ASSER PRESS

International Criminal Justice Series

Volume 22

Humanness as a Protected Legal Interest of Crimes Against Humanity

Conceptual and Normative Aspects

Rustam Atadjanov

Springer

International Criminal Justice Series

Volume 22

Series Information

The *International Criminal Justice Series* aims to create a platform for publications covering the entire field of international criminal justice. It therefore deals with issues relating, among others, to:

– the work of international criminal courts and tribunals;
– transitional justice approaches in different countries;
– international anti-corruption and anti-money laundering initiatives;
– the history of international criminal law.

It is peer-reviewed and seeks to publish high-quality works emanating from excellent scholars.

Editorial Office

Prof. Dr. Gerhard Werle
Humboldt-Universität zu Berlin
Faculty of Law
Unter den Linden 6,
10099 Berlin, Germany
gerhard.werle@rewi.hu-berlin.de
vormbaum@uni-muenster.de

More information about this series at http://www.springer.com/series/13470

Rustam Atadjanov

Humanness as a Protected Legal Interest of Crimes Against Humanity

Conceptual and Normative Aspects

ASSER PRESS

Springer

Rustam Atadjanov
Faculty of Law
University of Hamburg
Hamburg, Germany

ISSN 2352-6718 ISSN 2352-6726 (electronic)
International Criminal Justice Series
ISBN 978-94-6265-298-9 ISBN 978-94-6265-299-6 (eBook)
https://doi.org/10.1007/978-94-6265-299-6

Library of Congress Control Number: 2019935825

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

This T.M.C. ASSER PRESS imprint is published by the registered company Springer-Verlag GmbH, DE part of Springer Nature
The registered company address is: Heidelberger Platz 3, 14197 Berlin, Germany

Dedicated to my beloved wife Galina
and our amazing miracles Samira and Malik

Foreword

This splendid book began in December 2013, over a cup of tea at my friend Rustam Atadjanov's apartment in Tashkent. At the time, both of us were legal advisers at the ICRC Regional Delegation in Central Asia, I just defended my Dr. iur. thesis on the crime of aggression in international criminal law (ICL),[1] and Rustam was contemplating a doctorate. As we were discussing gaps in ICL, in search for a possible thesis topic for Rustam, there emerged a number of questions: what exactly is this "humanity" against which "crimes against humanity" are directed? Why include a philosophical notion in a central concept of ICL, which must be sufficiently specific, by virtue of the principles of legality and legal certainty? What to do about the multiplicity of meanings of the word "humanity"? Which of those distinct meanings is implied in the concept of crimes against humanity? Why did the authors of the term not opt for an alternative, more "measurable" term—for example, "crimes against the civilian population"? What is the relationship between "crimes against humanity" and "the laws of humanity" referred to in the Martens Clause? As the discussion progressed, it became quite clear that Rustam did identify a topic for his future thesis. Next year, both of us left the ICRC, with an interval of four months: I assumed my academic position at KIMEP University in Almaty, and Rustam embarked, with his natural curiosity and hard-working attitude, on a challenging academic journey, which would result in this book.

Despite that the *concept* of crimes against humanity is now firmly rooted in ICL, its precise *content* still begs fine-tuning. Unlike the concept of genocide, which remained virtually unchanged since the adoption of the Genocide Convention in 1948,[2] the notion of crimes against humanity has been continually developing since

[1] Sayapin S (2014) The Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State. T.M.C. Asser Press, The Hague.

[2] Schabas W (2009) Genocide in International Law: The Crime of Crimes, 2nd edn. Cambridge University Press, Cambridge; Sayapin S (2009) Raphael Lemkin: A Tribute EJIL 20:1157–1162.

after the end of World War II. The definitions of crimes against humanity were not identical already in the Charters of the Nuremberg and Tokyo Tribunals,[3] and the Control Council Law No. 10 constituted another departure from both previous definitions.[4] In turn, the definitions of crimes against humanity, which were included in the Statutes of the International Criminal Tribunals for the Former Yugoslavia[5] and Rwanda,[6] were quite different, with due regard to the circumstances of the respective armed conflicts. An attempt was made to converge the most essential elements of crimes against humanity in Article 7(1) of the Rome Statute of the International Criminal Court (ICC) but even that definition could not be regarded as complete from the point of view of the principle of legal certainty.[7] After the adoption of the Rome Statute, a group of ICL experts embarked on the development of a Draft Convention on Crimes against Humanity, which sought to fill some of the substantive and procedural gaps.[8] In the context of ongoing doctrinal and legislative developments, Dr. Atadjanov's book is both timely and useful—not least, because it is the first comprehensive monograph on the subject written by a Central Asian author for an international audience. The subject of Dr. Atadjanov's book is particularly relevant in Central Asia, since no State in the region has, so far, implemented crimes against humanity in a domestic penal law. Neither have these crimes been criminalised elsewhere in the Commonwealth of Independent States (CIS).

After the general introduction in Chap. 1, the author in the next chapter introduces "humanity" from linguistic, historical, ethical and philosophical perspectives, as a multifaceted concept indeed, one, which is fundamental to the very human civilisation (although authors like Toynbee or Huntington might disagree with the idea of a single human civilisation). He traces the concept back to the Martens Clause and suggests, helpfully, a working definition of the "laws of humanity" (which, notably, Martens himself failed to do when he proposed his catch-all Clause): ""Laws of humanity" represent unwritten and non-fixed rules (or considerations) of an active goodwill towards fellow human beings, which recognize the inherent humanity (i.e., human status) in them" (Sect. 2.1.2). I find this

[3] Cf. Article 6(c) of the Nuremberg Charter and Article 5(c) of the Tokyo Charter (the latter did not single out "religious grounds" for the commission of crimes against humanity).

[4] Article II(1)(c) of the Control Council Law No. 10 did not contain any nexus to an armed conflict.

[5] Cf. Article 5 of the ICTY Statute (provided for prosecution for the commission of crimes against humanity in international or internal armed conflicts).

[6] Cf. Article 3 of the ICTR Statute (provided for prosecution for crimes against humanity "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds").

[7] Article 7(1)(k) of the ICC Statute establishes criminal responsibility for "[other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health]". Although I do accept the practical utility of such an open-ended provision, it is still not sufficiently specific as a rule of international criminal law.

[8] Sadat L (2011) Forging a Convention for Crimes against Humanity. Cambridge University Press, Cambridge.

definition accurate, precisely because it explains the laws of humanity as "unwritten and non-fixed" rules (or considerations) which are therefore capable of adapting themselves to evolving circumstances and new challenges as well as to various cultural traditions of the world. This approach is reminiscent of Schachter's classic idea of "human dignity as a normative concept"[9] in that it pours an essentially philosophical notion in a vessel of legality, and thus makes it usable by (international) lawyers. Also, importantly, the proposed definition seeks to fill a conceptual gap in international law, which has been in existence for just over a century.[10] As the author notes in Sect. 2.1.2, the proposed definition is "rather subjective" but was Martens' idea of the "laws of humanity" not equally subjective? It most certainly was indeed, it was very *personal* (like many useful ideas are), and Dr. Atadjanov's subjective (and therefore personal) attempt to explain it, at least, for the purpose of the book is most certainly appropriate. The proposed definitions of "fundamental standards of humanity" as "an irreducible core of non-derogable humanitarian norms and human rights to be respected at all times and in all situations", and of "humanitarian considerations" (Sect. 2.1.3), appear equally convincing.

Chapter 3 builds upon the preceding chapter's interdisciplinary foundation, and places "humanity" in the context of international law and, more specifically, of crimes against humanity. Helpfully, the author applies the "law in history" method, which essentially consist[s] in a study of law or a legal concept within its broader context (political, cultural, social, economical, phenomenological, etc.) (Sect. 3.1). This chapter offers an illuminating tour through leading ideas, which influenced the evolution of the concept of humanity, from the ancient world to present days. Here, like in other chapters, the wealth of doctrinal sources amazes: the author studies not only Western but also non-Western ideas of humanity, and engages with them in a critical way. A comprehensive account is thus turned into a thoughtful analysis. In the latter part of the chapter, Dr. Atadjanov shows how the ideas (and ideals) of humanity were integrated in early sources of modern international law such as the Lieber Code, the Martens Clause, the 1915 Declaration by France, Great Britain and Russia, and peace treaties concluded after World War I and hence, how ways were paved for clothing those ideas in the garments of law, particularly international criminal law, after World War II. The comprehensive chapter is summed up in an elegant conclusion (Sect. 3.4):

> [T]he history of the idea is not the history of the word. Many significant factors have contributed to the development of the considerations of humanity pertinent to the evolution of legal theories. Those factors go beyond purely theoretical or conceptual definitions and include: realities of life and politics in any given society, in addition to legal developments, individual influences including philosophical contributions, social factors, globalization and international developments. This contextual aspect must always be kept in mind when trying to understand the nature of the concept of humanity […]

[9] See Schachter O (1983) Human Dignity as a Normative Concept AJIL 77:848–854.

[10] Cf. the 8th preambular paragraph to the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land and the 8th preambular paragraph of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land.

Chapter 4 elaborates on the concept of humanity in the context of leading theories of crimes against humanity. Here, the central questions are (1) how crimes against humanity should be understood, and (2) what exactly justifies prosecutions for crimes against humanity (cf. Sect. 4.2). These related factors are central to the understanding of crimes against humanity as a normative concept, for humanity is shown as a protected value (*Rechtsgut*) attacking which turns an act into a threat to international peace and security (Sect. 4.3 and Chap. 5). The author shows convincingly that crimes against humanity may be ascribed to State and non-State actors alike (Sect. 4.2.3.2), and that crimes against humanity are usually crimes committed by identifiable groups against other identifiable civilian groups (Sect. 4.2.3.3). On the basis of the foregoing, Dr. Atadjanov proposes what he calls "a theory of humanity as "humanness, or human status"", the central theory of his book from which an understanding of crimes against humanity results as follows:

> The commission of these acts eventually aims at rendering their victims "inhuman", in the sense of depriving them of that very status. All parts of this status come under attack:
>
> (1) the victims' individual freedom is denied;
> (2) they are deprived of their human dignity;
> (3) the civilized attitude is negated removing the link between the victims and mankind;
> (4) the sentiment of active good will, or humaneness, ceases to exist by the commission of inhumane acts, and
> (5) the victims' human nature in the form of reason is denied as well since those acts do not allow them the status of reasonable creatures anymore.

In Chap. 5, the author asserts "humanity" as a valid protected interest under the *Rechtsgutheorie*. The chapter offers an excellent account of this theory's key aspects and functions (Sect. 5.2) and its alternatives (Sect. 5.3), and applies the theory to the book's central normative construct—crimes against humanity. The chapter's chief question is "whether or not humanity a.k.a. humanness represents a fully valid legal interest, i.e., *Rechtsgut* as such" (Sect. 5.5). If legal goods, as interpreted by the author, are "(1) conditions or (2) purposes (3) that are necessary for (4) the free development of the individual(-s), (5) the realization of his/her fundamental rights, as well as (6) the functioning of a state system based on these objectives" (Sect. 5.5.1.1), the question should certainly be answered in the affirmative. Crimes against humanity are massive and grave criminal violations of fundamental human rights, and the modern system of international criminal justice, which was established in 1945 and has been evolving, slowly but surely, ever since, *inter alia*, serves the purpose of protecting identifiable civilian groups against such criminal assaults. In line with this, Dr. Atadjanov concludes in Sect. 5.6:

> [T]he concept of humanity as a valid *Rechtsgut* satisfies both the critical (limiting) function as well as the methodological function of the doctrine. It does so because, first, it represents a legitimate legal interest which needs to be protected by criminal law whose main task is to ensure a peaceful co-existence of members of the society and without the humanity such co-existence does not seem plausible. Second, it may not be considered as a simply abstract object of protection but rather as a more global value, as are international peace and human rights, of ICL and law of crimes against humanity; thinking otherwise would compromise the whole value-based foundation of ICL.

In Chap. 6, Dr. Atadjanov offers a useful comparative analysis of legal interests protected, respectively, by the concept of crimes against humanity and other crimes under international law. In practice, specific acts sometimes constitute more than one crime under international law, which require separate qualifications. Methodologically, setting the legal interest protected by the concept of crimes against humanity apart from those attacked by other crimes under international law is an appropriate approach, for by showing what crimes against humanity *are*, at the same time, one shows what they are *not*. In other words, as Dr. Atadjanov puts it, identifying the specific legal interest protected by the concept of crimes against humanity, through the lens of the theory of humanness put forward by the author, contributes "to a better understanding of genocide, war crimes and the crime of aggression" (Sect. 6.1). In the author's opinion (cf. Sect. 6.5), the relationship between crimes against humanity, on the one hand, and other "core" crimes under international law is as follows:

> [A]ll core crimes have one common *Rechtsgut* which is the protection of international peace and security. They do so either in an indirect manner – by ensuring first the other unique values, as is the case with genocide, war crimes and crimes against humanity, or directly, in a literal way which is typical for the crime of aggression. But it is not the only common protected category. The other one includes a range of individual rights which encompass the right to life, dignity, bodily integrity, freedom, prohibition of torture, etc. The determination of the precise right covered by the protection depends on the material elements and protected interests of the individual acts constituting the core crimes.

Indeed, what sets crimes against humanity apart from other crimes under international law is the very *human nature* of victims of such crimes. This nature is common to all mankind, despite all objective—racial, religious, cultural, and other—differences among members of the protected groups, and consists in all individuals' equal dignity and freedom, whose objective and measurable manifestations include non-discrimination, absence of threats to life, psychological and physical health, personal security, freedom of movement, residence, and work. Certainly, specific ways of implementing these rights and freedoms are conditioned by cultural features of a given society, and the realisation of specific rights in different societies may vary. However, no cultural variations may ever justify (or even reasonably explain) *mass* (widespread or systematic) deprivations of fundamental rights—and crimes against humanity are exactly such acts: the purpose of crimes against humanity consists in degrading victims' human nature, in turning them from subjects with conscience, will and freedom of choice to outlawed objects, in "showing" the "sub-humanity" of the target groups. In this regard, an alternative formula—for example, "crimes against the civilian population"—would probably be more precise and accurate from the point of view of legal technique but it would certainly lack the emotional force and ethical substance of "crimes against humanity". Be it as it may, the term "crimes against humanity" is by now recognised and firmly established, and the matter is not about replacing it with a new term but about interpreting the concept of "humanity" agreeably, which Dr. Atadjanov did very convincingly in his book.

As I am recalling that amiable conversation in December 2013, it appears to me that my friend Rustam, the future Dr. Atadjanov, was probably *destined* to write a book on the notion of humanity in ICL. As a fluent speaker of several Central Asian and European languages and an international lawyer trained in Uzbekistan, the United States and Germany, he was certainly qualified, as a professional, to deal with a complex subject, which required academic rigour and mastery of international academic literature on ICL. But writing a book on the concept of *humanity* takes more than just *professionalism*: one has to be *human* and *humane*—and one could not get these qualities only from formal education, or even from working at the International Committee of the Red Cross (although most ICRC staff I know *are* people with truly humanitarian hearts and minds). I assume, these essential features resulted from Rustam's love for our Pale Blue Dot[11] as an amateur astronomer and paleontologist, his love for beauty, arts and music, and from his being a loving family man with two amazing children. Indeed, good international lawyers are made by their hard work and attention to detail but exceptional international lawyers are made by their love for the world, their innate idealism and sense of beauty, and love for human beings (and animals, for that matter). And now, having finished reading the manuscript of Dr. Atadjanov's excellent book, I am grateful for the depth of his reflection as an academic (for he made me reflect together with him), and for his attention to detail and clarity of argumentation as a lawyer (for the book could not be more convincing, to my professional taste). Yet, above all, I am grateful to Rustam for filling the book with his own personality—fair, curious, hard-working and meticulous. Now, there is more work to be done. This book is not the end—just another beginning.

Almaty, Kazakhstan
October 2018

Sergey Sayapin, LLB, LLM, Dr. iur.
Associate Professor of International and Criminal Law
School of Law KIMEP University

[11] See Sagan C (1994) Pale Blue Dot: A Vision of the Human Future in Space. Random House, New York.

Preface

After the adoption of the Nuremberg Charter in 1945, crimes against humanity came to be positively established in international law. Together with genocide, war crimes and the crime of aggression, crimes against humanity represent "classical" core crimes under international law. They are perhaps the most commonly known type of crimes which is often used for labeling mass atrocities almost every time when there is news those have occurred, in big part due to the enormous emotional resonance that the phrase "crimes against humanity" causes. Furthermore, their historical development, practical application, material and mental elements, scope, role in international (criminal) law, pertinent jurisdiction and other aspects have already been a subject of both general and detailed analysis. The domestic and especially international jurisprudence has included numerous cases on counts of crimes against humanity. However, what remains unclarified in law is their exact protective scope. In other words, the fundamental notion of "humanity" attacked by crimes against humanity has not been considered in a holistic or detailed manner; there is no definition for it in positive law.

This book aims at filling in that gap by tracing comprehensively the evolution of the concept of humanity in international law as well as studying in detail the existing legal theories of crimes against humanity. In analysing the historical developments, the book tries to take into account various factors going beyond purely legal ones which affected or were affected by the conceptual understandings of "humanity" since ancient times. A new useful classification of the existing plentiful doctrinal accounts of crimes against humanity is offered; those are divided into two major types—conceptual and normative. The book then lays out its own theory based on an inclusive view of "humanity". Combining both conceptual and normative aspects, the proposed theory purports to provide responses to two critical questions: "What is humanity?" and "Why crimes against it must be criminalised?" The respective answers are, first, that "humanity" is to be understood as "humanness" or "human status" and second, that, crimes against humanity should be criminalized precisely because humanness constitutes their valid protected interest.

Furthermore, the book offers an analysis of the German doctrine of *Rechtsgut* in order to justify the penalization of these crimes at both domestic and international level drawing upon the doctrine's contractualist view of the social contract system. Finally, it also provides a first-ever comparative analysis of the protective scopes of crimes against humanity and other core crimes under international law.

The author hopes that the book would turn out useful for different audiences, theorists and practitioners alike. It aims at providing students and instructors of international law and international criminal law with a scholarly analytical tool which takes stock of various legal, philosophical, historical and other ramifications of the protective scope of one of the most horrific types of international crimes. Moreover, the book is also intended to serve as a helpful academic source for jurists who deal with crimes against humanity law in their practice, by offering a developed theoretical framework addressing a big "white spot" in contemporary international criminal law.

Tashkent, Uzbekistan Rustam Atadjanov
November 2018

Acknowledgements

This book is based on a doctoral thesis the research for which was carried out under the academic supervision of Prof. Florian Jessberger at the University of Hamburg, Faculty of Law. Thanks to his unceasing support, very relevant comments and suggestions on both major and minor aspects of the research, his constant attention to various doctrinal nuances as well as the unwavering understanding shown towards my work in the writing process, I managed to transform all the information on such a complicated topic contained therein into a length more fit for a book. It was a privilege to work with him, and I remain immensely grateful for all his guidance and help. Also, my sincere thanks go to Prof. Nora Markard and Prof. Peter Wetzels at the University of Hamburg for the time they took to review my manuscript and pose important questions related to the many different issues raised in it.

Ms. Ute Ehrk at the University of Hamburg's Chair in Criminal Law, Criminal Procedure, International Criminal Law and Modern Legal History was very helpful in terms of administrative support for presenting the manuscript at various stages of the drafting process during the doctoral colloquiums at the Faculty. My sincerest appreciation goes to Ms. Claudia Zavala and Ms. Christiane Andresen at the Faculty of Law, University of Hamburg, for their invaluable assistance, flexibility and patience during my four-year long *Promotionsverfahren* at the Faculty.

My exceptional gratitude is due to my mentor, friend and colleague Associate Professor Sergey Sayapin at the KIMEP University School of Law. It was thanks to his inspiring ideas, encouraging words and friendly support that the book came into being. Not only did he contribute some initial suggestions but he also later found time to read the whole text—which is of a considerable length—and write a positive Foreword for it. For all this I remain extremely indebted to Sergey whom I have known for many years since I came to work with the International Committee of the Red Cross back in 2007.

I would like to take this occasion to thank sincerely the representatives of the Albrecht Mendelssohn Bartholdy Graduate School of Law (AMBSL) at the University of Hamburg's Faculty of Law for their understanding and patience shown with regard to my frequent questions and requests during the three-year

scholarship period at the University, in particular Prof. Tilman Repgen and Prof. Hans Heinrich Trute. I am appreciative for their deep knowledge and pedagogical wisdom they shared during the memorable discussions at the AMBSL lectures and seminars including on the issues of the *Rechtsphilosophie* und *Rechtsgeschichte* as well as on various aspects of German law relevant to the book.

These acknowledgments would be incomplete without expressing my thanks to my doctoral colleagues Ms. Maiara Giorgi, Mr. Gregor Lammersdorf, Mr. Matthias Packeiser and Mr. Victor Ventura at the University of Hamburg, for either sharing with me some useful ideas, asking relevant questions during AMBSL colloquiums and suggesting practical issues to research, or showing support in the difficult process of writing the dissertation while in Hamburg. The same can be said about my friends and like-minded people in Hamburg: Mr. Vakhob Abdunazarov, Mr. Mikhail Goldenzweig, Dr. Azamjon Isabaev and Dr. Abdurasul Kayumov who provided their own perspectives—practical, philosophical and/or humanitarian—on various substantive matters discussed in the book.

Furthermore, I feel obliged to Prof. Isidoro Blanco Cordero at the University of Alicante, Prof. Alberto di Martino of the Sant'Anna School of Advanced Studies and the University of Pisa as well as Dr. Julia Geneuss at the University of Hamburg for their practical suggestions regarding the concept of humanity and important questions on its relationship with crimes against humanity.

In many respects the book would not have turned into reality without the support and recommendations coming from my respected friend and colleague, Associate Professor Mykola Gnatovsky at the Taras Shevchenko National University of Kiyv to whom I remain very thankful.

The representatives of T.M.C. Asser Press have been exceptionally professional and understanding during the book's publication process. My special thanks are due to Mr. Frank Bakker for his support, flexibility and professionalism as well as to Ms. Kiki van Gurp for her expert assistance with the preparation of the manuscript for eventual publication. I would like to deeply thank Prof. Gerhard Werle and Prof. Moritz Vormbaum at the Humboldt-Universität zu Berlin for the careful attention they paid to the text as the editors of the International Criminal Justice Series.

Finally but no less importantly I thank wholeheartedly my dearest wife Galina for all her love, support and encouragement throughout the manuscript writing process. Her belief in me is what keeps me resolute and unswerving on the academic path. She and our two children have been a true blessing in my life. This book is dedicated to my wonderful family.

It goes without saying that any possible omissions in the book are totally my responsibility. I will be available for reader's comments and suggestions for future editions via the following email address: rustamatadjanov1@gmail.com.

Hamburg, Germany Rustam Atadjanov
February 2019

Contents

About the Author

Rustam Atadjanov, LLB, LLM, Dr. jur. is a Graduate of the Karakalpak State University, Uzbekistan (2003), University of Connecticut School of Law, USA (2006), with the main focus on International Human Rights Law, and University of Hamburg, Germany (2018), focusing on International Criminal Law and crimes against humanity. Formerly a Legal Adviser at the Regional Delegation of the International Committee of the Red Cross (ICRC) in Central Asia (2007–2014) dealing with International Humanitarian Law and Public International Law issues. He authored a small book on the role of individuals in International Law and the United Nations human rights protection system in 2013. Rustam actively publishes with a number of European and Asian academic periodicals writing on a range of topics in the area of International Law and Criminal Law.

Abbreviations

CCL	Control Council Law №10
DRC	Democratic Republic of the Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Court of Human Rights
ETSCP	East Timor's Serious Crimes Panel
HRL	Human Rights Law
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights of 1966
ICJ	International Court of Justice
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
ISIL	Islamic State
LoAC	Law of Armed Conflict
NGO	Non-Governmental Organization
Rome Statute	Rome Statute of the International Criminal Court
SCSL	Special Court for Sierra-Leone
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

UNTS	United Nations Treaty Series
UNWCC	United Nations War Crimes Commission
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties of 1969

Chapter 1
Introduction

Abstract It is difficult to find a more ambiguous and multifaceted category than the concept of humanity. There are several definitions of the term; however, no integral comprehensive interpretation of the concept exists in law. There can hardly be more topical an area in the conceptual realm of "humanity" than the question of its role and influence on the legal theories of crimes against humanity. This chapter introduces the main problem analyzed in the book: absence of the exact definition of what exactly constitutes the central protected interest of crimes against humanity, i.e., humanity. The chapter poses several substantive questions, notes some etymological issues related to humanity, formulates the main purposes of the monograph and briefly describes the main points of the discussion in each subsequent "substantive" chapter. It points out one of the monograph's key aims which is to re-examine and assign to the notion of humanity its proper place within the contemporary understanding of crimes against humanity, and propose a comprehensive conceptual and normative concept of humanity, in light of German *Rechtsgutsheorie* and social contract doctrine.

Keywords Definitions of humanity · Crimes against humanity · Martens Clause · Nuremberg Charter · Rome Statute · *Rechtsgüterschutz*

Humanity. It is hard to imagine a more compelling and global idea for appeal in the modern public discourse worldwide. A broad range of circumstances and situations where humanity may be invoked demonstrates the category's universal and fundamental nature. Academicians, scientists, state representatives, international and national non-governmental organizations (NGOs), celebrities, and many other actors have increasingly been claiming to speak and act on behalf of humanity.[1] It appears that almost everyone agrees – albeit intuitively, that humanity must be

[1] For an interesting exploration of universalist claims and studying the effects of such claim-making as a dynamic interplay between governance and humanity, see Feldman and Ticktin 2010.

R. Atadjanov, *Humanness as a Protected Legal Interest of Crimes Against Humanity*, International Criminal Justice Series 22,
https://doi.org/10.1007/978-94-6265-299-6_1

considered a sacred thing. It permeates each and every societal culture. Thinking and discussions involving some sort of implied notion of humanity can be traced back to ancient times.[2] And yet, it is also difficult to find a more ambiguous and multifaceted category than the concept of humanity. This is all the more so striking considering its widespread appearance in legal, political, ethical, social and cultural spheres, expressly or otherwise. A study throughout history shows that there has not been a systematical and meticulous analysis of the concept applied universally, with a view to suggesting an integral comprehensive interpretation of the concept. There are simply too many diverse understandings of humanity.[3]

The first substantive elaborations for some of those understandings can be found in human history as early as in the 6th century BC. For example, "humanity" as a virtue, or altruistic notion of the "love of people" was central to the teachings of ancient Chinese politician and philosopher Confucius who used the so-called term *Ren* in order to denote the good feeling a virtuous human experiences when being altruistic.[4] Furthermore, two of the most famous ancient Greek philosophers, Plato and Aristotle, wrote extensively on the matter of virtues. Although neither one of them ever elaborated on the notion of "humanity" as such they highly valued love and kindness, the two elements of this virtue.[5] Beyond the writings of the influential individual thinkers of the past, the virtue of humanity was so crucial in some positivist Christian cultures that it was to be capitalized like God.[6]

Another perception of "humanity" consisted in the reference to the distinguishing natural characteristics of people which inherently render them human beings. Their study originated from the rationalistic thinking of classical Athenian philosopher Socrates[7] and hugely influenced subsequent ancient and medieval philosophy. The relevant discussions continued on with more recent times including in the writings of modernist and post-modernist thinkers such as Hobbes, Rousseau, Kierkegaard, Nietzsche, Sartre, and others. Yet another understanding of the term is closely linked with the Latin word *Humanitas*, virtually meaning "human nature, civilization and kindness" but it was first used to describe the formation of an ideal speaker, or orator, in ancient Rome (see further below). This latter concept was crucial in the development of humanistic thinking during the age of Renaissance, e.g., for the Early Italian Renaissance, French Enlightenment period as well as the German *Aufklarung*.

---

[2] See Chap. 3 for a more detailed and chronological discussion.

[3] Feldman and Ticktin 2010, pp. 1–2.

[4] Peterson and Seligman 2004, p. 40; see also Chan 1955, p. 296.

[5] See Peterson and Seligman 2004, p. 40. As Chap. 3 will show, this is important for understanding how the concept of "humanity" purportedly came to be engraved within the legal term "crimes against humanity" in their present-day shape. See Ibid. for further study of humanity's understanding as a human virtue in the historical perspective, including on Thomas Aquinas' so-called "Seven Heavenly Virtues".

[6] Coit 1906, pp. 424–429.

[7] Aristotle 1989, book 13, Sect. 1078b.

The abovementioned non-exhaustive examples illustrate how complicated the notion of humanity is; its different characteristics, or rather, perceptions of it (such as, e.g., what exactly causes and defines the elements of human nature) have been widely and hotly debated throughout history, and belong to the oldest and most important questions to be solved in the western philosophy, ethics, politics and theology.[8] Its fundamental conceptual reach goes perhaps even beyond such old and prominent phenomena of human civilizations as religion and war[9] encompassing in itself all or most aspects of past and modern societies' developments.

There are several contemporary definitions of the word in common knowledge. The first, and apparently the most widespread understanding of it is humanity as humankind, i.e., the aggregation of all human beings, as a collectivity.[10] The second definition encompasses the quality of being human, or humanness, or the very human condition itself.[11] It is mainly studied through a set of academic disciplines known as "humanities" which includes law, history, philosophy, literature, sociology, arts, linguistics, and others. These first two figure prominently in various legal scholarly works dealing with crimes against humanity.[12] The third definition already mentioned earlier foresees the set of strengths focused on tending others, or humanity as a virtue (benevolence). This one is strongly related with the development of such concepts as "humanist" and "humanitarianism". Yet another meaning, also mentioned above, represents a combination of natural human characteristics (such as ways of thinking, feeling and acting), or humanity as human nature.

When dealing with different understandings and sub-concepts flowing out from the term "humanity" it is important to bear in mind the fundamental differences and possible similarities between them. Each one of those has had its own historical origins, undergone varying distinctive sways in their development, and had their own protagonists. Yet all of them are connected through one common root word "human". It is also significant to realize the ambiguities inevitably inherent in every one of these notions. The question of clear conceptual definitions becomes critical when one tries to analyse what exact role those concepts played in the formation of legal categories including in the sphere of international law. And hardly there can

---

[8] That falls out from the purpose and scope of the present book. As described below, this legal monograph will deal with, first of all, the question of how the relevant views on "humanity" affected the shaping out of the current legal concepts such as crimes against humanity, and to track down in what ways they formed the object of this legal category. This will be needed to proceed towards considering and determining the protected legal interest of these international crimes. At times this process appears to have flown so inherently that there has been almost no explicit or relevant fundamental research of the concept for that purpose. However, there has been some amount of research carried out on the matter during the 20th century as discussed further below.

[9] For an instructive overview of the phenomenon of war and its definitional features, see Sayapin 2014, pp. 4–7, citing Neff 2005, pp. 14–29.

[10] See also Luban 2004, pp. 86–87.

[11] Ibid.

[12] See, e.g., Luban 2004; Bassiouni 2011; Lippman 1997; May 2005; Cassese 2003; Werle and Jessberger 2014.

be more topical an area in the conceptual realm of "humanity" than the question of its role and influence on the legal theories of crimes against humanity. There the matter departs from a pure theoretical dimension and acquires its more practical significance as it is further explained below.

Perhaps, crimes against humanity are a type of core international crimes that are most often and commonly known to be used for labelling mass atrocities almost every time when there is news those have occurred. This holds true for many regions in the world from European continent through Asia to Africa and Latin America where such situations arouse. The phrase "crimes against humanity" has acquired enormous resonance in the legal and moral discourse in the post-World War II world.[13] This is fully understandable given the horrific atrocities and vast numbers of victims of the crimes committed by states against their own and other citizens since that time. To name some: one million in Nigeria were killed in the 1960s, one million fell victim in Bangladesh in the 1970s, at least one million murdered in Cambodia during 1970s and 1980s, 800,000 killed in Rwanda back in 1993–1994, 500,000 killed in Liberia and Sierra-Leone, more recently, 3,000,000 in the Democratic Republic of the Congo (DRC) since 2005, and many more.[14] This tragic list is not exhaustive. And it is only during the last several decades that legal prohibition of crimes against humanity at the international level has gradually emerged and was shaped out, with the last twenty years when the crimes' elements in international criminal law (ICL) started to become more or less precisely clarified.

The genesis for the term ("crimes against humanity") is derived from the so-called "laws of humanity"[15] included by renown international law expert, Fyodor Martens,[16] into his famous "Martens Clause" which was incorporated into the Preambles of the Second Hague Convention of 1899 and the Fourth Hague Convention of 1907 on the Laws and Customs of War on Land.[17] The earliest

[13] See Luban 2004, p. 86.

[14] Bassiouni 2011, p. 83.

[15] Analysis of the concept of "laws of humanity" is found in Chaps. 2 and 3 as it is directly relevant to the main issue of the present volume.

[16] Not to confuse with Georg Friedrich von Martens, a German jurist and diplomat.

[17] It was formulated in the Second Convention as follows: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience". Convention (II) with Respect to the Laws and Customs of War on Land (Hague II), opened for signature 29 July 1899, entered into force 4 September 1900, in Schindler and Toman 1996, pp. 69–93. The Fourth Convention contains a slightly modified version: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience". Convention (IV) Respecting the Laws and Customs of War

reference to "crimes against humanity" as a legal concept is found in the Joint Declaration by France, Great Britain and Russia in 1915, in response to the mass killings of Armenians by the Ottoman Empire. It denounced "crimes against humanity and civilization" and warned perpetrators of personal responsibility.[18] However, this expression was not eventually included into the Treaty of Versailles due to the opposition by the United States on the grounds that the legal content of the term was not defined since it was based on natural law. Thus, up until 1945 the words used in the Preambles of the two Hague Conventions remained the only references in international treaty law from which to draw the subsequent term "crimes against humanity". The latter was left to future normative developments in positive law, first of all, to the drafting of the Charter of the International Military Tribunal (IMT) at Nuremberg.[19]

Article 6(c) of the Nuremberg Charter defined crimes against humanity as a constellation of prohibited acts committed against civilian populations.[20] This category of crimes was added to the Charter in order to guarantee that many of the Nazis' defining acts would not go unpunished, in particular, to cover acts committed by Germans against other Germans which did not fall under the category of war crimes. Strikingly enough, so far no precise record exists of in what particular way and how the term "crimes against humanity" was chosen by the drafters of the Nuremberg Charter. It is known that the term was selected by the Chief US Prosecutor at IMT, Robert Jackson who consulted, at least over that matter, with great international law scholar Hersch Lauterpacht. But their deliberations and discussions were left unrecorded.

A more or less similar definition of "crimes against humanity" was included at the time into the Charter of the International Military Tribunal for the Far East (IMTFE Charter)[21] and the Allied Control Council Law No. 10 (CCL).[22] Few national cases involving crimes against humanity were considered as well as few international instruments dealing with some acts pertaining to crimes against humanity were adopted, in the period between the CCL and the work-out of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in

on Land (Hague IV), opened for signature 18 October 1907, entered into force 26 January 2010, in Schindler and Toman 1996, pp. 69–93; see also for reference Roberts and Guelff 2000.

[18] United Nations War Crimes Commission 1948, p. 35.

[19] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, 59 Stat. 1544, adopted 8 August 1945, 82 U.N.T.S. 279 (entered into force 8 August 1945, Article 6(c).

[20] Article 6 provides that along with crimes against peace and war crimes, the following acts come within the jurisdiction of the Tribunal and entail individual responsibility: "… (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. …" Ibid., Article 6.

[21] Cryer and Boister 2008, pp. 7 et seq.

[22] See Ferencz 1980, p. 488.

1993.[23] The notable domestic cases include the trials of *Eichmann* (Israel), *Barbie* (France) and *Finta* (Canada).[24] The latest definitions of these crimes were included into the Statute of the International Criminal Tribunal for Rwanda (ICTR)[25] and the Rome Statute of the International Criminal Court (ICC).[26] Currently, there is also no specific international treaty on crimes against humanity, unlike the situation with, for example, the crime of genocide.[27]

There is an abundant legal scholarly literature on crimes against humanity. Their historical development, practical application, material and mental elements, their scope, role in ICL, pertinent jurisdiction and many other aspects have been a subject of both general and detailed analysis. Those aspects are sometimes hotly debated. Given this plethora of analytical work, it comes as a striking surprise that not a single one ever focused on considering a fundamental notion of "humanity" within the context of crimes against humanity in a comprehensive way. Moreover, some outstanding scholars have even argued that it is not useful to ask philosophical questions about what constitutes humanity, or what its nature is, or why there should be crimes against humanity at all. According to this view, the focus of the discussion should rather be on the need to have the norm, its scope, contents, enforcement, sanctions, remedies, and prevention.[28] There is a fully valid point in the second part of this reasoning. In fact, as stated earlier, all those legal elements have been and will undoubtedly continue being analyzed, by both theoreticians and practitioners, thus affecting, clarifying and shaping out the future development of international law. However, the author of the present book thinks otherwise with respect to the first part.

While this was not the case with the generally used common term of "humanity" (see above) which has several notions embedded under the one umbrella term, no explicit and accepted definition of the word "humanity" currently exists in international legal documents or in international or domestic case-law. It appears that since the beginning of the 20th century, its precise intrinsic meaning has been left to an intuitive understanding in a big measure conditioned by political, social, cultural, or possibly some other important factors. Apparently, some sub-elements of "humanity" such as "human dignity" were invoked in several concrete situations where it was generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be defined (for example, in several cases judged by the

---

[23] United Nations Security Council 1993, Annex to the Secretary General's Report, Article 5.

[24] Werle and Jessberger 2014, pp. 13–14, 130–134, paras 43, 348–353.

[25] United Nations Security Council 1994, Annex, p. 4, Article 3.

[26] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) (Rome Statute), Article 7.

[27] There are presently efforts on the side of the legal academic community to promote the adoption of such an international legal instrument. See Sadat 2011. In my opinion, this renders the comprehensive analysis of the legal understanding of "humanity" as implied in the context of crimes against humanity, and correspondingly, of the valid legal protected interest it may signify within this context, ever more topical in a practical sense.

[28] Bassiouni 2011, pp. 43–44.

European Court of Human Rights (ECHR) and domestic courts in Western Germany).[29]

Perhaps, in some cases an abstract definition is not needed; but logically, it is not entirely satisfying to accept the idea that humanity as a protected interest cannot be defined or analyzed using, first of all, legal analytical approaches. In the opinion of this author, to study a concept in a detailed manner does not mean to reject it or to reject the legal constructions of which the concept forms a part. Without a full understanding of this basic underlying concept many important questions will continue arising on the precise nature of the crimes under question, first of all, on their legal nature and the main interest they purport to protect. It is precisely this practical aspect that renders the undertaking of a corresponding legal analysis justified.

Research efforts conducted by some legal scholars, e.g., German lawyers during the 20th century, cast initial light in interpreting humanity as a legal term within the category of crimes against humanity. According to Gustav Radbruch, distinguished legal philosopher from Lübeck, the word coming closest in its meaning to the notion of humanity, was "*humanitas*", a Latin noun which was coined by famous ancient Roman lawyer, orator and politician Cicero.[30] His interpretation of its meaning came explained up to our present days as follows:

> Humanitas is what renders people truly human; it means education, it raises them above animal brutality and becomes a fertile soil for hearty kindness and love for people. It is the idea of the civilized mankind that connects all the people, so that the people are to be worthy, regardless of their status or nation.[31]

According to this definition, there are three constituent elements of humanitas: education, benevolence and human dignity. Those are analysed in more detail in Chap. 3.

According to Radbruch, while the first element was connected to the ancient Greek term "paideia" (i.e., rearing and education of the member of the *polis*, or city), the second one was viewed as a practical aspect of the humanity concept, philanthropy, or benevolence; and finally, the third element of humanity was representing what Immanuel Kant believed to be a respect for human dignity.[32] Radbruch then proceeds to explaining how this threefold understanding of humanity helps in the proper legal interpretation of crimes against humanity as crimes attacking all humanity – or mankind.[33] In its multi-layered meaning, presented this way, the term "humanitas" is also not alien to the modern understanding

---

[29] For an introductory discussion with respect to human dignity, see Schachter 1983, p. 849. The discussion of human dignity as an element of humanity in the context of crimes against humanity is also important for the purposes of this book (see Chaps. 3, 4 and 5).

[30] Gustav Radbruch 1947, pp. 131–136.

[31] Radbruch 1947, p. 131. Translation from German made by this author.

[32] Ibid.

[33] Ibid.

of the concept of humanity as described above, though the latter is certainly far more diverse.

Subsequent attempts to explain what particular values are encroached upon by the commission of crimes against humanity also include legal analysis based upon a deserving interpretation of Immanuel Kant's philosophy of law.[34] According to this vision, the commission of acts comprising the crimes against humanity deny the victims their "underlying" human rights which belong inherently in them by the very virtue of their humanity. The application of such a "rights' denial, or rights' negation principle" as a maxim (philosophical category of a ground rule) is what renders these acts crimes against humanity. The freedom of others (i.e., victims) in its meaning as a self-sufficient factor regulating their individual human behaviour – as understood by Immanuel Kant,[35] is denied altogether. Crimes against humanity can then be seen literally as depriving the people of their basic definition as legally free beings.[36] This interesting point of view is worth digging deeper into and it may assist in the proper comprehensive understanding of the legal interests protected by the criminalization of crimes against humanity.

Different language versions of the word "humanity" do potentially contribute to the problem of lack of conceptual clarity of its meaning, especially when it comes to a proper interpretation of legal categories such as crimes against humanity.[37] For example, while in English there is one term to describe several notions under one comprehensive word, this is not the case with some other world languages. In English, the word "humanity" can indicate "mankind" (i.e., aggregation of all human beings), "humanness" (or quality of being human), or "humaneness" (benevolence towards others).[38] The same is true with the French definition of "humanité".[39] However, the situation is different with the Russian language: there

[34] Gierhake 2005, pp. 272–273. Kant's views of fundamental concepts such as humanity, freedom, human autonomy and categorical imperative as well as his philosophy of law are relevant for this book's subsequent analysis in the main chapters (Chaps. 3, 4 and 5).

[35] Kant's definition of freedom may be summarised as follows: "Freedom is the only one and original right of every man inherent in him by virtue of his humanity, provided it can coexist with the freedom of others, in accordance with one universal law." ["Freiheit, sofern sie mit jedes anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist (das) einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit zustehende Recht", translation from German by the author], quoted literally in Ibid., p. 273, fn. 783.

[36] Ibid.

[37] In particular, in different domestic contexts, in terms of legislative and judicial interpretation and application of the law – where language concerns are certainly crucial, as well as in academic discourse in the sphere of ICL.

[38] See the modern accepted English definition at "Oxford Dictionaries Online" (UK English), maintained by Oxford University Press, available at http://www.oxforddictionaries.com/definition/english/humanity. Accessed 26 November 2018.

[39] See contemporary definitions of "humanité" in French at "Dictionnaire de francais "Littré"", available at http://littre.reverso.net/dictionnaire-francais/definition/humanit%C3%A9. Accessed 26 November 2018. Also for comparison see Brachet 1873, p. 186. A similar situation exists with Spanish and Portuguese languages: in general, "humanidad" and "humanidade" carry the same comprehensive meanings, see, correspondingly, "SpanishDict, the Spanish-English Dictionary