

INTRODUCTION: DECODING CRIMES AGAINST HUMANITY: TOWARDS A RECONSTRUCTIVE APPROACH

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THIS ISSUE of *Journal of East-West Thought* is particularly devoted to the topic of crimes against humanity (CAH). Theoretically and practically, CAH is still an unsolved issue. S. R. Ratner points out, the debate on CAH is “the enduring debate” (Ratner, 2007, 583). D. Luban claims, the concept of CAH “is still in the childhood of its legal development” (Luban, 2004, 161). M. deGuzman declares, CAH has “enduring normative debates and doctrinal ambiguities” (deGuzman, 2010). M. Cupido argues that the debate concerning the theoretical characterization of the policy requirement as either an element of crime or an evidentiary relevant circumstance for CAH is deficient (Cupido, 2011). C. Macleod says: “Within political philosophy, especially that operating in the Anglo-American tradition, there has been very little consideration given to the nature of crimes against humanity. The same can be said about genocide, and indeed many other crimes referred to in international criminal law, though these offences shall not concern us here” (Macleod, 2010, 281).

Human rights, human dignity and humanitarianism should be considered the highest and most universal values in today’s world. From the broadest perspective, any behavior or action against these values can be regarded as a crime. The two most influential listings of international crimes were set out roughly sixty years apart. The 1945 Charter of the International Military Tribunal at Nuremberg identified three classes of international crime: Crimes Against Peace, War Crimes, and Crimes Against Humanity. The 1998 Rome Statute of the International Criminal Court (ICC) lists four categories of crime: The Crime of Genocide, Crimes Against Humanity, War Crimes, and the Crime of Aggression (May, 2005, 6) According to the Nuremberg Charter, CAH is one of the three categories of crimes which is defined as: “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 domestic law of the country where perpetrated.”¹ The Rome Statute of the International Criminal Court defines CAH as “particularly odious offenses in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings.” The modern usage of CAH has its genesis in Article 6(e) of the London Charter, which repeats the Nuremberg Definition as follows : “CRIMES

¹Nuremberg Charter, supra note 5, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288.

AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, whether before or during the war, or persecutions on political, racial, or religious grounds in execution with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.” In my opinion, CAH can be defined as a crime or series of crimes committed as a strategic, organized, systematic, or widespread attack directed against any group of people because of race, religion, nationality, ideology, or socio-political interests. Persecutions based on gender, age, disability or poverty must also be classified as CAH. Actually, genocide, war crimes and CAH should be regarded as Three-in-One or Threefold Crime as they are inter-relatable, inter-actable, and inter-transformable. Like genocide and war crimes, CAH is a most harmful crime in today’s world. In a sense, CAH is the most popular and fundamental one among these three crimes. In other word, genocide and war crime can finally be reduced to crime against humanity. For instance, “a crime characterized as genocide constitutes, of itself, crimes against humanity within the meaning of persecution” (Boot, 2000, 432).

Recently, certain scholars have conducted in-depth discussions on CAH conceptually and theoretically. D. Luban extracts a concept of CAH from the differing conceptions given in various statutes and judicial decisions: Firstly CAH is typically committed against fellow nationals as well as foreigners; Secondly CAH is international crimes; Thirdly CAH is committed by politically organized groups acting under color of policy; Fourthly CAH consists of the most severe and abominable; Lastly CAH is inflicted on victims based on their membership in a population rather than their individual characteristics (Luban, 2004, 93-103). Accordingly, in the case of CAH, there is no robust case law assigning the phrase a technical meaning, and indeed the various statutes defining it-the Nuremberg Charter, Allied Control Council Law No. 10, the ICTY, CTR, and Rome Statutes, national statutes, and a handful of law commissions' proposals-all define it differently. The pioneers of topology had no "official" definition of a topological space. Their task was to come up with one, and the raw materials they had to work with were intuitions about what conceptual work the definition was supposed to do. The term “‘crimes against humanity’ packs an enormous rhetorical wallop, and it does so not because lawyers treat it as a technical term, but rather because all of us know that ‘humanity’ means something universal and immensely important. After a century in which crimes against humanity have taken tens of millions of lives, it may be that understanding the twin meanings of "humanity" that these deeds offend is the least we owe the dead” (*Ibid*, 161).

For S. R. Ratner, lawyers and philosophers have offered a number of different diagnoses and prescriptions about the relative gravity of the two crimes: Genocide

and CAH are equally bad; relatively genocide is worse. He stresses that all evil acts against civilians are genocide (Ratner, 2007, 584-585). For him, a look back at the twentieth century reveals that the most critical steps in the criminalization of mass human rights constituted the academic work of Raphael Lemkin and his conceptualization of genocide; the International Military Tribunal Charter's criminalization of CAH and the trials that followed; and the conclusion and broad ratification of the Genocide Convention. The Convention was the first treaty since those of slavery and the "white slave traffic" to criminalize peacetime actions by a government against its citizens. "Since that time, customary international law has recognized the de-coupling of crimes against humanity from wartime" (Ibid, 583). C. Macleod outlines the seven meanings of CAH: an action is a CAH if and only if: 1) it is an action contrary to the human-nature of the perpetrator; 2) it targets the human-nature of the victim(s); 3) in ignoring it, we would ourselves be acting contrary to human-nature; 4) an action that shocks the conscience of human-kind; 5) it is a crime that endangers the public order of human-kind; 6) it is a crime that diminishes human-kind; and 7) it is a crime that damages human-kind (Macleod, 2010, 281-202).

In his book, G. Robertson weaves together disparate strands of history, philosophy, international law, and politics to show how an identification of CAH, first defined at Nuremberg, has become the key that unlocks the closed door of state sovereignty, enabling the international community to bring tyrants and torturers to heel. He condemns the hypocrisy of the United States, "the nation which refuses to be bound by international human rights law [yet] demands the prosecution of foreigners who violate it (Robertson, 2007, 386). D. Chandler thinks that Robertson provides "a cogent argument about double-standards and the duplicity or *realpolitik* of international business and political leaders. Robertson has a valid critique of the misuse of human rights concerns as rhetoric and propaganda" (Chandler, 2000, 244).

M. Cherif Bassiouni studied the historical evolution and contemporary application of CAH. He addresses 1) The nature of CAH and the element of the policy; 2) Phenomenological and criminological considerations of CAH as a crime of state; 3) The emergence of CAH in positive international law from the Law of the Charter to the post-World War II for formulations arising out the Chapter; 4) Post-Chapter developments; 5) The principles of legality in the London Chapter and in post-Chapter legal developments; 6) The specific acts listed in the different formulations of CAH; 7) Necessarily changes gears in order to consider *ratione personae* and the theories and elements of criminal responsibility; 8) The theoretical and jurisprudential histories of defenses and exonerations in the context of CAH; and 9) National prosecutions for CAH and CAH-type crimes (Bassiouni, 2011, 1-742).

In the past few years, the book series *Human Rights and Crimes against Humanity* published by Princeton University Press, such as *Stalin's Genocides* (2011,

by N. M. Naimark), *The International Human Rights Movement: A History* (2012, by A. Neier), *The Young Turks' Crime Against Humanity: The Armenian Genocide and Ethnic Cleansing in the Ottoman Empire* (2012, by T. Akçam), and *All the Missing Souls: A Personal History of the War Crimes Tribunals* (2013, by D. Scheffer), provides a forum for debate on the perpetration of large-scale atrocities and the often highly charged political and ethical issues of human rights protection, memory, and redress that develop in their wake. This series uses a broad understanding of CAH, including genocides, ethnic cleansings, massacres, various forms of slavery, lynchings, mass rapes, and torture. Chronologically, the series runs from around 1500, the onset of the modern era marked by European colonialism abroad and the Atlantic slave trade, to the present. Geographically, it takes in every area of the globe. It publishes significant works of original scholarship and major interpretation by academics, journalists, and other writers. An important goal is to bring these crimes--and the responses to them--to the attention of a wide audience and to stimulate discussion and debate in the public sphere as well as among scholars and in the classroom. "The knowledge that develops from the series will also, we hope, help promote human rights standards and prevent future crimes against humanity."² Obviously, with respect to the responsibility of intellectuals, an important as well as urgent task for us is to continue to contribute more scholarly studies on CAH for more wide-ranging and profound examination, argumentation, justification and criticism.

In this issue, Josef Seifert explores the nature of CAH and the moments that distinguish such a kind of crime. It indicates that such crime is featured by a quantitative magnitude and number of victims and the qualitative "inhumanity". By this token, it contends that actions besides extermination (such as psychological persecution, torture, systematic rape, etc.), notwithstanding the horror of these crimes, constitute other types of "crimes against humanity" and do not as such constitute genocide, but augment the overall genocidal character of certain crimes. Xunwu Chen's paper purports to explore the nature of CAH as a unique family of crimes and how the concept of CAH embodies the spirit of our time. It argues that what makes CAH profound crimes is the fact that they are crimes against the metaphysical and practical identity of all human beings; they injure humanity as the intersubjectivity of all human beings. Doing so, it will first demonstrate how the concept of CAH bears out the truth that the norm of humanity is a legal norm; humanity is a possible object of legal injury and a legitimate subject to which action is held accountable for. It then examines the four basic features of crimes against humanity, indicating that a CAH is a global crime that is motivated to injure humanity, policy-laden, and systematic.

²See <http://press.princeton.edu/catalogs/series/hrch.html>.

Finally, it further discusses the nature and precepts of the laws of humanity in virtue of which CAH are defined as so and so.

Cheikh Mbacke Gueye addresses the issue of CAH requires a robust theory about personal attitude, politics, justice at home and abroad, as well as a true conception of human nature. The author contributes to this debate by emphasizing the importance of adopting a “rooted cosmopolitanism” that neither excludes wider loyalties, nor overrides the narrower ones. It is a theory that requires, not a world state, but solid democratic, and accountable states respectful of the rights of their citizens and the demands of the human person. The call for normative democracy at the global scale is motivated by the failure of politics that has been dangerously confined to the realization of local and national interests leaving aside crucial issues that engage other people and nations. John F. Crosby starts from the ancient Greek distinction between “Greek” and “barbarian,” which seems to express an inveterate, incorrigible way of thinking about other human beings. People who are cast into the role of “barbarians” are exposed to violence and injustice at the hands of the “Greeks.” They are deprived of a certain moral protection; the “Greeks” can with a good conscience commit CAH as long as humanity is thought of as “barbarian” humanity. The author then asks how we as philosophers can overcome the Greek-barbarian way of thinking, and how, at the level of philosophical reflection, we can protect people from being degraded to “barbarians.” The author argues that we can raise a strong intellectual bulwark against all such degradation if we think of the encounter with others in terms of personalism. The author develops the personalist distinction between “environment” and “world” and shows why it is that through our world-openness we destroy the aspect of others as barbarians. The author also considers and rejects a plausible “cosmopolitan” misunderstanding of his “personalist” way of extending respect to all human beings.

Paola Premoli De Marchi’s paper consists of four parts: (i) The first part develops a phenomenological description of power as an interpersonal relationship of influence of a human being over some other human being and aim to show that the two fundamentals of any ethics of power are the respect of the recipient of the relationship – which is a human dignity endowed with a dignity - and the intentional and transcendent character of the relation itself. (ii) The second part is dedicated to the question why power is a temptation for man, namely the use of power can easily turned into abuse. (iii) The third part inquiries hatred as that specific temptation of power which can motivate some human being to perform criminal acts against humanity. (iv) The fourth and final part of the paper aims to summarize the different moral responsibilities of any human being in the fight against genocide and other CAH.

Marcelo L. Cambroner and Felician Merino Escalera analyze the terrible phenomenon of genocide, which represents a particular case of CAH. They attempt at accounting for the causes at the root of the phenomenon, starting from two concepts, which we argue as central: the notion of ‘type’ and its impact to community construction, and the concept of ideology; the latter, understood as a philosophical perversion flourishing in an unprecedented manner in the contemporary world, allows the demonization of a group and the gestation of social processes conducting to

destruction, especially because the targeted group is viewed as carrying a particular community 'type'. For Ericka Tucker, the problems of contemporary states are in large part "affective disorders"; they are failures of states to properly understand and coordinate the emotions of the individuals within and in some instances outside the state. By excluding, imprisoning, and marginalizing members of their societies, states create internal enemies who ultimately enervate their own power and the possibility of peace and freedom within the state. Spinoza's political theory, based on the notion that the best forms of state are those that coordinate the power and emotions of those within a state, offers us both a diagnosis of and a cure for these affective disorders. The author will outline Spinoza's notion of the power of the state as a function of the power and coordination of the emotions of its citizens, and show that when the state contracts an affective disorder, such as excessive crime, rebellion, terrorism, etc. the state has failed to properly empower, include and coordinate the passions of the multitude of its citizens and subjects.

An ancient Chinese proverb says, "Cast a brick to attract jade." Its real meaning is "offer a few start-up and debatable remarks by way of introduction so that others may come up with much more valuable and creative Insights." It is for this purpose, this special issue invites more scholars to decode CAH and consider a reconstructive approach to the various, perplexing and unresolved issues presented.

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References

- Bassiouni, M. Cherif. 2011. *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press.
- Boot, Machteld. 2000. *Genocide, Crimes Against Humanity and War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*. Intersentia Uitgevers N V.
- Chandler, David. 2000. "Book Review," *Peacebuilding and Police Reform*, Edited by Tor Tanke Holm and Espen Barth, Frank Cass Publishers, pp243-245.
- Cupido, Marjolein. "The Policy Underlying Crimes Against Humanity: Practical Reflections on a Theoretical Debate," *Criminal Law Forum*, Vol. 22, No. 3, 2011.
- deGuzman, Margaret. 2010. "Crimes Against Humanity: Enduring normative debates and doctrinal ambiguities," *IntLawGrrls* - <http://intlwgrrls.blogspot.com/> .
- Ratner, Steven R. 2007. "Can We Compare Evils? The Enduring Debate on Genocide and Crime against Humanity," *Washington University Global Studies Law Review*, Vol. 6, 2007, pp583-589.
- Luban, David. 2004. "A Theory of Crimes Against Humanity," *The Yale Journal of International Law*, Vol. 29, 2004, pp85-167.
- Macleod, Christopher. 2010. "Towards a Philosophical Account of Crimes Against Humanity," *European Journal of International Law*, Volume 21, Issue 2, pp. 281-302.