

M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, 845 pages. ISBN-10: 1107001153.

M. CHERIF BASSIOUNI is the author of 24 and editor of 43 books on International Criminal Law, Comparative Criminal Law, Human Rights, and U.S. Criminal Law; and the author of 265 articles published in law journals and books in the U.S. and other countries. These publications have been written in Arabic, English, French, Italian and Spanish. Some of them have been cited by the International Court of Justice; the International Criminal Tribunal for the Former Yugoslavia (ICTY); the International Criminal Tribunal for Rwanda (ICTR); the United States Supreme Court; the United States Circuit and Federal District Courts and various State Supreme Courts. Several of his works have been translated into: Arabic, Chinese, Farsi, French, German, Hungarian, Italian, Portuguese and Spanish.

In 1999, Bassiouni published *Crimes against Humanity in International Criminal Law*. This book significantly establishes the legal validity of the Nuremberg Charter and describes the evolution of “crimes against humanity (CAH)” from 1945 to the 1998 ICC Statute. The book's comprehensive historical and legal analysis starts with the origins of this crime in the international regulation of armed conflicts and covers the Nuremberg, Tokyo and Allied Prosecutions after World War II, and subsequent national prosecutions, as well as the Statutes of the ICTY (the International Criminal Tribunal for the Former Yugoslavia), ICTR (the International Criminal Tribunal for Rwanda) and their jurisprudence, and the Statute of the ICC (the International Criminal Court). The book examines the ten different international legal formulations which were developed at that time, particularly their overlap with genocide and war crimes, and sorts out the confusion regarding the legal characteristics of this crime. The meticulous and thorough analysis of all relevant legal issues, many of which are not covered elsewhere, includes: principles of legality, criminal responsibility for decision-makers and others, command responsibility, obedience to superior orders and other defenses, specific contents and their counterpart in national laws, policy considerations, and the applicability of this crime to non-State actors.<sup>1</sup> In 2010, in his article “Crimes against Humanity: The Case for a Specialized Convention,” Bassiouni emphasizes that If the adoption of a specialized convention on crimes against humanity is only capable of saving one life, then those who will have worked at bringing it about will share in the rewarding knowledge that their efforts are equivalent to having saved all of humanity. Experience, however, tells us that if such

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<sup>1</sup> [http://books.google.com/books/about/Crimes\\_Against\\_Humanity\\_in\\_International.html?id=MbiedpEFzbYC](http://books.google.com/books/about/Crimes_Against_Humanity_in_International.html?id=MbiedpEFzbYC).

a convention is adopted and is enforced, even with limitations, it is likely to have a preventive and deterring effect that will save many lives. “In so doing, those who have contributed to the effort will have the reward of having contributed something of value to humankind, and they will also contribute to peace, because, ultimately, there is no peace without justice.”<sup>2</sup>

In 2011, Bassiouni published a new book, entitled *Crimes against Humanity: Historical Evolution and Contemporary Application*. This book is his latest contribution to human justice. As a reviewer says: “The book constitutes a unique and comprehensive treatment of all legal and historical aspects pertaining to crimes against humanity in a single definitive volume.”<sup>3</sup> This new book provides a historical review for the evolution of CAH and an analytical examination for the application of CAH. The author discusses the categorization of CAH in normative jurisprudential and doctrinal terms, and then examines the specific contents of CAH through international criminal tribunals, mixed model tribunals, and the International Criminal Court. He also attempts to justify CAH along with the history and jurisprudence of both international and national prosecutions. According to the author, this book is the result of his many years of work as an academic and as a participant in international legislative efforts. These experience were rich and rewarding and provided him with useful insights, which will benefit the readers. “This is a new book, not merely an update of previous editions of Crime against Humanity in International Law. This book includes all of the jurisprudential developments of CAH, from the post-World War II proceedings to the ICTY, ICTR, and ICC, as well as the mixed-model tribunals and relevant national prosecutions.” (pXIV) This 845 page book is divided into ten chapters.

In Chapter 1, the author discusses the nature of CAH and the element of the policy. For him, the past century witnessed more people killed in various types of conflicts and regime victimization than has ever occurred at any other point in the history of mankind. Most of the victimization falls within the meaning of CAH (p1). He includes analysis of the concept and characteristics of this element, the discriminatory element in “civilian population,” the crime’s historical connection to war, the policy connection between individual conduct and state policy in the London Charter, the imputability of individual conduct to the State, and the applicability of

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<sup>2</sup> M. Cherif Bassiouni. 2010. “Crimes Against Humanity: The Case for a Specialized Convention,” *Washington University Global Studies Law Review*. Volume 9, Issue 4, 2010. Pp592-593.

<sup>3</sup> [http://www.amazon.com/Crimes-Against-Humanity-Contemporary-Application/dp/product-description/1107001153/ref=dp\\_proddesc\\_0?ie=UTF8&n=283155&s=books](http://www.amazon.com/Crimes-Against-Humanity-Contemporary-Application/dp/product-description/1107001153/ref=dp_proddesc_0?ie=UTF8&n=283155&s=books).

the policy requirement in the context of non-state actors. More significantly, the author concludes with some philosophical considerations (p50).

In Chapter 2, the author contemplates Phenomenological and criminological considerations of CAH as a crime of state. He begins with an etiology of crimes of state, followed by phenomenological observations concerning the protagonists, neutralization, apathy, indifferences, passivity, de- and sub-humanization, objectification, and the “banality of evil.” According to him, “Crimes of state have, in some form or another, existed throughout human history and have essentially manifested themselves when the state’s organizational structure is under the control of tyrannical ruler or a ruling elite engaging in abuses of power” (p55). The author next focuses on the legal controls of crimes of state by considering legal philosophy and both international and domestic criminal law regimes. The author concludes by lamenting the historical enforcement gap of prosecuting atrocity crimes (p85).

In Chapter 3, the author examines 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 Charter: the IMTFE (International Military Tribunal for the Far East) and Control Council Law No. 10. He begins with the concept of “laws of humanity” in the history of the law of armed conflict. He claims that the genesis of CAH is in the Preambles of the First Hague Convention of 1899 on the laws and Customs of War and expanded in the Fourth Hague Convention of 1907 and in their annexed Regulations Respecting the laws and Customs of War on Land (p86). The author next addresses the London Charter, specifically Article 6(c), wherein CAH acquired its own identity. In his opinion, the initial methodological question discussed by the drafters of the London Charter was whether to have a generic definition of the crimes; a listing of specific acts constituting international crimes; or a combination of the two (p119). The analysis then shifts to post-Charter formulations that arose out of the Charter – the IMTFE and CCL 10. The author recalls that the united States revised its original American Drafts in a new Proposed Agreement of June 14, 1945, which referred to “Atrocities and Offenses against Persons or Property Constituting Violations of International Law, including the Laws, Rules and Customs of Land and Naval Warfare” (p120). The author concludes with the prosecutions pursuant to the Charters of Nuremberg and Tokyo and those of the CCL 10 Proceedings (p166).

In Chapter 4, the author centers on post-Charter developments and is divided into two parts. Part A moves from the substantive developments of CAH from the ILC’s codification efforts from 1947 to 1996, to the Security Council’s codifications in the Statutes of the ICTY and ICTR, to the Rome Statute. He next considers the CAH prosecutions of the ad hoc tribunals, as well as the status of prosecutions at the ICC. The next sections considers other normative proscriptions applicable to the same

protected interests as those protected by CAH. The subject of the penultimate section is the mixed-model tribunals, including those of Kosovo, Bosnia and Herzegovina, Sierra Leona, Tumor-Leste, Cambodia, and Iraq. Part A ends with an analysis of CAH's status as a part of jus cogens. Part B examines the post-Charter procedural developments, including the concept of aut dedere judicare, the duty to prosecute or extradite, the principle of non-applicability of statutes of limitations, and universal jurisdiction. For the author, "Arguably, prosecutions for CAH should be prioritized because of the principle aut dedere aut judicare, and, more generally, because international crimes form the foundation of the involvement of the international community and the creation of the Special Panels for Serious Crime as a hybrid court (p253). The author also provides his own concluding assessment of the post-Charter substantive and procedural developments (p295).

In Chapter 5, the author discusses the principles of legality in the London Charter and in post-Charter legal developments. He starts by examining the principles of legality in international criminal law. The Charter's approach to the issue follows. The next section reflects on the Prosecution's treatment of the question under the Charter, the IMTFE, and CCL 10. He next assesses legality issues in the post-World War II prosecutions. Interestingly enough, from a sense of legal philosophy, the author thinks that naturalists, relative positivist, pragmatists, and utilitarian's all found common ground, albeit from different vantage point, in upholding the legitimacy of the London Charter, even though most acknowledged its technical legal deficiencies. The enormity of the human harm had helped to overcome concerns about legal imperfections. Thus, the facts shaped the outcome of the law (p311). He then finishes with an evaluation of the issue of legality in post-Charter developments of the ICTY, the ICTR, and the ICC (p358).

In Chapter 6, the author analyzes the specific acts listed in the different formulations of CAH. After an introductory section on the meaning, method, and function of general principles of law, the specific crimes contained in the four primary formulations of CAH, including murder, extermination, enslavement, deportation, persecution, other inhumane acts, torture, unlawful human experimentation, rape and sexual violence, imprisonment, *apartheid*, and forced disappearance. The author concludes by examining the normative overlap between the three major international crimes: war crimes, CAH, and genocide. He stresses that it is important to note that CAH was first defined in the aftermath of the Nazi atrocities of World War II and was largely tailored to address such conduct. "Even the most modern definitions did not take into account that the majority of specific acts are either redundant or insufficiently defined, or have been incorporated into new conventions criminalizing them, as in the case of torture (p471).

In Chapter 7, the author thinks that necessarily changes gears in order to consider *ratione personae* and the theories and elements of criminal responsibility. He begins with the issue of international criminal responsibility of individuals. The first subsection generally considers the doctrinal differences between international law and national criminal law related to individual, group, and state responsibility. The second subsection analyzes the responsibility for the conduct of another and group responsibility in the London Charter, the IMTFE, and CCL 10 (Control Council Law). The next subsection considers criminal responsibility and the “general part,” moving from a discussion of national legal standards and their relevance to international criminal law, to an evaluation of the problems in identifying the “general part” from the London Charter to the Rome statute, and finishing with a historical analysis of the application of the “general part” by the various tribunals. The author points out: to determine the degree of control to be exercised by the superior over the subordinate, the ICTY Appeals Chamber has endorsed the “effective control” standard, which is defined as the material ability to prevent or punish criminal conduct (p551). After a section considering the issue of knowledge of the law and intent, the author concludes by reviewing two important theories of liability, namely command responsibility and joint criminal responsibility (p580).

In Chapter 8, the author details the theoretical and jurisprudential histories of defenses and exonerations in the context of CAH, including obedience to superior orders, compulsion, reprisals, and *tu quoque*. He also considers the non-applicability of reprisals and *tu quoque* to CAH. Finally, the author ends with a section examining the immunity of heads of state (p648). In Chapter 9, the author discusses national prosecutions for CAH and CAH-type crimes. He begins with two sections devoted to individual criminal responsibility in pre- and post-World War I international prosecutions, as well as a third section concerning other evidence of international individual criminal responsibility during the same period. The next section surveys some of the post-World War II national prosecutions of CAH and CAH-type crimes, including the prosecutions in Israel, France, Italy, Canada, Austria, Germany, Spain, Argentina, Indonesia, and Iraq. The next section considers other recent developments in national prosecutions of CAH-type crimes, and in situations that potentially give rise to such prosecutions. The penultimate section confronts the historical issue of the selective enforcement of CAH (p723). In the last Chapter, the author provides his concluding assessment to discuss “The need for an international convention” (pp724-742).

According to Bassiouni, the term crimes against humanity (CAH) has come to mean anything atrocious committed on a large scale. This is not, however, the original meaning nor the technical one. The term originated in the 1907 Hague Convention

preamble, which codified the customary law of armed conflict. This codification was based on existing State practices that derived from those values and principles deemed to constitute the “laws of humanity,” as reflected throughout history in different cultures. He continues to point out that CAH have existed in customary international law for over half a century and are also evidenced in prosecutions before some national courts. The most notable of these trials include those of Paul Touvier, Klaus Barbie, and Maurice Papon in France, and *Imre Finta* in Canada. But crimes against humanity are also deemed to be part of *jus cogens*—the highest standing in international legal norms. Thus, they constitute a non-derogable rule of international law. The implication of this standing is that they are subject to universal jurisdiction, meaning that all States can exercise their jurisdiction in prosecuting a perpetrator irrespective of where the crime was committed. It also means that all States have the duty to prosecute or extradite, that no person charged with that crime can claim the “political offense exception” to extradition, and that States have the duty to assist each other in securing evidence needed to prosecute. “But of greater importance is the fact that no perpetrator can claim the ‘defense of obedience to superior orders’ and that no statute of limitation contained in the laws of any State can apply. Lastly, no one is immune from prosecution for such crimes, even a head of State.”<sup>4</sup>

Bassiouni’s book is extremely comprehensive, systematic and initiative, it “represents the latest valuable tome on the topic of crimes against humanity from a giant in the field of international criminal law and one of the ‘leading experts on crimes against humanity’”;<sup>5</sup> and “...of all the books on CAH, this book is the first to include a world survey of national legislation and national prosecutions of CAH and CAH-type crimes that have occurred from the post-World War II era until the present. The book constitutes a unique and comprehensive treatment of all legal and historical aspects pertaining to CAH in a single definitive volume.”<sup>6</sup> To sum up, Bassiouni’s book is all combinations of the theoretical and practical, the historical and current, the legal and moral, the political and economic, the national and international, and the cultural and multicultural.

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<sup>4</sup><http://www.crimesofwar.org/a-z-guide/crimes-against-humanity/>.

<sup>5</sup>Caroline Davidson. 2012. Human Rights Quarterly, Volume 34, Number 4, November 2012, pp. 1193-1201.

<sup>6</sup><http://www.cambridge.org/aus/catalogue/catalogue.asp?isbn=9781107001152&ss=fro>.