

---

# *Attack by Design: Australia's Offshore Detention System and the Literature of Atrocity*

Itamar Mann\*

Behrouz Boochani. **No Friend but the Mountains**. Sydney: Picador, 2018. Pp. 416. €12.64 (paperback). ISBN: 1529028485.

## **Abstract**

*A great work of literature does more for international criminal justice than providing evidence. By couching the evidence in conceptual categories, literature can offer insights on how law should be interpreted. This review essay seeks to demonstrate this argument about legal interpretation through a reading of Behrouz Boochani's much-acclaimed No Friend but the Mountains. In doing so, it seeks to offer a reflection on the significance of literary evidence authored by those subjected to atrocity. Boochani is far from being the first author whose work has enormous value both as literature and as testimony (an overlap that has been widely studied in the humanities and social sciences). Yet the relationship between the two is still seldom appreciated by lawyers and seldom appreciated for its value to legal theory. The essay aims to contribute to the latter discussion, specifically as it pertains to contemporary abuses against asylum seekers.*

## **1 Introduction**

Have the asylum seekers held in Australia's offshore 'processing' facilities in Manus Island and Nauru been under an 'attack' as a matter of international criminal law?<sup>1</sup> This review essay seeks to articulate the insights that Behrouz Boochani's

\* Senior Lecturer, Faculty of Law, University of Haifa, Israel. Email: [imann@univ.haifa.ac.il](mailto:imann@univ.haifa.ac.il). I presented a first draft of this review essay at 'Forced Migration in Transition: Perspectives from Social Science and Law', which was held at Ruhr University, Bochum, in November 2019. For illuminating comments on later drafts, I am grateful to Charles Heller, Lorenzo Pezzani, Yahli Shershevsky and Lyndsey Stonebridge. Any errors are of course mine alone.

<sup>1</sup> This question came up in the Office of the Prosecutor's (OTP) response to communications from civil society actors alleging Australian agents committed crimes against humanity in the facilities. See, e.g., S. Medhora, 'Andrew Wilkie Takes Australia to International Criminal Court', *The Guardian*, 22 October 2014, available at [www.theguardian.com/australia-news/2014/oct/22/asylum-seekers-andrew-wilkie-takes-australia-to-international-criminal-court](http://www.theguardian.com/australia-news/2014/oct/22/asylum-seekers-andrew-wilkie-takes-australia-to-international-criminal-court).

much-acclaimed poetic and philosophical memoir from the Manus facility, *No Friend but the Mountains*, can reveal about this question.<sup>2</sup> In doing so, the essay does not seek to argue that, despite the prosecutor's finding to the contrary, asylum seekers have indeed been subjected to crimes against humanity in the facilities. That argument has been made more comprehensively elsewhere.<sup>3</sup> This review essay seeks instead to offer a reflection on the significance of literary evidence authored by those subjected to atrocity.<sup>4</sup> Boochani is far from being the first author whose work has enormous value both as literature and as testimony (an overlap that has been widely studied in the humanities and social sciences).<sup>5</sup> Yet the relationship between the two is still seldom appreciated by lawyers and seldom appreciated for its value to legal theory.<sup>6</sup> While the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) has found that conduct in the facilities did not amount to an 'attack', Boochani provides compelling evidence to the contrary. This review essay offers a reading of Boochani's literary work as evidence and, ultimately, also as a relevant source for (re)defining what is an attack under international criminal law.

Part 2 recounts the OTP's findings, written in response to one of the communications submitted to the OTP on the subject, where I was also personally involved as a co-author.<sup>7</sup> In short, the OTP found that treatment in the facilities does not amount to an attack because it was not purposefully intended to inflict abuse.<sup>8</sup> While it is not clear that either the Rome Statute or the jurisprudence of the ICC require any such purposiveness, Part 3 shows how Boochani reveals the purposeful nature of the Australian treatment: a system of cruelty by design.<sup>9</sup> Part 4 complicates the picture. It discusses a kind of diffusion of this purposeful intention in the book. For Boochani, the Manus

<sup>2</sup> B. Boochani, *No Friend but the Mountains: Writing from Manus Prison* (2019).

<sup>3</sup> Communiqué to the Office of the Prosecutor for the International Criminal Court, under Article 15 of the Rome Statute: The Situation in Nauru and Manus Island: Liability for Crimes against Humanity in the Detention or Refugees and Asylum Seekers (Communication to the OTP), n.d., available at [https://docs.wixstatic.com/ugd/b743d9\\_e4413cb72e1646d8bd3e8a8c9a466950.pdf](https://docs.wixstatic.com/ugd/b743d9_e4413cb72e1646d8bd3e8a8c9a466950.pdf).

<sup>4</sup> The review essay repeatedly refers to 'atrocity'. The term may evoke different meanings, but, in the present context, it is simply synonymous with 'a situation where a crime against humanity has occurred and has reached the gravity required in order to merit a response by the international criminal court'.

<sup>5</sup> Though there is a vast literature on the topic in the humanities, see, e.g., S. Felman and D. Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (1992); M. Givoni, *The Care of the Witness: A Contemporary History of Testimony in Crises* (2016); L. Stonebridge, *Writing and Righting: Literature in the Age of Human Rights* (2021). Note that the very meaning of the word 'testimony' often differs among the disciplines.

<sup>6</sup> Of course, this is not to say that the international criminal lawyers have ignored this relationship. See, e.g., Wall, 'Duress, International Criminal Law and Literature', 4 *Journal of International Criminal Justice (JICJ)* (2006) 724; Bikundo, 'Reading Faust into International Criminal Law', 33(1) *Law and Literature* (2020) 1; Sander, 'The Method Is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts', 19 *Melbourne Journal of International Law (MJIL)* (2018) 299; Kotecha, 'The Art of Rhetoric: Perceptions of the International Criminal Court and Legalism', 31 *Leiden Journal of International Law (LJIL)* (2018) 939.

<sup>7</sup> Communication to the OTP, *supra* note 3.

<sup>8</sup> Response Letter by the OTP (OTP Response Letter), Doc. OTP-CR-65/17 (17 February 2020), at 4 (on file with author).

<sup>9</sup> Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

facility is an environment in which the exploitation of humans, objects and nature is co-constitutive; the three are all experienced as ultimately waging an attack upon the detainee asylum seekers. But, when purposiveness is all encompassing in such a way, it may be particularly difficult for the lawyer to find any specific person or entity accountable or culpable. I consider the relevance that such an experience – and such a conundrum about accountability – may nevertheless have for legal analysis. Boochani renders these experiences – cruelty by design and the diffusion of intentions – as two aspects of one theoretical analysis of carceral domination: a 'Kyriarchal system'. Part 5 explains the theoretical work that the author does by introducing this term and its contribution to the understanding of the Australian 'attack' against asylum seekers. Part 6 offers an articulation of the generalizable insights that Boochani advances for understanding the legal significance of literature by victims of atrocity.

A great work of literature like this one does more for international criminal justice than providing evidence. By couching the evidence in conceptual categories, literature can offer insights on how law should be interpreted or reconstructed. Indeed, literature can help shape the legal categories with which we work as lawyers.<sup>10</sup> The way that Boochani can be read to do this may be of value not only to those interested in the rights of asylum seekers but also to a wider audience invested in law and literature.

## 2 A Letter from the OTP

On 12 February 2020, a couple of colleagues and I received a letter from the OTP.<sup>11</sup> Exactly three years earlier, on 13 February 2017, we had sent a communication to the OTP alleging that Australian agents, alongside personnel from Papua New Guinea and Nauru, as well as employees of companies such as Ferrovial and G4-S, may have committed crimes against humanity in the context of Australia's offshore refugee 'processing' system.<sup>12</sup> Students at Stanford Law School's human rights clinic and the Global Legal Action Network (GLAN) collaborated in writing the document under the supervision of Diala Shamas, Ioannis Kalpouzos and myself. The communication provided a detailed factual account of systematic and protracted ill treatment of migrants and refugees held in Australia's 'offshore processing centres' on the islands. The students travelled to Australia for interviews with asylum seekers and lawyers, but, by then, the basic underlying facts were well known. It was therefore possible, in large part, to rely on existing materials: a rich record of findings by United Nations (UN) treaty bodies, non-governmental organizations (NGO) reports and work by investigative journalists – notably, 'the Nauru Files', a trove of leaked documents released by *The Guardian*.<sup>13</sup>

<sup>10</sup> See generally M. Aristodemou, *Law and Literature: Journeys from Her to Eternity* (2000). Paraphrasing literary critic Lyndsey Stonebridge, Boochani reinterprets international criminal law from the point of view of the ideas and values that matter to him in our own time. See Stonebridge, *supra* note 5, at 6.

<sup>11</sup> OTP Response Letter, *supra* note 8.

<sup>12</sup> Communication to the OTP, *supra* note 3.

<sup>13</sup> 'Nauru Files', *The Guardian*, n.d., available at [www.theguardian.com/news/series/nauru-files](http://www.theguardian.com/news/series/nauru-files).

What was perhaps more novel was the legal analysis.<sup>14</sup> The team of lawyers and students submitted an argument according to which Australia's offshore processing system involved a 'widespread or systematic' attack on a civilian population. Article 7 of the Rome Statute requires that an alleged crime against humanity be commissioned within the context of such an attack. We also showed knowledge of the attack, as the chapeau of Article 7 requires, and proceeded to argue that several different crimes under the jurisdiction of the Court may have been committed: imprisonment under Article 7(1)(e) of the Rome Statute; torture under Article 7(1)(f); 'other inhumane acts' under Article 7(1)(k); deportation under Article 7(1)(d); and persecution under Article 7(1)(h).

The communication also offered an analysis of the 'gravity' of the situation, as required by Article 17(1)(d) of the Rome Statute. The gravity threshold provides that crimes must be sufficiently egregious for the prosecutor to initiate an investigation. Under the Rome Statute, the Court's docket is reserved for crimes of interest to 'the international community as a whole'.<sup>15</sup> The OTP has previously summarized the criteria for gravity as 'relating to the scale, nature, manner of commission and impact of the crimes'.<sup>16</sup> While emphasizing such aspects of the Australian practice, the communication also framed the risk that other countries take Australia's example in their own migration policies as a mark of gravity.<sup>17</sup>

Other scholars had made earlier arguments framing crimes against migrants in international criminal law terms.<sup>18</sup> Yet I believe that, for the large part, signatories were extremely sceptical that the communication would indeed trigger even a preliminary examination.<sup>19</sup> The view that the ICC is a rather weak court uncomfortable with cases against powerful states was solidified long before Donald Trump's sanctions

<sup>14</sup> To be sure, this was not the first such communication. See *supra* note 1.

<sup>15</sup> Rome Statute, *supra* note 9, preamble.

<sup>16</sup> International Criminal Court Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation (12 September 2016), para. 32; see also Communication to the OTP, *supra* note 3, at 111.

<sup>17</sup> Communication to the OTP, *supra* note 3, at 114. The communication thus argued that the OTP's investigation policy should not only look to the specific situation. It should also respond to trends showing an emerging acceptance of crimes within the Court's jurisdiction. Such acceptance is in and of itself an aspect of their gravity. At the time, politicians in Europe and the USA were already looking to Australia for precedents to rely on in eroding migrant rights. These crimes were grave, among other reasons, because '[t]o the extent that the policies Australia is adopting are taken up by other states, the Australian situation will result in the normalisation of crimes against humanity'. See also Kalpouzos and Mann, 'Banal Crimes against Humanity: The Case of Asylum Seekers in Greece', 16 *MJIL* (2015), at 24–28. On the social and cultural acceptance of crimes, see M.A. Drumbl, *Atrocity, Punishment, and International Law* (2007); Mann, 'Eichmann's Mistake: The Problem of Thoughtlessness in International Criminal Law', 33 *Canadian Journal of Law and Jurisprudence* (2020) 145.

<sup>18</sup> See Chetail, 'Is There Any Blood on My Hands? Deportation as a Crime of International Law', 29 *LJIL* (2016) 917; Henderson, 'Australia's Treatment of Asylum Seekers from Human Rights Violations to Crimes against Humanity', 12 *JICJ* (2014) 1161.

<sup>19</sup> The full list of signatories includes: Tendayi E. Achiume, T. Alexander Aleinikoff, James Cavalaro, Vincent Chetail, Robert Cryer, Gearóid Ó Cuinn, Tom Dannenbaum, Kevin Jon Heller, Ioannis Kalpouzos, Itamar Mann, Sara Kendall, Makau Matua, Gregor Noll, Anne Orford, Diala Shamas, Gerry Simpson and Beth Van Schaack.

against its personnel.<sup>20</sup> While no one had doubts about its legal grounding, the case's value was mostly 'expressive'.<sup>21</sup> When it comes to international criminal law, we are all realists.

With the February 2020 letter, the OTP finally delivered the news: '[T]he matters described in your communication do not appear to fall within the jurisdiction of the court.'<sup>22</sup> But even while we expected this outcome, the OTP's reasoning was surprising. Particularly, the OTP offered a curious interpretation of the plain language surrounding Article 7's chapeau requirement of an 'attack', and it displayed blindness to the nature of Australia's attack against refugees. The primary purpose of this review essay is to show how literary testimony can illuminate the latter.

The OTP rejected claims about most of the Article 7 subheadings, including torture, other inhumane acts, deportation and persecution. More interestingly, with one subheading, the rejection was not entirely straightforward. This was the illegal imprisonment claim.<sup>23</sup> According to the OTP, detention in the offshore processing centres did amount to prolonged cruel, inhuman and degrading treatment.<sup>24</sup> It thus constituted the material elements of the crime of imprisonment.<sup>25</sup> The OTP's language here merits quotation in some length:

[A]lthough the situation varied over time, the Office considers that some of the conduct at the processing centres on Nauru and Manus Island appears to constitute the underlying act of imprisonment or other severe deprivations of physical liberty under article 7(1)(e) of the Statute. The information available indicates in this regard that migrants and asylum seekers living on Nauru and Manus Island were detained on average for upwards of a year in unhygienic, overcrowded tents and other primitive structures while suffering from heatstroke resulting from a lack of shelter from the sun and stifling heat. These conditions also reportedly caused other health problems – such as digestive, musculoskeletal, and skin conditions among others – which were apparently exacerbated by an environment rife with sporadic acts of physical and sexual violence committed by staff at the facilities and members of the local population. The duration and conditions of detention caused migrants and asylum seekers – including children – measurably severe mental suffering, including by experiencing anxiety and depression that led many to engage in acts of suicide, attempted suicide, and other forms of self-harm, without adequate mental health care provided to assist in alleviating their suffering.<sup>26</sup>

<sup>20</sup> Human Rights Watch, US Sanctions International Criminal Court Prosecutor (2 September 2020), available at [www.hrw.org/news/2020/09/02/us-sanctions-international-criminal-court-prosecutor](http://www.hrw.org/news/2020/09/02/us-sanctions-international-criminal-court-prosecutor). Activists familiar with Australia's relations with the International Criminal Court (ICC) suggested that the OTP would resist confronting a partner that has been helpful in advocating for it among other Pacific countries.

<sup>21</sup> Sander, 'The Expressive Turn of International Criminal Justice: A Field in Search of Meaning', 32 *LJIL* (2019) 851; Ioannis Kalpouzou, 'International Law and the Violence against Migrants', 21(3) *German Law Journal* (2020) 571, at 585; on 'strategic expressivism, see generally B. Sander, *Doing Justice to History: The Construction of Historical Narratives within International Criminal Courts* (2017). For a sceptical view on such expressive value, see Hodgson, 'Exploring the International Criminal Court's Deterrent Potential: A Case Study of Australian Politics', *JICJ*, available at <https://academic.oup.com/jicj/advance-article/doi/10.1093/jicj/mqaa005/5813834>.

<sup>22</sup> OTP Response Letter, *supra* note 8, at 1.

<sup>23</sup> Communication to the OTP, *supra* note 3, at 63–73.

<sup>24</sup> OTP Response Letter, *supra* note 8, at 1.

<sup>25</sup> *Ibid.*, at 2.

<sup>26</sup> *Ibid.*

A finding of prolonged inhuman and degrading treatment of members of this vulnerable group is what Article 7(1)(e) seeks to criminalize. Why, then, not open an investigation limited to suspicions under this article alone?

For the OTP, what was missing was the contextual element set in the chapeau of Article 7: an ‘attack’. This is where the OTP’s interpretation becomes idiosyncratic. By saying that an attack was missing, the OTP appears to have meant something more specific: ‘[A]lthough Australia’s offshore processing and detention programmes were initiated to pursue, among other things, a policy of immigration deterrence ... the information available at this stage *does not support a finding that cruel, inhuman, or degrading treatment was a deliberate, or purposefully designed, aspect of this policy.*’<sup>27</sup> What the OTP thought it needed to see beyond the factual case put before it was a deliberate motivation to commission an attack. This purported requirement is not written into the Rome Statute. Article 7 explicitly refers to ‘knowledge of the attack’ – a lesser bar than the deliberate or purposeful nature that the OTP assumes the attack must have.<sup>28</sup>

On one level, this is simply an error of plain language interpretation. But to get to the bottom of this mistake, one must take a more sustained look at the kind of attack asylum seekers have suffered in the offshore detention centres. This closer look at the attack will shed light on why such an error of reading becomes possible in the first place.<sup>29</sup> Such a cultural imagination of a contemporary atrocity against migrants and asylum seekers is possible only if one ignores the most powerful account of the attack. This is not one of the scathing reports by UN treaty bodies; not the important information gathered by NGOs; not even the groundbreaking work by investigative journalists – rather, it is a literary work: Behrouz Boochani’s *No Friend but the Mountains* – a book that deserves a close reading by international lawyers.

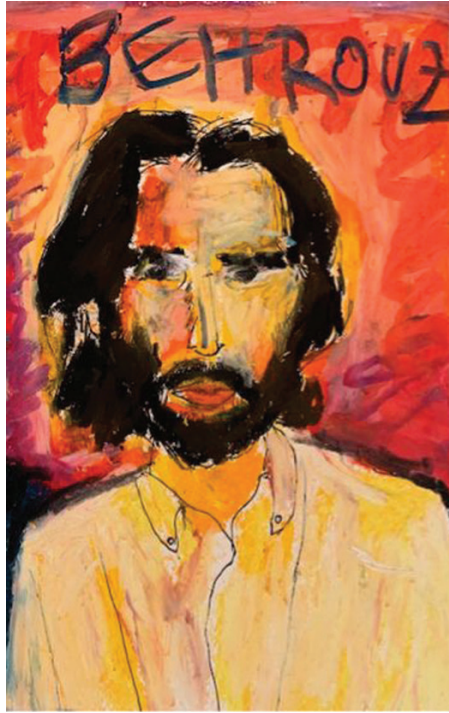
### 3 Cruelty by Design

In his acclaimed work *No Friend but the Mountains*, Kurdish author Behrouz Boochani recounts his experiences in the Australian detention facility on Manus Island, Papua New Guinea (Figure 1). His writing style is turbulent, visceral and scattered with verse and surrealist imagery. These stylistic features remove it from any ordinary piece of evidence when it comes to international criminal tribunals. We tend to think

<sup>27</sup> *Ibid.*, at 4 (emphasis added).

<sup>28</sup> As argued in the communication, it also does not follow the Court’s jurisprudence. Communication to the OTP, *supra* note 3, at 59–62.

<sup>29</sup> By imposing this new requirement, the OTP reflects a certain cultural imagination of mass atrocity. One that emphasizes pain and suffering that are imposed for pain and suffering’s own sake. It is questionable if this is ever the case (beyond the possible exception of genocide). The definition of torture, for example, requires pain and suffering imposed to obtain information. When torture to those ends becomes widespread or systematic, it becomes an attack, even outside of an armed conflict. See Elements of Crimes: Introduction to Article 7, *Prosecutor v. Bemba* (ICC-01/05-01/08), Pre-Trial Chamber II, 15 June 2009, para. 85. On what the course of conduct may entail, see also Decision on the Confirmation of Charges against Laurent Gbagbo, *Prosecutor v. Gbagbo* (ICC-02/11-01/11), Pre-Trial Chamber I, 12 June 2014, paras 208–221.



**Figure 1:** Behrouz Boochani (portrait by the author).

of collecting evidence for an international criminal trial as a sombre task of sifting through archives, arranging folders of documents and photographs, counting the dead.<sup>30</sup> Yet attention to Boochani's prose could have led the OTP to better understand the notion of 'attack' and the complex experience of purposiveness or intentionality with which it is imbued.<sup>31</sup>

The Australian system of offshore detention was originally modelled after the US facility in Guantánamo Bay. Guantánamo was designed for migrants and asylum seekers before it was repurposed and became a detention facility for detainees in the counter-terrorism context.<sup>32</sup> After 9/11, philosophers such as Judith Butler and

<sup>30</sup> To be sure, this exercise has its own aesthetics. See, e.g., Morgan, 'New Evidence: The Aesthetics of International Law', 18 *LJIL* (2005) 163.

<sup>31</sup> It will doubtless strike some readers as odd to focus a reading of Boochani so specifically on the notion of 'attack'. A more comprehensive way to think of his literary testimony would consider its relevance for the notion of jurisdiction (where he clearly has something to say against offshoring as a way of avoiding jurisdiction). It would also read what he might have to say on the substance of the relevant crimes—he clearly can teach us something about the nature of torture, persecution and deportation. Finally, his work on the 'Kyrarchical sytem' (see below) may pertain most naturally to the questions about gravity. By limiting the discussion almost entirely to that on the 'attack', I am indeed prioritizing the discussion simply according to an error the OTP made. But it seems to me worthwhile to do so. The concrete form of the reasoning that the OTP employed is worth commenting upon. I hope the corollaries that the book has for other discussions in international criminal law will become clear enough.

<sup>32</sup> See generally J. Kahn, *Islands of Sovereignty: Haitian Migration and the Borders of Empire* (2018).

Giorgio Agamben took the example of Guantánamo to describe a form of life outside of the law. Among the many legal theorists who intervened on the subject, Fleur Johns stands out with her insights on the way life in Guantánamo was legally constructed.<sup>33</sup> But the removal of Guantánamo detainees from the protection of law was already concluded earlier, in the facility's role as an offshore migrant detention centre in the 1990s.<sup>34</sup> Australia's legal design emulates the elimination of accountability that the US government had introduced in Guantánamo.<sup>35</sup>

Alongside earlier authors who have provided testimony of atrocity, such as Primo Levi,<sup>36</sup> Boochani's prose can be compared to that of another author who has written from offshore detention, the former prisoner at Guantánamo, Mohamadou Ould Slahi.<sup>37</sup> In both the Pacific and the Caribbean islands, governments have pretended that what happens beyond their territory is also beyond their legal responsibility. Such literature resolutely defies their jurisdictional games. Indeed, Boochani offers a powerful refutation of the legal artifice, based directly upon experience: 'This space is part of Australia's legacy and a central feature of its history – this place is Australia itself – this right here is Australia.'<sup>38</sup> While offshore incarceration aims to escape the territorial strictures of law, it comes to define the governments that employ it. Extraterritorial incarceration is located right at the heart of the legal system that designs it. In a keynote address he delivered from Manus Island for a workshop at Oxford University, on 9 November 2018, Boochani explains:

We are outside of any law. Humanitarian laws and international conventions are routinely and fundamentally broken. At the same time, we are victims of law. It is a new phenomenon, how we are living under law and at the same time outside of law. Philosophers have written about this, most notably Giorgio Agamben. For me, I want to explain the embodied knowledge I and all the refugees imprisoned here have of this.<sup>39</sup>

This notion of embodied knowledge is crucial, and I will return to it below. Meanwhile, notice the ambiguous unity of opposites: placing the detainees beyond the reach of law is itself a technique of domination by the law.<sup>40</sup> This begins to reveal the intentionality and, indeed, the purposiveness behind the Australian attack – its cruelty by design. While insights about deliberately being placed outside of the law have been discussed by international legal theorists in the last two decades, they are absent from the OTP's analysis of the 'attack'.

<sup>33</sup> Johns, 'Guantánamo Bay and the Annihilation of the Exception', 16 *European Journal of International Law (EJIL)* (2005) 613; F. Johns, *Non-Legality in International Law: Unruly Law* (2013), at 69–108.

<sup>34</sup> Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law', 29 *EJIL* (2018) at 362–364.

<sup>35</sup> D. Ghezl bash, *Refuge Lost: Asylum Law in an Interdependent World* (2018).

<sup>36</sup> See, e.g., Stonebridge, *supra* note 5, at 5. For a comparison with Primo Levin, in particular, see I. Mann, 'Boochani's Tribunal: Normalizing Human Degradation at Borders', *Just Security* (12 December 2019), available at [www.justsecurity.org/67718/boochanis-tribunal-normalizing-human-degradation-at-borders/](http://www.justsecurity.org/67718/boochanis-tribunal-normalizing-human-degradation-at-borders/).

<sup>37</sup> M.O. Slahi, *Guantánamo Diary* (rev. edn, 2015).

<sup>38</sup> Boochani, *supra* note 2, at 158.

<sup>39</sup> B. Boochani, 'A Speech from Manus Island', *YouTube* (6 December 2018), available at [www.youtube.com/watch?v=rIGyrET1J2M](https://www.youtube.com/watch?v=rIGyrET1J2M).

<sup>40</sup> See Johns, *supra* note 33.



From such an embodied perspective, the author is able to reveal the purposiveness in the smallest details of life in extraterritorial detention. For example, Boochani spends a considerable amount of energy on describing the ambivalent roles that health care providers have played in camps. Health care is often designed specifically to break prisoners' will. This is apparent, for example, early in the book following Boochani's arrival at Manus: 'The words of that nurse are more like a threat than words of concern for our wellbeing. It is like she is warning us: "Manus is a dangerous island with tropical and murderous mosquitoes. If we were in your place, we would fill out the voluntary deportation forms and go back to our homelands."' <sup>41</sup> The goal is to 'voluntarily' return asylum seekers to countries where they may be exposed to persecution. The OTP references health in its analysis of prolonged inhuman treatment. But using it to break the will of those within the facility is not something with which the OTP engages.

Another example reveals the system as rife with a kind of arbitrariness that often seems to amount to sadism:

In Corridor L, a few people were able to get hold of a permanent marker and draw a backgammon board onto a white plastic table. They began to play, using the lids from water bottles as counters. Almost instantly, a group of officers and plain-clothed guards entered Corridor L and crossed out the game. They wrote over it in bold letters, "Games prohibited". It seemed that was their only duty for the entire day: to shit all over the sanity of prisoners, who were left just staring at each other in distress. <sup>42</sup>

The rate in which such instances of mundane cruelty appear is so tremendous that it seems unimaginable that they remain epiphenomenal rather than essential to the institutional design.

On one level, then, Boochani answers the OTP in a very simple way. He shows the system's deliberate and purposive aspects. This starts from how the detainees are intentionally and artificially removed from Australian jurisdiction. And it continues through all the acts clearly designed to break the detainees' spirit through the infliction of severe pain and suffering. (Note that in the context of the chapeau of Article 7, any purposiveness, if indeed it was needed, could only be ascribed to a 'system' or a campaign – we are not talking about individual intent.) The aim to break the will of refugees is central to the kind of purposiveness behind the offshore detention system's 'attack': 'You might ask why the system is working like this. The answer is clear. The aim is to torture people to the point when the person gives up, and finally returns back to his home country.' <sup>43</sup> At first blush, a plain, straightforward rebuttal of the OTP, and its finding that 'the information available at this stage does not support a finding that cruel, inhuman, or degrading treatment was a deliberate, or purposefully designed, aspect of this policy'. <sup>44</sup>

<sup>41</sup> Boochani, *supra* note 2, at 87.

<sup>42</sup> *Ibid.*, at 126.

<sup>43</sup> Boochani, *supra* note 39, at 14:13–14:16.

<sup>44</sup> OTP Response Letter, *supra* note 8, at 4.

But this may not suffice for the prosecutor. One might say, for example, that such sadism among prison guards, though deplorable, is in fact rife in penitentiaries the world over. It does not have the added egregiousness international criminal law requires. How are all these detailed little attacks on asylum seeker life organized into one unified attack worthy of the attention of international criminal law? While Boochani gives us ample evidence of cruelty by design, there is a darker matter to be excavated when it comes to the question of purposiveness behind the system.

## 4 A Weaponized Environment

The notion of cruelty by design, which I have proposed above, must assume a unitary, identifiable designer. This is consonant with the basic structure of criminal law, where accountability needs to be reduced to natural or corporate individual suspects or defendants. But in Boochani's universe, blame is constantly being cast beyond the Australian policy-makers behind the apparatus. It is projected upon the entire environment, chimerically shape-shifting to the point of no recognition. The detention facility does not only dehumanize detainees, but it also presents itself to its detainee witness as being operated by inhuman intentions distributed through every aspect of the material surroundings.<sup>45</sup> Boochani's translator and editor, Omid Tofighian, aptly labels this an 'anthropomorphic' aspect of Boochani's prose.<sup>46</sup> Capturing this dynamic in terms of the legal category of an 'attack' is a rather more complicated task. This conceptualization of purposiveness mediated by objects is at the heart of Boochani's more considerable challenge – not to his Australian oppressors – but to the categories of international criminal law.

A certain kind of intentionality is thus locatable, for example, in the 'primitive structures' erected in the camp as well as in the weather. It is inscribed in the ways the toilets are built – the very material they are made of – and the hollows and orifices around them. Diffuse and inhuman ill will run fluidly through all aspects of degradation that the OTP recognizes in its finding of protracted cruel treatment: over-crowdedness and unbearable heat; filth and consequent infection and disease; 'sporadic' acts of physical and sexual violence; and a 'mental health epidemic', resulting in a pattern of self-harm.<sup>47</sup> The all-encompassing nature of the attack may make it hard for a legal mind to see what is going on as purposeful. When everything presents itself as purposive, who is the culprit?

The suggestion here is not that the OTP was misled by Boochani's anthropomorphism. This would be an unnecessarily extravagant hypothesis. Despite the fact that I have explicitly appealed to the officers at the OTP to do so,<sup>48</sup> who knows if anyone there took the time to read his account. Rather, my argument is that this prose

<sup>45</sup> Cf. Kang and Kendall, 'Introduction: Legal Materiality', 23 *Law Text Culture* (2019) 1.

<sup>46</sup> Boochani, *supra* note 2, at 388.

<sup>47</sup> See Communication to the OTP, *supra* note 3, at 5.

<sup>48</sup> Mann, *supra* note 35.

captures a literally naturalized atrocity, which comes hand in hand with its normalization and acceptance on the international level. Even without reading Boochani, what he captures presents itself to the legal observer as an extremely deplorable and unfortunate condition in which intentions are too many to trace back to any unitary actor. For even if the attack is by design, who or what is behind this all-encompassing design? In Boochani's writing, the detention centre seems like the making of an evil god, teeming with countless torments and, therefore, beyond human reach. When everything is accorded subjecthood, the reader is indeed led past the realm of anthropomorphism and into a wild pantheistic hell.

Crowds in the camp, for example, are analysed as having a certain intentionality above and beyond the individuals that compose them. When over-crowding is extreme, the crowd itself appears as its own roaring entity perpetrating its own violence against the individual. This collective body includes Manusian prison guards as well as fellow detainees, often mixed into one lunatic mass. A cast of characters appear from within the crowd and from among the detainees. These constantly seem to generate their own momentary, fragile, internal hierarchies. Here, the absent Australian authorities do not even count: one of the detainees thus gets mockingly called the 'prime minister', in a label that can only look like a form of mimicry of the true prime minister in control of the situation, who is beyond imagination's reach.<sup>49</sup> Others fill varied imagined roles that are unrelated to any relationship of victims with their perpetrator but appear as an independent reality, a masquerade of sorts.<sup>50</sup>

This experience of crowding, of course, is related to the hygiene crisis that the OTP addresses. In the book, privacy is eliminated, and the boundaries between bodies are occasionally gone as well. Queuing becomes an all-pervasive aspect of life in the camp, especially salient around food and excrement. Indeed, the queues are everywhere in the book. Not long after the detainees are done with the queue for lunch, they must start queuing for dinner. 'The queues have agency', writes Boochani. Those who are most responsible for erecting the camp in the first place – the sought-after suspects sitting in Canberra – may in this context recede into an unidentifiable background.

The effects of this agency of the queue are dramatic. Through accounts of standing in line for fruit or paracetamol, Boochani reveals how the lives of asylum seekers have been weaponized. He carefully describes how the rationing of food pits prisoners against each other. The dynamic is reminiscent of Primo Levi's description of Auschwitz: 'It was a Hobbesian life, a continuous war of everyone against everyone.'<sup>51</sup> In this historically constructed state of nature, accountability too is presumably beyond reach.<sup>52</sup> An assertion that 'the queues have agency' is powerful and goes a long way in revealing

<sup>49</sup> This mimicry is subversive, as classically explained in H.K. Bhabha, *The Location of Culture* (2nd edn, 2004), at 125.

<sup>50</sup> Cf. I. Mann, 'Border Masquerades', *Social Sciences Research Network* (2020), available at <https://papers.ssrn.com/abstract=3688527>.

<sup>51</sup> P. Levi, *The Drowned and the Saved* (2017), at 120.

<sup>52</sup> On the state of nature as a historically constructed experience, see I. Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (2016), at 61.

the nature of the ‘attack’. It may be read as more than just metonymy.<sup>53</sup> But the insight stands in stark tension with any search for a purposefulness recognizable by the law. While it seems clear enough that crowding is part of protracted cruel treatment, a prosecutorial mind can be confused by an apparent attempt to blame the queue.<sup>54</sup>

A similar diffusion of intentionality occurs in Boochani’s writing about the natural environment (which, by the way, beautifully captures the lushness of a tropical island). Take, for example, another component of the cruel treatment that the OTP identifies in its letter – the heat: ‘The heat is debilitating. By noon our bodies begin to show signs of the impact of the sun’s rays as they sliver through the open passages of the prison. The sun seems to be in cahoots with the prison to intensify the misery of the prison ... it uses its rays like shafts to violate us.’<sup>55</sup> The suggestion of a conspiracy between the sun and the prison is figurative, of course, and not to be taken literally. In this figurative use, in which the sun and the prison are co-conspirators in a crime, both elements are not human. From a legal mindset, let alone that of the OTP, this may be baffling. While the sun becomes one of the villains in the book, it is coupled with a guardian deity, which is also part of the same environment: in contrast to the scorching sun, ‘the Manusian moon is the most benevolent element in the natural environment’.<sup>56</sup>

This attribution of intentionality and will to objects no less than people is not some anecdotal or marginal aspect of the book. And it aligns with a fair amount of academic writing, mostly from outside the legal discipline, which emphasizes how environments are ‘weaponized’ against refugees and migrants.<sup>57</sup> Scholars have comparably discussed the ‘liquid grave’ of the Mediterranean or the heat of the Sonoran Desert. As people and nature are exploited together,<sup>58</sup> the ‘deterrence paradigm’ transforms the entire environment.<sup>59</sup>

<sup>53</sup> The literal aspect of the queue’s agency is formulated in the agency ascribed to technologies (including simple technologies such as the queue) in ‘actor network theory’. See, e.g., Latour and Venn, ‘Morality and Technology’, 19 *Theory, Culture and Society* (2002) 247, at 250 (‘thanks to the hammer, I become literally another man’). For a collection of applications of this theory to international legal scholarship, see J. Hohmann and D. Joyce (eds), *International Law’s Objects* (2018).

<sup>54</sup> Lyndsey Stonebridge’s interpretation of the book’s account of ‘suppression of human time’ is valuable here. See Stonebridge, *supra* note 5, at 105.

<sup>55</sup> Boochani, *supra* note 2, at 127.

<sup>56</sup> *Ibid.*, at 295.

<sup>57</sup> See, e.g., J. De León, *The Land of Open Graves: Living and Dying on the Migrant Trail* (2015); S. Levidis, ‘Border Natures: The Environment as Weapon at the Edges of Greece’ (2020) (PhD dissertation on file at Goldsmiths University, London); L. Pezzani, ‘Hostile Environments’, *E-flux*, available at [www.e-flux.com/architecture/at-the-border/325761/hostile-environments/](http://www.e-flux.com/architecture/at-the-border/325761/hostile-environments/); Boyce, Chambers and Launius, ‘Bodily Inertia and the Weaponization of the Sonoran Desert in US Boundary Enforcement: A GIS Modeling of Migration Routes through Arizona’s Altar Valley’, 7 *Journal on Migration and Human Security* (2019) 23. For a general methodological background, see sources referenced in notes 45 and 51.

<sup>58</sup> For a study of the long exploitation of the people and environment of Nauru and international law, see C. Storr, *International Status in the Shadow of Empire: Nauru and the Histories of International Law* (2020).

<sup>59</sup> On Australian deterrence in offshore detention, see Pickering and Weber, ‘New Deterrence Scripts in Australia’s Rejuvenated Offshore Detention Regime for Asylum Seekers’, 39 *Law and Social Inquiry* (2014) 1006. A fair amount of work in anthropology has further accounted for how in some indigenous cultures environments are indeed regarded as having agency. See, e.g., E. Kohn, *How Forests Think: Toward an Anthropology beyond the Human* (2013).

Once again, however: from a legal mindset, it is not clear how to regard this aspect of the book. A brilliant researcher working on human rights violations of migrants in the Aegean once explained to me that, over there, the sea currents are used to help execute 'pushbacks' of asylum seekers from Greece to Turkey. He hoped that I would find in this fascinating revelation an added value in asserting accountability – *refoulement* is being done 'by proxy', in what Stefanos Levidis has proposed to call 'drift-backs'.<sup>60</sup> But the legal mind is often too boring to know what to do with such a claim: if I can say that *refoulement* is accomplished directly by Greek forces, the added proxy of the sea would only weaken my case. Similarly, if Boochani says the sun is harming detainees, does that not in some way reduce the culpability of the designers of the system?

For attributing criminal responsibility, we need to locate intentions as well as purposes with perpetrators, and these must be individual humans (or, less often, corporations). This is the root of the OTP's erroneous interpretation of the Article 7 'attack' requirement as well. Even from the more general perspective of simply holding someone accountable, regardless of international criminal law, the diffusion of intentions may be problematic. The effort of asserting accountability, of course, is something that Boochani also partakes in, as an activist. His commitment to focusing the blame on perpetrators is reflected, for example, in an assertion that 'torture is the purpose of the system'. But whose purpose is it? In his book, Boochani is reflective about this difficulty with accountability when asserted from within the camp. Perhaps the clearest passage in which his challenge to assumptions of criminal law becomes clear is this one:

Every prisoner is convinced that they or their group are *the* critical theorists of the systematic foundation, the chief analysts of the system's architecture. But the greatest difficulty is that no-one can be held accountable, no-one can be forced up against the wall and questioned, no-one can be interrogated by asking them 'you bastard, what is the philosophy behind these rules and regulations? Why according to what logic, did you create these rules and regulations? Who are you?'<sup>61</sup>

## 5 The Kyriarchal System

How, then, does Boochani resolve the seeming contradiction between what I have called 'cruelty by design' and 'a weaponised environment'? The book needs to answer the question if it seeks to contribute to political theory. (Unlike the legal discussion, where its contribution is only implicit, the book explicitly engages political theory.) To answer this question, Boochani introduces a concept borrowed from feminist theory and refers to 'Kyriarchy' or to the 'Kyriarchal system' of the offshore detention facilities.<sup>62</sup> This is a system of domination in which all the actors in the system (human

<sup>60</sup> Levidis, *supra* note 57.

<sup>61</sup> Boochani, *supra* note 2, at 209.

<sup>62</sup> *Ibid.*, at 126, 136.

but here also non-human) not only are subjects of domination but also used as tools against each other:

The developments over the months slowly but surely prove to everyone that the principle of The Kyriarchal System governing the prison is to turn the prisoners against each other and to ingrain even deeper hatred between people. Prison maintains its power over time; the power to keep people in line. Fenced enclosures dominate and can pacify even the most violent person – those imprisoned on Manus are themselves sacrificial subjects of violence.<sup>63</sup>

As Boochani's editor and translator, Omid Tofighian, explains in a footnote, '[t]he technique of capitalising the phrase is employed to personalise the system and give the impression that it exercises agency'.<sup>64</sup>

But what lessons can international criminal lawyers draw from Boochani's political theory of the Kyriarchy? One way to think of it is by its contribution to the quasi-legal notion of purposive agency that the OTP relies on in order to leave the impunity of Australian authorities intact.<sup>65</sup> In an environment where all actors are used against each other, it is perhaps unsurprising that intentionality is diffused. But by offering their analysis of 'Kyriarchy', what Boochani and Tofighian reveal is that this diffusion is itself a by-product of the system's design. It is a strategy of cruelty by design. It is purposeful strategy that is part and parcel of the attack; indeed, its defining character.<sup>66</sup>

Cruelty may be experienced as directed by the sporadically violent Manusian guards, by the primitive structures in the camp, by the queues for meals or the toilet or by scorching sunlight. But the bad intentions that such actors within the system display are in fact merely what might be called 'purposiveness effects'. They are epiphenomenal to the overarching attack, which is perpetrated by Australian authorities and reducible to them. By conceptualizing and abstracting the fundamental tenets of an attack by such purposiveness effects, *No Friend but the Mountains* provides the outlines of a contribution to the theory of international criminal law. The internal hostilities that develop in the camp are premeditated and designed by the Australian authorities. This is a type of attack that should inform how we understand the term in the Rome Statute—one that we may see elsewhere not only against asylum seekers but also against other oppressed groups.

There is a deep affinity here between Boochani's critique and post-colonial critique, which has often emphasized modes of internalized violence perpetrated by the colonized. To be sure, this is not a perspective that needs to be discovered by some sophisticated exercise of interpretation. In his interviews and writings, Boochani constantly emphasizes it himself.<sup>67</sup> Surely, the Manusian guards should be viewed through that lens.

<sup>63</sup> *Ibid.*, at 124.

<sup>64</sup> *Ibid.*

<sup>65</sup> OTP Response Letter, *supra* note 8, at 4.

<sup>66</sup> Cf. Roxin, 'Crimes as Part of Organized Power Structures', 9 *JICJ* (2011) 193; Werle and Burghardt, 'Introductory Note', 9 *JICJ* (2011) 191.

<sup>67</sup> See, e.g., Boochani, *supra* note 2, at 359 (translator's reflections).

All this may still seem to have very little bearing on the question whether Australian agents should be investigated for suspicions of committing crimes against humanity. For a trial may not be the best place to offer a novel understanding of purposive action<sup>68</sup> or of the relationship between humans and their environments. Great works of literature may help us more. Redefining purposive action is perhaps closer to philosophy than it is to law. Further, as explained above, the chapeau of Article 7 does not even require a deliberate, intentional 'attack'. What is needed is knowledge, which is undisputed. If the OTP chose to force an erroneous interpretation on the Rome Statute just to avoid getting into trouble with Australia, there seems to be nothing literature can do. Yet perhaps the source of the error is different – namely, a belief that widespread and systematic imprisonment of asylum seekers in inhuman and degrading treatment simply cannot be an 'attack'. Under this view, the expectation of purposiveness is not replaceable by the term 'knowledge' in Article 7 but is cabined in the very definition of the word 'attack' itself.<sup>69</sup> This could perhaps stem from a strong cultural imagination that an 'attack' must somehow be purposive. Many of us – those who have not been imprisoned in systems like this one – may not even know of the possibility of an attack in a 'Kyriarchal system'. We have not experienced anything like it. By listening closely to how Boochani ties together assertions of accountability and the diffusion of cruelty throughout an entire environment – the Kyriarchal system – we may learn how to think of an attack.

It is with regard to the latter imagination that an exposure to mass atrocity literature, such as Boochani's, may be useful. For through such literature, we become capable of an engagement with the law on a moral and political level: the reader can learn how to see another kind of attack.

## 6 The Literature of Atrocity

At one point, Boochani emphasizes a certain cluelessness about accountability that unites detainees and prison guards in Manus: 'No person who is part of the system can ever provide an answer.'<sup>70</sup> This may suggest that the dilemma I have discussed in this review essay – the relationship between designed cruelty and its diffusion across the environment – is simply dispensable. As lawyers, we do not need the ultimate unity between these two opposites in the notion of the Kyriarchal system simply because their opposition does not arise as a problem. From this view, no person who is part of this system can really judge the system, but the lawyers who do need to judge it are precisely not part of it. The material that an eloquent writer like Boochani provides us with may be aesthetically pleasing or even provide some relevant information. But we may duly set aside its philosophical challenge. The fruit of a delirious mind struck by pain and suffering cannot inform a sober legal analysis.

<sup>68</sup> Cf. Mann, *supra* note 16.

<sup>69</sup> According to this view, an 'attack' must be a governmental policy, not simply the description of many discrete instances in which criminal acts are perpetrated.

<sup>70</sup> Boochani, *supra* note 2, at 209.

Yet such a response is precisely what Boochani convincingly urges us to oppose with his call to embodied knowledge. According to the view that he advances, the embodied knowledge that literature can bring from the site of an atrocity does not simply amount to access to information. (Of course, this is not to discard the importance of information and the indispensable work of asylum seekers in leaking it.) Beyond providing information, the literature of atrocity can and should sometimes move us to reshape the concepts through which information about atrocity is processed in the first place. And it should have influence on how we interpret the relevant law – in this case, the notion of ‘attack’ in Article 7 of the Rome Statute.

The blindness to the basic characteristics of the Kyriarchal system, which the OTP displays in its understanding of ‘attack’, is the outcome of a discussion around refugees in which, to use Boochani’s words once again, ‘[r]efugees on Manus are undervalued or misread in terms of the testimonies they provide and other transactions they enter into; they are not involved in the construction and application of the concepts, critical debates and themes that affect how the phenomenon of Manus prison is seen by the general public and, in some cases, affect their self-perception and self-understanding’.<sup>71</sup> The OTP’s obliviousness to literary evidence thus provides a good opportunity for reflection on how literature can contribute to accountability for mass atrocities: in the Australian offshore processing context and perhaps more generally. To beneficially rely on victim literature for legal interpretation, one must stay away from two possibilities, both of which lead to missing the specific contribution literature can have: call these the ‘informational fallacy’ and the ‘difference fallacy’.

As already noted above, one is reducing literature to the information it offers. The emphasis here is on transforming literature to evidence that is just like any other evidence. For one thing, this does not pertain to the task of legal interpretation at all. Evidence does not serve us for interpretation purposes but, rather, is what we need to prove the facts. Surely, the literature of victims can at times, just like any other document, help prove a fact. The point is that literature can do more than, say, what a bank statement does to prove that a payment has been made.

Further, this ‘informational fallacy’ will tend to strip literature from its exact form. Word choices, sentence structure, passages written in verse rather than prose, all that will be eliminated and ‘cleaned’. But Boochani shows that those choices also have legally relevant significance, inasmuch as they inform his account of the Kyriarchal system, one that may ultimately shape an interpretation of ‘attack’. This is not to deny that when stripped bare of style and delivered to a court according to legal conventions, testimony can have aesthetic, moral or political value. Michal Givoni has described the importance of testimony as a political discourse, emphasizing its ‘minimalism’ – a style I would not associate with Boochani’s work.<sup>72</sup> Beyond the minimalism of 20th-century atrocity witnessing, scholars have recently observed the turn to data in the atrocity trials. The move may increase the chances of conviction, but it

<sup>71</sup> *Ibid.*, at 364.

<sup>72</sup> M. Givoni, *Witnessing/Testimony, Mafte’akh* (2nd edn, 2011) at 148.



would seem to further eliminate the individual voices of victims.<sup>73</sup> While this informational fallacy would invite such a turn, it is unlikely to influence interpretation, or, at least, not to rely on the specifically literary character of the source is such influence. In other words, the turn to data in evidence may conceivably end up influencing how we interpret law. But this kind of influence is a kind of by-product rather than a direct and deliberate outcome of literary style, as it should be when we read Boochani.

On the other end of the spectrum, there is a second fallacy that one must avoid in order to rely on victim literature, at least in the sense proposed here. 'The difference fallacy' is the error of thinking that the task of literature by victims of atrocity is to capture the voice of the victim 'in itself' or 'in its own terms'. To be sure, there is a great temptation to this view. At first blush, it may look more radical and may seem to offer an entirely different understanding of what justice is, which is totally unfamiliar to those of us who have not experienced displacement and this kind of offshore internment.

However, it is a mistake to understand victims as free from the strictures of existing law or as entirely redefining it. More concretely, the outcome of such thinking will be some kind of an idealized victim.<sup>74</sup> Jacques Derrida famously argued that Michel Foucault's attempt to represent madness outside of the strictures of reason is deemed to fail because reason itself is ultimately not entirely distinguishable from madness.<sup>75</sup> Similarly, even if the world Boochani paints seems entirely external to our own, we should not be tempted to reify that difference. International criminal law as it currently exists already has within it something of the reality on Manus, and that should be revealed and made accessible rather than any attempt to reinvent the discipline *ex-nihilo*.<sup>76</sup> As Barbara Johnson put a similar point in her study of poetry and the law, 'lyric and law might be seen as two very different ways of instantiating what a "person" is. There appears to be the greatest possible discrepancy between a lyric "person" – emotive, subjective, individual – and a legal "person" – rational, rights-bearing, institutional. ... these persons can illuminate each other'.<sup>77</sup>

Avoiding the two fallacies means reading literature by victims of atrocity with an ear towards legal interpretation. The question that the reader should have in mind is: 'how should the law be interpreted in order to recognize the victim's perspective?' In order to answer this question, we must try to understand not only the semantics of the victim's words but also how she or he connects them into propositions. The imagery, cadence and allusions to other literary works are all relevant in the task of reconstructing this perspective. This does not mean freeing the literature of atrocity

<sup>73</sup> Keydar, 'Mass Atrocity, Mass Testimony, and the Quantitative Turn in International Law', 53 *Law and Society Review* (2019) 554.

<sup>74</sup> Schwöbel-Patel, 'The "Ideal" Victim of International Criminal Law', 29 *EJIL* (2018), at 709–718.

<sup>75</sup> Derrida, 'Cogito and the History of Madness', in *Writing and Difference* (1978) 31.

<sup>76</sup> One work that falls into that trap of choosing an *ex-nihilo* reconstruction of atrocity crimes rather than allowing room for interpretation is, in my view, A.D. Moses, *The Problems of Genocide: Permanent Security and the Language of Transgression* (2021).

<sup>77</sup> Johnson, 'Anthropomorphism in Lyric and Law', 10 *Yale Journal of Law and the Humanities* (1998) 549, at 550.

from ordinary standards of legal credibility.<sup>78</sup> After all, it is entirely imaginable and accurate that works of art often weave together fact and fiction in ways that must carefully be discerned in a legal process. It also does not simply mean taking account of the information that the victim provides with respect to pre-existing, frozen legal categories. As I have emphasized, interpreting the law considering the literature of atrocity also does not mean reinventing the law in order to reflect the victim's interests. There should thus be no expectation that the victim's hopes in terms of the justice that the law will provide them, and the law as it stands, are ultimately in perfect agreement. The expectation is more modest – namely, that the interpretation is one that the victim can be expected to accept as a reasonable one.

## 7 Conclusion

The poetic and philosophical imprisonment memoir by Boochani came out more than a year after we submitted our communication, on 31 July 2018. In light of this, it may seem further questionable that the OTP would have considered it as part of the evidence. To make sure that it is considered, I sent the OTP a copy of the book with an explanatory note published online on 12 December 2019. The mere suggestion may seem to some readers ironic or otherwise not entirely serious.

But I am dead serious. By ignoring it, an important opportunity to provide a measure of global justice has been missed. Hearing Boochani's voice would have been a historic opportunity for the international criminal justice institution to redefine what kind of justice it seeks to deliver. Through the very processes of criminal law, we could have been able to directly confront a fundamental problem: what will, if any, is required to accomplish an attack upon persons? As the trend of offshore processing based on the Australian model has only continued since the criminal complaints on these policies, the question is as relevant as ever.<sup>79</sup>

<sup>78</sup> On the difficulties that may arise, for example, when a personal testimony is also aimed at representing a collective, see R. Menchu and G. Grandin, *I, Rigoberta Menchu / Who Is Rigoberta Menchu?* (2011).

<sup>79</sup> D. Pegg and P. Lewis, 'Australian-Style Offshore Asylum Plan Driven by No 10', *The Guardian* (30 September 2020), available at [www.theguardian.com/uk-news/2020/sep/30/australian-style-offshore-asylum-plan-driven-by-no-10](http://www.theguardian.com/uk-news/2020/sep/30/australian-style-offshore-asylum-plan-driven-by-no-10).