legalisation, bureaucratisation and institutionalisation of the asylum regime — again, despite its ultimate dysfunction — indicate that this is not a random set of isolated acts;[71] it is a systematic policy.[72]

The attack is also 'widespread'. This is widely perceived to be referring to the scale of the violations and the numbers of individuals affected.[73] While a pedantic 'numbers game' should be avoided, the scale of violations is acknowledged and emphasised by the authorities cited in the previous section. Perhaps the strongest evidence of this is the dramatic result of the *MSS* judgment, which led most EU states to stop transferring migrants and asylum seekers to Greece.[74] The fact that the applicant to ECtHR was exposed to IDT in Greece was not considered to be a mere coincidence. Rather, there was a high probability that *any* asylum seeker that would reach Greece would be exposed to IDT. This high probability provides prima facie evidence that IDT was 'widespread' for the purpose of art 7 of the *Rome Statute* as well. Indeed, IDT of asylum seekers in Greece has been ongoing for nearly a decade, and has now affected thousands of victims.[75]

In conclusion, the state's detention policy entails the exposure of asylum seekers to IDT through a multiplicity of acts, which constitute a widespread and

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68 See *Kunarac TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-96-23-T, 22 February 2001) [429].

69 See, for example, the definition in: *Akayesu TC* (International Criminal Tribunal for Rwanda, Trial Chamber, Case No ICTR-96-4-T, 2 September 1998) [580].

70 *Prosecutor v Blaškić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [203] ('*Blaškić TC*').

71 The International Criminal Court ('ICC') has rightly emphasised this, most recently in *Gbagbo PTC*: *Gbagbo PTC* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 12 June 2014) [223]. See also *Prosecutor v Al Bashir (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [81] ('*Al Bashir PTC*').

72 MSF argued that Greek detention centres 'systematically' expose asylum seekers to substandard detention conditions: *Invisible Suffering*, above n 37.

73 See *Gbagbo PTC* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 12 June 2014) [222]; *Al Bashir PTC* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009) [81].

74 For the list of states, see w2eu.info, *Deportations to Greece Are Stopped in Most Countries of the EU* (April 2012) <http://www.w2eu.info/dublin2.en/articles/deportationstop-greece.en.html>.

75 The latest available number is from April 2014, when MSF estimated that 6000 migrants were held in regular detention, and perhaps several thousand more were apprehended in police stations: *Invisible Suffering*, above n 37, 7. While exact figures are unavailable, individuals affected in the last decade number in tens, maybe hundreds of thousands. For an overview, see Global Detention Project, *Greece Detention Profile* (April 2014) <http://www.globaldetentionproject.org/countries/europe/greece/introduction.html>.

systematic attack against a vulnerable collectivity. This elevates the prohibited acts described below to the category of crimes against humanity.

B *Through Unlawful Imprisonment, Persecution and Other Inhumane Acts*

While varied and partially open-ended, the prohibited acts within the definition of crimes against humanity are meant to capture a level of egregiousness that justifies international prosecution. Extant doctrine allows the application of these categories for the protection of asylum seekers, particularly *Rome Statute* arts 7(1)(e) ('Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'); 7(1)(h) ('Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender … or other grounds that are universally recognised as impermissible under international law'); and 7(1)(k) ('Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health').

1 *Imprisonment*

Article 7(1)(e) of the *Rome Statute* applies either to imprisonment, or to any deprivation of liberty of similar severity. This suggests that various forms of incarceration — including immigration detention — are within the ICC's scope of review to the extent that they are of 'severity' similar to 'imprisonment' and in violation of 'fundamental rules of international law'.

There is little doubt that the deprivation of liberty of asylum seekers is 'severe', both in terms of its duration and in terms of the specific conditions of imprisonment. The duration often measures in months and may even qualify as indefinite.[76] The detention facilities are of a strictly speaking carceral nature, rendering the deprivation of liberty as comprehensive as that experienced in prison facilities. This is the case both in specifically purposed immigration detention centres described above and in the context of detention in police stations, which are at the very centre of the concept of 'imprisonment'. The severity of the deprivation of liberty is accentuated, and reflected, in the often complete lack of access to outside space.[77] Indeed, the inhumanity of the conditions of detention, while not strictly associated in ICL jurisprudence with this specific prohibited act, may be seen to exacerbate the severity of the deprivation of liberty.

Does the incarceration of asylum seekers in Greece violate 'fundamental rules' of international law, as per art 7(1)(e)? The dominant interpretation of 'fundamental rules' has so far focused on *procedure.* Accordingly, 'imprisonment' as a crime against humanity entails a severe deprivation of

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[76] See above nn 16–19 and accompanying text.

[77] See above nn 21, 23, 26 and accompanying text.

liberty without due process.[78] According to the International Criminal Tribunal for the Former Yugoslavia ('ICTY') 'imprisonment … should be understood as [contemplating] arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law'.[79]

Significantly, the legality of detention will be assessed not under domestic law, but under international law.[80] Here ICL is referring to egregious violations of HRL,[81] specifically the right to a fair trial as it applies to administrative decisions leading to detention (and subsequent access to asylum). These can be found both in specialised systems, such as the EU regulations on access to asylum, in regional systems, such as the *ECHR*, in international systems, such as the *International Covenant on Civil and Political Rights*, and in customary international law.[82] According to the UN Working Group on Arbitrary Detention there is arbitrary detention

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78 On the *conditions* of imprisonment ICL literature supports the view that '[a]nother category which may constitute arbitrary detention is when the conditions of detention themselves amount to torture or cruel, inhuman or degrading treatment'. See Christopher K Hall, 'Article 7 Crimes against Humanity' in Otto Triffterer (ed), *Commentary on the* Rome Statute of the International Criminal Court*: Observers' Notes, Article by Article* (C H Beck, 2nd ed, 2008) 159, 201 [38]. Indeed, the text of the *Rome Statute* can be seen as supporting this approach. This would also reflect the concept of 'arbitrariness' in human rights law. See Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 4 [14] ('*General Comment No 35*'). '[D]etention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained'. Nevertheless, the narrower focus of ICL jurisprudence on procedural arbitrariness is followed here, and the inhumanity of conditions is considered further below.

79 *Prosecutor v Kordić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/2-T, 26 February 2001) [302], affd *Kordić v Prosecutor (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Appeals Chamber, Case No IT-95-14/2-A, 17 December 2004) [116]. While the ICC has charged an accused with the crime, it has not yet developed its jurisprudence. See count 34 in: *Prosecutor v Harun (Warrant of Arrest for Ahmad Harun)* (International Criminal Court, Pre-Trial Chamber 1, Case No ICC-02/05-01/07, 27 April 2007) 12.

80 *Prosecutor v Krnojelac (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-25-T, 15 March 2002) [114] ('*Krnojelac TC*'). Most recently, see *Prosecutor v Stanišić (Judgement: Volume 1 of 3)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-08-91-T, 27 March 2013) [79].

81 Although, it may also refer to the law of armed conflict, specifically the law of occupation. See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) arts 42–3.

82 For a breakdown of principles on justification, duration and reviewability of detention, see Michael Fordham, Justine N Stefanelli and Sophie Eser, *Immigration Detention and the Rule of Law: Safeguarding Principles* (British Institute of International and Comparative Law, 2013).

> [w]hen the total or partial non-observance of the international norms relating to the right to a fair trial, established in the *Universal Declaration of Human Rights* … is of such gravity as to give the deprivation of liberty an arbitrary character.[83]

Specifically, the detention of asylum seekers beyond 'a brief initial period in order to document their entry' and 'in the absence of particular reasons specific to the individual, such as an individualised likelihood of absconding, a danger of crimes against others or a risk of acts against national security' as well as without 'periodic re-evaluation and judicial review' is arbitrary.[84] 'The inability of a [s]tate party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention'.[85] The continuing potential for arbitrariness is reflected in ICL jurisprudence, which stipulates that the absence of the possibility to review the legality of detention is also crucial as '[i]f at any time the initial legal basis ceases to apply, the initially lawful deprivation of liberty may become unlawful at that time and be regarded as arbitrary imprisonment'.[86]

Indeed, both the ECtHR and numerous reports[87] have expounded on the complete breakdown of the access to asylum system both within and outside detention centres in Greece.

2 *Persecution*

The legal bases discussed above reflect how ICL can articulate and address both the arbitrariness and the conditions of the detention of asylum seekers in Greece. These facts, however, can be further encompassed in a wider category of ICL, which better reflects the fact that the treatment of asylum seekers is ultimately the product of active discrimination, rather than an inadequate reaction to immigration flows, due perhaps to insufficient funds.[88] The crime of persecution is traditionally used to describe (legal) regimes of widespread human rights violations on discriminatory grounds against individuals who are perceived as 'foreign bodies'. It is an umbrella concept, the openness of which

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83 Working Group on Arbitrary Detention, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Working Group on Arbitrary Detention*, UN GAOR, 44th sess, Item 8 of the Provisional Agenda, UN Doc E/CN.4/1998/44 (19 December 1997) annex 1 16–17 [8(c)]. This document has been widely quoted by international criminal tribunals as authoritative. See *Krnojelac TC* for other procedural standards references as well: *Krnojelac TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-25-T, 15 March 2002) [113]. This approach is further and most recently developed in: *General Comment No 35*, UN Doc CCPR/C/GC/35, 3–8 [10]–[23].

84 *General Comment No 35*, UN Doc CCPR/C/GC/35, 5–6 [18].

85 Ibid (footnote omitted).

86 *Krnojelac TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-25-T, 15 March 2002) [114].

87 See above nn 16–19 and accompanying text.

88 This is one argument/excuse commonly employed by officials in the public discourse. See Leonidas K Cheliotis, 'Behind the Veil of Philoxenia: The Politics of Immigration Detention in Greece' (2013) 10 *European Journal of Criminology* 725, 736–7. Although it should be noted that it is only sparingly evoked in official communications. *Contra* Council of Europe, 'Response of the Government of Greece to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on Its Visit to Greece from 20 to 27 January 2011' (Response No CPT/Inf (2012) 2, 10 January 2012) 75 <http://www.cpt.coe.int/documents/grc/2012-02-inf-eng.pdf>.

needs to be balanced by containing acts clearly defined[89] and of similar gravity to other prohibited acts,[90] lest the principle of legality be unacceptably stretched (see also with regard to 'other inhumane acts' below).

Persecution can be seen as a microcosm of the overall structure of the concept of crimes against humanity. Accordingly, it needs to be committed through specific acts, subsumed under the general concept. These can either be physical acts, or indeed the legislative and administrative acts necessary for establishing the discriminatory treatment.[91] Moreover, acts charged under persecution may have also been part of the charges under other prohibited acts.[92] Indeed, persecutory acts can fall under either of two categories:[93] acts which would fulfil the criteria of other war crimes, acts of genocide or crimes against humanity; and 'behaviors that do not in themselves satisfy the listed definitions'.[94] Specifically, both the ICTY and the ICC have determined that 'serious bodily and mental harm and infringements upon individual freedom may be characterised as persecution'.[95] The analysis above is therefore also applicable here.

What is required further, however, is that the persecutory acts, 'rather than the attack in general',[96] are committed against 'any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender … or other grounds that are universally recognised as impermissible under international law'.

While asylum seekers, as a collectivity, might not prima facie satisfy the enumerated categories, such an interpretation is possible and may find support in ICL jurisprudence. One such approach would stand on a wide interpretation of 'political' grounds. While there are cases of narrow interpretation of 'political grounds',[97] 'other jurisprudence has found that political persecution occurred where discrimination has been effected pursuant to political motivations or a

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89 *Prosecutor v Kupreškić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [618] ('*Kupreškić TC*').

90 Ibid [621]. Justices Cassese, May and Mumba go further and argue that the gravity of the acts 'must be evaluated not in isolation but in context, by looking at their cumulative effect': at [622]. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed "inhumane".

91 The first modern elaboration for this conception of persecution is to be found in: *Tadić TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94 -1-T, 7 May 1997) [703]–[710].

92 For example, see *Prosecutor v Ruto (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the* Rome Statute*)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-01/11, 23 January 2012) [271].

93 For the development of this distinction, see Gerhard Werle, *Principles of International Criminal Law* (TMC Asser, 2005) 255–7 [741]–[743].

94 This was developed in *Tadić TC* and has been followed in the case law of the ICTY: *Tadić TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT -94-1-T, 7 May 1997) [703] et seq. This extension, and its use of the discriminatory focus, has been criticised in: Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press 2008) 211–15.

95 See *Blaškić TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [220]; *Prosecutor v Harun (Decision on the Prosecution Application under Article 58(7) of the* Statute*)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/07, 27 April 2007) [73].

96 *Krnojelac TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-25-T, 15 March 2002) [436].

97 *Semanza TC* (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) [471].

political agenda against a group which itself may not hold any political views'.[98] Seeing the establishment of certain conditions of detention as a reflection and consequence of the perception of asylum seekers as unwanted foreign bodies, the flows of which need to be managed, deterred and reversed, does entail ascribing them a certain political status. Official statements linking the conditions of detention to their aspired deterrent effect may exemplify such discriminatory animus.[99] The political grounds leading to the infliction of widespread human rights violations are in the eye of the persecutor.

Alternatively, other universally impermissible grounds could contain 'social grounds',[100] although such an interpretation of art 7(1)(h) would not be uncontroversial.[101] Finally, in the context of comparable treatment of asylum seekers in Australia, the case has been made that HRL provides sufficient support for the universal impermissibility of discriminating on the basis of 'mode of arrival'.[102]

3 *Other Inhumane Acts*

The category of other inhumane acts occupies a pivotal spot in the legal and conceptual architecture of crimes against humanity. Its role has always been to capture acts of similar gravity and severity to the other prohibited acts. It reflects the dynamic and, for this very reason, potentially problematic nature of a legal regime that seeks to expand its sanctions and therefore threatens the strict principle of legality in ICL.[103] For this reason 'this residual category … must be interpreted conservatively and must not be used to expand uncritically the scope of crimes against humanity'.[104]

Nevertheless, the category can be used to describe and capture acts and conditions that constitute 'serious violations of international customary law and

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98 *Prosecutor v Nuon (Case 002/01 Judgement)* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber I, Case No 002/19-09-2007/ECCC/TC, 7 August 2014) [430] ('*Nuon TC*'). *Nuon TC* provides an overview, focusing on ICTY case law.

99 Revealing, in this respect, is the analysis of the Greek Minister of Public Order and Citizen Protection, Nikos Dendias, in 4 October 2012 during a TV interview, where he argued that an immigration detention centre is not a 'hotel' and that conditions are at the 'lowest acceptable civilised minimum' as these can 'discourage illegal migration by sending [the] message that' Greece is an 'unfriendly' country. See Cheliotis, above n 88, 735–6.

100 See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN Doc A/CONF.183/2/Add.1 (14 April 1998) 26 n 15: 'this also includes, for example, social, economic and mental or physical disability grounds'.

101 For an argument for a narrow or 'cautious' interpretation of 'other grounds' on the basis that 'universal impermissibility' requires a high threshold and that social and economic grounds had been suggested in the Preparatory Committee draft above but not ultimately adopted in the Rome Conference, see Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes:* Nullum Crimen Sine Lege *and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia, 2002) 522.

102 Henderson, above n 49, 1180.

103 See Kenneth S Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009) 336.

104 *Prosecutor v Muthaura (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the* Rome Statute*)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09-02/11, 23 January 2012) [269].

the basic rights pertaining to human beings'[105] and lead to significant physical and mental suffering, as observed in detention centres. Courts and tribunals have used this category to capture a variety of acts as long as there was

> (i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity.[106]

The circumstance, including the age of the victims, their health and the physical, moral and mental effects of IDT on victims are crucial.[107] 'Serious' and 'systematic' levels of IDT have expressly been recognised as qualifying as other 'inhumane acts'.[108] The same applies to overcrowding of cells, absence of bedding and basic hygiene, leading to lice and other diseases.[109] The deprivation of 'adequate food, shelter, medical assistance, and minimum sanitary conditions', has also been found to qualify.[110] So have beatings, 'physical and psychological abuse and intimidation, inhumane treatment, and depriv[ation] of adequate food and water'.[111] The conditions described above, and their widespread and systematic occurrence, fit the pattern, as do the physical and mental consequences on the victims. An investigation may further determine the gravity of such inhumane conditions, as well as the extent to which incidents of

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105 *Katanga PTC* (International Criminal Court, Pre-Trial Chamber, Case No ICC-01/04-01/07, 30 September 2008) [448].

106 *Prosecutor v Vasiljević (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-32-T, 29 November 2002) [234]. For example, see *Kupreškić TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [562]–[566]. See also *Prosecutor v Blagojević* for the discussion of forcible transfer under this category: *Prosecutor v Blagojević (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Section A, Case No IT-02-60-T, 17 January 2005) [629].

107 *Prosecutor v Galić (Judgement and Opinion)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-29-T, 5 December 2003) [153].

108 *Kupreškić TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-16-T, 14 January 2000) [566]. It should be noted that a discriminatory element is identified in this case as adding to the seriousness of the inhuman and degrading treatment.

109 *Krnojelac TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-25-T, 15 March 2002) [135]–[136]. It may be debated what exactly constitutes, as in *Krnojelac TC*, a *deliberate policy* of overcrowding. The judgment doesn't state whether each of the described conditions, or each set of conditions, by themselves qualify as other inhumane acts. At [144]:

> The Trial Chamber is satisfied that the physical and psychological health of many non-Serb detainees deteriorated or was destroyed as a result of the living conditions accepted as having existed at the KP Dom ... In making this finding, the Trial Chamber notes that there is no legal requirement that the suffering of a victim be lasting for the offences of cruel treatment or inhumane acts to be established. However, the Trial Chamber is satisfied that many of the non-Serb detainees continue to suffer lasting physical and psychological effects of their period of detention at the KP Dom. This factor supports the Trial Chamber's finding that the acts and omissions found below were of a serious nature.

110 *Nuon TC* (Extraordinary Chambers in the Courts of Cambodia, Trial Chamber I, Case No 002/19-09-2007/ECCC/TC, 7 August 2014) [456], [565]. It should be noted that this was found in the context of population movements, rather than detention.

111 *Blaškić AC* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-95-14-A, 29 July 2004) [154]. *Blaškić AC* discusses such treatment in the context of persecution.

beatings and sexual violence[112] can be characterised as an inherent part of the detention system,[113] or divergent behaviour of specific individuals.

4 *Some Observations on Mens Rea*

While it is impossible in this context to conclusively diagnose the mental state of potential individual suspects, certain observations on mens rea are relevant to the distinction between banal and radical evil crimes. A useful focus may be placed on border guards, employees both of the Greek state and Frontex, either holding or transferring asylum seekers to facilities that inflict IDT. In interviews conducted with them,[114] many expressed understanding, and even some measure of regret, that asylum seekers suffered IDT. We assume these people did not *want* asylum seekers to be exposed to IDT. Their role was simply to be part of an overall policy, described above in ICL terms. Both the *Rome Statute*[115] and ICL jurisprudence[116] are satisfied with the perpetrators' knowledge/awareness that their acts or omissions will lead to the specific result. Both Greek and Frontex agents testified to have being aware that IDT occurred in Greek immigration detention centres, and that, therefore, this would be the consequence of their actions 'in the ordinary course of events'.[117] Indeed, their placement in close proximity to these events could not have allowed them to remain oblivious to these consequences, even if they so preferred.

There is a question whether the same test for mens rea applies for 'other inhumane acts', since art 7(1)(k) requires the acts to 'intentionally caus[e]' the suffering. It may be argued that the detention conditions, deplorable and inhumane as they are, are not *intended* to cause the physical and mental suffering and injury they do. The regret the interviewed actors felt would therefore effectively shield them. Here we see, in the *lex lata*, a reflection of the distinction between banal and radically evil acts, potentially distinguishing between sadistic infliction of suffering and simple participation in a degrading system. However, the elements of crimes do not seem to suggest that a mens rea threshold, higher

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112 *HRW Report*, above n 13, 35. Similarly, see *Tadić TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) [730]; *Kordić TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95 -14/2-T, 26 February 2001) [270].

113 Indeed, the possibility was entertained that current '[m]istreatment of detainees could constitute crimes against humanity under Article 7(1)(a), (e), (f), and (k)' in Libya in: The Office of the Prosecutor, 'Seventh Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1970 (2011)' (Report, International Criminal Court, 13 May 2014) 5 [20].

114 One of the authors of this article, Itamar Mann, participated in a HRW mission reporting on asylum seekers' rights in north-western Greece in 2010–11.

115 *Rome Statute* arts 30(2)(b), 30(3).

116 See *Krnojelac TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-97-25-T, 15 March 2002) [132]. While this point of law is supported by ample jurisprudence, this case is particularly apposite both in terms of the substantive crimes charged and the role of the defendant, who was a warden at a detention facility.

117 This would be compatible even with the higher threshold of 'close to certainty' as set out in: *Bemba PTC* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009) [352]–[369].

than the one in art 30(2) discussed above, is imposed here.[118] Awareness of the consequences of the action suffices,[119] and the position of guards guarantees such awareness. Beyond this, and to the extent that *dolus directus* would be necessary,[120] we suggest it worth determining the extent to which the entire detention system assumes a punitive character by identifying migration and asylum seeking as a threat, to be punished through inhumane detention conditions. Indeed, there is anecdotal evidence that such a punitive mindset is present in centres of crucial authority.[121] This is fertile ground, at least, for a preliminary investigation.

One further complication with regard to the mens rea threshold exists in the context of the need for a discriminatory animus for persecution. Knowledge of discriminatory overall policy is not enough. While this may prove problematic for individual detention facility guards, such a hurdle might be easier to overcome in the case of individuals associated with the establishment of the overall institutional and administrative discriminatory state.[122]

C *With the Complicity of Frontex*

ICL requires placing the focus on individuals and their link to the inhumane consequences of their actions. The law provides the tools to address the responsibility of individuals physically proximate to the detention facilities and the inflicted IDT as well as the responsibility of those who, while physically removed, play an important role in constituting and participating in the 'attack'. This could include individuals who serve as guards as well as those in crucial positions in the political and/or police apparatus. We cannot, in this space, provide a roll call of potential defendants. As with the discussion of mens rea, a doctrinal analysis does not lend itself to proving the criminal responsibility of an

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118 *ICC Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2, 5 [2]: '[w]here no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element … intent, knowledge or both, set out in article 30, applies'. See *Rome Statute* arts 30(2)(b), 30(3).

119 See also for the application of the law in *Gbagbo PTC* where the reference to awareness of consequences, as a general threshold, seems to suffice as mens rea for 'other inhumane acts': *Gbagbo PTC* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11 -01/11, 12 June 2014) [235]–[236].

120 Even independently from the *Rome Statute*, it has been suggested that mens rea requires that 'the accused … must have been motivated by the intent to inflict serious bodily or mental harm upon the victim': *Blaškić TC* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14-T, 3 March 2000) [243].

121 One such instance is a recorded statement by the Greek Head of Police who argued that, in order to deter, both specifically and generally, further migration the authorities should 'make [a detained irregular migrant's] life unbearable'. See Amnesty International, 'Greece: Investigate Police Chief's Alleged Call Targeting Migrants' (Media Release, 19 December 2013) <http://www.amnesty.eu/en/news/press-releases/region/eu/greece-investigate-police -chief-s-alleged-call-targeting-migrants-0684/#.VXUlIM-qpBd>.

122 See, for example, the statement of the Greek Minister: see above n 99.

individual or a set of individuals. It will be up to the Prosecutor to determine 'who bear[s] the greatest responsibility'.[123]

We must, nevertheless, offer some brief observations on the role of Frontex and its agents. This is partly because, as set out above,[124] the IDT of asylum seekers in Greece can only be seen as an EU phenomenon. Excluding non-Greek state agents would mean limiting the blame to the relatively weaker actor. Moreover, conceptually, the implication of an EU agency visibly illustrates the complexity, bureaucratisation and multi-level functioning of systems of banal criminality. We thus tentatively indicate some avenues that ICL doctrine provides us in order to link individuals to the consequences of their actions.

Frontex's role, as discussed above, has been focused on patrolling, providing assistance to Greek border guards and transferring migrants to Greek custody. The detention of asylum seekers in camps, in the interests of Greek and EU immigration policy, can be seen as a 'common plan'. The idea of a 'common plan', to which perpetrators (associated with either the Greek state or Frontex) are contributing is central in the principle of co-perpetration, according to *Rome Statute* art 25(3)(a).[125] Approaching Greek and EU collaboration as a 'common plan' may also allow the ICC Prosecutor, following the focus of ICC jurisprudence,[126] to address the potential liability of individuals at higher levels of decision making.[127] The oft quoted dictum of the *Prosecutor v Lubanga* Pre-Trial Chamber has set out the combined subjective/objective approach which confirms that principal liability

> is not limited to those who physically carry out the objective elements of the offence, but also include[s] those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.[128]

Crucially, the plan itself does not have to be criminal:

> It suffices … that the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a

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123 While the term does not constitute a formal legal criterion in the *Rome Statute*, it has been adopted early on as an Office of the Prosecutor policy. See The Office of the Prosecutor, 'Paper on Some Policy Issues before the Office of the Prosecutor' (Policy Paper, International Criminal Court, September 2003) 7. See also Paul Seils, 'The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court' in Morten Bergsmo (ed), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Torkel Opsahl Academic EPublisher, 2nd ed, 2010) 69.

124 See above Part II.

125 Space does not permit us to discuss the looser requirements for *Rome Statute* art 25(3)(d).

126 The starting point here is: *Prosecutor v Lubanga (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06, 29 January 2007) [330]–[340] ('*Lubanga PTC*'). See also *Gbagbo PTC* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 12 June 2014) [230].

127 This would allow a top-down liability approach, as opposed to a bottom-up approach through command responsibility, as per *Rome Statute* art 28.

128 *Lubanga PTC* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04 -01/06, 29 January 2007) [330].

> non-criminal goal) will result in the commission of the crime, and (b) accept such an outcome.[129]

Even if we accept that IDT is not the ultimate goal, the ECtHR case law has shown that it is a necessary consequence of the 'plan', as executed. The perpetrators are also, at least, fully aware of the risk that implementing the common plan will result in the commission of the crime and, by their actions, have accepted the outcome. Finally, it can be argued that Frontex and the Greek state have joint control over the plan and are *both* able 'to frustrate the commission of the crime by not performing the assigned functions'.[130] Put differently, Frontex's role, including in transferring individuals, provides an 'essential' contribution to this plan.[131]

Even if principal liability cannot be successfully constructed, Frontex's role can be described as 'aiding and abetting'. The combination of the level of the contribution, having 'a substantial effect upon the perpetration of the crime', with the knowledge[132] of the detention conditions,[133] satisfies accessory liability in accordance with *Rome Statute* art 25(3)(c).[134] Article 25(3)(c) requires the aid to be given 'for the purpose of facilitating the crime',[135] an element that may complicate attribution, raising once more the issue of the extent of the integration of the criminal and non-criminal aspects of detention.[136] On this, we can only agree with Robert Cryer's recommendation[137] that the ICC follows the principle of *Tadić v Prosecutor,* namely that 'awareness … of the essential elements of the

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129 Ibid [344]. See also *Gbagbo PTC* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/11-01/11, 12 June 2014) [231]: 'violence against civilians, while not in itself the ultimate goal of Laurent Gbagbo and his inner circle, was a criminal element inherent to the common plan to stay in power at any cost'.

130 Reflecting the mutual dependency of co-perpetration according to: Cassese and Gaeta, above n 53, 176.

131 *Prosecutor v Lubanga (Judgment pursuant to Article 74 of the* Statute*)* (International Criminal Court, Trial Chamber I, Case No ICC-01/04-01/06, 14 March 2012) [999]. Even though this added criterion is not in the language of the *Rome Statute* and its necessity is disputed. See Jens David Ohlin, Elies Van Sliedregt and Thomas Weigend, 'Assessing the Control-Theory' (2013) 26 *Leiden Journal of International Law* 725.

132 See *Taylor v Prosecutor (Judgment)* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-03-01-A, 26 September 2013) [436] ('*Taylor AC*').

133 See *Tadić AC* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [220].

134 On whether the *Rome Statute* requires 'substantial' contribution or something less, see *Prosecutor v Mbarushimana (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/10, 16 December 2011) [279] n 661.

135 See also ibid [281]. *Prosecutor v Mbarushimana* argues that this distinguishes accessory liability under the *Rome Statute* from ad hoc international criminal tribunals' jurisprudence.

136 While the ICC has not settled this issue in its jurisprudence yet, there is a parallel, if not identical, debate over the requirement of 'specific direction' in aiding and abetting. The recent appeal chamber judgment in *Taylor AC* rejected the customary basis of such a requirement: *Taylor AC* (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL -03-01-A, 26 September 2013) [476]. The latest word of the ICTY Appeals Court in *Prosecutor v Šainović* also contributes to this conclusion: *Šainović v Prosecutor (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-05-87-A, 23 January 2014) [1650].

137 Robert Cryer, 'General Principles of Liability in International Criminal Law' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart, 2004) 233.

crime committed by the principal would suffice'.[138] Finally, the fact that 'the lending of practical assistance … may occur before [the] offence occurs',[139] seems to adequately describe Frontex's role in handing over individuals to be detained in the described conditions.

IV GRAVITY

Even if we have outlined a prima facie case so as to satisfy the requirement in *Rome Statute* art 53(1)(a) that the available information provides a 'reasonable basis' for prosecution, we must also show that the crimes committed in Greek detention centres are of sufficient gravity to warrant investigation by the ICC Prosecutor. This requirement constitutes another stumbling block for the project of extending crimes against humanity to include banal acts as well as radically evil ones. As explained above, banal acts are normalised occurrences, understood as rooted in social and economic process rather than in politics. Their perpetrators may be 'well-intentioned', as Greek and Frontex border guards may have been in attempting to prevent unauthorised migration into Greece. As we have shown, these banal acts fit within the ICC's mandate.

While radically evil crimes clearly amount to *grave* crimes, banal acts are — of their nature — *less obviously* grave. For this reason,[140] we suggest a different interpretation of 'gravity', demonstrating that banal crimes can nonetheless be sufficiently serious to warrant investigation. The term 'gravity' is laid out, undefined, in *Rome Statute* arts 17(1)(c) and 53(1)(c). The concept of 'gravity' combines the necessity of definition with the flexibility of prosecutorial policy. The ensuing vagueness is both a blessing and a curse: while it provides a criterion for selection, it also invites charges of selectivity, affecting the perceived legitimacy of the Court.

The Prosecutor's approach so far has been to interpret gravity as meaning one thing: 'mass atrocities'.[141] Within this framework, one might agree that the detention of asylum seekers in Greece is deplorable and even merits humanitarian response. But it pales in comparison with other cases the ICC has so far taken on. The situations in the Central African Republic, Côte d'Ivoire, Darfur, the Democratic Republic of Congo, Libya, the Republic of Kenya and Uganda all involved spectacular acts of human destruction. As one commentator

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138 Ibid 249, citing *Tadić AC* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [164].

139 *Prosecutor v Milutinović (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-05-87-T, 26 February 2009) [91].

140 'Gravity' is not the only criterion for the exercise of the Court's jurisdiction. Space does not permit discussion of 'the interests of justice' and 'complementarity'. The former have so far been interpreted purely negatively, as a stop or pause to prosecution, and a converse interpretation would arguably be too far off the common understanding. See The Office of the Prosecutor, 'Policy Paper on the Interests of Justice' (Policy Paper, International Criminal Court, September 2007) <http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf>. The practice of 'complementarity', which expresses ICL's confidence in well-functioning and 'developed' legal systems, has been perceptively critiqued by Sarah Nouwen: Sarah M H Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, 2013).

141 Kevin Jon Heller, 'Situational Gravity Under the *Rome Statute*' in Carsten Stahn and Larissa van den Herik (eds), *Future Perspectives on International Criminal Justice* (TMC Asser, 2010) 227.

put it, the defendant in such cases figures as 'an ogre forever bent on the consumption of humans'.[142] Suspects currently facing prosecution at the ICC have all intentionally engaged in attacks on civilian population involving massacre, rape, torture, tyrannical rule or a combination of the above. There are sound reasons for international prosecution of mass atrocities. Yet the Court docket has, in recent years, provoked considerable criticism, according to which its cases inappropriately target African countries.[143] Such criticisms must raise the basic question: do the Court's cases reflect a valid understanding of 'gravity'?

We believe the hierarchy between the banal and the spectacular, and in fact the disregard of the former category altogether, must be reconsidered. Confronting acts that seem to be natural by-products of global social and economic process may allow the Court to more seriously address contemporary criticisms of its case selection. This is imperative, if the Court's case selection is to realise a universalist vision of politics. The analysis above with respect to asylum seekers in Greece is merely one of a potentially much larger set of circumstances constitutive of banal crimes against humanity. Many of these may potentially trigger prosecution against developed countries.

To be sure, the Office of the Prosecutor ('OTP') itself has started to develop a flexible approach, rejecting 'an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court'.[144] It called for 'both quantitative and qualitative considerations', including the scale, nature, manner of commission and impact of the crimes.[145] This open-endedness has been criticised as opening the ICC to accusations of 'politicisation'.[146] Such open-endedness, however, should recalibrate prosecutorial policy away from an exclusive focus on the spectacular. More pointedly, some politicisation is both inevitable and necessary if the OTP is to develop a coherent understanding of its

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142 Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201, 202.

143 This may help improve the reputation of the Court and help undo some of the damage caused by the perception that it has a political bias. See, eg, Mahmood Mamdani, 'The New Humanitarian Order', *The Nation (online)*, 10 September 2008 <http://www.thenation.com/article/new-humanitarian-order#>. There is also a perception that the ICC has a racial bias against Africans. See Richard Lough, 'Ethiopian Leader Accuses International Court of Racial Bias', *Reuters* (online), 27 May 2013 <http://www.reuters.com/article/2013/05/27/us-africa-icc-idUSBRE94Q0F620130527>.

144 The Office of the Prosecutor, 'Policy Paper on Preliminary Investigations' (Policy Paper, International Criminal Court, November 2013) 15 [60] ('*ICC Policy Paper*'); *Ntaganda v Prosecutor (Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04, 13 July 2006) [69]–[79]. See also The Office of the Prosecutor, '*Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*' (Report, International Criminal Court, 6 November 2014) 55 [136]. The qualitative elements of attacks on 'persons who represent the international community' are discussed, with reference to *Prosecutor v Garda*: at 58–9 [145]; *Prosecutor v Garda (Decision on the Confirmation of Charges)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-02/09, 8 February 2010).

145 *ICC Policy Paper*, above n 144, [61]–[65].

146 Margaret M deGuzman, 'Gravity Rhetoric: The Good, the Bad and the "Political"' (2013) 107 *Proceedings of the Annual Meeting of the American Society of International Law* 421.

role as an institution of universal criminal justice.[147] Meting out justice, on this account, is an inherently political task,[148] as is any understanding of what it means to be *universal*.

Kevin Heller has already argued for a qualitative focus, based on three central considerations: the centrality of the state, the high level of systematisation of the conduct and the potential for 'social alarm'. The latter term 'is a function of how widely a crime is committed',[149] a notion adopted by the Pre-Trial Chamber in the context of the use of child soldiers.[150] Heller further argues that prioritising the prosecution of torture, even when there is no great number of victims, would increase the expressive function of prosecution, and thus the deterrent effect of the Court.[151]

Such a switch to the qualitative is relevant here. It contains the potential to address the inhumane treatment of asylum seekers; more importantly, it requires the Prosecutor to confront structural forms of violence that political systems generate.[152] It allows ICL, and the ICC specifically, to address varieties of evil and of criminality, not purely of the spectacular or radical kind, necessitating sadistic violence. For torture is not necessarily wielded by sadistic individuals or totalitarian regimes bent on the extermination of their own populations. It has often been the by-product of the work of well-intentioned security officials, whose only stated objective was to protect their fellow citizens from a perceived terrorist threat.[153] Today, the threat of unauthorised immigration generates inhuman and degrading treatment that can easily become accepted as a way to protect the state. Banal crimes are often the most widely committed — far more states mistreat refugees than engage in mass atrocity. Moreover, the banal crimes are the kinds of crimes that Western states may be as likely to commit as states in the Global South: another case in point is Australia's extraterritorial treatment of asylum seekers in facilities such as those on Manus Island.

But simply moving from a quantitative orientation of gravity to a qualitative one may not be enough. 'Banal' crimes against humanity seemingly raise an interesting paradox. If, as we argue, they may pass the threshold of gravity required in order to trigger an investigation by the OTP, how can they pass as 'banal'? Why do they lack the shock value characteristic of international crimes? From one perspective, the idea that an act can seem 'grave' and 'banal' in one and the same time may even seem self-contradictory.

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147 According to Margaret deGuzman, gravity empowers the discretionary initiative of the Prosecutor and thus affects the Court's perceived 'legitimacy'. See Margaret M deGuzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008) 32 *Fordham International Law Journal* 1400.

148 See also Frédéric Mégret, 'Beyond "Gravity": For a Politics of International Criminal Prosecutions' (2013) 107 *Proceedings of the Annual Meeting of the American Society of International Law* 428.

149 Heller, above n 141, 233.

150 *Prosecutor v Lubanga (Decision concerning Pre-Trial Chamber I's Decision of February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04 -01/06, 24 February 2006) [46].

151 Heller, above n 141, 243.

152 See Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 *Journal of Peace Research* 167.

153 This is why the torturer may figure in the popular imagination as a hero. See Paul W Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (University of Michigan Press, 2008) 95.

The fact that acts that fall under the *Rome Statute* and the ICC's mandate may not even register as international crimes is paradigmatic of the crimes we are thinking about. These are acts that aim to preserve the national interests of states that are largely considered democratic, legitimate and at the very centre of the 'we' of the 'international community'.[154] However, this legitimacy may look quite different when considered from the perspective of the ramifications of global inequality reflected in such crimes. It is from this global perspective that the OTP must look at the world. Indeed, this perspective is codified in *Rome Statute* art 5, which mandates the ICC Prosecutor to ask which crimes are 'of concern to the international community *as a whole*'.[155] That a certain set of circumstances normally cannot even be seen from the perspective of its victims is in fact one of the hallmarks of the gravity of 'banal' acts. They are grave *because* the current world order somehow conceals their adverse consequences on the populations they target, not *despite* that fact.

Moreover, the notion of gravity we argue for allows the ICC to realise a broad notion of complementarity. The Prosecutor does not only have to carry out a preconceived notion of gravity, based on a seeming global consensus. The Prosecutor must also question that consensus, constantly asking how that consensus might itself be an instrument of subjugation of particular populations. ICL, in this view, is one of various legal instruments designed to counter such subjugation when it is systematised. This may seem like a difficult, indeed 'Herculean' task (to use Ronald Dworkin's term).[156] However, the only other option is a self-serving, uncritical notion of 'gravity', based upon the *doxa* held by a particular culture prevalent in relatively strong societies. Such a view will continue to erode the legitimacy of the Court in the eyes of some.

Complementarity, in our view, does not only mean that the Court steps in when a state is 'unwilling or unable' to carry out its own prosecution, as ICL doctrine ordinarily has it. It also realises an older tradition in international law, according to which international organisations step in to protect populations that no state grants protection to. This tradition has been prevalent in international law at least since the establishment of refugee protection organisations in the interwar period.[157] This notion of complementarity may continue the gradual expansion of ICL since its inception with the Nuremberg trials. The gradual expansion has, throughout its history, often impinged on the interests of states.[158] This time, the interests of relatively strong states and organisations — not only Greece but also EU member states and specialised agencies — are in question.

In order to embody such a notion of complementarity, the ICC Prosecutor's judgement must take into account the desired political role of the ICC. The Prosecutor must prevent the possibility that international criminal prosecution

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154 The ultimately exclusive function of this 'we' is analysed in: Immi Tallgren, 'The Voice of the International: Who is Speaking?' (2015) 13 *Journal of International Criminal Justice* 135.

155 *Rome Statute* art 5(1) (emphasis added).

156 Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 239–42.

157 See generally R Yewdall Jennings, 'Some International Law Aspects of the Refugee Question' (1939) 20 *British Yearbook of International Law* 98, 110.

158 See Margaret M DeGuzman, 'How Serious are International Crimes? "The Gravity Problem in International Law"' (2012) 51 *Columbia Journal of Transnational Law* 18.

will become a mode of domination of the rich and powerful against the poor and weak.[159]

V CONCLUSION

There is significant evidence that crimes against humanity, which the ICC Prosecutor has the mandate to investigate, have been taking place at the south-eastern corner of Europe. Article 5 of the *Rome Statute* presents perhaps the most important question about these alleged crimes: are they 'of concern to the international community as a whole'?

In order to confront this thorny question, we have argued, one must recognise a previously unacknowledged, qualitative, concept of 'gravity'. The label of banal crimes against humanity was our attempt to capture this concept and explain it. And the particular context of Greece (which is by no means a unique one around the world) illustrated the blind spot — both doctrinal and policy based — concerning such banal crimes. In future work, we hope to further interrogate this blind spot, which in our view is potentially crucial both in understanding and in practicing ICL.

In order to engage the blind spot of banal crimes, the Prosecutor should look beyond the imagination of radical evil for future prosecutions. To this end, we have shown that the Prosecutor already possesses the necessary doctrinal tools to refocus ICL from its narrow attention on the developing world to a genuinely universal scope, carefully considering even normalised grievances rooted in the social and economic inequalities of the international system.

It is not at all clear to us that the ICC can tackle banal crimes against humanity without taking on some measure of institutional risk. Investigating crimes whose perpetrators may be powerful traditional supporters of the Court (such as EU actors) may imperil such support.[160] But without taking such risks, the ICC may lose its most basic justification. Only by going beyond radical evil can the Prosecutor approach the regulative ideal embedded in the phrase: 'of concern to the international community *as a whole*'.[161]

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159 Compare with the notion of critique by: Itamar Mann 'The Dual Foundation of Universal Jurisdiction: Towards a Jurisprudence for the "Court of Critique"' (2010) 1 *Transnational Legal Theory* 485.

160 See also Sara Kendall, 'Commodifying Global Justice: Economies of Accountability at the International Criminal Court' (2015) 13 *Journal of International Criminal Justice* 113.

161 *Rome Statute* art 5(1) (emphasis added).