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Contemporary Approaches to the Philosophy of Crimes against Humanity

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Abstract

Crimes against humanity have become a fundamental part of international criminal law. Yet several theoretical issues are still up for grabs. What exactly is a crime against humanity? How are crimes against humanity different from domestic offences? What does humanity stand for in this notion? And who is entitled to define and prosecute these crimes? Crimes against humanity have recently been the object of significant examination in contemporary analytical philosophy. This article provides a concise, critical overview of the main positions available in the literature. It seeks to isolate the key conceptual and normative issues that surround this debate, and to assess the different answers currently available. It concludes that although all the answers available face significant objections and difficulties, they have made increasingly clear what the philosophical questions surrounding the notion of crimes against humanity are.

Keywords

crimes against humanity – analytical philosophy – international harm principle – justice – extraterritorial jurisdiction

1 Introduction

Crimes against humanity are part of what are normally considered core crimes of international criminal law. They are provided for in the Rome Statute for the

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International Criminal Court, as well as under customary international law. States are also increasingly adopting domestic legislation defining and providing domestic jurisdiction, often on extraterritorial grounds, over them. But what exactly is a crime against humanity? How are crimes against humanity different from domestic offences? What does humanity stand for in this notion? Who is entitled to define and prosecute these crimes? As a legal category, crimes against humanity (hereinafter CAH) can be schematically defined as the commission of certain inhumane acts (such as murder, torture, rape, and so on) as part of a widespread or systematic attack directed against a civilian population.[1] The fact that a given conduct is considered a CAH essentially entails, from a legal perspective, that their perpetrators can be brought to account for them by courts of foreign states and international criminal tribunals.[2] These crimes are subject to the regime known as universal jurisdiction.

This article is not concerned with the legal definition or implications associated with CAH. By contrast, it seeks to identify and assess existing answers to the questions identified above from a philosophical perspective. The notion of CAH has been recently the object of significant examination in contemporary analytical philosophy. This article provides a concise, critical overview of the main positions available in the literature. It seeks to isolate the key conceptual and normative issues that surround this debate, and to assess the different answers currently available. This does not mean that the law concerning CAH is immaterial for our purposes here though. On the one hand, if a philosophical conception of CAH it is to provide us with useful insights into existing practice, it cannot be entirely divorced from legal practice and political discourse. On the other hand, we cannot take legal practice and political discourse as a given and develop a conception of CAH as merely a rationalization of their fundamental traits. Any theoretical account of CAH that is worth pursuing must also provide a critical bite on the legal practice.

Early philosophical work on CAH was mainly concerned with standard jurisprudential quarrels between legal positivism and natural law. Contemporary philosophical debates, by contrast, have significantly changed their focus. They are more concerned with examining the main conceptual traits of the notion of CAH as well as their key normative implications. Most of the

1 *See* Article 8 of the Rome Statute of the International Criminal Court. *See also*, Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2008), p. 187.

2 E.g., *Case concerning the Arrest Warrant of 11 April 2000* (DRC v. *Belgium*) ICJ Rep 3 (*see* the position of Judges Higgins, Buergenthal, and Koojimans in their separate opinion and the position of Judge Koroma and Judge *ad hoc* van den Wyngaert).

theoretical work currently being done on this topic is connected with the fact that CAH are considered different in some respect from ordinary or domestic offences. In effect, this article shall claim that a critical aspect of any theory of CAH must be connected with what makes them international crimes. And this, in turn, entails explaining which of their conceptual features account for their expansive jurisdictional regime.

Admittedly, this paradigm is not necessarily focused on the legal category of CAH, as distinct from war crimes, genocide, or crimes against peace (aggression). Rather, it often implies the particular view, traceable perhaps to The Hague Convention's Martens Clause, that all of these international crimes (and other possible candidates) harm or violate humanity itself.[3] This harm to humanity purportedly explains why some extraterritorial state or an international tribunal would be entitled to punish their perpetrators. Interestingly, it is in the context of CAH as a *legal* category (namely, distinct from war crimes, genocide or crimes against peace) that scholars and tribunals have been pressed to distinguish municipal from international offences.[4] War crimes and crimes against peace, by contrast, have entered the constellation of international offences largely uncontested.[5] In any event, CAH have now established themselves as a category of international offences in their own right and, some would argue, they could eventually become synonymous with them.[6]

This piece is organized as follows. A preliminary question any theory of CAH should ask is precisely what it is striving for, i.e., what such a philosophical account is trying to achieve. Section 2 shall address precisely this issue. Section 3 presents the conceptions of CAH which revolve around specific interpretations of 'humanity'. Section 4, in turn, discusses Larry May's International Harm Principle. Section 5 assesses the so-called 'relational' conceptions of CAH. Finally, I present my own account of CAH in Section 6. Section 7 provides a succinct conclusion.

3 Preamble to the 1899 Hague Convention (II). *See also Prosecutor* v *Erdemovic*, Case No. IT-96–22 (Trial Chamber, Sentencing Judgement (29 November 1996)), para. 28.

4 *See*, e.g., Phillis Hwang, 'Defining Crimes against Humanity in the Rome Statute of the International Criminal Court', 22 *Fordham International Law Journal* (1999) 457; Beth Van Schaack, 'The Definition of Crimes against Humanity: Resolving the Incoherence', 37 *Columbia Journal of Transnational Law* (1999) 787.

5 Thomas H. Sponsler, 'The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen', XI *Loyola L Rev* (1968–1969) 43–67.

6 William J. Fenrick, 'Should Crimes against Humanity Replace War Crimes?', 37 *Columbia Journal of Transnational Law* (1998–1999) 767. For the view that war crimes are more appropriate as synonyms of international offences *see* Gerry Simpson, *Law, War & Crime* (London: Polity Press, 2007).

2 Theorizing CAH: Conceptual and Normative Issues

The first issue that needs to be examined here is the kind of philosophical enterprise involved in developing a theory of CAH. A popular strand defends the view that such an enquiry is purely conceptual in nature, that is, entirely discrete from any normative issue. I, by contrast, will defend the need to develop a view in which the conceptual question is partly shaped by such normative questions. I shall argue that what is in need of philosophical elucidation is precisely why it is that we consider CAH international crimes, and what we mean by this. But let us first see what is wrong with the alternative approach.

As suggested, some theorists take philosophical work on CAH as essentially concerned with refining the way in which we employ this term. One way to go about this would be to focus on linguistic usage. This usage, of course, would not be limited exclusively to the analysis of legal norms but is conceived as a philosophical enterprise. Christopher McLeod, who otherwise defends this kind of purely conceptual enquiry, rightly suggests that this first type of project will probably not be very fruitful. The uses of the term are messy and often mixed with the self-interest of those defining it. Besides, the critical philosophical question is not how we effectively use the notion of CAH, but rather how we ought to do so.[7] This holds even if one is prepared to accept that the conceptual elucidation of CAH cannot be entirely divorced with the legal and extra-legal uses of the term.

A more extended, and perhaps more theoretically fertile option, has suggested that what is in need of theoretical elucidation is the meaning of the term 'humanity' within the notion of CAH. It has been suggested, for instance, that humanity in this context may refer either to humankind, as all the individuals who conform it collectively, or it can make reference to a trait all human being share, i.e., our humanness.[8] McLeod, for instance, clearly characterizes this type of approach. He suggests we must concentrate on the question of "how best to identify crimes against humanity" rather than on "the issues of the conditions for prosecution of and response to instances of these crimes".[9] These two are, for him, "entirely separate" questions. That is, even if we take into consideration how crimes against humanity explain "both why intervention in the affairs of other sovereign nation is warranted and why legal

7 Christopher McLeod, 'Towards a Philosophical Account of Crimes against Humanity', 21(2) *European Journal of International Law* (2010) 288–289.

8 *Ibid.*, p. 283; Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2001), p. 249.

9 McLeod, *supra* note 7, p. 282.

prosecution by third-party states is acceptable", "[t]he issue remains wholly how to *define* the crime."[10] The fact that any such conception is compatible with these specific normative implications is only a reason to choose that definition over others. But nowhere he thinks of this as the defining reason.

I disagree. I think the link between the conceptual enquiry into the notion of CAH and the normative implications associated with them is intrinsic and not just contingent. Normative questions not only help support one definition but, rather, clarify precisely what it is at stake from a conceptual point of view. Interestingly, McLeod may implicitly have conceded this much when suggesting that "[a]ny definition of [CAH] will have to pass … the *Arendt test*: does the definition successfully capture and account for the gap between this crime and other lower-order crimes."[11] It is precisely the normative implications attached to the former by contrast to those attached to the latter that is at issue. As we shall see below, this gap or distinction is precisely what is, or at least should be governing this debate.

Let me illustrate this. Criminal law theory has traditionally distinguished between different basic questions at the core of the philosophical enterprise of explaining the proposition 'X is morally justified in punishing an offender O'. Among them, it has standardly distinguished issues of criminalization, that is, the sort of behaviours that can be the object of criminal sanctions, from the question about when a particular body (i.e., generally a given State) would be entitled to legitimately impose criminal sanctions on an offender.[12] The former issue has remained largely underexplored in the contemporary literature on CAH. There is almost no philosophical work aimed at sorting out whether marginal cases of CAH do in fact belong in that category. As we shall explore in the following sections, virtually all of the conceptions of CAH are concerned with the latter question.

There are, admittedly, a number of different normative implications specifically attached to the notion of CAH. From a legal perspective, it has been claimed that they preclude the possibility to grant amnesties or pardons, or of applying statutes of limitations to those responsible for them, or that they may even affect (at least *de lege ferenda*) the law on sovereign or diplomatic immunity.[13] But the critical implication seems to be that domestic or international

10 *Ibid.*, p. 299. Emphasis in the original.

11 *Ibid.*, p. 292. Emphasis in the original.

12 *See*, classically, Jeffrie Murphy, 'Does Kant Have a Theory of Punishment', 87 *Columbia Law Review* (1987) 509–532.

13 *See* the 1968 Convention on the Non-Applicability of the Statutory Limitations to War Crimes and Crimes against Humanity (adopted by G.A. Res 2391) and the parallel

tribunals can hold individuals accountable for them in the absence of any traditional jurisdictional link or *nexus* with the perpetrator, the victim, or the offence.[14] It is their peculiar jurisdictional regime with distinguishes CAH from municipal offences. In the language of Antony Duff, the relevant question is against whom is anyone responsible for committing a CAH.[15] Put simply, what is in need of philosophical elucidation is precisely why Belgium could legitimately claim the right to prosecute a militia member for perpetrating CAH in the DRC, but cannot prosecute and punish a single case of rape or murder perpetrated in El Salvador.

It may be objected that by focusing exclusively on this jurisdictional aspect I am using a single normative implication to conceptualize CAH instead of providing a sound analysis of the concept itself. In other words, this way of proceeding could be said to put the cart before the horse. Admittedly, the approach I advocate implies a criticism of part of the existing literature,[16] because it suggests that it is unhelpful to try to determine what humanity stands for in the notion of CAH, and then explain all of their normative implications on the basis of this connection. Instead, it favours the strategy of isolating what is characteristic of CAH – i.e., that they allow extraterritorial prosecutions – and provide a normative argument to account for it.[17] This approach gains additional support in my view from the fact that CAH are usually referred to as international crimes, and that prosecutions for them are often resisted and criticized precisely because of this reason.

European Convention of 1974. *See also*, ICC Statute, Articles 29 and 27(2) and, eg, the Argentine Supreme Court decision in *Arancibia Clavel,* Argentine CSJN Decision n 259, 24 August 2004, and the French Court of Cassation in *Barbie* 78 I.L.R. 125, and the I/A Court H.R., *Case of Gelman v. Uruguay,* Merits and Reparations (Judgment of February 24, 2011 Series C No. 221).

14 It is arguably their expansive jurisdictional regime which explains, under one of the leading accounts, why officials or former officials would not be able to claim immunity *ratione materiae* against international offences such as CAH (*see*, eg, the opinions of Lord Browne-Wilkinson, Lord Hope, and Lord Saville in *R. v Bow Street Magistrates ex p Pinochet* [2000] 1 A.C. 147 (House of Lords)).

15 *See* Section 5 *infra*.

16 Exceptions include Larry May, *Crimes Against Humanity* (Cambridge: Cambridge University Press, 2005); Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005), p. 75; and Massimo Renzo, 'Crimes Against Humanity and the Limits of International Criminal Law', 31(4) *Law and Philosophy* (2012) 449.

17 For examples of this approach *see* David Luban, 'A Theory of Crimes Against Humanity', 29 *Yale Journal of International Law* (2004) 85; and Richard Vernon, 'What Is Crime against Humanity?', 10(3) *The Journal of Political Philosophy* (2002), p. 231.

Someone may object, then, that any such theory of CAH that attaches no relevance to elucidating what humanity stands for in that concept is unpromising. I agree. Any theory that would suggest this is, perhaps, liable to a fatal objection and should be discarded. But this is not what I am suggesting here. Rather I simply state that the best way to understand, and arguably to identify those CAH is precisely to examine the reasons why we should subject them to this particular regime. All of the relevant conceptions examined in the following sections are ultimately concerned with this important question.

3 Defining Humanity in a Theory of CAH

As suggested above, one of the leading philosophical approaches to the notion of CAH relies on the work that a plausible conception of 'humanity' must do to account for its core conceptual and normative features. David Luban, who has provided one of the most influential accounts of CAH, pursues this line of enquiry. He suggests that just as there are crimes against persons, property, or public order, there are other offences which are simply against humanity.[18] In a nutshell, he argues that CAH share five distinctive features: a) they are typically (though not exclusively) committed against fellow nationals, as well as foreigners; b) they are international offences in the sense that "they pierce the veil" of domestic authority; c) they are committed by politically organized groups acting under the colour of policy; d) they consist in the most severe and abominable acts of violence and persecution; and e), they are inflicted on victims based on their membership in a population rather than their individual characteristics.

Luban explicitly admits that he came up with these features by proceeding inductively from the various relevant statutes and decisions.[19] However, these features seem to have a deeper meaning in his conception than simple abstractions or generalizations about the law. For instance, Luban explains the notion of humanness that he suggests underlies the legal reference to 'humanity' by recourse to them.[20] He argues that the aspect of our humanness that is "most central to the law of crimes against humanity is our character as political animals."[21] By this he means that human beings are political, rather than social animals (as e.g. ants), in the sense that we live in groups under some form of

18 Luban, *ibid.,* p. 87.

19 *Ibid*., p. 91.

20 *Ibid.,* pp. 109–110.

21 *Ibid*., p. 110.

artificial coercive organization.[22] The problem, he suggests, is that politics can go horribly wrong. Now "because we cannot live without politics, we exist under the permanent threat that … the indispensable institutions of organized political life will destroy us."[23]

Luban's theory is committed to granting CAH the jurisdictional regime accorded to international offences by opposition to municipal offences. The reason for this is that CAH pose a 'universal' threat and that, as a result, all humankind has an interest in repressing them. In other words, he argues, CAH are both crimes against humanness (our nature as political animals) and crimes against humankind (the aggregation of *all* human beings). Furthermore, the particular interest that justifies accounts for their broad jurisdictional regime is the "interest in expunging [them] from the repertoire of politics …[;] in a world where crimes against humanity proceed unchecked, each of us could become the object of murder or prosecution solely on the basis of group affiliation we are powerless to change."[24] Indeed, "because the party in interest is humanity itself taken severally…, the withdrawal of social protection from the wrongdoer is universal."[25] Thus, his argument unfolds as follows: a) CAH are characterized by five core features; b) these features both explain and are explained by the fundamental fact that CAH violate our nature as political animals; c) we all share this nature, and we are all hostages to the threat that politics pose; d) therefore, every individual has an interest in repressing and punishing CAH; e) now, because allowing every individual to exercise this right would pose a significant threat, we are better off by conferring upon every state the power to do so.

This account is certainly persuasive. However, I suggest it pays to take a closer look at what is doing the justificatory work in Luban's argument. On the one hand, Luban suggests that CAH reflect the idea that politics should no longer be permitted to protect politics that have become so dreadful.[26] That is, when security forces or state officials in a given State perpetrate CAH against part of its own population, such state would forfeit its right against other parties intervening. However, this is too quick. Namely, Luban provides no argument as to which right has the State in question actually forfeited. I have

22 *Ibid*., p. 113.

23 *Ibid*., p. 90–91. This is similar to Richard Vernon's explanation of CAH as an "inversion of the jurisdictional resources of the state" (Vernon, *supra* note 17, p. 242).

24 Luban, *supra* note 17, p. 138.

25 *Ibid*., p. 140. Interestingly, Luban goes on to claim that as a matter of philosophical argument CAH must give rise not to universal jurisdiction, but to vigilante jurisdiction. This peculiarity of his account, however, is beyond the scope of the present exposition.

26 *Ibid*., p. 109.

illustrated this point elsewhere by referring to an interpersonal example.[27] When A threatens to kill B by holding her at gun point, A would arguably lack a right against third parties intervening to save B's life. This is often explained by arguing that A forfeited her right against being attacked. However, once the threat is over (e.g. A misses her final shot or, indeed, B is dead) a third party would need a different kind of justification to use force against A.[28] This is, precisely, what justifications for legal punishment provide and this is the question this argument ultimately begs.

On the other hand, Luban's argument rests on the claim that every single human being (human-kind) shares an interest in CAH being punished irrespectively of where they were perpetrated simply because anyone could be a victim of these offences. We are all hostages of some political organization, and politics can always go horribly wrong. And yet, one may still wonder whether this claim leads to his purported conclusion. Namely, we may readily object that we also live inevitably next to each other, and anyone could also be a victim of murder, rape or burglary. In fact, for a vast majority of the world's population the chances of being a victim of any of these municipal offences are far greater than those of being a victim of CAH. Put differently, this argument seems to be ultimately based on the fact that international or third-party state prosecutions would *deter* the commission of CAH. Nevertheless, and as I have argued at a greater length elsewhere, deterrence as a general justification for criminal punishment seems to conflate rather than distinguish international and domestic crimes. If we accept that there will be some extra deterrence by conferring jurisdiction on every state and international courts, any justification that relies on deterrence would be committed to granting every state the power to punish any particular offender, regardless of the type of crime he may have perpetrated. In sum, then, this reasoning cannot explain on its own the particular jurisdictional regime Luban purports to accord CAH.

Cristopher McLeod, on his part, claims that CAH are those which damage humanity as "human-kind".[29] Quite uncontroversially, he conceives the notion of damage in that proposition as involving the violation of someone's interests.[30] Yet in order to make sense of the notion of CAH, he still needs to account

27 Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford: Oxford University Press, 2010), p. 95.

28 *See*, classically, Judith Jarvis Thomson, 'Self-Defense', *Philosophy & Public Affairs* 20 (1991), pp. 283–310.

29 McLeod, *supra* note 7, p. 287.

30 Ibid., p. 294, citing Saladim Meckled-Garcia, 'Harm'. in T. Honderich (ed.), *The Oxford Companion to Philosophy* (Oxford: Oxford University Press, 2nd ed, 2005), p. 359.

for two rather hard questions. First, he must identify who is ultimately damaged by CAH. Second, he needs to specify which of her interests are damaged. These two claims, in turn, will need to account for precisely what it is that distinguishes CAH from domestic offences, which he pertinently describes as the fact that they allow "intervention in the affairs of other sovereign nations … and … legal prosecution by third-parties".[31]

Let us start by McLeod's answer to the first question. He recognizes that human-kind in this context has two rather different meanings. It may mean either "every person, treated collectively but remaining conceived as a composite set of individuals" or "every person, thought of as a collective and singular body", a "*grand-être*".[32] McLeod goes for the latter option. The reason for this is that taking human-kind as a set of individuals would need to face the difficulty that not everyone is directly harmed by any given instance of CAH. "[A] hermit in a cave who hears about [a massacre] but is totally unaffected by it acts as a falsifier against [the proposition] that every human-being" would be harmed.[33] This problem would be avoided by taking humanity as a "*grand-être*". Humanity in this sense would have a conscience and interests of its own and, as a result, may be harmed in the relevant sense he advocates. To speak about humanity in these terms, McLeod notes, is in fact less controversial than might initially seem. We regularly ascribe properties or interests to many groups, including corporations, universities, and states. The basic insight here is the plausible position of accepting "the irreducibility of our everyday discourse about groups to the individuals who compose them."[34] This "*grand-être*" is, therefore, the entity which is directly harmed by CAH.

Interestingly, McLeod's argument rests on the claim that this damage to humanity as a "*grand-être*" also damages individuals themselves, though as a "secondary" or "residual" sort of damage. This idea, he submits, is plausible enough with respect to other groups: "[w]hen an injury befalls my nation, an injury befalls me".[35] Similarly, he argues, individuals "partake in and identify with human-kind" in this collective sense. As a result, "citizens of the UK would be damaged in significant numbers by a crime against humanity half a world away because of the damage this act inflicts upon human-kind, and this itself merits UK intervention."[36] Interestingly, McLeod submits that this is not

31 McLeod, *supra* note 7, p. 299.
32 *Ibid.*, p. 293.
33 *Ibid.*, p. 295.
34 *Ibid.*, p. 296.
35 *Ibid.*, p. 300.
36 *Ibid.*

because violence can spread across national borders but, rather, because "violence abroad, when severe enough, *just is* violence at home."[37] This would provide individual states with a "reason to practice intervention in times of gross misconduct by a state on its own people", on the basis of the principles of passive personality or protection, that is on the nationality of the victim or the sovereign interests of the state.[38]

Each of the two steps in the argument faces important difficulties. First, even if one accepts that humanity can be portrayed as a "*grand-être*", and that as such it may have interests of its own, one could doubt that McLeod has shown exactly which of its interests warrants conferring upon third-party states the right to prosecute and punish perpetrators of CAH. That is, he suggests that the relevant interests of human-kind are an interest "in retaining an undiminished status, and an interest in the international order being secure."[39] Now, the former interest would not only need a full explanation of what this status amounts to but, critically perhaps, how CAH diminish it. After all, it seems somewhat artificial to claim that the criminal rule prohibiting murder or rape as part of a widespread or systematic attack against a civilian population essentially protects humanity's status and not individuals' basic rights. Similarly, we could discard McLeod's resort to human-kind's "interests in maintaining a stable, morally reputable, and culturally varied international community".[40] In fact, this latter interest makes this account purely contingent, as arguably many CAH which do not cross national borders do not obviously challenge the security of the international order. Suddenly this theory of CAH may have turned into a theory of war crimes or of crimes against peace, and therefore would miss what it was critical about it, i.e., that it would allow us to identify CAH or at least refine our thinking and use of the term.[41]

Second, I am not persuaded that the residual harm done to third-party state individuals by CAH is compatible with the basic notion of harm he defends. From a psychological point of view, it seems clear that neither individuals nor states consider *themselves* harmed in any relevant way by a CAH being perpetrated at the other end of the world. This is eloquently shown by the fact that neither the passive personality principle nor the principle of protection have been invoked to ground extraterritorial jurisdiction over CAH, and that such invocation would probably meet with resistance. This position faces the

37 *Ibid.* Emphasis in the original.

38 *Ibid.*, pp. 299 and 301.

39 *Ibid.*, p. 294.

40 *Ibid.*, p. 298.

41 McLeod, *supra* note 7, p. 288.

additional difficulty of defining the interests of individuals without giving any consideration whatsoever to what they perceive as their interest.[42] Finally, I am unsure about the way in which the position of these individuals abroad would be any different from that of the hermit McLeod uses to criticize the more individualistic conception of humanity.

In sum, then, it is not obvious that the different conceptions of 'humanity' identified by Luban and McLeod would allow us to either explain why extraterritorial criminal jurisdiction over CAH must be conferred upon third-parties, or distinguish them from domestic offences.

4 The "International Harm Principle" and the Group-based Character of CAH

The Larry May book-length treatment of CAH is perhaps one of the most ambitious attempts to explore the different philosophical issues they raise. A central strength of his account is that he correctly discerns that any plausible theory of CAH would need to justify the imposition of legal punishment not only to the political community in which the offence has been perpetrated, but also to the perpetrator herself. May therefore offers a two-step account of CAH: CAH are those which violate both the 'security principle' and the 'international harm principle'. The 'security principle' is violated when a given state deprives its subjects of physical security or subsistence, or is unable or unwilling to protect them from harms to their security or subsistence. It follows from it that such State would forfeit its immunity against a foreign body interfering by prosecuting those responsible for such crimes.[43] The 'international harm principle', in turn, is violated when one of the following two (ideally both) conditions are met: "either the individual is harmed because of that's person group membership or other non-individualized characteristic, or the harm occurs due to the involvement of a group such as the State."[44] May suggests that this principle justifies the infringement to the liberty of individuals that comes from criminal trials.[45] In this section I argue that ultimately May fails to provide a convincing account of CAH, at least one that can consistently explain what he presents as its two key normative

42 On this *see*, Cecile Fabre, *Whose Body Is it Anyway? Justice and the Integrity of the Person* (Oxford: Oxford University Press, 2006), p. 17.

43 May, *supra* note 16, p. 68.

44 *Ibid.,* p. 83.

45 *Ibid.*, p. 70.

implications. To assess this proposition we need to consider each of his arguments in some detail.

We may start with the security principle. Much in the same way Luban argued before him, May submits that when security forces or state officials in a given state perpetrate acts of mass violence against part of its population, that state would lack the right against other parties interfering in its internal affairs by, in particular, punishing the perpetrators. As I argued in response to Luban, this type of consideration is ultimately analogous to an individual other-defense situation. As a result, it seems to entail recognizing third-parties a right to intervene in order to rescue those individuals but not, or not yet, a right to punish the perpetrators.[46] So we are left exactly where we started, namely, with the need to provide a rationale for conferring upon some extraterritorial state or international tribunal the *power to punish* offenders for CAH.

It may be that this is precisely the normative work the international harm principle performs. As indicated above, the international harm principle is aimed at justifying to the perpetrator the imposition of legal punishment upon her, and is based either on the group-based character of the perpetrator or on the group-based character of the victim of CAH (ideally both). May defends the international harm principle on two set of discrete considerations. First, he argues that:

> [w]hen a harm is systematic and it is carried out by a State or State-like entity, there are likely to be other people who will be victimized on the basis of the characteristics picked out by the plan since the harms being planned are aimed at more than a single individual. The international community then would have a legitimate basis for intervention so as to *protect the larger community also likely to be harmed by the plan*.[47]

This argument stands on the interests of potential victims in being protected from the attack. Again the structure of the argument is analogous to an other-defence situation, so unless May wants to rely on deterrence or incapacitation as general justifying aims of legal punishment, he would have difficulties justifying before the offender the infliction of legal punishment upon him once the attack has ended. Furthermore, in so far as this argument is based on

46 *See* text accompanying *supra* notes 27 and 28. May is consistent here. He conceives of a state's sovereign right to non-interference in terms of first-order Hohfeldian incidents. However, this failure to distinguish first and second order incidents obscures significant features of the right to punish.

47 May, *supra* note 16, p. 88. Emphasis added.

399 the interest of potential victims of the attack, it does not explain conferring the
400 power to punish the perpetrators to authorities representing humanity as
401 such. Namely, if CAH committed in Argentina risk affecting potential victims in
402 Chile, Uruguay or other Latin-American countries, as the Plan Condor did, this
403 may well explain Chile and Uruguay's power to punish individuals responsible
404 for such crimes. But it does not, or not yet, explain conferring upon, say,
405 Australia the power to do so.[48] And this is precisely what it means to claim they
406 constitute CAH.
407 Second, what makes CAH international offences is that they are committed
408 against individuals on grounds of their membership of a group or population.
409 In May's words, "[h]umanity is implicated, and in a sense victimized, when the
410 sufferer merely stands in for larger segments of the population who are not
411 treated according to individual differences …, but only according to group
412 characteristics."[49] This is because this type of offence is "individuality-
413 denying". All human beings have "interests that people be treated primarily as
414 fellow humans rather than according to their subgroup affiliations."[50] The cru-
415 cial link is between the group-based character of the victims and the notion of
416 harm to humanity. Ultimately, it is the claim that international crimes harm
417 humanity that accounts for their specific jurisdictional regime.[51] This link,
418 however, is difficult to establish. The underlying rationale behind these claims
419 would be that these crimes could happen to people for reasons that are beyond
420 their control. But that someone is assaulted because she is tall, or short, or
421 pretty does not seem to constitute a sufficient reason for triggering the extra-
422 territorial prosecution of her attacker. Conversely, the argument seems unable
423 to accommodate a situation in which the victim is attacked for belonging to a
424 particular political party, or professing a certain religion (things she would
425 eventually be able to change).
426 Ultimately, as Massimo Renzo argues, the main shortcoming of this
427 approach is not "the answer it provides to the question of what kind of crimes
428 can be said to harm humanity, but … the very assumption that an adequate
429 account of crimes against humanity will have to be given by answering this

48 It may argued that CAH would also cross borders in the sense that they would very likely cause large numbers of refugees and asylum seekers arriving in neighbour states. Given that May is hereby talking about the group-based character of the victim, this kind of consequence for individuals in neighbour states seems not the kind consideration he has in mind.

49 May, *supra* note 16, pp. 85–86.

50 Larry May, 'Humanity, International Crime, and the Rights of Defendants (Reply to my critics)', *Ethics & International Affairs* 20(3) (2006), p. 374.

51 Ibid., p. 376.

question."[52] The harm principle has been plausibly described as a normative requirement that "conduct should be criminalized only if it is harmful."[53] Its function is therefore to set a limit to what conduct should be criminalized. Regardless of the intrinsic merits of such an approach, the issue at stake with CAH does not seem to be whether they should be criminalized at all but, rather, who should have the power to do so. To that extent, its invocation in this context seems somewhat misplaced.

5 Relational Conceptions of CAH

Antony Duff has developed one of the leading accounts of domestic criminal law available in the contemporary literature. More recently, he has also put forward a theoretical account of international criminal law which revolves around the notion of humanity.[54] Although his is not strictly a theory of CAH, it informs well the more loose understanding of them as roughly equivalent to international crimes. Duff puts forward what he has termed a relational account of responsibility: "there must be some relationship between B who calls and A who is called that gives B the right or the standing thus to call A [to account]: some relationship that makes A's alleged wrongdoing B's business, and that entitles B to make this demand."[55]

This fits well with the way in which we see responsibility in extralegal contexts. That is, as a university teacher, there are only certain bodies or individuals who can call Sam into account if, say, he delivers an ill-prepared lecture. He will not be accountable to "a passing stranger, or to [his] aunt, … or to the Pope".[56] Similarly, an offender is not just responsible for having committed X, she is responsible for X *to Y*, or better, she is responsible *as W* for X *to Y*. Thus, in the case of a single murder, or any other type of domestic offence,

52 Massimo Renzo, 'A Criticism of the International Harm Principle', *Criminal Law and Philosophy* 4(3) (2010), p. 278.

53 *See* Hamish Stewart, 'The Limits of the Harm Principle', *Criminal Law and Philosophy* 4, no.1 (2010), pp. 17–35.

54 For a detailed discussion of Duff's account, *see* Alejandro Chehtman, 'Citizenship v Territoriality: Explaining the Scope of the Criminal Law' *NCLR* Vol. 13(2), pp. 427–448, from where I draw here.

55 Antony Duff, 'Responsibility, Citizenship, and Criminal Law', in R.A. Duff & Stuart P. Green (eds.), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), p. 132.

56 Antony Duff, 'Criminal Responsibility, Municipal and International' (unpublished manuscript: 2006, cited with permission from the author), p. 5.

an individual would be responsible as a citizen to her political community. Domestic criminal responsibility is thereby grounded on citizenship.[57] By contrast, CAH are precisely those wrongs over which an individual is responsible not as a citizen to the particular political community to which he belongs, but rather simply *as a moral agent* and *to the whole of humanity*.[58] Duff rejects any suggestion that these offences harm or victimize humanity "as a whole".[59] This position, he contends, is too artificial. Rather, his account relies on the following analogy: in the same way we say that crimes are public wrongs, i.e., that they are kinds of wrongs that *properly concern* the political community as a whole, international offences such as CAH are wrongs that *properly concern* the whole of humanity as a whole.[60]

As I have argued elsewhere, however, this is a bit too quick.[61] First, this analogy controversially assumes that the reasons why a single homicide is the business of the political community to which an offender belongs are clear enough.[62] Furthermore, Duff assumes that these reasons similarly explain (by analogy) why CAH are the business of humanity as a whole. I am not persuaded that Duff can explain the former issue convincingly.[63] Yet this latter proposition seems to me even more mysterious. Duff admits that we should not try to portray humanity as a *political* community.[64] Rather, he presents humanity for these purposes as a *moral* community. Still, he claims that these wrongs are everyone's business "simply in virtue of our shared humanity with their victims (and with their perpetrators)".[65] Yet this proposition creates internal consistency problems within his framework. For one, if we accept that we all belong to "that broadest of human

57 Antony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (London: Hart Publishing, 2007).

58 Duff, *supra* note 56, p. 21.

59 *Ibid.*

60 *Ibid.*, p. 22; emphasis added.

61 Chehtman, *supra* note 54.

62 For doubts, s*ee*, eg, Mike Redmayne, 'Theorizing the Criminal Trial', *New Criminal Law Review* 12 (2009), p. 287.

63 Elsewhere, I have argued that Duff's citizenship-based account faces difficulties in explaining, for example, a state's right to punish foreigners who perpetrate an offence on its territory (*see* Alejandro Chehtman, 'The Extraterritorial Scope of the Right to Punish', 29(2) *Law & Philosophy* (2010) 127–157). I cannot pursue this issue here.

64 R.A. Duff, 'Authority and Responsibility in International Criminal Law', Section 3 in Samantha Besson & John Tasioulas (eds.), *Philosophy of International Law* (Oxford: Oxford University Press, 2010).

65 Duff, *supra* note 56, p. 22.

communities",[66] then one may wonder what is precisely the normative work that *belonging* to a particular political community – whatever that community may be – does in his explanation of domestic offences. Second, even if we accept that we all share our human condition, the question subsists of how that makes it *every state's* business to call an offender to account for CAH. This, Duff does not explain and this is, I suspect, precisely what he would need to explain.

Massimo Renzo has provided an account which addresses this point explicitly, though in a way which radically modifies Duff's project. By doing so, Renzo seems to confirm that it is not obvious that Duff's relational account can explain the distinction between domestic crimes and CAH in an intuitively plausible manner–or at least one that roughly follows contemporary legal practice. Renzo fully endorses Duff's relational conception of responsibility and the claim that for certain wrongs we may be answerable as moral agents to humanity at large.[67] Yet, he largely expands the kind of wrong for which an individual may incur in this type of responsibility. In short, he characterizes CAH as wrongs which show "a lack of respect and concern that we [individuals] owe to our fellow human beings qua human beings."[68] On these grounds, he distinguishes wrongs such as murder or rape from other wrongs such as theft, which he claims violate duties individuals owe only to other citizens as fellow citizens.[69]

Renzo accounts for this distinction by reference to the idea of human rights. Unlike rights individuals have by virtue of their membership in a political community, human rights are the kind of moral rights human beings have "as such", that is, irrespective of "where they live, … what their social or economic condition, is, and … whether these rights are included in the constitution of their state."[70] Violations of human rights deny that their victims have the status of human beings. This makes every serious violation of a basic human right a CAH in the sense that it is answerable not only to our fellow citizens, but also to all human beings *qua human beings*.[71]

Admittedly, Renzo seeks to somewhat limit his radical proposal. He suggests that the argument he advocates "requires expanding the scope of our current notion of international crimes to include individual cases of murder

66 *Ibid.*, p. 21.

67 Renzo, 'Responsibility and Answerability in Criminal Law', in A. Duff et al. (eds.), *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013), p. 213.

68 *Ibid.*, p. 226.

69 *Ibid.*

70 Renzo, *supra* note 16, p. 450.

71 *Ibid.*, p. 449.

or rape but does not commit us to the implausible position that *every* individual case of murder or rape should be punished by an international court."[72] By contrast, he claims that there are pragmatic and principled reasons why we should give priority to domestic courts. For one, the national courts are usually better placed to investigate and prosecute crimes perpetrated in their state's territory.[73] Second, "states' sovereignty plays a crucial role in determining the structure of political life both at the national and the international level, and therefore ought to be respected whenever possible."[74] And finally, he contends that even though an individual who is responsible for a homicide is accountable to the whole of humanity, his political community has a "stronger claim" to call him to account.[75] Renzo illustrates his overall approach by reference to the "case of an Italian citizen who committed a sex-crime in Thailand and then flees to France."[76] He argues that while under current legal arrangements France would have to extradite him to Thailand or Italy, his approach would provide France a right to prosecute and punish him directly.

A first thing to note is that Renzo not only proposes an account which radically challenges our contemporary conception of CAH. Under almost all other accounts a single act of murder or rape would not count as a CAH, and most legal theorists and international law scholars would consider this suggestion simply implausible.[77] But Renzo seems to be endorsing a radically revised understanding of human rights too. First, because he flatly rejects that the right to property qualifies as a human right, something which goes against standard international human rights law and practice.[78] But also, because he considers a single act of murder, rape or assault as a violation of human rights, irrespective of who is responsible for it and what is the attitude of the State in which it takes place. This further claim is also deeply controversial in the contemporary literature. Although violations by non-state actors have increasingly been accepted as human rights violations, the kind of wrong Renzo has

72 Renzo, *supra* note 67, p. 223.

73 Renzo, *supra* note 16, p. 464.

74 *Ibid*., p. 468.

75 *Ibid*., p. 472. For this proposition, however, he does not provide an argument.

76 *Ibid*., p. 474.

77 A notable exception here would be Michael Moore, *Placing Blame: A Theory of Criminal Law* (Oxford: Clarendon Press, 1997).

78 *See*, e.g., Art. 17 of the Universal Declaration of Human Rights; Art. 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Paris, 20. III.1952); Art. 21 of the American Convention on Human Rights; and Art.14 of the African Charter on Human and Peoples' Rights, (adopted June 27, 1981).

in mind has certainly not.[79] These considerations might not be fatal to his conception, but they certainly undermine its plausibility vis-à-vis our contemporary understanding of these basic concepts.

More importantly, it is unclear to me what makes it the business of the French (or for that purpose the Brazilian, the Canadian or the Japanese) to punish the Italian offender for his sex-offence in Thailand. To say that it is of concern to them seems to me empirically false. We may feel empathy with any victim in the same way we would, should the crime be committed in our own city, or country. But that does not obviously make it *our* business to censure the perpetrator under a relational account of responsibility. Renzo could claim that the fact that "it is of concern to us" works not as an empirical, but as a normative proposition, i.e., one based on the respect and concern that individuals owe to each other as fellow human beings. But this further proposition is blatantly underargued.[80] We may readily admit that we all share with the Thai victim a basic human quality that has been denied by the perpetrator of the offence. But he would need a further argument that explains why we all have an interest in perpetrators of this kind of wrong be punished that suffices to justify our State, or better, every State having the right to do so, and what interest that would be. Put differently, the problem seems to be that Renzo's account is unconnected to the normative considerations (i.e., the reasons) that would justify anyone holding the moral right to prosecute and punish any given wrongdoer. Furthermore, insofar as he does not take this issue seriously enough, one could claim that his account seems to take too lightly the normative force of self-government as the main normative claim underpinning the shape and scope of domestic systems of criminal law. In the next section I defend a conception of CAH which is particularly sensitive to these concerns.

6 A Jurisdictional Theory of CAH[81]

In this last section I introduce my own account of CAH. The critical move I advocate is looking in greater detail to the reasons we may have for punishing wrongdoers. Justifications of legal punishment are notoriously complex and an adequate examination of the relevant arguments is far beyond the scope of

79 *See*, e.g., Andrew Clapham, 'Human rights obligations of non-state actors in conflict situations', IRRC 88(863) (2006), pp. 504–505.

80 I am grateful to Massimo Renzo for drawing my attention to this distinction.

81 This section is heavily based on my own account of international crimes as presented in Chehtman, *supra* note 27, Chapter 4.

this article.[82] For present purposes let me succinctly present the justification for legal punishment on which I rely for my account of CAH.[83] I submit that a state's Hohfeldian power to punish wrongdoers is justified by the (collective) interest of individuals in that state in there being a system of criminal law in force. This claim is based on the assumption that having a system of criminal law in force constitutes a public good that benefits the individuals that live under it in a certain way. In particular, I suggest that it contributes to their sense of dignity and security.[84] This is an empirical claim that will have to be taken at face value here. By contrast, the conceptual link between the system being in force and the need to punish offenders needs to be further elucidated. It has been standardly argued that a system of criminal law is in force if and only if both those subject to it and external observers have reasons to believe so.[85] For this to obtain, at least two conditions must be met: i) those who violate these criminal rules should be punished for their violation; and ii) this punishment ought to be meted out by a body expressly authorized by *that* legal system. These conditions explain why this collective interest entails both a power to punish offenders and why this power should be held by a given court authorized by a particular legal system (that is, that which claims to be binding). To sum up, I assume that the collective interest individuals have in this system being in force, i.e., binding on them, is sufficiently important to grant a state a right to punish those who violate these rules.

This explanation easily accounts for states having the power to punish offences committed on their own territory: for the criminal rule against murder to be in force on state X, X should have the power to punish those who violate this rule, and as a matter of fact it should enforce this rule. By contrast, there are certain criminal rules that cannot be in force on the territory of X unless at least some extraterritorial authority holds a concurrent power to punish those who violate them. These rules are, in a nutshell, international offences of which CAH are, perhaps, the archetypical example. Consider, for

82 I have argued elsewhere that most consequentialist and deontological justifications for legal punishment are incapable of providing a sound account regarding extraterritorial punishment. *See* Chehtman, *supra* note 63. For criticism, *see* I. Glenn Cohen, 'Circumvention Tourism', 97*Cornell Law Review* (2012) 1341.

83 I will not defend this theory here. All I may say in its favour is that it gains some support from the way in which it accounts for some of our intuitions regarding jurisdiction over CAH. For a fuller defence, *see* Chehtman, *supra* note 27, Chapters 2 and 3.

84 This argument does not rely on the proposition that a state's right to punish offenders is grounded on an *increase* in the sense of dignity and security that individuals enjoy in a particular society.

85 *See* Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999), p. 171.

instance, acts of torture as part of a widespread or systematic attack on any given population.[86] Plausibly, whenever this type of act is perpetrated in X, it will be necessarily the case that X is either responsible for perpetrating, instigating or allowing them, or simply unable to do anything about them. As a result, the fact that X criminalizes this kind of acts cannot really contribute to the sense of dignity and security of individuals in X. Put differently, the criminal prohibition of these acts can never rest on the exclusive authority of the territorial state. Rather, it must rest (also) on the authority of international criminal law and the adjudicatory mechanisms of some extraterritorial judicial body.

This claim may be illustrated by reference to the last Argentinean dictatorship. As it is well documented, the military had significant leeway to kidnap individuals, torture them, and in most cases make them disappear.[87] Individuals living in that context knew that there was nothing, not even the local criminal law or their law enforcement agencies that would warrant their fundamental rights should a military squad knock on their door. There was no recourse to the police, no hope of being rescued. These squads were not, in any meaningful sense, bound by a criminal prohibition against doing what they were, in fact, ordered to do as a matter of policy. In this context, individuals in Argentina could not meaningfully believe that they were protected by a criminal rule against being kidnapped, tortured and killed by state officials. If individuals in such situation are to believe that they have rights and that these rights are protected by legal norms, there must be a forum (or better, several *fora*) alternative to the courts of the local state, that should be also entitled to prosecute them under international law, and be willing to do so.

This argument readily accounts for the fact that state sovereignty is not a plausible bar against this type of penal 'interventions'. Indeed, we may accept that individuals in state X have a conflicting interest that precludes intervention, namely, their interest in X being a self-governed policy. This interest, under normal circumstances, entails a *prima facie* Hohfeldian immunity against extraterritorial authorities adjudicating cases concerning facts

86 *See* Article 7.1. of the ICC Statute. I leave aside for the time being the requirements of them being carried out the elements of "an attack directed against any civilian population" and the "knowledge of the attack" (*ibid*) and any further qualification stemming from Art. 7.2.

87 *See* Jaime E. Malamud Goti, *Game without End: State Terror and the Politics of Justice* (Norman: University of Oklahoma Press, 1996); and Iain Guest, *Behind the Disappearances: Argentina's Dirty War against Human Rights and the United Nations*, *Pennsylvania Studies in Human Rights* (Philadelphia: University of Pennsylvania Press, 1990).

obtained (exclusively) in X. Nevertheless, I submit that the interest of individuals in X in the rules prohibiting CAH perpetrated there is sufficiently important to provide not only extraterritorial bodies the power to adjudicate on them, but also to override X's *prima facie* immunity against them doing so.[88] To illustrate, the interest of the Germans in 1941 in a foreign body not punishing Goebbels for acts of widespread and systematic murder on German soil is insufficiently important to warrant conferring upon Germany an immunity against a foreign body punishing him. This is because the interests of, for instance, the German Jews and other persecuted minorities in such a criminal rule being in force in Germany is clearly more important than the interest of their Aryan co-nationals in being left alone.

Furthermore, in assessing these two *prima facie* rights, i.e., the power to punish and the immunity not to have punishment administered on a polity's territory, one would have to take into consideration the interests of individuals outside state X. The interest in those criminal prohibitions being in force is shared by individuals in all of those states where CAH are being or have recently been perpetrated. They too have a fundamental interest in the criminal rules that provide for these offences being in force, as this contributes to *their* sense of dignity and security. The fact that an offender is punished, for her offence perpetrated in state X, by an authority expressly authorized by the international legal system would not only ground the belief in that such a criminal rule is in force in X, but also on states Y, Z and so on.

Finally, this account also explains the precise role that moral heinousness has in distinguish CAH from other offences perpetrated on a widespread or systematic scale. In short, widespread or systematic traffic violations or bicycle theft perpetrated on X do not amount, under the scheme advocated, to CAH. The reason for this is precisely that the interest of individuals in X being a self-governed state is more important than their interest in traffic regulations being binding on particular groups of individuals. Only acts which violate fundamental rights such as the right not to be tortured, killed, raped, etc. would override such an important interest.

It may be clear now that the crucial feature of CAH as international offences is explained neither simply by their moral enormity, nor merely by the *locus* of their commission, the group-based character of their perpetrators or their

88 A conceptual clarification is in order here. On the basis of the correlativity thesis, to claim that X lacks this immunity means that some extraterritorial authority would hold the power to punish. On the correlativity between a liability and a power *see* Matthew Kramer, 'Rights Without Trimmings', in M. Kramer et al. (eds.), *A Debate over Rights* (Oxford: Oxford University Press, 1998).

victims. They need not rely either on the fiction that they harm or violate humanity itself. Rather, the reason why CAH are international rather than municipal offences relies on the interest that normally explains the state's *power to punish* municipal crimes.[89]

7 Conclusion

This article provides a concise analysis of some of the main contemporary philosophical approaches concerned with the notion of CAH. This body of literature, which has been developed somewhat recently, can provide critical insights into the conceptual and normative issues raised by this notion. I have strived to show what the main limitations of the accounts examined above are. But it is also clear that there are perhaps many more strengths than weaknesses in them. In particular, I have sought to show the different ways in which we can approach the main philosophical questions underlying the notion of CAH. Most centrally, from the arguments examined, it is increasingly clear what those philosophical questions precisely are. That is, even though we may not agree with many or all of the answers to them, I think we may be confident that at least we got the questions right.

89 For interesting criticism to this position, *see* Guyora Binder, 'Authority to Proscribe and Punish International Crimes', *University of Toronto Law Journal* 63(2) (2013) 310–326. Unfortunately, I cannot address his criticisms here.