BORDER VIOLENCE AS CRIME

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ABSTRACT

As the violence of borders has increased since the beginning of the century, advocates have started to employ the language of anti-impunity. This discourse aims to frame border violence as a crime, often as a mass atrocity. This Article is the first to identify and critically assess this type of response. It offers a comparative multi-regional analysis to analyze the turn to criminal law as it has figured in attempts to enforce the rights of refugees and migrants. After defining the anti-impunity project, the Article analyzes anti-impunity in the context of migration to Australia, Europe, and the United States. It then proceeds to evaluate this trend in light of recent literature, which has been critical of anti-impunity and "the turn to criminal law" in human rights. Critics of anti-impunity have argued, in the context of a broad range of human rights campaigns,

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that the criminal law vocabulary diverts attention from underlying structural issues, including economic inequality. This Article presents a defense of the criminal law framing of border violence, as one instrument within a broader toolbox of strategic litigation, and of transformative political action. I argue the atrocity framing, common to contemporary progressive movements around the world, is an attempt to employ criminal law to counter violence rooted in global inequality.

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I. INTRODUCTION

On August 9, 2018, Ben Ferencz, the last surviving prosecutor at the Nuremberg trials, opined that Donald Trump committed "a crime against humanity" against migrants and refugees.[1] Neither the 99-year-old lawyer nor the former President of the United States are alone in their respective roles as the accuser and the accused. Around the world, advocates have increasingly appealed to criminal law, including international criminal law, to establish liability for border violence. Protest movements and progressive politicians have stressed analogies between contemporary abuses against migrants and historical mass atrocities—including, but not limited to, concentration camps. As politicians in many developed countries introduce cruel measures against migrants, activists have turned towards criminal law and a discourse of *anti-impunity*.[2] Celebrities have echoed this discourse on Twitter.[3]

As a legal program, anti-impunity holds that a central mechanism of ensuring accountability for gross violations of human rights is criminal law.[4] If domestic institutions fail to hold violators accountable, an international body should proceed, instead. Scholars identified a turn to criminal law in human rights in the

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[1] Mythili Sampathkumar, *Last Surviving Prosecutor at Nuremberg Trials Says Trump's Family Separation Policy is 'Crime Against Humanity'*, INDEPENDENT (Oct. 16, 2018), https://www.independent.co.uk/news/world/americas/trump-border-crisis-nazis-nuremberg-trial-ben-ferencz-family-separation-migrants-un-a8485606.html [https://perma.cc/5CNU-3BSD].

[2] On anti-impunity generally, see M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 421 (2000); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L L. 7, 16 (2001). In the context of migration, see, for example, ANA GONZÁLEZ-PÁRAMO, THE WIDESPREAD IMPUNITY OVER MIGRANT DEATHS (2017), http://www.statewatch.org/analyses/no-321-migrant-deaths-impunity.pdf [https://perma.cc/NLN4-W78A]; Ryan Goodman (@rgoodlaw), TWITTER (June 22, 2019, 6:54 PM), https://twitter.com/rgoodlaw/status/1142566649465397250 [https://perma.cc/MQS2-JJYB].

[3] *See e.g.*, Marissa J. Lang (@Marissa_Jae), TWITTER (July 16, 2019, 11:46 AM), https://twitter.com/Marissa_Jae/status/1151234786217857028; Andrea Pitzer (@andreapitzer), TWITTER (June 25, 2019, 5:07 PM), https://twitter.com/andreapitzer/status/1143626892660097026/photo/1 [https://perma.cc/6G3A-PZDR].

[4] *See* Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1077-78 (2015) (explaining the reasons why early anti-impunity advocates looked to "individual criminal responsibility" to hold human rights abusers accountable).

1990s, and criminal law has since become central to human rights.[5] Yet anti-impunity goes beyond a set of legal agendas. It also refers to rhetoric in which gross human rights violations are analogized to past atrocities. The turn to criminal law is part of a discourse on mass atrocity, characteristically grounded in the context of war and authoritarianism, and often advanced under the banner "never again."[6]

This Article offers a comparative multi-regional analysis to assess the turn to criminal law and to anti-impunity as it has figured in attempts to enforce the rights of refugees and migrants. Karen Engle has advanced the critique of anti-impunity in an article titled *Anti-Impunity and the Turn to Criminal Law in Human Rights*.[7] Alongside her co-editors Zinaida Miller and D.M. Davis, she has also collected critiques of this turn in an illuminating edited volume, *Anti-Impunity and the Human Rights Agenda*.[8] This Article engages the critiques of anti-impunity primarily through a consideration of these sources. Among the various contributions to the latter collection, I especially spend argumentative energy pushing back against Samuel Moyn's essay *Anti-Impunity as Deflection of Argument*.[9] I believe he raises an important philosophical challenge; one that is ultimately misguided.

As the turn to criminal law in the protection of refugees and migrants is still rather inchoate, the scholars involved in this critique typically do not address refugees and migration.[10] At the same time, this area of human rights has become one of the most divisive in public opinion in developed countries.[11] This Article, therefore,

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[5] *Id.*

[6] For a description of the rhetorical role of this phrase, see, for example, Michelle D. Bonner, *'Never Again': Transitional Justice and Persistent Police Violence in Argentina*, 8 INT'L J. TRANSITIONAL JUST. 235 *passim* (2014); Charles Davison, Special Report, *Never Again!!*, 26 LAWNOW 32, 35 (2001); Karinne Coombes, *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?*, 43 GEO. WASH. INT'L L. REV. 419, 420 (2011).

[7] Engle, *supra* note 4.

[8] ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA (Karen Engle, Zinaida Miller & D.M. Davis eds., 2016).

[9] Samuel Moyn, *Anti-Impunity as Deflection of Argument*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, *supra* note 8, at 68, 68.

[10] An exception to this, discussed below, is Janie Chuang's important critique of criminalization in the context of trafficking. *See* Janie A. Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, 108 AM. J. INT'L L. 609 *passim* (2014).

[11] *See, e.g.*, Anthony Heath et al., *Contested Terrain: Explaining Divergent Patterns of Public Opinion Towards Immigration within Europe*, 46 J. ETHNIC &

seeks to determine to what extent the critique the literature raises is applicable to the burgeoning anti-impunity discourse on migrants and refugees. As I have been involved in several of the initiatives described below, I do not argue from a purely academic perspective. My perspective is one of engaged academic and lawyer.

Part II briefly explains what anti-impunity is. Part III identifies the emergence of what I call *the new anti-impunity*. I describe how the discourse appeared in refugee and migration policy conversations in three regional contexts: Australia, the external borders of the EU, and the United States. Part IV summarizes a set of critiques scholars have raised in recent years against the human rights movement's turn to anti-impunity. As advocates, should we extend anti-impunity discourse toward migrant and refugee struggles? Or should the critique—originally directed at perceived shortcomings of anti-impunity in responding to war crimes and authoritarianism—serve as a warning against anti-impunity's futility or adverse consequences? While highlighting the value of the critique, I offer a qualified defense for strategies grounded in anti-impunity. Part V concludes by providing an assessment of the merits, as well as the potential pitfalls, of the turn to criminal law in struggles for refugee and migrant rights.

II. WHAT IS ANTI-IMPUNITY?

The Rome Statute came into force in 2002 and established the International Criminal Court ("ICC").[12] The Statute's preamble declares the aspirations that motivated its drafting process: "that the most serious crimes of concern to the international community as a whole must not go unpunished . . . ."[13] The drafters were "[d]etermine[d] to put an end to impunity for the perpetrators of these crimes . . . ."[14] In Samuel Moyn's words, perceptive if mildly overstated, the ICC has come to symbolize "the new dream of individual criminal accountability as a central feature—perhaps the central feature—of our current vision of international or global

MIGRATION STUD. 475, 475 (2019) (observing that "public opposition to immigration has become a major disruptive force in developed democracies, with the emergence of a new family of political parties, the populist radical right").

[12] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

[13] *Id.* at pmbl.

[14] *Id.*

justice."[15] This Article argues against the view that criminal law is occluding other vocabularies of global justice, and instead argues that in the migration context, anti-impunity is part of a wider progressive vision.

Commentators locate the sources of anti-impunity as a genre of legal rhetoric long before the Rome Statute. The popular historical narrative often begins with the Nuremberg trials, continues with the establishment of *ad-hoc* tribunals,[16] and culminates with the Rome Statute.[17] Other iconic instances in which anti-impunity discourse has been central are Argentina's "dirty war" trials; the debate surrounding South Africa's Truth and Reconciliation Commission; and the discussion on how to measure justice against peace in war crimes cases in which Colombian paramilitary and guerrilla groups have been charged.[18] Anti-impunity has been central to debates on transitional justice, a field pioneered against the backdrop of post-authoritarian accountability efforts.[19] Recall anti-impunity's Argentinian *cri de cœur*: "Nunca Más!"[20] Anti-impunity's focus on

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15 Moyn, *supra* note 9, at 69.

16 *See, e.g.*, U.N. SCOR, 3217th mtg. at 2, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the International Criminal Tribunal for the Former Yugoslavia ("ICTY")); U.N. SCOR, 3453 mtg. at 2, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda ("ICTR")).

17 Vasuki Nesiah, *Doing History with Impunity*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, *supra* note 8, at 95, 110 (providing a critique of historical progress among atrocity trials).

18 For literature focusing specifically on historical examples of anti-impunity in international criminal law and atrocity trials see, Karen Engle, *A Genealogy of the Criminal Turn in Human Rights*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, *supra* note 8, at 15, 39; Zinaida Miller, *Anti-Impunity Politics in Post-Genocide Rwanda*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, *supra* note 8, at 149, 149; Louise Mallinder, *The End of Amnesty or Regional Overreach: Interpreting the Erosion of South America's Amnesty Laws*, 65 INT'L & COMPAR. L.Q. 645 (2016); Engle, *supra* note 4 at 1101 n.131; Natalie Sedacca, *The 'Turn' to Criminal Justice in Human Rights Law: An Analysis in the Context of the 2016 Colombian Peace Agreement*, 19 HUM. RTS. L. REV. 315 (2019); Rodolfo Mattarollo, *Impunity and International Law*, 11 REVUE QUÉBÉCIOSE DE DROIT INTERNATIONAL 81, 94 (1998).

19 *See* David Dyzenhaus, *Transitional Justice*, 1 INT'L J. CONST. L. 163, 164 (2003) (book review) (discussing the history of the concept of transitional justice); Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321, 323-24 (2009) ("This essay examines the shift . . . from the recognition of new practical dilemmas to the development of a knowledge-base to address those dilemmas through the emergence of a new field called 'transitional justice.'").

20 *See* Jamal Benomar, *Confronting the Past: Justice After Transitions*, 4 J. DEMOCRACY 3, 11 (1993) (referencing a government-commissioned report that revealed the atrocities committed by Argentina's military regime in the 1970s and 1980s).

criminal law and on punishment has been dominant in campaigns against human rights violations in war and under authoritarian government throughout the twenty-first century.[21]

Lawyers have often expressed the view that the "impunity gap" should constantly be "narrow[ed]," culminating in impunity's ultimate "eradicat[ion]."[22] It is this kind of rhetoric that will later become the backdrop for a critique that criminal justice has expanded disproportionately, somehow "colonizing" the global moral-political imagination.[23] Indeed, the turn to criminal law in the human rights agenda has expanded far beyond the instances noted above. For example, the rhetoric of anti-impunity has become central for certain feminists and is perhaps most familiarly associated with the work of Catherine MacKinnon.[24] As Janie Chuang has documented, a watershed moment in the human rights agenda's turn to criminal law was the framing of the Trafficking Protocol of 2000.[25] Citing previous work by Anne Gallagher, Chuang explains how "the Trafficking Protocol, developed as a protocol to the UN Convention on Transnational Organized Crime . . . 'unceremoniously plucked' the trafficking mandate out of the human rights realm and reframed it as a criminal justice issue."[26]

In 2008, MacKinnon was appointed Special Gender Adviser to the Prosecutor of the ICC, with the expectation that she helps the court speak for the victims of sexual violence.[27] In an address soon after her appointment, MacKinnon explained: "The campaign of violence against women well-documented around the world, with substantial variation but also substantial impunity, is the longest-

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21 ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, *supra* note 8, at 1.

22 *See, e.g.*, Helen Duffy, *Toward Eradicating Impunity: The Establishment of an International Criminal Court*, 26 SOC. JUST. 115, 116 (1999) ("To suggest that the creation of an ICC will single-handedly eradicate impunity would be fanciful, but as an essential part of the emerging system of international justice, it will make a real contribution to narrowing the impunity gap.").

23 *See* discussion *infra* Part IV.

24 Janie Chuang calls this group the "neo-abolitionists", emphasizing the analogy they drew between trafficking and slavery. *See* Chuang, *supra* note 10, at 615-16.

25 *Id*. at 614-16.

26 *Id*. (citing ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 62 n. 48 (2012)).

27 Fatou Bensouda, Prosecutor-elect, Int'l Crim. Ct., "Gender Justice and the ICC: Progress and Reflections": International Conference: 10 Years Review of the ICC. Justice for All? The International Criminal Court 3 (Feb. 14, 2012).

running siege of crimes against humanity in the real sense." [28] Comparable to the yet-to-evolve rhetoric in the migration context, examined below, MacKinnon charged that societies and their leaders have been complicit in a worldwide criminal scheme.[29]

The new frontiers of anti-impunity go further, arguably including the global fight against climate change.[30] For example, Philip Alston has recently warned of a "climate apartheid."[31] The categorization of something as an "apartheid" aims to trigger fundamental rejection. It is one of those words that should presumably make us say "never again." At a Democratic presidential debate in November 2019, Senator Bernie Sanders reiterated his proposal to criminally prosecute fossil fuel executives "who knowingly destroyed the planet."[32] Senator Sanders appealed to the sentiment human rights scholars have termed anti-impunity.

Such views may suggest that anti-impunity is exclusively associated with liberal and progressive political agendas. The truth is, however, that the legal and rhetorical strategy of anti-impunity can serve different masters. Conservative agendas are just as likely as progressive ones.[33] A newfound anti-impunity agenda among conservatives seeking to criminalize abortions, for example,

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[28] Catharine Mackinnon, Special Gender Adviser to the Prosecutor of the Int'l Crim. Ct., The Int'l Crim. Ct. and Gender Crimes, Address at Consultative Conference on International Criminal Justice (Sept. 11, 2009).

[29] *Id.* Other feminists have stressed the limits of international criminal law in achieving substantive changes. *See* Doris Buss, *Performing Legal Order: Some Feminist Thoughts on International Criminal Law*, 11 INT'L CRIM. L. REV. 409, 409 (2011) (arguing that criminal law is an inherently limited arena for advocating for "feminist-inspired social change"); Fionnuala Ní Aoláin, Dina Francesca Haynes & Naomi Cahn, *Criminal Justice for Gendered Violence and Beyond*, 11 INT'L CRIM. L. REV. 425, 426 (2011) (arguing that international criminal law alone cannot adequately address the underlying systemic causes of gender-based violence).

[30] *See* Itamar Mann, *Eichmann's Mistake: The Problem of Thoughtlessness in International Criminal Law*, 33 CANADIAN J.L. & JURIS. 145 *passim* (2020) (noting that knowingly taking actions that are detrimental to the environment could, in some points of view, be construed as international actions).

[31] Philip Alston (Special Rapporteur on Extreme Poverty and Hum. Rts.), *Climate Change and Poverty*, ¶ 50, U.N. Doc./HRC/41/39 (June 25, 2019).

[32] Bernie Sanders (@BernieSanders), TWITTER (Nov. 20, 2019, 10:11 PM), https://twitter.com/BernieSanders/status/1197351780604141569?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1197351780604141569&ref_url=https%3A%2F%2Fwww.vox.com%2F2019%2F11%2F12%2F20959293%2Fbernie-sanders-climate-lawsuit-exxon-juliana-sinnok [https://perma.cc/RWY2-ZU5Z].

[33] Political agendas that are possibly not consonant with an agenda of anti-impunity are those that oppose criminal law as such (this may be true about certain libertarian or anarchistic tendencies). *See* Mann, *supra* note 30, at 159.

illustrates that it is not necessarily liberal.[34] A particularly remarkable case-in-point is Supreme Court Justice Clarence Thomas's comparison between birth control and eugenics, and its historical motivation "to exterminate" the black population.[35] Just like with the concentration camps example, which I will discuss below in some detail, the anti-impunity vocabulary's tendency to return to loaded historical examples is clear. Other conservatives have called for prosecuting those responsible for abortion clinics.[36] Whether their aspirations—or Sanders'—are closer to political realities, remains to be seen.

Alongside climate change, the struggle against impunity for violations against refugees and migrants is another new frontier associated with liberal and progressive views. Be their political orientation as they may, the novel developments continue previous campaigns against impunity in the contexts of war and authoritarianism and build upon them. Considering the old leftist critique according to which criminal law enforces an unequal distribution of private property,[37] anti-impunity's endurance within the progressive camp should not be taken for granted. Around the world, criminal law has often been used to disproportionally incarcerate racially discriminated against or politically disfavored groups.[38] Curiously, these new articulations of anti-impunity have developed precisely when optimism about the ICC as a forum for accountability has generally waned.[39] Rather than protecting

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[34] For Justice Thomas's recent opinion on that matter, which engages anti-impunity rhetoric, see Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019) (discussing the history of birth control as it relates to eugenics and forced sterilization). *See also* Helena Alviar García & Karen Engle, *The Distributive Politics of Impunity and Anti-Impunity: Lessons from Four Decades of Colombian Peace Negotiations*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, supra note 8, at 216, 226 (noting that in Colombia, "[a]nti-impunity became the cry of both the left and the right, albeit not always at the same time").

[35] *Box*, 139 S. Ct. at 1788 (citing *Birth Control or Race Control? Sanger and the Negro Project*, Margaret Sanger Papers Project Newsletter #28 (2001), http://www.nyu.edu/projects/sanger/articles/bc_or_race_control.php [https://perma.cc/L6KS-72ER]).

[36] *See* Mann, *supra* note 30, at 166-70.

[37] For a more nuanced account, see Paul Q. Hirst, *Marx and Engels on Law, Crime and Morality*, 1 ECON. & SOC'Y 28 *passim* (1972) (articulating and emphasizing the transformations in Marx's theory of law, and thus highlighting its complexities).

[38] *See* Engle, *supra* note 4, at 1125-26.

[39] For information on how the expectations of the ICC are now generally more modest than they were at its founding see, ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, *supra* note 8, at 4; Engle, *supra* note 4, at 1116-17, 1125-26; Moyn, *supra* note

refugees and migrants, criminal law is applied ever more frequently to block access to asylum.[40] What is the lasting appeal of criminal law among liberal and progressive advocates working in the field of migration?

At the center of the international human rights system lie multilateral conventions, sometimes equipped with monitoring systems or quasi-constitutional tribunals, designed to discipline states.[41] The anti-impunity discourse, however, goes beyond this focus on states. In the international law sphere, anti-impunity reflects a proclivity towards sources of law that seem not to require explicit state consent, i.e., those of *jus cogens*. It adopts the language of absolute prohibition binding upon all ("*erga omnes*").[42] Anti-impunity's emphasis on criminal accountability, particularly but not only in the guise of *international* criminal justice, relates to its reliance on such absolute imperatives.[43]

Both the vocabulary of *jus cogens* and that of criminal law are exceptional in the international human rights law environment, in which states are still the dominant actors. The two emphasize the

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9, at 71; David Luban, *After the Honeymoon: Reflections on the Current State of International Criminal Justice*, 11 J. INT'L CRIM. JUST. 505 *passim* (2013).

[40] *See, e.g.*, Cathryn Costello & Michelle Foster, *Non-refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test*, 46 NETH. Y.B. INT'L L. 273, 275 (2016); SARAH HAMMERL, UNITED AGAINST INHUMANITY, ASYLUM CRIMINALISATION IN EUROPE AND ITS HUMANITARIAN IMPLICATIONS 2 (2019); UN Special Rapporteur Attacks "International Regime of Impunity" Over Migrant Deaths, U.N. HUM. RTS. OFF. HIGH COMM'R (Oct. 27, 2017) (referencing a UN-commissioned report on the EU's criminalization of asylum seekers), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22322&LangID=E [https://perma.cc/WP6D-2VS2]. For additional information, see the below discussion on "crimmigration," *infra* note 123 (citing the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' report critiquing the international community for failing to protect migrants and refugees).

[41] *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S 3 (entered into force Jan. 3, 1966); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S 85 (entered into force June 26, 1987).

[42] *See* M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 L. & CONTEMP. PROBS. 63 *passim* (1996) (arguing that when an international crime achieves *jus cogens* status, states should be obligated to proceed against perpetrators of such crimes).

[43] *See* Akhavan, *supra* note 2, at 9 (explaining how the ICTY and ICTR helped introduce a structure for criminal accountability in the international criminal justice system).

responsibility of individuals rather than stopping at the responsibilities of states.[44] Some argue that corporations should be held criminally liable for their actions, too; once again going beyond international law's traditional focus.[45] In a world in which violators include for-profit corporations, part of the appeal of criminal law emanates from an expectation that it can fill an accountability deficit.[46] The new anti-impunity that has emerged in the context of migration has been drawn, considerably, by this effort to extend international accountability from states to individuals and corporations.

In my scholarship, I have identified a structural accountability deficit when it comes to irregular migrants, which I have argued is hard-wired in international law.[47] Among scholars and activists seeking to defend migrants from border violence, extending accountability to individuals and corporations has sometimes seemed like a compelling way to potentially fill that deficit. But what do the concrete examples of "the new anti-impunity" look like? Before discussing the strategic and philosophical underpinnings of this orientation to law, I first need to demonstrate that the phenomenon *exists*.

III. THE NEW ANTI-IMPUNITY

a. Foundational Obligations Towards Migrants

For a couple of decades, commentators have argued that the duty of *non-refoulement*—barring the return of refugees to where they may suffer persecution—has attained the status of *jus cogens*: it

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[44] *See id.* at 27 (discussing the ICC's role in ensuring that member states "impose individual accountability for international crimes."); Thomas Weatherall, Jus Cogens *and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEO. J. INT'L L. 1151, 1154-55 (2015) ("Individual responsibility is at the core of the legal regime of *jus cogens* . . . .").

[45] *See* Mordechai Kremnitzer, A *Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law*, 8 J. INT'L CRIM. JUST. 909, 909 (2010).

[46] On migration and accountability generally, see Cathryn Costello & Itamar Mann, *Border Justice: Migration and Accountability for Human Rights Violations*, GERMAN L.J. 311 (2020).

[47] Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 EUR. J. INT'L L. 347, 357, 368 (2018).

has become a peremptory norm of international law, binding upon all regardless of state consent.[48]

Though the claim has often been questioned, its very prevalence is indicative. For some groups, *non-refoulement* has been part of a moral vocabulary experienced as a kind of "higher law."[49] Consider, for example, the "sanctuary" tradition practiced in churches and other religious organizations to protect refugees in danger of deportation. "When Churches and their congregations confer 'sanctuary,'" wrote Richard Falk in 1988, "they are interposing their bodies and lives between the government and these beleaguered individuals from overseas."[50] These acts of solidarity are of course not criminal law measures. They do not reflect, in and of themselves, an impetus towards punishment. Indeed, rather than a strong crime-and-punishment discourse, they belong to a vocabulary of civil disobedience.[51] They therefore may seem odd as a starting point for a discussion of anti-impunity in the migration and refugee contexts.

Yet, the perception that *non-refoulement* has become *jus cogens* has been an important pre-condition for the new anti-impunity. First, *jus cogens* obligations are thought of as binding upon *individuals*. Such obligations thus help transform questions of fundamental rights and state duties into questions of individual responsibility. Second, they have often rested on an analogy to historic heroic acts in the face of atrocity, such as hiding members of persecuted groups from Nazi persecutors.[52] They, therefore, encourage an analogy between historic atrocities and present policies. Third, they reflect an aspiration to break free from the

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[48] *See, e.g.*, Costello & Foster, *supra* note 40, at 307-08.

[49] For an account of the place of moral imperatives towards migrants and refugees in international law, see ITAMAR MANN, HUMANITY AT SEA: MARITIME MIGRATION AND THE FOUNDATIONS OF INTERNATIONAL LAW (2016). *See also* MORITZ BAUMGÄRTEL, DEMANDING RIGHTS: EUROPE'S SUPRANATIONAL COURTS AND THE DILEMMA OF MIGRANT VULNERABILITY 137-52 (Cambridge Univ. Press 2019).

[50] Richard Falk, *Accountability, Asylum, and Sanctuary: Challenging Our Political and Legal Imagination*, 16 DENV. J. INT'L L. & POL'Y 199, 201 (1988). *See also* MANN, *supra* note 49, at 211 (commenting on Falk's observations); Jon Sharman, *Pilots Stop 222 Asylum Seekers Being Deported from Germany by Refusing to Fly*, INDEP. (Dec. 5, 2017), https://www.independent.co.uk/news/world/europe/german-pilots-refuse-deport-asylum-seekers-lufthansa-angela-merkel-migrants-a8092276.html [https://perma.cc/H57H-KH98] (providing another example of such instances of civil disobedience).

[51] *See* Itamar Mann, *The Right to Perform Rescue at Sea: Jurisprudence and Drowning*, 21 GERMAN L.J. 598, 614-18 (2020).

[52] *See, e.g.*, sources cited *infra* notes 208, 255.

strictures of extant political conditions and transcend them altogether: rather than a vision of political transformation through majoritarian institutions, the paradigm is one of direct action.[53] These three aspects of the sanctuary tradition prepared the ground for a turn to impunity in the context of refugee and migrant rights and have remained its central tenets. To the extent that we can talk of migration anti-impunity as a *movement*, the three remain its distinct characteristics.

Starting from the first decade of the twenty-first century, human rights organizations began to report on human rights violations against asylum seekers in detention. Little by little, we started to see invocations of stricter legal standards, particularly the prohibition of torture and inhuman and degrading treatment.[54] Contrary to previous human rights reporting on refugees, which directed allegations of torture nearly exclusively against past events in states producing refugees, now the "host" states were sometimes alleged culprits.[55] The new allegations of torture are often also directed against border enforcement agencies and corporations implementing border policies for developed countries.[56]

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[53] *See generally* Costello & Foster, supra note 40, at 276 n. 42 (discussing the "custom plus" approach to identify norms of customary international law that have achieved *jus cogens* status); Georg Schwarzenberger, *International* Jus Cogens*?*, 43 TEX. L. REV. 455, 456 (1965) (explaining the features of *jus cogens*); Weatherall, *supra* note 44, at 1154-55 (comparing *jus cogens* and the tradition of international law in conjunction with Nuremberg prosecutions); Jens David Ohlin, *In Praise of* Jus Cogens' *Conceptual Incoherence*, 63 MCGILL L.J. 701, 711, 718 (2018) (demonstrating how *jus cogens* is a compromise and justifying it based on a theory of fiduciary duties).

[54] *See, e.g.*, Claire Henderson, *Australia's Treatment of Asylum Seekers: From Human Rights Violations to Crimes Against Humanity,* 12 J. INT'L CRIM. JUST. 1161, 1175 (2014) (noting that Australia's treatment of asylum seekers is likely not in compliance with multiple multilateral conventions).

[55] *See* Priscilla Alvarez, *Exclusive: Watchdog Finds Detainees 'Standing on Toilets' for Breathing Room at Border Facility Holding 900 People in Space Meant for 125*, CNN (May 31, 2019), https://edition.cnn.com/2019/05/31/politics/inspector-general-warns-overcrowded-conditions/index.html [https://perma.cc/9WLG-W5T4] (describing "'dangerous overcrowding' and unsanitary conditions at an El Paso, Texas, Border Patrol processing facility"); The Ed. Bd., *Children Shouldn't Be Dying at the Border. Here's How You Can Help*, N.Y. TIMES (June 24, 2019), https://www.nytimes.com/2019/06/24/opinion/border-kids-immigration-help.html [https://perma.cc/WAX2-S7MF] (exposing the treatment of child asylum seekers at the border by US immigration officials).

[56] *See, e.g.*, Zolan Kanno-Youngs, *Squalid Conditions at Border Detention Centers, Government Report Finds*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/us/politics/border-center-migrant-detention.html?smid=nytcore-ios-share [https://perma.cc/L25M-QC8S] (describing

Under customary international law as well as under the Convention Against Torture ("CAT"), "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[57] International law imposes such prohibitions on states, but criminal law too proscribes them, both in the domestic and in the international spheres.[58] As for international criminal law, the Rome Statute tells us the foundational status granted to torture includes other related behaviors, in a list of categories that is not positively *finite*. While systematized torture is defined as a crime against humanity in Article 7(1)(e), Article 7(1)(e) similarly criminalizes imprisonment "in violation of fundamental rules of international law;" and Article 7(1)(k) refers to "other inhumane acts."[59] The three provisions illustrate the "open texture" of international criminal law.[60] Such a texture suggests that forms of violence not previously considered international crimes can be added.[61]

Through the doctrinal avenue of "crimes against humanity" and the notion that some legal rules cannot be compromised, advocates have made the transition from state responsibility to individual criminal liability. This is the basic component of anti-impunity rhetoric. In the following subsections, I trace how the transition has been made in three different regional contexts: Australia, the EU, and the U.S.

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the findings of an official watchdog report revealing "overcrowded, squalid conditions" in U.S. migrant centers); Chantal Da Silva, *U.S. Border Patrol Accused of Forcing Migrant Families Sleeping Outside to Wake Up and Stand Every Three Hours*, NEWSWEEK (Apr. 2, 2019), https://www.newsweek.com/us-border-patrol-accused-forcing-migrant-families-sleeping-outside-wake-stand-1382858 [https://perma.cc/RFM4-T7WS] (discussing accusations that border patrol agents committed inhumane abuses against asylum seekers in holding areas); Tendayi E. Achiume et al., *The Situation in Nauru and Manus Island: Liability for Crimes against Humanity in the Detention of Refugees and Asylum Seekers*, https://www-cdn.law.stanford.edu/wp-content/uploads/2017/02/Communiqu%C3%A9-to-Office-Prosecutor-IntlCrimCt-Art15RomeStat-14Feb2017.pdf [https://perma.cc/X4YT-WBHM].

[57] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 41, art. 2(2).

[58] Indeed, the criminalisation of torture is obligatory under the Convention Against Torture. *See id.*, art. 4.

[59] Rome Statute, *supra* note 12, art. 7(1)(e)-(f), (k).

[60] On the "open texture of law," see H.L.A. HART, THE CONCEPT OF LAW 124-128 (3d ed. 2012).

[61] This of course raises a concern in terms of the principle of legality, *nullum crimen sine lege.*

i. Australia

In 2001, Australia introduced the "Pacific Solution," whereby refugees seeking asylum were sent for "processing" in Australian-funded detention centers in Nauru and Manus Island, Papua New Guinea.[62] Modeled on the United States' earlier offshore treatment of asylum seekers in Guantanamo Bay, Australian offshore detention stretched rule of law principles.[63]

Scholar and activist responses to the Pacific Solution arguably pioneered the new anti-impunity. Influenced by reports on human rights violations in Nauru and Papua New Guinea, Penny Green and Mike Grewcock argued in 2002 that "the failure by states to positively embrace the right to asylum . . . have resulted in the systematic and organised breach of human rights, . . . which can usefully be defined as state crime."[64] While the Australian model was the most draconian, the authors also pointed their fingers towards Europe: "the new Europe is not just a fortress, but a bastion of state crime."[65] The "state crime" paradigm, anchored in criminology (rather than law), rests on an analogy between state policies and crimes.[66] It is thus not *per se* a criminal allegation—the latter can be directed towards an individual or a corporation, but not

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[62] *See* Ishan Ashutosh & Alison Mountz, *Migration Management for the Benefit of Whom? Interrogating the Work of the International Organization for Migration*, 15 CITIZENSHIP STUD. 21, 31 (2011) (noting the role of the International Organization of Migration ("IOM") in putting in place this infrastructure); Itamar Mann, *Dialectic of Transnationalism: Unauthorized Migration and Human Rights 1993-2013*, 54 HARV. INT'L L.J. 315, 334 (2013).

[63] *See* DANIEL GHEZELBASH, REFUGE LOST: ASYLUM IN AN INTERDEPENDENT WORLD 130-133 (2018); *see also* Tania Penovic & Azadeh Dastyari, *Boatloads of Incongruity: The Evolution of Australia's Offshore Processing Regime* 13 AUSTL. J. HUM. RTS. 33, 34 (2007); Mann, *supra* note 62.

[64] Penny Green & Mike Grewcock, *The War Against Illegal Immigration: State Crime and the Construction of a European Identity*, 14 CURRENT ISSUES CRIM. JUST. 87, 88 (2002).

[65] *Id.* at 88, 98. Coming from the perspective of criminology, the authors explain that state crime refers to instances when the state engages in violence that would be criminal "if performed by 'individual citizens.'" *Id.* at 98. They therefore rely on a kind of hypothetical and do not necessary imply that suspects should be investigated and perhaps prosecuted under extant law. *Id.*

[66] For background on the "state crime" paradigm in criminology, see Herman Schwendinger & Julia Schwendinger, *Defenders of Order or Guardians of Human Rights?* 5 ISSUES CRIMINOLOGY 123, 141 (1970); Stanley Cohen, *Human Rights and Crimes of the State: The Culture of Denial*, 26 AUSTL. & N.Z. J. CRIMINOLOGY 97, 97-103 (1993).

towards a state.[67] Certainly, it sets in motion a way of thinking in which migrants and refugees are the victims of guilty acts (*actus rei*), perpetrated by actors who entertain criminal intent (*mens rea*).[68]

Such concerns were partially assuaged when, in 2008, Australia temporarily ceased its offshore detention.[69] But following Australia's return to the scheme in 2012,[70] Member of Parliament Andrew Wilkie took an additional step, demanding that the ICC investigate Tony Abbott's government for crimes against asylum seekers.[71] Wilkie prepared a communication under Article 15 of the Rome Statute, calling upon the prosecutor to initiate an investigation based on the information he provided (*proprio motu*).[72] As he explained, "'[i]n my application I have particularly named crimes against humanity, such as the forced relocation of people, obviously to the Republic of Nauru or Papua New Guinea.'"[73] On the academic side, Claire Henderson quickly followed and argued in 2014 that Australian policies constituted a *prima facie* international criminal case against Australian agents.[74] The publication of her paper in the Journal of International Criminal Justice, a well-regarded and high-profile peer-reviewed publication dedicated to international criminal law, was a signal. The argument about

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[67] *See* Green & Grewcock, *supra* note 64, at 98.

[68] *See generally* Mann, *supra* note 30 (discussing how potential defendants may be unknowingly committing acts that are illegal).

[69] *Immigration Detention in Australia*, PARLIAMENT OF AUSTL. (Mar. 20, 2013), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/Detention [https://perma.cc/Y77F-GDEC].

[70] *Id.*

[71] *See* Amy Maguire, *Will the International Criminal Court Prosecute Australia for Crimes Against Humanity?*, CONVERSATION (Oct. 26, 2014, 11:29 PM), https://theconversation.com/will-the-international-criminal-court-prosecute-australia-for-crimes-against-humanity-33363 [https://perma.cc/3G7P-NRQ7].

[72] *Id.*; Rome Statute, *supra* note 12, art. 15.

[73] Shalailah Medhora, *Asylum Seekers: Andrew Wilkie Takes Australia to International Criminal Court*, GUARDIAN (Oct. 21, 2014), https://www.theguardian.com/australia-news/2014/oct/22/asylum-seekers-andrew-wilkie-takes-australia-to-international-criminal-court [https://perma.cc/9XTY-GPSN]. Wilkie submitted his full communiqué on January 23, 2015. *See* COMMUNIQUÉ FOR THE OFFICE OF THE PROSECUTOR REGARDING MR. ANDREW WILKIE MP'S APPLICATION RELATING TO CRIMES AGAINST HUMANITY IN AUSTRALIA, Ref: OTP-CR-322/14 (Jan. 23, 2015), https://andrewwilkie.org/wp-content/uploads/2015/10/Brief-for-the-ICC-OTP-CR-322-14.pdf [https://perma.cc/36LW-QK3K].

[74] Henderson, *supra* note 54, at 1173-74.

international crimes against refugees committed by Australian agents was no longer perceived as "off the wall."[75]

Henderson emphasized the crimes of persecution and imprisonment in violation of fundamental rules of international law.[76] Unlike Wilkie, she expressed the view that deportation may not be the "relevant prohibited act".[77] These doctrinal disagreements, which will continue among advocates of a criminal law framing for border violence, reflect that the relevant interpretations were far from settled. As will be the case in the European and U.S. contexts, they highlight an emerging agreement that certain acts of violence committed by state agents against asylum seekers are indeed criminal. The question would now be, how do we best express that within the boxes of the relevant legal text?

In 2016, Vincent Chetail published another remarkable piece, taking Australia as one case study, and laying the groundwork for a more general turn to anti-impunity.[78] Chetail's opening paragraph conveys the sentiment that impunity for violations against migrants had indeed approached something like a worldwide criminal scheme.[79] Referencing MP Wilkie's submission, Chetail asks:

> Is there any blood on my hands? This is a question shared by an increasing number of people who observe or carry out migration control in the Global North and the rest of the world. This questioning has become a particularly controversial issue in Australia where the policy of returning asylum-seekers and the accompanying mistreatment are alleged to amount to crimes against humanity.[80]

While the phrase "alleged," taken out of context, may connote passive reporting on a preexisting interpretation of the law, Chetail advances his own interpretation to the effect mentioned. A longstanding tradition among lawyers, the idea is to set in motion a

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[75] On the importance of "off the wall" arguments in legal interpretation, see Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

[76] Henderson, *supra* note 54, at 1178-80.

[77] *Id*. at 1176-78.

[78] Vincent Chetail, *Is There any Blood on my Hands? Deportation as a Crime of International Law*, 29 LEIDEN J. INT'L L. 917, 917-19 (2016).

[79] *Id*. at 917.

[80] *Id*. (footnotes omitted).

novel legal interpretation while conveying that it is only another step in a well-trodden path.[81]

Chetail doubles down on deportation as the relevant international criminal prohibition for the protection of asylum seekers and migrants.[82] Under Article 7 of the Rome Statute, deportation may constitute a crime against humanity when conducted as part of a "widespread or systematic attack directed against any civilian population, with knowledge of the attack."[83] Citing the International Criminal Tribunal for the Former Yugoslavia's *Tadić*, Chetail points out that an armed conflict is not a necessary condition for deportation to constitute an attack against a civilian population.[84] Unlike war crimes, crimes against humanity can be perpetrated in times of peace.[85] Chetail even goes so far as to demonstrate that deportations may constitute a crime of genocide.[86] In his conclusion, he discusses Australian interceptions of boat migrants and the policy of delivering them to offshore detention sites, dispassionately observing: "there are some reasonable grounds to argue that the systematic nature of these unlawful deportations associated with the state policy of arbitrary detention may reach the threshold required to be considered a crime against humanity under conditions detailed in the present article."[87]

On February 22, 2017, a group of seventeen lawyers, Chetail among them, filed another Communication under Article 15 of the Rome Statute against Australian agents.[88] This time, the communication came from outside of Australia and was facilitated by Stanford Law School's International Human Rights and Conflict

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[81] On the relevance of this method to international law, see Başak Çali, *On Interpretivism and International Law*, 20 EUR. J. INT'L L. 805 (2009). For effective examples of this move when aiming to protect the rights of asylum seekers and migrants see the works of Violeta Moreno-Lax, such as Violeta Moreno-Lax, *Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea*, 23 INT'L J. REFUGEE L. 174 *passim* (2011).

[82] Chetail, *supra* note 78, at 919-40.

[83] Rome Statute, *supra* note 12, art. 7.

[84] Chetail, *supra* note 78, at 923.

[85] *Id*.

[86] *Id*. at 933-40.

[87] *Id*. at 943.

[88] Achiume, *supra* note 56. The full list of signatories includes: Tendayi E. Achiume, T. Alexander Aleinikoff, James Cavallaro, Vincent Chetail, Robert Cryer, Gearóid Ó Cuinn, Tom J. Dannenbaum, Kevin Jon Heller, Ioannis Kalpouzos, Itamar Mann, Sara Kendall, Makau Mutua, Gregor Noll, Anne Orford, Diala Shamas, Gerry Simpson, and Beth Van Schaack. *Id.*

Resolution Clinic and the Global Legal Action Network ("GLAN").[89] Together with Ioannis Kalpouzos and Diala Shamas, I was also one of the principal authors of the complaint. We alleged several sub-titles of crimes against humanity, including imprisonment (Article 7(1)(e) of the Rome Statute), torture (Article 7(1)(f)), persecution (Article 7(1)(h)), deportation (Article 7(1)(d)), and other inhumane acts (Article 7(1)(k)).[90] We particularly highlighted questions of corporate liability pertaining to companies that administered Australia's facilities.[91]

In July 2017, U Ne Oo, an activist from Sydney, made an additional Article 15 submission.[92] This third communication focuses on a rather unorthodox interpretation of the crime of enslavement (Article 7 1. c.) under the Rome Statute. Allegedly, the Australian government has "lent" asylum seekers to private corporations, so that they generate a profit from their business of running Australian "processing centers" on Nauru and Manus.[93] While it is unclear if the interpretation of enslavement is sound, the categorization illuminates a crucial aspect of the Australian situation which other communications highlight as well: Australia has not only "externalized" its enforcement to Nauru and Manus as states;[94] it also outsourced its violations to corporations and privatized them.[95] The new anti-impunity discourse, like earlier instances of

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[89] *Id*. at 9.

[90] *Id.* at 5.

[91] *Id.* at 101-06.

[92] U Ne Oo, *Enslavement in Manus Island and Nauru, Summary of Allegations*, http://www.netipr.org/saorg/docs/enclosure_icc-reply-n-comm.pdf [https://perma.cc/J47W-2C3Z]. *See also* Dr. U Ne Oo, *Letter to Australia Foreign Minister*, ROHINGYA BLOGGER (Jan 27, 2013), http://www.rohingyablogger.com/2013/01/letter-to-australia-foreign-minister-by.html?zx=373835d249704281 [https://perma.cc/9HNG-7A78].

[93] *Id.* ¶¶ 19-21.

[94] On "externalization" of border control, see Ashutosh & Mountz, *supra* note 62, at 28, 31-32; Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUMANS. 51, 99 (2016); Bill Frelick, Ian M. Kysel & Jennifer Podkul, *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION & HUM. SEC. 190, 193-99 (2016). *See also* B. Shaw Drake & Elizabeth Gibson, *Vanishing Protection: Access to Asylum at the Border*, 21 CUNY L. REV. 91, 115-17 (2017); Rachael E. De Orio, *Seeking Sanctuary Across the Sea: Why the Influx of Refugees and Asylum Seekers to Greece Requires Major Policy Changes*, 41 SUFFOLK TRANSNAT'L L. REV. 51, 70, 97-98 (2018).

[95] Achiume, *supra* note 56, at 101-06. Relevant enterprises include Spanish Ferrovial, Transfield, Broadspectrum, and most recently Ferrovial.

such discourse, aimed to activate basic liberal commitments against historical atrocities—in this case, that of slavery.[96]

At the time of publication, the applications have been rejected.[97] Perhaps the latest iteration in the development of anti-impunity on the Australian front is a class action filed on December 10, 2018, arguing the country subjected refugees to crimes against humanity in the offshore sites.[98] Though the lawsuit seeks civil damages rather than criminal punishment, the appeal to crimes against humanity reveals ripple effects of the new anti-impunity discourse beyond strictly punitive measures. As Gabrielle Holly has emphasized, the synthesis between international criminal law and tort law has yielded a measure of accountability, even if impunity largely remains.[99]

ii. The European Union

On the European front, the framing of abuses against refugees and migrants as criminal offenses first emerged around the same time as it did in Australia. Namely, after the Rome Statute came into force in 2002. The European migration anti-impunity discourse arguably started with efforts to criminalize human trafficking, rather than direct allegations against border enforcement policies.[100]

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[96] *Compare* the reference to slavery and trade in humans in the Libyan context, *infra* note 126, *with* the use of the concentration camps analogy in the United States context, *infra* notes 208, 212, 213, *and* Mann, *supra* note 30, at 18.

[97] Letter from Phakiso Mochochoko, Dir., Jurisdiction, Complementarity & Coop. Div., Int'l Crim. Ct., to Kate Allingham, Off. of Andrew Wilkie MP (Feb. 12, 2020).

[98] *See* Helen Davidson, *Australia Subjected Refugees to Crimes against Humanity, Class Actions Allege*, GUARDIAN (Dec. 9, 2018), https://www.theguardian.com/australia-news/2018/dec/10/australia-subjected-refugees-to-crimes-against-humanity-class-actions-allege [https://perma.cc/522Y-CSFG].

[99] Gabrielle Holly, *Challenges to Australia's Offshore Detention Regime and the Limits of Strategic Tort Litigation*, 21 GERMAN L.J. 549, 550-51 (2020).

[100] *See* Engle, *supra* note 4, at 1073-79; Anne Gallagher & Paul Holmes, *Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line,* 18 INT'L CRIM. JUST. REV. 318, 319-21 (2008); *see also* HAMMERL, *supra* note 40, at 14 (discussing criminalization of humanitarian action relating to assistance for refugees in Europe).

During the drafting of the Rome Statute, the drafters contemplated if human trafficking would be criminalized.[101] Article 7(2)(c) specifies that the definition of "enslavement" includes ownership over persons exercised in the context of trafficking.[102] Starting from the beginning of the twenty-first century, an anti-impunity discourse therefore aimed to protect migrants and refugees from traffickers, sometimes by reference to international criminal law.[103] This push went hand in hand with a larger feminist campaign, as trafficked individuals are often female victims of sexual violence.[104] Notably, this feminist push towards criminal law generated controversy within the feminist movement. While it was vociferously advanced by MacKinnon and others,[105] Janie Chuang and others objected on feminist grounds.[106]

Importantly, border enforcement policies also quickly adopted the fight against traffickers and smugglers, latching on to its anti-impunity bent. As trafficking and smuggling represented constant trespass across national borders, eliminating the perpetrators gradually became a central priority of European border governance.[107] This ad-hoc alignment between certain feminists, refugee advocates, and states seeking to close their borders

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101 *See* Tom Obokata, *Trafficking of Human Beings as a Crime against Humanity: Some Implications for the International Legal System*, 54 INT'L & COMPAR. L.Q. 445, 448-53 (2005) (analyzing human trafficking as a crime against humanity under the Rome Statute).

102 Rome Statute, *supra* note 12, art. 7(2)(c).

103 *See, e.g.*, Gallagher & Holmes, *supra* note 100, at 319; Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUM. RTS. Q. 975, 983-84 (2001) (providing an example of the discourse that emerged aimed at protecting migrants and refugees from traffickers).

104 Engle, *supra* note 4, at 1078; *see also* Gallagher, *supra* note 103, at 983-88 (detailing contested debates over prostitution's possible inclusion in the Rome Statute's definition of trafficking). *But see* Chuang, *supra* note 10, at 615 (criticizing the divisive and hotly debated focus on the sex-sector in the legal definition of trafficking as problematic).

105 *See* MacKinnon, *supra* note 28; *see also* Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442, 1442-59 (1993) (providing a critique on *Beyond Rape*). For a critique of MacKinnon's interventions in this context, see Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1 *passim* (2008).

106 *See* Chuang, *supra* note 10, at 614-15.

107 *See* Gallagher, *supra* note 103, at 976-77, 998; Francois Crépeau, *The Fight Against Migrant Smuggling: Migration Containment Over Refugee Protection*, *in* THE REFUGEE CONVENTION AT FIFTY: A VIEW FROM FORCED MIGRATION STUDIES 173 (Joanne van Selm et al. eds., 2003).

illustrates the political ambiguousness of the anti-impunity agenda.[108] Critics would later raise the question of whether this political ambiguity should ultimately rule anti-impunity out of a vocabulary for social change.[109] As I explain below, I think the answer is no.[110]

In 2010, a Human Rights Watch report accused Ukraine of using torture practices against asylum seekers.[111] The report highlighted the role states on the outer margins of Europe had in the evolving ill-treatment.[112] As observers noted, the freer the movement within Europe became, the worse the violence became at the EU's external borders.[113] Similarly, several international organizations, as well as non-international organizations, accused Greece of exposing asylum seekers to torture and inhumane and degrading treatment.[114] Greece is relatively accessible from Iraq and Syria, places where new political crises continually developed following the United States'

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[108] *See* Abigail Schwartz, *Sex Trafficking in Cambodia*, 17 COLUM. J. ASIAN L. 371, 374 (2004).

[109] *See infra* Part IV.

[110] *Id*.

[111] *Ukraine: Migrants and Asylum Seekers Tortured, Mistreated*, HUM. RTS. WATCH (Dec. 16, 2010), https://www.hrw.org/news/2010/12/16/ukraine-migrants-and-asylum-seekers-tortured-mistreated [https://perma.cc/F4YW-5QVQ].

[112] *Id*.

[113] HAMMERL, *supra* note 40, at 8; Kenan Malik, *How We All Colluded in Fortress Europe*, GUARDIAN (June 10, 2018), https://www.theguardian.com/commentisfree/2018/jun/10/sunday-essay-how-we-colluded-in-fortress-europe-immigration [https://perma.cc/RKU5-PQME]. Compare with early critiques of European economic integration, recounted in QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 182-217 (2018). This is what is referred to, in popular commentary, as the dynamic of "fortress Europe."

[114] *See No End in Sight: The Mistreatment of Asylum Seekers in Greece*, OMCT SOS-TORTURE NETWORK (Aug. 21, 2019), https://www.omct.org/en/resources/news-releases/no-end-in-sight-the-mistreatement-of-asylum-seekers-in-greece [https://perma.cc/GWV5-LSUD] (describing the mistreatment of asylum seekers in Greece).

invasion of Iraq.[115] Allegations of "pushbacks"[116] and torture in Greece paved the way for the impunity turn: as emphasized above, torture can be analyzed as a matter of state responsibility, but it is also a criminal offense. Critical reports about Greece culminated in a landmark judgment at the European Court of Human Rights ("ECtHR") in *MSS v. Belgium and Greece*.[117] The Court prevented returns to Greece from other European countries,[118] because conditions in Greece amounted to violations of Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman and degrading treatment.[119]

In its *MSS* judgment, the ECtHR opined that the inhuman and degrading treatment of asylum seekers was rampant in Greek detention centers. Under Article 7 of the Rome Statute, when imprisonment "in violation of fundamental rules of international law" is part of a "widespread or systematic attack directed against any civilian population," it constitutes a crime against humanity.[120] As noted above, such an attack does not require the backdrop of an armed conflict.[121] Taken together, the *MSS* finding and the rules of international criminal law therefore suggest a crime against humanity was committed against asylum seekers in Greece. Far from a merely technical result produced out of mixing two

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115 *Stuck in a Revolving Door*, HUM. RTS. WATCH (Nov. 26, 2008), https://www.hrw.org/report/2008/11/26/stuck-revolving-door/iraqis-and-other-asylum-seekers-and-migrants-greece/turkey [https://perma.cc/GD4A-W4W4] (emphasizing the consequences "generalized violence" in Iraq following the 2003 intervention on asylum seekers arrivals and asylum seekers processing in Greece). On the calamitous results of American intervention in Iraq, see generally Asli Bâli & Aziz Rana, *Constitutionalism and the American Imperial Imagination*, 85 U. CHI. L. REV. 257, 281 (2018). On the use of the term "pushbacks," see Niamh Keady-Tabbal & Itamar Mann, "*Pushbacks as Euphemism*," EJIL:TALK! (April 14, 2021), https://www.ejiltalk.org/pushbacks-as-euphemism/#:~:text=Late%20in%20March%2C%20the%20UN,border%20between%20Greece%20and%20Turkey [https://perma.cc/8X32-5PNB].

116 Pushbacks are deportations of asylum seekers contrary to the rule of *non-refoulment*. *See* Convention Relating to the Status of Refugees, art. 33, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954).

117 The word 'impunity' appears once in the *MSS* judgment, where it refers to conditions in Afghanistan. *See* M.S.S. v. Belgium and Greece, 53 Eur. Ct. H.R. 28, ¶ 197 (2011).

118 *Id*. at 98, ¶ 3-9 (Villiger, J., dissenting).

119 *Id*. ¶ 424 (3) (unanimous declaration of a Greek violation of Article 3 of the European Convention on Human Rights).

120 Rome Statute, *supra* note 12, art. 7.

121 Chetail, *supra* note 78, at 923 (stating that a systematic attack against civilians "does not require a nexus with an armed conflict and can be thus committed in time of peace").

international legal "regimes" (international human rights law and international criminal law), the inference seemed to encapsulate a notable development: policies that seem to be part of the banal, everyday practice of border enforcement are in fact egregious crimes which many developed states are complicit in.[122]

That, at least, was the core of a legal argument Ioannis Kalpouzos and I made in 2015, where we emphasized the imprisonment aspect of immigration detention (Article 7(1)(e)).[123] We did not frame allegations exclusively or even primarily against Greek agents. During the period we examined, border guards from many European countries were deployed in Greece, as part of an operation facilitated by Frontex, the European Union's border enforcement agency.[124] The distribution of responsibility among multiple states, we argued, is an institutional design intended to diffuse accountability.[125] Along with the "externalization" of border enforcement, and the privatization of control, the legal architecture that evolved at the fault lines between "developed" and "developing" states arguably generated a mode of impunity.[126]

Violations in Greece largely persisted over the coming years, with the country's European lenders rushing contributions for detention facilities, but largely failing to alleviate conditions in them.[127] At the same time, another significant European struggle against impunity for the violation of migrant rights occurred as a

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122 *See* Agnes Callamard (Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions), *Unlawful Death of Refugees and Migrants,* U.N. Doc. A/72/335 (Aug. 15, 2017), https://reliefweb.int/sites/reliefweb.int/files/resources/N1725806.pdf [https://perma.cc/3MS7-NNWS] (detailing killing by state and non-state actors of migrants during their flight as a human rights crisis).

123 Ioannis Kalpouzos & Itamar Mann, *Banal Crimes against Humanity: The Case of Asylum Seekers in Greece*, 16 MELB. J. INT'L L. 1, 14 (2015) (describing the imprisonment of asylum seekers as inhumane).

124 *Id.* at 9.

125 *Id.* at 22-24*; see also* Melanie Fink, *Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding 'Technical Relationships'*, 28 MERKOURIOS-UTRECHT J. INT'L & EUR. L. 20, 21 (2012) (emphasizing the shift of border control to "third countries").

126 Mann, *supra* note 62, at 346-47.

127 Leonidas K. Cheliotis, *Behind the Veil of Philoxenia: The Politics of Immigration Detention in Greece*, 10 EUR. J. CRIMINOLOGY 725, 737 (2013); EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), COPING WITH A FUNDAMENTAL RIGHTS EMERGENCY: THE SITUATION OF PERSONS CROSSING THE GREEK LAND BORDER IN AN IRREGULAR MANNER 6 (2011), https://fra.europa.eu/sites/default/files/fra_uploads/1500-Greek-border-situation-report2011_EN.pdf [https://perma.cc/39XQ-UASY].

response to policies conducted in the Central Mediterranean. Before the Libyan 2011 revolution, Italy had already established externalized border control with Qaddafi's government.[128] Not long after Qaddafi was overthrown, cooperative border governance fell into disarray, with Italy scrambling to cooperate with multiple Libyan militias, often indistinguishable from migrant traffickers.[129] Alongside overwhelming violence against migrants in Libyan camps,[130] and the unending catastrophe of migrant deaths at sea,[131] a primary reason for the shift to anti-impunity was also a legal development. In 2011, the ICC Office of the Prosecutor opened its investigation into the situation in Libya, following a referral by the UN Security Council.[132] The investigation came to buttress an argument that crimes against migrants and refugees were committed.

Indeed, in her statement of May 8, 2017, the ICC Prosecutor explained to the UN Security Council that the investigation also concerns "serious and widespread crimes against migrants attempting to transit through Libya."[133] Fatou Bensouda labeled

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[128] Treaty of Friendship, Partnership and Cooperation between the Italian Republic and the Great Libyan Arab Giamariria, It.-Libya (Oct. 23, 2008), https://www.repubblica.it/2008/05/sezioni/esteri/libia-italia/testo-accordo/testo-accordo.html [https://perma.cc/ME3F-DD26].

[129] *See, e.g.*, Lorenzo Tondo, *Human Trafficker Was at Meeting in Italy to Discuss Libya Migration*, GUARDIAN (Oct. 4, 2019), https://www.theguardian.com/world/2019/oct/04/human-trafficker-at-meeting-italy-libya-migration-abd-al-rahman-milad [https://perma.cc/WQ4J-J2YU] (explaining the suspected involvement of traffickers in the Libyan coastguard).

[130] *See* MEHMET ENES BEŞER & FATIMAH ELFEITORI, LIBYA DETENTION CENTRES: A STATE OF IMPUNITY 6 (2018) (describing human rights violations and conditions in Libyan detention centers).

[131] *Id.* at 2; *see also* Alessio Perrone, *Italy: Navy, Coastguard Officials Charged in Migrant Deaths*, AL JAZEERA (Sep. 16, 2019), https://www.aljazeera.com/news/2019/9/16/italy-navy-coastguard-officials-charged-in-migrant-deaths [https://perma.cc/JL6J-TTYR] (highlighting the death of thousands of migrants trying to reach Italy by sea).

[132] *ICC: Prosecutor to Open an Investigation in Libya*, HUM. RTS. WATCH (Mar. 3, 2011), https://www.hrw.org/news/2011/03/03/icc-prosecutor-open-investigation-libya# [https://perma.cc/26M5-HCM6].

[133] Fatou Bensouda, ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, ¶ 25 (May 9, 2017), https://www.icc-cpi.int/pages/item.aspx?name=170509-otp-stat-lib [https://perma.cc/9DSE-9TBC]; *see also* FOURTEENTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UNITED NATIONS SECURITY COUNCIL PURSUANT TO UNSCR 1970 (2011) (Nov. 8, 2017), https://www.icc-cpi.int/iccdocs/otp/otp-unsc-lib-11-2017-ENG.pdf [https://perma.cc/7CEX-TVU3] (assessing the situation in Libya and whether actions taken there amount to crimes against humanity).

Libya as a "marketplace for the trafficking of human beings"[134] and said that "thousands of vulnerable migrants, including women and children, are being held in detention centers across Libya in often inhumane condition."[135] Bensouda, in word but so-far not in deed, joined the anti-impunity push to defend migrants and refugees. She concluded a later address to the UN Security Council with the emphatic observation that if the ICC does not pursue its mandate in Libya, "impunity will reign . . . . This, we cannot allow."[136] As the unspeakable violence against migrants in Libya was widely reported in global news media, it also became clear that European actors were complicit in aiding Libyan forces. This could potentially implicate European actors in crimes.[137]

Comparable to the role criminologists played in the Australian context, two social scientists contributed significantly to the new discourse in the Mediterranean. Anthropologist Maurizio Albahari made a relevant contribution with his *Crimes of Peace* in 2015.[138] Documenting drownings and border violence, he described "methodical negligence, ill-conceived policies, and well-oiled criminal networks."[139] Drawing ambiguous relations with categories of criminal law, Albahari explains that "[r]ather than unveiling guilt, investigating crimes of peace deals with explicating events, situations, mechanisms, and networks of correlations—possibly conveying legal and political responsibilities."[140] Furthermore, "[c]rimes of peace do not need intentionality: they may bank on the variable interest of unequally distributed 'tragedies.'"[141] Albahari's ambivalence on issues of *mens rea*—or indeed on the question of agency versus structure—illustrates the broader predicament of extending anti-impunity from

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134 Bensouda, *supra* note 133, ¶ 27.

135 *Id.* ¶ 26.

136 Fatou Bensouda, ICC Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, para. 56 (Nov. 8, 2017), https://www.icc-cpi.int/Pages/item.aspx?name=otp_lib_unsc [https://perma.cc/9E6W-8U5J].

137 Itamar Mann, Violeta Moreno-Lax & Omer Shatz, *Time to Investigate European Agents for Crimes Against Migrants in Libya*, EJIL: TALK! (Mar. 29, 2018), https://www.ejiltalk.org/time-to-investigate-european-agents-for-crimes-against-migrants-in-libya/#more-16057 [https://perma.cc/Y3P2-5FP2] (supporting and urging investigation of Europe's involvement in migrant abuse).

138 MAURIZIO ALBAHARI, CRIMES OF PEACE: MEDITERRANEAN MIGRATIONS AT THE WORLD'S DEADLIEST BORDER 22 (2015).

139 *Id.*

140 *Id.*

141 *Id.*

authoritarianism and war to migration. His intervention is therefore comparable to the work of Penny Green and Mike Grewcock in the Australian context examined above.[142] In both cases, the criminal law framing articulated by social scientists is not intended as a formal legal argument and is more of a metaphor invoked for primarily expressive purposes.

In their ground-breaking work, interdisciplinary researchers Charles Heller and Lorenzo Pezzani of "Forensic Oceanography" ("FO") investigated European and Italian failures to rescue asylum seekers and migrants in the central Mediterranean.[143] In a series of reports published from 2014-18, FO constantly alluded to legal categories.[144] Through their work, patterns of state responsibility for actions and omissions that violated migrant rights became visible.[145] Alongside state responsibility, their allusions to the law of the sea's duty of rescue, and sometimes to criminal law, seemed to expose aspects of individual responsibility as well. When a vessel avoids performing a rescue, the arrow of accountability is split between its captain and its flag state.[146] The question of where should accountability stop raises interesting philosophical questions but is also a matter of strategy. The underlying legal questions often require considering the overlap and disjuncture between these different areas of law, including human rights law, criminal law, and the law of the sea.[147] Whether on the legal or "merely" the moral levels, what they exposed appeared to some of us as an atrocity of historic dimensions.

Against a backdrop of tragic events in the central Mediterranean, an Italian prosecutor was the first to initiate an actual criminal

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142 Green & Grewcock, *supra* note 64.

143 *See About the Project*, VISIBLE, https://www.visibleproject.org/blog/project/forensic-oceanography-various-locations-in-europe-and-northern-africa/ [https://perma.cc/97N8-8J79] (last visited Feb. 2, 2021) (describing Forensic Oceanography, a project investigating the militarized border regime in the Mediterranean Sea).

144 Itamar Mann, *Killing by Omission*, EJIL:TALK! (Apr. 20, 2016), https://www.ejiltalk.org/killing-by-omission/ [https://perma.cc/88MK-6HES].

145 *See, e.g.*, Charles Heller & Lorenzo Pezzani, *Ebbing and Flowing: The EU's Shifting Practices of (Non-) Assistance and Bordering in a Time of Crisis*, NEAR FUTURES ONLINE, http://nearfuturesonline.org/ebbing-and-flowing-the-eus-shifting-practices-of-non-assistance-and-bordering-in-a-time-of-crisis/ [https://perma.cc/GYA3-47C3] (using Forensic Oceanography research to better understand migrant abuse).

146 *See* Mann, *supra* note 144.

147 It should be disclosed that I often had the fortune of following their work closely and the privilege of serving as their legal advisor.

investigation against a violator of migrant rights. His target was then Italian Minister of Interior, Matteo Salvini. Luigi Patronaggio of Catania, Sicily, acted in August 2018 on the premise that the Minister's refusal to allow 177 rescued migrants to debark from a Coastguard vessel amounted to "kidnapping."[148] The investigation concluded with a decision to prosecute the far-right Salvini for the crime.[149] However, under Italian immunity rules, such prosecution must be voted upon in the parliament.[150] In February 2019, Salvini avoided facing a trial thanks to an online vote.[151] Within the short history of anti-impunity rhetoric on behalf of migrants, the mere *launching* of an investigation was a rare and remarkable occasion. Often, we have merely seen calls for prosecution or investigation, without any real response by prosecuting authorities. At best, activists put together people's tribunals, as was the case, for example, in Stockholm and Barcelona.[152] Here, anti-impunity comes from a state official. An elected branch of government halted the move of a member of its bureaucracy and thus refused the criminal law framing. The instance may be perceived as feeding into a narrative of collaboration between a bureaucratic class of civil servants and human rights lawyer-activists against elected officials and popular will. Such perceptions should today be on the minds of lawyer activists and demand our urgent consideration.

In June 2019, lawyers Omer Shatz and Juan Branco authored an Article 15 communication equating the entire European and Italian policy in the central Mediterranean during 2014-19 to multiple

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148 *See* Lorenzo Tondo, *Salvini Defiant over Investigation into Illegal Detention of Migrants*, GUARDIAN (Aug. 22, 2018), https://www.theguardian.com/world/2018/aug/22/illegal-detention-italian-ministers-bar-on-migrant-ship-probed [https://perma.cc/9RMV-4GF6] (describing Salvini's attitude towards the investigation into his refusal to allow 177 migrants to leave a coastguard vessel in Catania); Davide Vampa, *Matteo Salvini Just Avoided Facing a Kidnap Trial – Thanks to an Online Vote*, CONVERSATION (Feb. 20, 2019), https://theconversation.com/matteo-salvini-just-avoided-facing-a-kidnap-trial-thanks-to-an-online-vote-111979 [https://perma.cc/9RMV-4GF6].

149 Vampa, *supra* note 148.

150 *Id.*

151 *Id.*

152 *See generally* Andrew Byrnes & Gabrielle Simm, *International Peoples' Tribunals: Their Nature, Practice and Significance*, *in* PEOPLES' TRIBUNALS AND INTERNATIONAL LAW 11 (Andrew Byrnes & Gabrielle Simm, eds. 2018) (analyzing the history of modern international peoples' tribunals).

international crimes.[153] Relying primarily on FO's work for their factual account, the submission argues for the investigation of European actors for a variety of crimes against humanity, including: murder (Article 7(1)(a) of the Rome Statute); enslavement (Article 7(1)(c)); rape (Article 7(1)(g)); deportation (Article 7(1)(d)); unlawful imprisonment (Article 7(1)(e)) torture (Article 7(1)(f)); persecution (Article 7(1)(h)) and other inhumane acts (Article 7(1)(k)).[154] In interviews, the two suggested possible defendants may not be limited to someone like EU representative Federica Mogherini, whose name comes up in the relevant evidence.[155] They direct their accusations towards Emmanuel Macron and Angela Merkel, as well.[156]

The communication applies international criminal law to alleged systematic omissions to act upon rescue duties at sea.[157] Beyond its legal analysis, the communication made an enormous bang in international media, with leading newspapers across many countries giving it central coverage.[158] Multiple European parliaments and universities hosted events discussing the topic.

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153 Omer Shatz & Juan Branco, Communication to the Office of Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute, *EU Migration Policies in Central Mediterranean and Libya (2014-2019)*, at 8 (June 3, 2019), https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf [https://perma.cc/VSF3-XUC6].

154 *Id*. ¶¶ 163, 167, 173, 177, 179, 182, 185, 188.

155 *Id*. ¶ 386; Von Fabian Hillebrand, Strafrechtlich eine einfache Angelegenheit [A Simple Matter under Criminal Law], ND (Oct. 11, 2019) https://www.neues-deutschland.de/artikel/1127023.omer-shatz-strafrechtlich-eine-einfache-angelegenheit.html?fbclid=IwAR1s0Zpz0lk5ekddJepN7TSj1QxAfBIqpNUA_AEFMdL-6p9_GC0u1NNIe_c [https://perma.cc/3W9P-D7M6].

156 *See also* Owen Bowcott, *ICC Submission Calls for Prosecution of EU over Migrant Deaths*, GUARDIAN (June 3, 2019), https://www.theguardian.com/law/2019/jun/03/icc-submission-calls-for-prosecution-of-eu-over-migrant-deaths [https://perma.cc/DUB4-DAEE] (describing the submission to the ICC accusing various European leaders of migrant abuse).

157 Shatz & Branco, *supra* note 153, ¶¶ 6-12.

158 *See* Bowcott, *supra* note 156; Emma Sofia Dedorson, *Meet the Lawyer Taking the EU Migration Policy to the ICC*, EUOBSERVER (June 14, 2019), https://euobserver.com/news/145162 [https://perma.cc/3MGP-M556] (interviewing Branco, one of the lawyers who wants to see European Union officials and member states prosecuted at the ICC for abusive migration policies); Kerstin Carlson, *Migration: Time For the ICC to Put European Leaders on Trial*, AFR. REP. (July 26, 2019), https://www.theafricareport.com/15694/migration-time-for-the-icc-put-european-leaders-on-trial/ [https://perma.cc/N72M-M6HD] (describing the decision the ICC faces after two lawyers filed a complaint naming European member states' migration policies in the Mediterranean as crimes against humanity).

This attention reflects how captivating the anti-impunity narrative about the central Mediterranean has become for popular audiences globally. Based on its record thus far, it remains hard to believe that the Office of the Prosecutor will do anything about this communication. And yet, the public reception seems to prove that the criminal law framing has been successful in capturing the imaginations of many.

iii. The United States

Just like in the Australian and European cases, the American roots of the new anti-impunity are also found two decades back. Here, however, they are different. Rather than anything directly related to the Rome Statute coming into force, they grew out of the aftermath of the terror attacks of September 11, 2001. Responding to the attacks, the United States reorganized its border enforcement. Through the Homeland Security Act of 2002, Congress consolidated all border patrol agencies into the Department of Homeland Security ("DHS").[159] In March 2003, the U.S. Customs and Border Protection ("CBP") and the U.S. Immigration and Customs Enforcement ("ICE") agencies were established, both under the umbrella of DHS.[160] In hindsight, we now know that this reorganization entrenched and consolidated border violence, as well as the lack of accountability for it.[161]

As emphasized above, the anti-impunity discourse first emerged in the context of war and authoritarianism. The recreation of the U.S. border enforcement system, and particularly the ascendance of CBP and ICE, quickly led to the militarization of U.S. borders. The establishment of a quasi-military environment on the U.S.-Mexican border prepared the ground for an anti-impunity discourse on migration. Indeed, during the first decade of the twenty-first

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[159] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

[160] *CBP Through the Years*, U.S. CUSTOMS AND BORDER PROTECTION (May 5, 2021), https://www.cbp.gov/ [https://perma.cc/8A9Y-GDBA]; *History of ICE*, U.S. IMMIGR. AND CUSTOMS ENF'T (Jan. 1, 2021), https://www.ice.gov/history [https://perma.cc/PW4Z-HTQ5].

[161] This is, of course, not to say that border violence is an entirely new or unprecedented phenomenon. For a look at previous decades, see generally Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 SAN DIEGO INT'L L.J. 1 (2001) (detailing the history of U.S. border violence against Mexican migratory workers).

century, the environment on the U.S.-Mexican border became both more war-like and more authoritarian:

> [I]t has become entirely normal to look up into the Arizona sky and to see Blackhawk helicopters and fixed-wing jets flying by . . . [and to] hear Predator B drones buzzing . . . [that] are equipped with the same kind of 'man-hunting' [radar] that flew over the Dashti Margo desert region in Afghanistan.[162]

Just like in the burgeoning field of national security law, a militarized environment becomes intertwined with criminal law. In a foundational articulation of this development, in 2006, legal scholar Juliet Stumpf introduced the study of "crimmigration."[163] Crimmigration refers to the intense conversion between immigration enforcement and criminal law during the period, and indeed ever since.[164] As Stumpf explained, the two become only "nominally separate."[165]

Stumpf's intervention, which has also become influential in the Australian and European contexts I have described above, makes what is now likely a familiar claim: criminal law has become a major administrative avenue through which the border is being enforced and managed. As criminal law became a central category for thinking about migration, anti-impunity became a natural step to take. The European developments I have described above in the struggle against smuggling have a direct American parallel, embodied in efforts to criminalize trafficking worldwide (and to expand the category). This push to criminal law began during the George W. Bush administration and continued during the Obama administration. Like in the Australian and the European contexts, part of its vocabulary included analogies to slavery.[166] Anti-

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[162] Brief of Amici Curiae Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners at 6, Hernandez v. Mesa, 140 S.Ct. 735 (2020) (N. 17-1678) (quoting Todd Miller, *War on the Border*, N.Y. TIMES (Aug. 17, 2013), https://www.nytimes.com/2013/08/18/opinion/sunday/war-on-the-border.html [https://perma.cc/BW9A-4G2Z]). On the notion of "manhunting," see GRÉGOIRE CHAMAYOU, A THEORY OF THE DRONE 30-36 (Janet Lloyd trans., 2015).

[163] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 368 (2006). Stumpf is widely credited for the term, even though she was not the first to invoke it.

[164] *Id*. at 381.

[165] *Id*. at 376.

[166] Chuang, *supra* note 10, at 623-24.

impunity appears in this context as an instrument of transnational governance.[167] Importantly, we also see this move to criminal law in the language through which gang violence is addressed during this period. Starting from the first decade of the twenty-first century, gang violence was identified as one of the major drivers of unauthorized migration.[168] In the fields of development and human rights, the issue often came to be regarded as one of impunity. Like in Europe, the term was also employed in the United States to address smuggling networks, which in both regional contexts established the material infrastructure for unauthorized entries.[169]

Various actors pushed for greater criminal accountability in Mexico, as part of an agenda that presented itself as one of border security and human rights at one and the same time.[170] These included government actors, NGOs, and UN circles. "[I]mpunity for human rights abuses against migrants is rampant," wrote UN Special Rapporteur on Migrant Rights, Jorge Bustamante, in 2008.[171] "With the pervasiveness of corruption at all levels of government and the close relationship that many authorities have with gang networks, incidences of extortion, rape and assault of migrants continue."[172]

Rereading Stumpf in the context of the history of anti-impunity, the relationship between the national security emergency and the criminalization of migrants becomes abundantly clear. The United States' use of offshore detention facilities in Guantánamo and other "black sites" only started to become visible in the public discussion

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167 *Id*. at 623.

168 Julia G. Young, *The Situation at the U.S.-Mexico Border Can't be 'Solved' Without Acknowledging its Origins*, Time (Mar. 31, 2021), https://time.com/5951532/migration-factors/ [https://perma.cc/ZYR5-PBXT].

169 On the notion of "infrastructure" and its application in this context, see generally Thomas Spijkerboer, *The Global Mobility Infrastructure: Reconceptualizing the Externalisation of Migration Control*, 20 EUR. J. MIGRATION & L. 452 (2018).

170 *See, e.g.*, U.S. AGENCY FOR INT'L. DEV., CENTRAL AMERICA AND MEXICO GANG ASSESSMENT 10-11, 31-32 (2006), https://pdf.usaid.gov/pdf_docs/PNADG834.pdf [https://perma.cc/VA2C-5Z5X]; AMNESTY INT'L, INVISIBLE VICTIMS: MIGRANTS ON THE MOVE IN MEXICO (2010), https://www.amnesty.org/download/Documents/36000/amr410142010eng.pdf [https://perma.cc/3NSU-N2L5].

171 Jorge Bustamante (Special Rapporteur on the Human Rights of Migrants), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 65, U.N. Doc. A/HRC/11/7/Add.2 (Mar. 24, 2009).

172 *Id*.

with high-profile cases in the Supreme Court.[173] Imagining a future in which the criminalization of immigration continues, Stumpf takes a page from the national security playbook. She envisions that it is the year 2017, and the United States has continued on its path of criminalizing migration.[174] The result is that detention facilities are over-populated, and a network of offshore detention sites has been established in faraway places.[175] For example, Israel is in the role that Nauru and Papua New Guinea play for Australia: it provides the United States with offshore immigration detention services (specifically for Muslim detainees).[176]

This allusion to national security cooperation is especially pertinent to the discussion of anti-impunity in the U.S. migration context. Beyond the impunity of criminal gangs in Mexico, it starts to expose the sensibility I have focused on in my analyses of Australia and the European Union: that border enforcement has evolved into a global plot to circumvent basic human rights rules, and create "legal black holes" (to use the term of the day for Guantánamo).[177] In Stumpf's imagined scenario, European States respond to the United States' violation of fundamental human rights rules by imposing economic sanctions upon the United States.[178] True, this is not a tool of international criminal justice; arguably, however, it belongs to the same "family" of international legal tools, reserved for the worst of actors within the international community.[179] That economic sanctions against the United States become imaginable in the mid-2000s reflects the dread some scholars start to feel when witnessing the emergence of carceral border policies. Little could Stumpf know, at the time, that Europe would be developing its own version of such carceral policies.

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173 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

174 *See* Stumpf, *supra* note 163, at 368-75.

175 *Id.*

176 *See id.* at 374-75.

177 *Cf.* Mann, *supra* note 47, at 347 (exploring "the trope of the 'legal black hole' to reveal questions of legal theory arising from contemporary migrant drownings").

178 *See* Stumpf, *supra* note 163, at 375.

179 After all, Chapter 7 of the UN Charter, through which the UN Security Council imposes "coercive measures", has been historically employed both to impose economic sanctions and to establish international criminal tribunals. *See* DAVID SCHWEIGMAN, THE AUTHORITY OF THE SECURITY COUNCIL UNDER CHAPTER VII OF THE UN CHARTER: LEGAL LIMITS AND THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE 109, 116 (2001).

The description in the quote above, of the U.S.-Mexico border as a zone of man-hunting drones, is taken from an *amicus* brief.[180] On August 9, 2019, CBP officials submitted it to the United States Supreme Court in *Hernandez v. Mesa*.[181] Though the brief is recent, the underlying set of facts concern the killing of a 15-year-old Mexican teenager, Sergio Hernandez, back in 2010.[182] The brief thus shed remarkable light on the development of border policies during the preceding decade and provides considerable insight on the American version of the new impunity. Addressing the underlying facts, Roxana Altholz writes that CBP's immunity for border killings stems from the fact that "all victims of border killings, regardless of geographic location of the harm, lack effective access to a remedy."[183]

For example, it is worth highlighting what might be referred to as, paraphrasing Chuang, "impunity creep."[184] As the brief emphasizes, starting from the mid-2000s, CBP and ICE often hired personnel with deep connections to criminal organizations in Mexico, including cartel members.[185] The suggestion is that impunity, normalized on the southern side of the border, was thus invited into the U.S.'s border control agencies. Furthermore, the former officials talk about a culture of protectionism within the agencies, which systematically thwarts efforts to impose disciplinary or criminal measures upon agents when appropriate.[186] These internal norms both reflect and further solidify patterns of violence that have been carried forward all the way to the present: "Between 2003 and May 2018 Border Patrol agents have killed at least 97 people, including 28 US citizens and six children."[187]

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[180] Brief of Amici Curiae Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners, *supra* note 162.

[181] Hernandez v. Mesa, Proceedings and Orders, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/hernandez-v-mesa-2/https://www.scotusblog.com/case-files/cases/hernandez-v-mesa-2/ [https://perma.cc/KWU8-JANS].

[182] Brief of Amici Curiae Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners, *supra* note 162, at 32.

[183] Roxanna Altholz, *Elusive Justice: Legal Redress for Killings by U.S. Border Agents*, 27 BERKELEY LA RAZA L.J. 1, 5 (2017).

[184] *See* Chuang, *supra* note 10.

[185] Brief of Amici Curiae Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners, *supra* note 162, at 3.

[186] *Id*. at 23-28.

[187] Linda Green, *COVID-19 and Legalized Criminality: Notes from the Arizona Borderlands, Part 2*, 44 DIALECTICAL ANTHROPOLOGY 265, 265 (2020).

Hernandez was one of these people, and his family sued in order to obtain a civil remedy, but was barred from doing so under the doctrine of qualified immunity. The case, which the Supreme Court has not yet decided as I write, seeks a finding that federal courts should recognize a damages claim if plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth Amendment rights for which there is no alternative legal remedy. The *amici* start their submission with a clear statement:

> Sergio Hernández should not have been killed. He was an unarmed teen who did not pose an imminent threat to the U.S. Border Patrol agent, Respondent Jesus Mesa, Jr., who shot him. But because of conditions within the Border Patrol, similar incidents will likely continue to occur if agents cannot be held accountable in civil suits.[188]

They then add: "Without the possibility of civil liability, the unlikely prospect of discipline or criminal prosecution will not provide a meaningful deterrent to abuse at the border."[189] The *Hernandez* case began "[a]fter President Obama's Department of Justice declined to charge Mesa."[190] The brief illustrates, perhaps better than any other set of sources, how the extreme violence at the border and an utter lack of accountability for that violence developed during his administration. Indeed, President Barack Obama increased migrant deportations to an unprecedented rate, while allowing others amnesty and paths to citizenship.[191]

Yet, arguably, only as a response to President Donald Trump's anti-immigrant policies, often couched in explicitly racist language,[192] did activists and politicians turn in earnest to a

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[188] Brief of Amici Curiae Former Officials of U.S. Customs and Border Protection Agency in Support of Petitioners, *supra* note 162, at 3.

[189] *Id.* at 4.

[190] Mark Joseph Stern, *Sonia Sotomayor Raises the Alarm over Border Patrol's Lawless Brutality*, SLATE (Nov. 13, 2019), https://slate.com/news-and-politics/2019/11/hernandez-supreme-court-oral-arguments-sotomayor-border-patrol.html [https://perma.cc/FH8Y-JFSX].

[191] Serena Marshall, *Obama has Deported More People than Any Other* President, ABCNEWS (Aug. 29, 2016), https://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661 [https://perma.cc/R5BZ-4MK4].

[192] Michael D. Shear & Julie Hirschfeld Davis, *Stoking Fears, Trymp Defied Bureaucracy to Advance Immigration Agenda*, N.Y. TIMES (Dec. 23, 2017), https://www.nytimes.com/2017/12/23/us/politics/trump-immigration.html?_r=1 [https://perma.cc/MTE4-D3MV].

vocabulary of impunity. During the Obama era we talked about the militarization of the border.[193] During the Trump era, we have seen repeated deployments of actual troops along the border.

Particularly central to the discourse of anti-impunity have been "child separation" policies, as well as punitive detention and deportation measures.[194] A significant part of the anti-impunity discourse in the United States has focused on ICE. In August 2018 Zephyr Teachout, a progressive New York lawyer who ran for New York Attorney General, expressed her view in a campaign video that, "ICE was born in xenophobia in the time after 9/11, and has grown up to become a tool of fear and illegality."[195] She therefore promised that, "as Attorney General, I will continue to speak out against ICE, I will prosecute ICE for their criminal acts. . . . The idea that we can call this law enforcement is a real offense to the idea of law itself."[196] The left-wing candidate and Fordham law professor was ultimately not elected, but nonetheless received the endorsement of the *New York Times*; a forerunner of endorsing migration anti-impunity in liberal media.[197]

In the following months, several major American human rights organizations, as well as highly regarded legal commentators, advanced the argument that child separation policies at the border legally constituted torture. Like in the Australian and European contexts, the centrality of torture to the criminal law argument stemmed from torture being both a human rights violation and a criminal offense.[198] Beth Van Schaack, a law professor at Stanford and a former State Department official, authored a remarkable piece

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193 *See* Joel Rose, *President Obama Also Faced a 'Crisis' at the Southern Border*, npr (Jan. 9, 2019), https://www.npr.org/2019/01/09/683623555/president-obama-also-faced-a-crisis-at-the-southern-border [https://perma.cc/PKU6-F3GQ].

194 *See* Linnaea Honl-Stuenkel, *John Kelly Cashes in On Child Separation Policy He Pushed*, CREW (May 9, 2019), https://www.citizensforethics.org/john-kelly-child-separation-policy/ [https://perma.cc/3KKA-SGQ7] (describing immigration policies in the Trump administration).

195 Zephyr Teachout, *Zephyr Teachout Is Promising to Prosecute ICE*, NOWTHIS (Aug. 1, 2018), https://nowthisnews.com/videos/politics/zephyr-teachout-is-promising-to-prosecute-ice [https://perma.cc/LP6K-EBEV].

196 *Id.*

197 Ed. Bd., Opinion, *The New York Times Endorses Zephyr Teachout for Attorney General in Thursday's Primary*, N.Y. TIMES (Aug. 19, 2018), https://www.nytimes.com/2018/08/19/opinion/zephyr-teachout-new-york-attorney-general.html [https://perma.cc/7NUW-4SZ5].

198 Under federal law in the United States: 18 U.S.C. § 2340A (2006).

on the torture of migrants in October 2018.[199] Her analysis of the Trump administration's engagement in torture relies both on the international legal definition and on domestic criminal law.[200] She emphasizes a facet of the policy "acutely relevant to the U.S. definition of mental torture," namely the unlawful drugging of children.[201] As Van Schaack points out, "the administration of mind-altering substances or procedures to disrupt the victim's senses" has been specifically included in the U.S. Senate's list of policies constituting mental torture.[202] While she doesn't spell it out, the outcome of her analysis is clear: the perpetrators of torture against "[b]oth [p]arents and [c]hildren," presumably U.S. border enforcement agents and political appointees—perhaps including the President—may in the future be targets of criminal prosecution.[203]

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[199] Beth Van Schaack, *The Torture of Forcibly Separating Children from Their Parents*, JUST SEC. (Oct. 18, 2018), https://www.justsecurity.org/61138/torture-forcibly-separating-children-parents/ [https://perma.cc/T3S6-A6E9]; *Beth Van Schaack*, JUST SEC., https://www.justsecurity.org/author/vanschaackbeth/ [perma.cc/5C3U-KGFA].

[200] Van Schaack, *supra* note 199.

[201] *Id.* Judge Dolly M. Gee has found that children in detention are being over-medicated and administered psychotropic drugs without parental consent or judicial authorization through a court order. Richard Gonzales, *Federal Judge Orders Government to Seek Consent before Medicating Migrant Children*, NPR (July 30, 2018), https://www.npr.org/2018/07/30/634171415/federal-judge-orders-government-to-seek-consent-before-medicating-migrant-childr [https://perma.cc/98TG-CB9W]. Separated children in detention have alleged that they had been forced to take multiple psychotropic medications simultaneously. Samantha Schmidt, *Trump Administration Must Stop Giving Psychotropic Drugs to Migrant Children Without Consent, Judge Rules*, WASH. POST: MORNING MIX (July 31, 2018, 6:38 AM), https://www.washingtonpost.com/news/morning-mix/wp/2018/07/31/trump-administration-must-seek-consent-before-giving-drugs-to-migrant-children-judge-rules/ [https://perma.cc/9R4D-33GF]. These medications, which react with the central nervous system, can have long-term side effects (hallucinations, self-harm, suicidal ideation, etc.) when administered to adolescents or children. M.B. v. Corsi, No. 2:17-cv-04102-NKL, 2018 U.S. Dist. LEXIS 3232 (W.D. Mo. Jan. 8, 2018). Lawyers have alleged that detention facility personnel are administering these medications solely to control the behavior and "pacify" the children and not because the children have a psychiatric disorder in need of treatment. *Id. See also* Michael E. Miller, *'I Want to Die': Was a 5-year-old Drugged After Being Separated from His Dad at the Border?*, WASH. POST (Aug. 9, 2018), https://www.washingtonpost.com/local/i-want-to-die-was-a-5-year-old-drugged-after-being-separated-from-his-dad-at-the-border/2018/08/08/df4cc2aa-95e1-11e8-a679-b09212fb69c2_story.html [https://perma.cc/4B6C-8898].

[202] Van Schaack, *supra* note 199; *see also* MICHAEL JOHN GARCIA, CONG. RSCH. SERV., RL32276, THE U.N. CONVENTION AGAINST TORTURE: OVERVIEW OF U.S. IMPLEMENTATION POLICY CONCERNING THE REMOVAL OF ALIENS 5 (2009), https://fas.org/sgp/crs/intel/RL32276.pdf [https://perma.cc/2VN2-VA6E].

[203] Van Schaack, *supra* note 199.

When it was revealed in December 2018 that migrants detained at the border are kept in freezing cells nicknamed 'iceboxes' (*Las Hieleras*), such concerns about torture were once again aggravated.[204]

A legal clinic at New York University School of Law submitted another notable *amici* brief in February 2019, making torture and inhuman and degrading treatment arguments.[205] This brief was submitted on behalf of a list of human rights groups and law professors.[206] It reads: "the forcible separation of minor children from the adult(s) with who they have a parental relationship and with whom they migrate, as in the case of [redacted for privacy] and her son, to deter immigration, constitutes torture under international law."[207] Notably, child separation also raised the specter of enforced disappearances, which have long been central to anti-impunity rhetoric, especially in the context of struggles against authoritarianism.[208]

Echoing some of the Australian and European analyses of migrant detention for "deterrence" purposes, the NYU clinic also alleged that "the U.S. government's routine and non-exceptional detention of arriving asylum seekers like Mrs. De Faria Teixeira, without a meaningful individualized custody determination or independent review, and for an unlawful purpose, violates the prohibition on arbitrary detention under international law."[209] A similar analysis may apply to the force-feeding of hunger strikers in migrant detention facilities, revealed around the same time.[210]

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[204] Mariana Alfaro, *Migrants Detained at the Border are Kept in Freezing Cells Nicknamed 'Iceboxes' — Here's What We Know About Them*, BUS. INSIDER (Dec. 27, 2018, 12:05 PM), https://www.businessinsider.com/migrants-detained-at-border-kept-in-freezing-cells-nicknamed-iceboxes-2018-12 [https://perma.cc/YPH5-8RTW].

[205] Unopposed Motion of Global Justice Clinic et al. for Leave to File Brief *Amici Curiae* in Support of Petitioner's Habeas Corpus Petition Pursuant to 28 U.S.C. § 2241, De Faria Teixeira v. Whitaker, EP-19-CV-43-KC (W.D. Tex. 2019).

[206] *Id.*

[207] *Id*.

[208] *See* Alonso Gurmendi, *On Calling Things What They Are: Family Separation and Enforced Disappearance of Children*, OPINIOJURIS (June 24, 2019), http://opiniojuris.org/2019/06/24/on-calling-things-what-they-are-family-separation-and-enforced-disappearance-of-children/ [https://perma.cc/942G-GT8K] (detailing enforced disappearances).

[209] Brief of Amici Curiae in Support of Petitioner Valquiria de Faria Teixeira's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, De Faria Teixeira v. Whitaker, EP-19-CV-43-KC (W.D. Tex. 2019).

[210] *US: Cease Force-Feeding Migrant Hunger Strikers*, HUM. RTS. WATCH (Aug. 19, 2019), https://www.hrw.org/news/2019/08/19/us-cease-force-feeding-migrant-

Perhaps the fieriest moment unfolded on June 17, 2019, when Democratic Representative Alexandria Ocasio-Cortez took to Instagram to protest the "fascist presidency" "running concentration camps."[211] Representative Alexandria Ocasio-Cortez has become one of the most influential leaders of the party, and her words echoed far and wide. In the coming days, then presidential candidate and former Attorney General of California, Kamala Harris, repeatedly claimed that the President's treatment of migrants is "a crime against humanity."[212] One wonders whether Harris had intended, would she have been elected President, to instruct federal prosecutors to act accordingly. For their own parts, celebrities including Cher, J.K. Rowling, Bette Midler, and many more tweeted in vociferous agreement.[213] The looming specter of concentration camps, echoing World War II Nazi prisons and the United States internment of Japanese citizens, came with a veritable anti-impunity eruption.[214]

To be sure, some found this eruption inappropriate or even intimidating. The United States Holocaust Memorial Museum, for

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hunger-strikers [https://perma.cc/7DTA-UDJP]. More recently, see Noah Lanard, *ICE Is Force-Feeding Hunger Strikers, in Violation of Medical Ethics*, MOTHER JONES (Jan. 16, 2020), https://www.motherjones.com/politics/2020/01/ice-is-force-feeding-hunger-strikers-in-violation-of-medical-ethics/ [https://perma.cc/5V6Y-LMYE].

211 Tim Hains, *Ocasio-Cortez: "Fascist Presidency" is Running "Concentration Camps" On The Southern Border*, REAL CLEAR POLITICS (June 18, 2019), https://www.realclearpolitics.com/video/2019/06/18/ocasio-cortez_trump_administration_is_running_concentration_camps_on_the_souther_border.html [https://perma.cc/D856-GEQ8].

212 *See* Susan Jones, *Kamala Harris: Immigration Raids Are 'A Crime Against Humanity'*, CNSNEWS (July 12, 2019), https://www.cnsnews.com/news/article/susan-jones/kamala-harris-immigration-raids-are-crime-against-humanity [https://perma.cc/5ZME-8Y49]; *see also* John Bowden, *Kamala Harris: Trump's Treatment of Migrants is 'A Crime Against Humanity'*, HILL (June 22, 2018, 7:10 PM), https://thehill.com/homenews/senate/393742-kamala-harris-trump-treatment-of-migrants-is-a-crime-against-humanity [https://perma.cc/NEE3-R8NT].

213 *Here Are All the Celebs Weighing in on the Trump Administration's Separation of Children at the Border*, AMERICA'S VOICE (June 18, 2018), https://americasvoice.org/blog/celebrities-separation-border/ [https://perma.cc/E53B-ER7X].

214 On the relevance of concentration camp trials for contemporary international criminal law, see Durwood "Derry" Riedel, *The U.S. War Crimes Tribunals at the Former Dachau Concentration Camp: Lessons for Today?*, 24 BERKELEY J. INT'L. L. 554 *passim* (2006) (emphasizing, *inter alia,* that not all "concentration camps" were similar to each other).

example, expressed criticism of such comparisons.[215] As I write these words, however, activists deploying an anti-impunity rhetoric to defend migrants continue to display enormous energy. On July 27, 2019, protestors gathered on the D.C. National Mall, chanting "never again!"[216] Similar events are unfolding in other American cities.[217]

Perhaps because the United States is not a member of the Rome Statute, the turn to anti-impunity in the United States did not focus on international criminal law. As it unfolded in the build-up to the November 2020 elections, it was characterized by a much more popular tone. This is not to say international law did not have a role here. A political imagination of mass atrocities and their historical memory, with an implicit allusion to law, has been just as important.

b. A Global Trend

The analysis above focuses on the fault lines between "developed" and "developing" countries. And yet, the turn to the new anti-impunity in the context of migration is arguably global. To name just two other apposite examples, the ICC prosecutor may seek to assert accountability for the violation of rights of Rohingya refugees fleeing Myanmar.[218] On January 23, 2020, the International

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[215] *See* Edna Friedberg, *Why Holocaust Analogies Are Dangerous*, U.S. HOLOCAUST MEM'L MUSEUM (Dec. 12, 2018), https://www.ushmm.org/information/press/press-releases/why-holocaust-analogies-are-dangerous [https://perma.cc/M9PJ-3TCJ].

[216] *See* Alex Graf, *Activists March in DC Calling for 'Dignity Not Detention' for Migrants*, GLOBE POST (July 16, 2019), https://theglobepost.com/2019/07/16/dc-never-again-march/ [https://perma.cc/EZ4E-PKQN].

[217] See Ben Kesslen, *'Never Again Means Close the Camps': Jews Protest ICE Across the Country*, NBC NEWS (July 15, 2019), https://www.nbcnews.com/news/us-news/never-again-means-close-camps-jews-protest-ice-across-country-n1029386 [https://perma.cc/8K93-S3V3] (detailing the July 2, 2019 protest in Boston led by Jewish groups against ICE Detention camps).

[218] *See* Press Release, General Assembly, Universal Ratification of Rome Statute Crucial to Reduce Impunity for Atrocity Crimes, International Criminal Court President Tells General Assembly, U.N. Press Release GA/12210 (Nov. 4, 2019), https://www.un.org/press/en/2019/ga12210.doc.htm [https://perma.cc/D2L8-FBTE]; *see also* ICC, Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Request for Authorization of an Investigation Pursuant to Article 15 (July 4, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03510.PDF [https://perma.cc/Q924-5KJD].

Court of Justice arguably joined this effort as it issued "provisional measures" to prevent the crime of genocide against the Rohingya minority in Myanmar.[219] Separately, the option has also been discussed with regard to refugees from Syria.[220]

Working within this general context, Agnes Callamard, Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Execution has identified something like a worldwide criminal scheme. Callamard, thus, starts a recent report with a dramatic note, which I think strongly attests to the rise of migration anti-impunity.[221] Her report "is concerned with what can only be described as a human rights and humanitarian crisis. This crisis is characterized by mass casualties globally, a regime of impunity for its perpetrators and an overall tolerance for its fatalities."[222] If that is not enough, Callamard immediately explains that she is writing about "an international crime whose very banality in the eyes of so many makes its tragedy particularly grave and disturbing."[223]

IV. THE CRITIQUE OF ANTI-IMPUNITY

The basic claims of the new anti-impunity have no doubt emerged as a central and wide-ranging response to border violence. It is therefore high time to assess it in the light of the critical literature on anti-impunity more generally. The latter scholarship has largely proposed progressive and leftist alternatives to "the turn to criminal law," and it is from this perspective that I would like to examine the trend.[224]

The rise of the new anti-impunity can be explained by reference to worsening policies towards refugees and migrants. According to

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[219] *See* Press Release, International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) (Jan. 23, 2020), https://reliefweb.int/sites/reliefweb.int/files/resources/178-20200123-PRE-01-00-EN.pdf [https://perma.cc/F5B4-YF3W].

[220] *See* Kevin Jon Heller, *Implications of the Rohingya Argument for Libya and Syria (and Jordan)*, OPINIO JURIS (Apr. 10, 2018), http://opiniojuris.org/2018/04/10/additional-implications-of-the-otps-rohingya-argument/ [https://perma.cc/D92W-SGSB].

[221] Callamard, *supra* note 122, at 4.

[222] *Id*.

[223] *Id*.

[224] *See, e.g.*, sources cited *supra*, note 17-18.

this view, criminal law came to be part of the rhetoric for defending refugees and migrants only when violations against them indeed became *criminal*. Surely, there is something to that, but it can only be part of the story. As many scholars have noted, border violence was abundant before the beginning of the 2015 "refugee crisis," and, indeed, before the framing of the Rome Statute and the 9/11 attacks.[225] Further, the criminality of border violence is by no means *evident*, nor is it a matter of political consensus. Even with copious evidence of horrid violence systematically directed against migrants and refugees, the criminality of border enforcement remains politically controversial. Save, perhaps, for an Italian investigation against Salvini—truncated without an indictment—we have not seen prosecutions against political leaders, or any notable state backing for the new anti-impunity.[226] In the United States context, even under the liberal Obama administration, it has proven difficult to impose any form of accountability on border enforcement agents who have killed unarmed persons.[227] More often, the claims of the new anti-impunity remain the aspirations and dim threats of activists.

The criminal law framing of border violence is the outcome of the political choices of activists and the interpretive work of lawyers. As such, they must be critically examined, not least by advocates who have made such efforts. Might the vocabulary of mass atrocity be futile, perhaps even counter-productive? What alternative agendas, progressive or other, may anti-impunity occlude? In what remains of this Article, I raise four salient and closely related criticisms that have been marshalled against the turn to criminal law in human rights. I respond to each in the more specific context of migration, to assess the critique's merits, as well as its misjudgments.

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225 The Berlin Wall is only one iconic example. *See* U.S. DEP'T OF STATE, 101ST CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1989, at 1115–16 (Joint Comm. Print 1990) (discussing the German Democratic Republic).

226 *See supra* notes 149-53 and accompanying text.

227 *See* Brian Bennet, *Border Patrol Sees Little Reform on Agents' Use of Force*, LA TIMES (Feb. 23, 2015), https://www.latimes.com/nation/la-na-border-abuse-20150223-story.html [https://perma.cc/YM7D-NKAW] (explaining how a year after the Obama administration promised to crack down on Border Patrol, little reform efforts had been taken).

a. Justification

Critics have long argued that claims grounded in *jus cogens* have the curious feature of begging the question[228]: What does it mean to say that the torture or inhuman and degrading treatment of migrants is "absolutely prohibited"? Martti Koskenniemi would perhaps respond that this is an instance of international legal *kitsch*.[229] While international law surely condemns some policies, their framing as *jus cogens* may fail to do the legal and political work necessary to show *why* that is the case in any specific instance. "Peremptory norms" may thus consistently fail to convince one's opponent.

Voicing this concern, Koskenniemi adopts a "methodological formalism" intended to eliminate the value-laden invocation of *jus cogens*.[230] A legal argument resting on state consent is better than one resting on "higher law." By appealing to the latter, we simply *assume* we are right and shrug away the need to make our case. Relatedly, *jus cogens* has too often been used to cast political opponents as villains. By taking a moral high ground, they seem to disallow a plurality of opinions and perspectives on issues that are, one must admit, controversial.[231]

In his contribution to *Anti Impunity and the Human Rights Agenda*, Samuel Moyn directs this critique towards the turn to criminal law in human rights.[232] For him, anti-impunity is a "deflection argument." Instead of explaining *why* criminalization would be effective for the prevention or deterrence of human rights abuses, the human rights movement has been satisfied with an obscure retributivism: some crimes are so egregious, one simply *must* prosecute.[233] Ending impunity, Moyn further remarks, advances "political trials."[234] These are "proceedings in which the organizer

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228 Martti Koskenniemi raised this objection against peremptory norms a long time ago. *See* Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113, 122 (2005).

229 *Id.*

230 *Id.* at 123

231 *See* Samuel Moyn, *The Embarrassment of Human Rights*, 50 TEX. INT'L L.J. 1, 7 (2015) (disagreeing with Finnish jurist Martti Koskenniemi over the history of international law and human rights post-World War II).

232 *See generally* Moyn, *supra* note 9.

233 *Id.*

234 *Id.* at 72; *see also* Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 33 (2002).

of the event has implicit or explicit aims beyond the ordinary workings of the criminal justice system."[235] Astonishingly, says Moyn, these political ends are never properly articulated. "The generalized slogan 'ending impunity,'" he writes, "suggests that it is *self-evidently* and *unfailingly* a good thing to mount such political trials."[236] While prosecution may or may not be justified, Moyn is alarmed that often no real justification is even *attempted*: "[I]ts validity goes without saying."[237]

For Moyn, the classical articulation of this unexplained retributivism is Hannah Arendt's defense of the Eichmann trial.[238] He thus banks on her intellectual opponent, Judith Shklar, who sought to advance a justification for the Nuremberg trials in specifically *consequentialist* terms.[239] The picture he paints, though not unfamiliar, is a bleak one: trials for mass human rights violations, particularly at the ICC, have largely been ineffective under any consequentialist account. Since violators have been tried and sentenced in the domestic sphere, that too is not an unmitigated social benefit: incarceration is a social harm. Ironically, "[t]he human rights movement emerged in opposition to imprisonment . . . . [I]t is surprising that it is now so focused on throwing people in jail."[240] As a general matter, migrant rights lawyers—who have often focused on fighting migrant criminalization and incarceration—surely share the latter view.[241]

Arendt thought that there are certain crimes for which the perpetrator simply "must" be punished.[242] Moyn questions how Arendt and other anti-impunity advocates arrive at this conclusion.[243] Yet the examples of migration anti-impunity described above shed a different light on Arendt's retributivism. Rather than merely "deflecting" the need to argue, they convey a

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235 Moyn, *supra* note 9, at 72.

236 *Id*. at 72.

237 *Id*. at 71.

238 *Id*. at 71-72; HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

239 Moyn, *supra* note 9, at 70.

240 *Id*. at 68

241 *See, e.g.*, Cathryn Costello, *Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law,* 19 IND. J. GLOBAL LEGAL STUD. 257 (2012); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012).

242 ARENDT, *supra* note 238, at 234-252; Moyn, *supra* note 9, at 70.

243 Moyn, *supra* note 9, at 70-71.

specific *kind* of argumentative move. The basic strategy of anti-impunity arguments, as reflected in the migration context, amounts to an attempt to reverse the burden of proof. When we call certain policies "torture," or we liken them to concentration camps, or provide legal analysis according to which they amount to crimes against humanity, what we mean to say is: "If you believe that this kind of suffering is justifiable, *you* should do the work to explain it"; a call for retribution is added for those who allow such human suffering to go on without explanation. From this perspective, the political conversation in which we work to convince one another must be complemented with a more basic attention to the conditions in which conversation proceeds. When certain boundaries on the permissiveness of border violence are set, one may have to reject such premises. The other side needs to first explain how, for example, freezing migrants can be justifiable.[244]

This might sound weird because the burden of proof in a criminal trial is assigned to the prosecution. This of course remains unchanged; but when Moyn asks those seeking to criminalize gross human rights violations to justify their campaign,[245] the appropriate response is that whoever carries out a "widespread or systematic"[246] attack upon migrants needs to do the justifying. After all, the conditions in which the conversation on migration is carried out are themselves politically constructed, and they too can be challenged. The way to challenge them is to reject underlying assumptions that are supposed to render certain categories of violence towards migrants justifiable or even invisible. Work from there.

By proceeding in such a way, the new anti-impunity partakes in reimagining the contours of the polity. It takes the view that law is not only about persuasion or justification within a predetermined context. It is also about simply taking off the table certain kinds of violence against humans in order to transform the context for any debate to proceed. The framing of migration cannot simply be accepted as part of the prerogative of states. To dismiss such a reimagination as lacking justification is to assume that those who represent the extant situation can enjoy the privilege of asking others to justify their positions *first*. A deflection, perhaps; but a principled as well as strategic one.

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244 Alfaro, *supra* note 204.

245 Moyn, *supra* note 9, at 71.

246 This, once again, is the language of Article 7 of the Rome Statute. Rome Statute, *supra* note 12, art. 7.

Furthermore, in making up our minds about the need to criminalize certain actions, their justifications, and their limitations, we cannot simply hide behind a call for "consequentialism." Such a call on this issue can only make sense against the background of political assumptions that go far beyond what consequentialism *alone* would allow. A consequentialist analysis seeking to "optimize" the outcomes for humans the world over is nearly impossible. Consequentialism will therefore often end up being formulated in terms of what is better for the citizens of a specific country. In this reformulation, however, there is already an implicit preference for citizens over other human beings.[247] This quickly becomes a justification for violence, potentially limitless violence. It is hardly surprising that when it comes to migrants and refugees, a consequentialist argument has very often had "blood on their hands" (to return to Chetail's formulation).[248] The "deterrence" paradigm of border enforcement treats migration in staunchly consequentialist terms. The paradigm has taken hold nearly everywhere.[249] Consequentialism has also been invoked, for example, to argue against access to asylum requests.[250] It has been recognized—sometimes even by courts—as a relevant factor for placing migrants behind bars and sending warning messages in that way.[251] What "deterrence" does, of course, is precisely consequentialist in allowing the violence toward *some* migrants to "deter" *other* would-be migrants. The underlying unarticulated assumption—not in itself an outcome of consequentialism—is that impervious borders are desirable for the protection of a polity. But it is not even clear that consequentialism, *in and of itself*, can justify a distinction between citizens and non-citizens at the border. Something else is at work.

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247 *See, e.g.*, Catherine Dauvergne, *Citizenship with a Vengeance*, 8 THEORETICAL INQUIRIES L. 489, 495 (2007).

248 Chetail, *supra* note 78, at 917.

249 *See* Thomas Gammeltoft-Hansen & James C. Hathaway, Non-Refoulement *in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235 *passim* (2015) (providing a discussion on states' responsibility for aiding migrants and the relationship to international migrant law).

250 *See, e.g.*, AUSTRALIAN GOV'T, REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS 13 (2012); *see generally* Mann, *supra* note 62, at 380 (arguing that "[p]ragmatic policy solutions are operative in the continuous exposure of unauthorized migrants from developing countries to inhumane and degrading treatment and refoulment").

251 *See* HCJ 8665/14 Tashuma Dasta v. The Knesset, 1, 20 (2015) (Isr.) (finding that deterrence can only be the purpose of immigrant detention if it is accompanied by another policy purpose).

To argue against U.S. government lawyers, who say that it is prudent to deny soap to migrant detainees,[252] it is not enough to "rationally" engage (e.g., by discussing probable health risks). It is unlikely that those who support such policies would be convinced by an appeal to statute or treaty law, where they would ignore a *jus cogens* argument. Such individuals should simply not be answered on their own terms. With respect to the spirit of compromise described above, the new anti-impunity is a self-conscious vocabulary of partisanship.[253] It is neither *deflection* nor proper *justification* set out to convey as well as to recruit political power.[254]

Consider a relevant explanation to the concentration camp analogies, by historian Timothy Snyder. Analogies to past atrocities are a central tenet of anti-impunity, generally. In a short piece, Snyder explained: "Analogizing is not some mysterious operation: It is how we think. . . . 'Never again' is nothing other than an invocation of that process."[255] According to Snyder, we reach back to the past to illuminate the present: "Once we understand something about the history of the Holocaust, we make our way forward again, seeing patterns we would have missed. If we notice a dangerous one, we should act."[256] Giving up on analogies in favor of purely consequentialist reasoning may allow atrocities to return.

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[252] *See* Kate Cronin-Furman, *The Treatment of Migrants Likely 'Meets the Definition of a Mass Atrocity'*, N.Y. TIMES (June 29, 2019), https://www.nytimes.com/2019/06/29/opinion/immigration-children-detention.html [https://perma.cc/55DJ-XS2C].

[253] To use a term Oona Hathaway and Scott Shapiro coined, anti-impunity arguments are designed to "outcast" opponents. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 *passim* (2011).

[254] Kate Cronin-Furman advanced an argument about the merits of such rhetoric. Cronin-Furman, *supra* note 252. For her, the criminal law vocabulary allows a focus on individuals, which will then impose on them a personal cost. *Id.* Even if they are not ultimately prosecuted, the idea is that those involved in something like child separation will become ashamed within their social circles, and that their reputations will suffer. *Id.* While I am not entirely sure such a strategy is always warranted, it is a strategic choice, which may advance a political struggle (or backfire against it). It therefore makes no sense to abandon or discard the tools of criminal law in the struggle against border violence. Of course, advocates using it must be self-conscious and sensitive to the likely outcomes, and cognizant of both short-term and long-term effects. For a conceptualization of such practices of "stigmatization" as a fundamental purpose of international criminal law, see Frédéric Mégret, *Practices of Stigmatization*, 76 L. & CONTEMP. PROBS. 287, 288 (2013).

[255] Timothy Snyder, *It Can Happen Here*, SLATE (July 12, 2019, 12:11 PM), https://slate.com/news-and-politics/2019/07/holocaust-museum-aoc-detention-centers-immigration.html [https://perma.cc/8TEH-5MEX].

[256] *Id.*

As Snyder puts it, "'never again' becomes its own opposite: 'It can't happen here.'"[257] Analogy, in other words, is a type of justification.

Invoking a chilling illustration, Snyder explains how Nazis lured famished Jews to the killing with rolls and jam; for its own part, "ICE used doughnuts to lure hungry migrants to a place where they could be arrested, seizing mothers and leaving children behind."[258] The bottom line: "While that is not exactly like using marmalade to lure Jews to the *Umschlagplatz* . . . . The same kind of mind drew suffering people with sugar in 2018 as in 1942."[259] Such analogies drive anti-impunity, old and new. If we decided to criminalize atrocity back then, perhaps we must act now as well; if trials were what we did back then, perhaps it is not foolish to push for trials now, as well. That does not mean that the two historical conditions are the same. Nor does it suggest that the United States is engaging in a policy similar to Nazi extermination. But it does mean that the two instances fall within a category of violence that should be rejected altogether.

The anti-impunity skeptic will still raise a legitimate objection. There is a world of difference, they will say, between using analogy as a call for political action (as Snyder does), and the retributivist conclusion that one "must punish." Can putting more people in prison ever be a progressive solution to anything? Perhaps not a solution. But as long as we have prisons, let them be filled with those who have committed the worst of crimes, instead of with migrants and refugees.

b. Structural Violence

For Engle, one of the main problems with criminal law is its focus on individuals.[260] Perhaps the major strand of critique directed at anti-impunity argues that this preference for individuals occludes larger systemic issues, which can then go unaddressed. Individualizing responsibility may serve to distract advocates from deeper social-economic hierarchies, structural discrimination on

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257 *Id*.

258 *Id*.

259 *Id*.

260 Engle, *supra* note 4, at 1120–22.

racial or other grounds, or colonial subordination.[261] If one focuses on individual heroic acts in the face of atrocity, they become more likely to forget that the actions or omissions of individuals are shaped by social conditions. The underlying social conditions should therefore be at the center of transformative political programs. Criminal law is ill-suited for the task.

This critical tradition, too, emerged long before the human rights turn to criminal law. While Moyn opposes Arendt in his critique of anti-impunity,[262] Engle relies on Arendt's exact same work to explain this second point.[263] She thus quotes Arendt's observation, once again in the context of the Eichmann trial, that "we convince ourselves that if we remove the bad actors, we deal with evil."[264] And indeed, Arendt's 1963 book, *Eichmann in Jerusalem*, is one of the most influential analyses of structural violence in twentieth century social thought.[265] The book's famous subtitle, referring to "the banality of evil," has preoccupied generations of commentators.[266] It captures how the most atrocious violence can be structurally embedded in the social norms we live by. Blaming a few defendants for the violence of an entire society may therefore be an exercise in self-deception. Engle follows Arendt in her argument that in obscuring state responsibility, international criminal law misses the

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[261] *See, e.g.*, Bonita Meyersfeld, *Domestic Violence, Health, and International Law*, 22 EMORY INT'L L. REV. 61, 77–86, 101–02 (2008) (observing that international law has transformed from understanding violence against women as primarily individual, to conceptualizing it as a way in which they are structurally subordinated to men).

[262] *See* Moyn, *supra* note 9, at 70–72.

[263] Engle, *supra* note 18, at 44.

[264] *Id.*

[265] *See* ARENDT, *supra* note 238.

[266] *Id.*; *see, e.g.*, Peter Burdon, Gabrielle Applyby, Rebecca LaForgia, Joe McIntyre & Ngaire Naffine, *Reflecting on Hannah Arendt and Eichman in Jerusalem: A Report on the Banality of Evil*, 35 ADEL. L. REV. 427, 429–32 (2014); Shoshana Felman, *Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust*, 1 THEORETICAL INQUIRIES L. 465, 467–72 (2000); Stephan Landsman, *The* Eichmann *Case and the Invention of the Witness-Driven Atrocity Trial*, 51 COLUM. J. TRANSNAT'L L. 69, 70–72 (2012); *cf.* DAVID CESARANI, BECOMING EICHMANN: RETHINKING THE LIFE, CRIMES, AND TRIAL OF A "DESK MURDERER" 4 (2006) (arguing that Arendt's thesis about Eichmann's ordinariness was to a large extent "predetermined and mythological"); DEBORAH E. LIPSTADT, THE EICHMANN TRIAL 165 (2011) (criticizing Arendt for discounting the evidence about Eichmann's centrality in plotting the genocide); BETTINA STANGNETH, EICHMANN BEFORE JERUSALEM: THE UNEXAMINED LIFE OF A MASS MURDERER xxiii (2014) (according to which, in the many years of controversy surrounding Arendt's book, it has "served to distract us from the matter at hand").

ways in which bureaucracy functions.[267] Does this critique of the criminal law apply to the new anti-impunity?

For Engle, the structural violence that criminal law fails to address is intertwined with the violence of economic inequality.[268] She develops her critique focusing on attempts to address systemic human rights violations through criminal law. She highlights a relationship between criminal law and economic policies that result in gross domestic inequalities: "Given that neoliberalism depends upon and reinforces criminal law, in part to protect private property rights, the cards are stacked against any attempt to use criminal law to challenge neoliberalism." [269] She thus suggests that tax law, corporate law, and private law generally, may be better suited than criminal law to counter inequality both on the domestic and on the global levels.[270] Thus, for example, Engle observes that despite the ICC's mandate to grant compensation to victims, criminal law is ill-suited for such economic remedies: "Given the selectivity of criminal prosecutions, the granting of these types of reparation is relatively arbitrary." [271] Alongside a co-author, Helena Alviar García, Engle argues that, in the Colombian context, "the campaign against impunity might have displaced concern for the structural causes of violence and the need to address them deliberately and explicitly."[272]

In the context of armed conflict, both Engle and Moyn have accused anti-impunity of an agenda of "humanizing war," which has allegedly displaced a broader program of ending war.[273] A similar concern has often arisen in my mind in the migration context. Might focusing on the torture and inhuman and degrading treatment of migrants end up simply advancing safer and "better" migrant detention facilities? In both cases—war and migration—the concern is that identifying and insulating instances of gruesome violence helps normalize a structurally violent system. It is

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267 Engle, *supra* note 17, at 44.

268 *Id*. at 46.

269 *Id*.

270 *Id*.

271 *Id*.

272 Alviar García & Engle, *supra* note 34, at 233; *see also* Natalie Sedecca, *The 'Turn' to Criminal Justice in Human Rights Law: An Analysis in the Context of the 2016 Colombian Peace Agreement*, 19 HUM. RTS. L. REV. 315, 315-45 (2019) (discussing the turn to a focus on criminal prosecution and custodial sentencing in international law).

273 Engle, *supra* note 4, at 1101–02; Moyn, *supra* note 9, at 73–74.

imaginable that a program of "prosecuting ICE," even if carried forward, will serve to penalize "bad apples"—low-level agents who may themselves be victims of an economic elite.[274] Higher-ranking state officials, including Donald Trump -- or indeed Joe Biden -- would remain off the hook.

Moving to another example from the European context, it is hard to question the value of work such as performing rescue at sea.[275] In some ways, these are direct descendants of the sanctuary tradition invoked above.[276] Their focus on saving lives is common to some of the efforts that laid the groundwork for criminalization, or those that made criminal allegations. Think of Heller and Pezzani's reporting on the organizational and personal *intentions* that lead to omissions of rescue;[277] and of an argument such as one raised by Shatz and Branco, namely, that omissions of rescue constitute a crime against humanity.[278] A legitimate question is whether liberal policymakers in Europe may not *harness* such arguments in a policy ultimately designed to *save migrants and asylum seekers precisely in order to keep them off of European soil*.[279] This indeed may be a fair description of long-held aspirations among centrist policymakers, seeking to more effectively "externalize" European border controls.[280] According to such a plan, people would be saved and immediately sent to a safe location outside Europe, where they may nevertheless not be able to realize a life worth living. The sea would be territorialized: a watery, porous sea border would be replaced by a much "harder" one, perhaps relying on the help of drones and other surveillance technologies.[281] This may not be an advantage from the standpoints of those who want more open borders.[282]

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274 *See* Itamar Mann, *Hangman's Perspective: Three Genres of Critique Following* Eichmann, *in* OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 652 (Kevin Jon Heller et. al. eds., 2020).

275 *See UN Special Rapporteur Attacks "International Regime of Impunity" Over Migrant Deaths*, *supra* note 40.

276 *See* Falk, *supra* note 50.

277 *See* Heller & Pezzani, *supra* note 145.

278 *See* Shatz & Branco, *supra* note 153.

279 *See* Kalpouzos & Mann, *supra* note 123.

280 *See supra* note 94.

281 *See* Daniel Howden, Apostolis Fotiadis & Antony Loewenstein, *Once Migrants on Mediterranean Were Saved by Naval Patrols. Now They Have to Watch as Drones Fly Over*, GUARDIAN (August 4, 2019), https://www.theguardian.com/world/2019/aug/04/drones-replace-patrol-ships-mediterranean-fears-more-migrant-deaths-eu [https://perma.cc/BW47-JKG9].

282 *See* Mann, *supra* note 51.

But such a critique of migration anti-impunity may miss some of its specificity. In the migration context, the turn to criminal law was also an attempt to shed light on the role of for-profit corporations in border violence.[283] This is reflected clearly, I believe, in the Article 15 submission that GLAN and the Stanford clinic submitted to the ICC prosecutor, directed at the complicity of the Spanish company Ferrovial.[284] We have also seen, in the Australian context, that the turn to criminal law came *alongside* a use of tort law in a class action alleging that such firms are liable for crimes against humanity.[285] These intersections of criminal law with tort law go beyond a simple retributivism and are self-consciously designed to achieve material results through criminal law alongside other legal disciplines. In other words, criminal law is merely one aspect of a multi-pronged program that is, ideally, very cognizant of the need to address "structural" problems. Ultimately, what is needed is a pluralist legal strategy in which different areas of law complement (rather than displace) each other.[286]

The way in which torts claims can build on an allegation of crimes against humanity has been demonstrated most vividly in the Australian case of *Kamasaee v Commonwealth*.[287] As Gabrielle Holly explains, allegations against the companies that facilitated detention in Manus and Nauru were framed in negligence.[288] Yet they

> mirror the matters relied on in NGO reports alleging contraventions of IHR [International Human Rights] law and those relied on in the Communiqué [The Stanford/GLAN Article 15 Communication] to support the views of its authors that the Australian Government and its corporate contractors could be prosecuted for crimes against humanity.[289]

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283 *See* Ioannis Kalpouzos, *International Criminal Law and the Violence Against Migrants*, 21 GERMAN L.J. 571, 585–88 (2020).

284 Achiume, *supra* note 56.

285 Gabrielle Holly, *Transnational Tort and Access to Remedy Under the UN* Guiding Principles on Business and Human Rights: Kamasaee v Commonwealth, 19 MELB. J. INT'L L. 52, 53-54 (2018).

286 *See* Barrie Sander, *History On Trial: Historical Narrative Pluralism Within And Beyond International Criminal Courts*, 67 INT'L & COMPAR. L.Q. 547, 548 (2018); Nikolas Feith Tan & Thomas Gammeltoft-Hansen, *A Topographical Approach to Accountability for Human Rights Violations in Migration Control,* 21 GERMAN L.J. 335, 336 (2020).

287 *Kamasaee v Commonwealth* (2016) 52 VR 368; Holly, *supra* note 285.

288 Holly, *supra* note 285.

289 *Id.* at 70 (footnotes omitted).

In other words, the international criminal law allegations formed a basis for the tort claim and lent it some weight. The *Kamasaee* case surely secured an economic remedy, which is what, for Engle, is missing from anti-impunity initiatives. On June 7, 2017, the parties settled for a sum of 70 million Australian dollars (around 47 million U.S. dollars),[290] 97 percent of which had been disbursed to victims by April 2018.[291] This was "the largest human rights class action settlement in Australian history."[292]

As Holly emphasizes, this economic remedy did not put an end to the structural issues the case sought to tackle. The very fact the case was settled meant that underlying matters of Australian liability were not decided: "[T]he settlement means that there is still no clarity regarding the legal limits on how Australia is entitled to conduct its offshore detention centres, and what its corporate contractors may do to facilitate its policy."[293] Similarly, the case did not remove "the veil of secrecy that remains draped over the offshore detention centres."[294] While I agree with Engle entirely that economic remedies are crucial in order to address structural violence, they do not suffice. There is a certain residue of structural violence in eschewing accountability, and a massive lack of transparency, which tort litigation may be amenable to. Countering these outcomes in a continued struggle may mean doubling down on the international human rights law and international criminal law strategies, not least because they involve non-Australian forums. Australian courts, even while facilitating an economic remedy by way of settlement, have gone a long way to defend an accountability gap and executive interests, such as secrecy.

Further, the interface between criminal law and private law is rooted in the intellectual sources of the new anti-impunity. The turn to criminal law in the migration context reflects, at least in part, *a concerted effort to redirect earlier anti-impunity campaigns precisely towards more structural issues*. Think, for example, of the relatively early conceptualizations of "state crime" in the Australian context.[295] The term, at least initially more conceivable in criminology than in

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290 *Id*. at 71.

291 *Id*.

292 *Id*. at 54.

293 *Id*. at 81 (footnote omitted).

294 *Id*. at 82 (footnote omitted).

295 *See* Green & Grewcock, *supra* note 64.

law, arguably invited the development of a doctrinal space between the international law of state responsibility and criminal law. This was directed to the protection of the world's poorer populations—those who typically cross borders in an unauthorized way.

The work Ioannis Kalpouzos and I did on "banal crimes against humanity" shared a similar agenda.[296] Responding to the Arendtian framing that had also preoccupied Engle, we chose a different direction. Rather than developing an argument against criminal law, we tried to develop a set of criminal law tools that would overcome a shortcoming of the discipline and capture structural violence.[297] Like the "state crime" paradigm, Albahari moves between notions borrowed from criminal law and an analysis of structural violence.[298] As reflected both in the academic work and advocacy in all three regional contexts discussed above, the category of "deterrence" emerged ostensibly as a form of governance for large scale populations. Recontextualizing it as amounting to criminal activity is perhaps the boldest and most important collective contribution of the new anti-impunity to a struggle against structural violence.

On a higher level of generality, the new anti-impunity is aimed directly at global structural issues, primarily global redistribution and decolonization.[299] No less important is the basic effort to simply *terminate* wrongful activity, which is as much a remedy of human rights law as it is a remedy of criminal law. Considering the *jus cogens* of the new anti-impunity, one might better think of the project as one of abolishing certain forms of border violence, not necessarily imprisoning its perpetrators.

While ambitious programs for global redistribution of wealth have largely failed, one avenue for such redistribution that has arguably been more successful is the bottom-up efforts of migrants. Moving and working across borders, citizens of impoverished countries have managed to send considerable remittances home. Often exposed to slave-like conditions in difficult jobs such as agriculture, they have nevertheless been able to positively influence

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296 *See* Kalpouzos & Mann, *supra* note 123.

297 *Id.*; s*ee also* Mann, *supra* note 30.

298 *See* Albahari, *supra* note 138, at 22.

299 *Cf.* E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019) (arguing for a different theory of state sovereignty, which affects economic migrants).

the GDPs of their countries.[300] Rather than direct transfers of wealth, migrants, both authorized and unauthorized, have arguably been at the forefront of a struggle against global inequality.

For some left-leaning critics, this contribution to reducing global inequality may be associated with a contribution to domestic inequality.[301] According to such a position, a freer movement of labor, often alongside lifting trade barriers, has resulted in an increased vulnerability of workers more generally. The latter proposition is probably the most important challenge to left-leaning advocates working for porous or open borders. Yet we believe there is no necessary zero-sum game in which granting opportunities for workers from abroad means disempowering domestic labor. The aim to criminalize border violence should come hand in glove with a concern for redistribution of wealth and particularly for labor at home. Moving to de-colonization, Tendayi Achiume has provided perhaps the most compelling account. For her, such a bottom-up movement of migrants also helps redefine formerly colonial societies, in a way that reflects their debts to former colonies.[302]

Taking these background conditions into account, the work of advocates engaging in the new anti-impunity can be conceptualized in terms of *increasing the costs* of border enforcement. Even if the campaign results in improved detention conditions, such improvement may end up being of use for global redistribution and/or decolonization "from below." The hope is that if one renders border violence more tolerable, this will indirectly facilitate a measure of freedom of movement. And freedom of movement may be the most effective and appropriate way of addressing certain kinds of global structural violence that have proven particularly intractable otherwise.

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300 *See, e.g.*, Muhammad Azam, *The Role of Migrant Workers Remittances in Fostering Economic Growth: The Four Asian Developing Countries' Experiences*, 42 INT'L J. SOC. ECON. 690, 690-705 (2015) (examining the economic impact of migrant workers on economic growth in four developing countries).

301 *See* Ravi Kanbur, *Globalization and Inequality, in* HANDBOOK OF INCOME DISTRIBUTION 1845 (Anthony B. Atkinson & François Bourguignon eds., 2015) (focusing on the discussion in section 7 on remittances and inequality).

302 *See* Achiume, *supra* note 308, at 1567.

c. Law and Politics

In a closely related point, Zinaida Miller observes that "anti-impunity is a kind of anti-politics."[303] Miller's sentiment may at first blush ring true about the new anti-impunity. Think again of Patronaggio's investigation against Salvini for "kidnapping."[304] As illustrated by the Italian Senate, if voters are not in line with anti-impunity agendas, their representatives will quickly render futile any appeal to criminal law.[305] Anti-impunity advocates hopeful of torture prosecutions against George W. Bush's national security team saw a similar dynamic even after Barack Obama's election. Obama had suggested his administration would consider such prosecutions, but once in office came nowhere near them—presumably wary of their political unpopularity.[306] Threatening to prosecute where it is politically unpopular is a risky thing to do. It may be likened to pointing an unloaded gun at one's enemy. Further, the rhetorical appeal of mass atrocity may invite a robust and destructive political backlash—something Obama may have sought to prevent, and that Salvini has *embodied*. For consequentialists who seek to better defend human rights, a political backlash is surely another harm that should be forestalled. Seemingly apolitical appeals to criminal law may play in favor of popular leaders aiming to score points against the rule-of-law bureaucracy.

Turning to a criminal law vocabulary may be perceived as a way of avoiding the more difficult conversation: why, in the first place, are migrants and refugees presently exposed to such horrid conditions in so many parts of the world? What are the pragmatic solutions that can be offered to help them? While the enforcement of national borders in many parts of the world surely depends on horrible violence, it is unclear that we know how to do away with them. In the face of intensified migration due to climate change,[307]

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303 Miller, *supra* note 18, at 160.

304 *See supra* notes 149-152 and accompanying text.

305 *See* Vampa, *supra* note 148.

306 Adam Serwer, *Obama's Legacy of Impunity for Torture,* ATLANTIC (Mar. 14, 2018), https://www.theatlantic.com/politics/archive/2018/03/obamas-legacy-of-impunity-for-torture/555578/ [https://perma.cc/4EEK-L9DT].

307 Mariam Traore Chazalnoël, *Climate Change and Migration in Vulnerable Countries*, Sustainable Dev. Goals (Sept. 3, 2019), https://www.un.org/sustainabledevelopment/blog/2019/09/climate-change-and-migration-in-vulnerable-countries/ [https://perma.cc/72CK-6EVY].

the concerns citizens have for their own security are ever more acute; translating them to worries about migration is sometimes understandable. Taken together, these arguments seem to indicate that the new anti-impunity—from Andrew Wilkie to Kamala Harris—is deeply misguided. At best, the new anti-impunity is a vanity project, helping citizens of rich countries alleviate their guilt. At worst, it scares the political center away from accepting policies that may help to welcome migrants and refugees.

Whether anti-impunity is a kind of anti-politics in other areas, I don't know. Whatever the answer, it seems to me the evidence above illustrates beyond any doubt that during the last decade and a half, the new anti-impunity has developed as part of a wider progressive agenda. The place where this is clearest is in the United States, where calls for prosecuting border control agents have been a component of an ascending popular movement, and its loudest proponents have been politicians on the left wing of the Democratic Party. Far from simply mobilizing the courts against the elected government, people like Zephyr Teachout, Alexandria Ocasio-Cortez, and others have made anti-impunity arguments *as part of a strategy designed to win votes*.

d. (Re)Writing History

A fourth critique Engle directs towards the turn to criminal law in human rights focuses on how the trend has resulted in trials being imagined as forums for writing history.[308] This concern, which is also traceable back to Arendt,[309] highlights the different kinds of burdens, mainly procedural and evidentiary, which prosecutorial and historical research must lift. When a criminal trial is understood to generate a historical record, the latter is tainted by the peculiarities of criminal law. Such a history may lose its critical role, and simply become subservient to political ends.[310] If, as Moyn remarks, mass atrocity trials are almost invariably "political

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[308] *See* Engle, *supra* note 4, at 1126–27.

[309] *See* Arendt, *supra* note 238.

[310] YOSAL ROGAT, THE EICHMANN TRIAL AND THE RULE OF LAW (1961); *see generally* BARRIE SANDER, DOING JUSTICE TO HISTORY: CONFRONTING THE PAST IN INTERNATIONAL CRIMINAL COURTS (2021).

trials";[311] and if—as has arguably often been the case at least since Nuremberg—such trials advance "victors' justice"; then it seems to follow that the history produced by mass atrocity trials will not only be politically tainted, but also will be a history from the point of view of victors.

Anti-impunity has often arisen in the context of societies in transition. Criminal trials have thus been advanced as an instrument of transitional justice. As such, they are supposed to help a society heal from a history of atrocity, restore relations between its factions, and begin anew. The role of criminal trials in writing history is closely linked to this transition. Generally, the court is expected to help narrate a history that the new society can accept as its own. This may be accomplished through the creation of a documentary archive, the hearing of victims and witnesses, and ultimately by the writing of a judgement. The court may further design punishments in a way that reflects the values a new social contract aims to espouse. Criminal trials, in their transitional justice mode, have a constitutional role.

Migration anti-impunity has hardly culminated in trials. What, if any, can be its role in a project of transitional politics? Might one be able to imagine migration anti-impunity as having such a quasi-constitutional role? A possible answer is provided by one aspect of migration anti-impunity I have not discussed thus far: peoples' tribunals. Peoples' tribunals aiming to assert a measure of accountability for the violation of migrant rights have often taken on the form of criminal prosecutions.[312] As Dianne Otto has remarked, such tribunals amount to "[i]mpunity in a [d]ifferent [r]egister."[313]

These peoples' tribunals are attempts to rewrite history, in a way that would help imagine an international society in which certain categories of border violence would cease to exist. Imagine what a world without torture or inhuman and degrading treatment of migrants would look like. Let's assume we could still have national borders between states, if perhaps more porous ones. How would they work?

Thinking through such questions requires us to partake in drawing an alternative world history, in which the history of

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311 Moyn, *supra* note 9, at 72.

312 *See* Dianne Otto, *Impunity in a Different Register: People's Tribunals and Questions of Judgment, Law, and Responsibility*, *in* ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, *supra* note 8, at 291, 294; *see also* Byrnes & Simm, *supra* note 152, at 11.

313 *See* Otto, *supra* note 312, at 291.

migration is part of a larger history of political and economic liberation. Shrugging away the needs of strangers and simply "letting them drown" becomes unconscionable.[314] When borders can no longer inflict violence on persons, the result is likely a world of much greater movement across borders; and much greater cooperation between states to facilitate orderly movement, both on bilateral and multilateral levels. But from our present perspective, it is hard to say much more.

This is as far as one can get from a victor's history, and we are still far from winning. The history also does not fall into a naïve or apolitical humanitarianism. The object is not only to protect migrants' bodies, but to engage in a utopian exercise in which barring border violence is only a first step in a much larger project: a new constitutional identity that would buttress an entire transformation of societies and economies in ways that would render such violence unnecessary to begin with.

V. CONCLUSION

Calls to criminalize border violence, through domestic or international mechanisms, have appeared around the world. This Article has juxtaposed such calls with a trend in human rights scholarship, namely the critique of anti-impunity discourse. I dealt with critiques according to which "the turn to criminal law" in human rights has: (1) lacked justification; (2) ignored structural violence; (3) inappropriately depoliticized human rights; and (4) misguidedly encouraged the appeal to criminal law as a forum for writing history. I have done so relying on an account of the emergence of anti-impunity in the context of migrant struggles around the world, focusing on Australia, Europe, and the United States.

The critical trend has revealed important limitations of criminal law orientations to human rights in war and under authoritarian government. Yet its authors' arguments are often overly broad when examined in the migration context. The new anti-impunity has, to some extent, evolved precisely in order to respond to points such as those the critique has raised, *from within the vocabulary of*

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314 *See* Naomi Klein, *Let them Drown: The Violence of Othering in a Warming World*, LONDON REV. BOOKS, June 2, 2016, https://www.lrb.co.uk/v38/n11/naomi-klein/let-them-drown [https://perma.cc/T7P9-88HZ].

criminal law. This is crucial, because it is often possible to avoid the pitfalls of criminal law while not entirely doing away with the opportunities for advocacy that it offers.

A possible objection to my approach is that I have narrowed the critique of the turn to criminal law and not treated all of its different angles. This is to some extent true. Karen Engle, Denis Davis, Zinaida Miller, and the authors they have brought together do not take into account the perspective of global migration law.[315] This is understandable, as migration is arguably still a small part of the broader anti-impunity discussion. But this is also not true about the entire universe of critical voices. Janie Chuang, who also advanced a critique of the turn to criminal law, closely considered migration issues, focusing specifically on human trafficking.[316]

Chuang favors a labor law perspective, and emphasizes the political ambiguousness of criminalization efforts, which has often been unhelpful. Yet she interestingly takes a more nuanced position, which does give room for criminal law measures:

> Although criminal justice approaches have (rightly) received much criticism, crime-control concerns have elevated the issue of trafficking to one of international and national concern . . . when pursued in a victim-centered, rights-protective manner, criminal justice interventions unquestionably offer much-needed accountability and restitution for egregious wrongs.[317]

Following her cue, I have offered a criminal law approach to border violence that takes criticism on board and is part of a wider variety of legal and political strategies. This Article thus aimed to contribute to a pluralist literature on transnational strategic human rights litigation.[318] What I have called "the new anti-impunity" reflects a sustained attempt to respond through criminal law to structural violence directed by rich states against citizens of poor states and at the fault lines between rich and poor states. This turn to criminal law in the protection of refugees and migrants is still

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[315] On global migration law as a disciplinary framing (which this Article has aimed to contribute to), see Jaya Ramji-Nogales & Peter J. Spiro, *Introduction to Symposium on Framing Global Migration Law*, 111 AJIL UNBOUND 1 (2017-2018).

[316] Chuang, *supra* note 10.

[317] Chuang, *supra* note 10, at 641 (footnotes omitted).

[318] *Cf.* Tan & Gammeltoft-Hansen, *supra* note 286 (advocating for a multi-prong accountability approach to address human rights violations in migration contexts).

rather inchoate. Advocates can and should continue to internalize the critique, adjusting their agenda accordingly and in real time, rather than ignoring it.

In the United States context, the United States Supreme Court's decision on *Hernandez v. Mesa* could have far-reaching implications on the level of impunity that the U.S. legal system tolerates. As has been the case with earlier precedents, a U.S. Supreme Court decision on this issue would have transnational and global ripple effects.[319]

If there is one critical point that I believe is important to take rather seriously, it is the critique of the ICC as the forum for the new anti-impunity. The more specific critique directed against the ICC, rather than against the criminal law more generally, may justify a turn away from that forum. The ICC has been sluggish and ineffective in many other areas, and at present, it is hard to imagine how it will become useful here. I have emphasized an instance in which a submission we have made regarding the Australian situation has later been useful for a domestic class action. That is a success of sorts in breaking the silos between criminal law and torts. However, without a change in how the ICC selects its cases, it is hard to imagine that such initiatives will be very helpful. The work to push a criminal law orientation on the domestic sphere may be harder. One practical insight that may be drawn from the critique of anti-impunity is that it may ultimately be more important to push criminal law on the domestic sphere than the international one.

By way of conclusion, I would like to highlight a slight discord between the title of this Article and its body. The former refers to *impunity*, a condition in which legal accountability for human rights violations is absent. The latter mainly discusses *anti-impunity*, a legal and social movement, and a political critique that has been marshaled against it. This slight discrepancy is intentional and signals the underlying normative motivation for writing. Rather than examining the rhetoric of anti-impunity as disinterested social inquiry, the Article has attempted to consider that rhetoric in order to improve the instruments of a struggle for accountability.

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[319] *Cf.* the study of the transnational trajectory of Sale v. Haitian Centers Council, 509 U.S. 155 (1993), in Mann, *supra* note 30. In *Sale*, the U.S. Supreme Court held that the Coast Guard on high seas is not bound by the principle of non-refoulment based on a fear of returning to the country of origin. 509 U.S. at 187.