Crimes against humanity

Birth of a concept

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Introduction

The idea of crimes against humanity was born, formally speaking, at the end of the Second World War. It was one of three classes of offence – the other two being crimes against peace and war crimes – in the London Charter signed by the Allied Powers on 8 August 1945, and it made up Count Four of the indictment of Nazi leaders and officials before the International Military Tribunal at Nuremberg. This much is a matter of generally agreed fact. Much else about the idea, however, is contested. It is a site of uncertain meanings and of disagreement over a number of important issues of substance.

The central, and narrow, purpose of the work which follows is to chart a way through these uncertainties and differences with a view to arriving at a concept of crimes against humanity that may be, I hope, at once clear and compelling. A broader, secondary purpose is to integrate the concept within the old meliorative perspective of the movement for a better world: a world come closer to being morally tolerable, because decently liveable in for the generality of its inhabitants. This aspiration is considered in light of the effort to create an international juridical framework for outlawing the more atrocious kinds of crime and holding those who commit them to account.

What is a crime against humanity? In the literature which has accumulated about this during more than half a century, it has become a commonplace that the content and boundaries of the idea have been imprecise. They were so from the very beginning. Hannah Arendt was reflecting a common view when she wrote that the judges at Nuremberg had left the new crime in a 'tantalizing state of ambiguity'.[1] Its subsequent evolution, too, 'has not been orderly',[2] as is not altogether surprising for what began life as a concept in customary law. There is a wide scholarly consensus about the resulting state of affairs. 'While crimes against humanity are clearly enshrined today in customary international law,' one commentator has said, 'their precise definition is not free of doubt'.[3] 'The scope of crimes against humanity', writes another, 'is difficult to determine precisely'.[4] Yet others speak of the term as 'shrouded in ambiguity', its definition as 'notoriously elusive', a situation of 'chronic definitional confusion'.[5] What I undertake here is, accordingly, an exercise

1 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, London 1977, p. 257; and cf. Roger S. Clark, 'Crimes Against Humanity at Nuremberg', in George Ginsburgs and V. N. Kundriavtsev (eds.), *The Nuremberg Trial and International Law*, Kluwer Law International, The Hague 1990, 177–99, at p. 198, and Elisabeth Zoller, 'La Définition des Crimes Contre l'Humanité', *Journal du Droit International* 120 (1993), 549–68, at p. 551.

2 Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference', *American Journal of International Law* 93 (1999), 43–57, at p. 44.

3 Yoram Dinstein, 'Crimes Against Humanity', in Jerzy Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, Kluwer Law International, The Hague 1996, 891–908, at p. 908.

4 Phyllis Hwang, 'Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court', *Fordham International Law Journal* 22 (1998), 457–504, at p. 487.

5 In turn: Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Journal* 100

in clarification. It can only effectively be that, however, by being at the same time an essay in reconstruction. This is because, attempting to eliminate imprecisions or obscurities where they exist, and coming down on one side or another – or at any rate somewhere – on matters of disagreement, one is unlikely to finish up with a conceptualization exactly matching those already available. But there is more to it. Some need for reconstruction arises also from the relation between crimes against humanity as a concept in international law and the wider environment of moral and philosophical thinking within which it is located.

Where, as an emergent norm or set of norms in customary international law, the offence of crimes against humanity developed in a haphazard, sometimes inconsistent way, a drawing of the contours of a putatively *ideal* theoretical concept will hope to iron out the incoherences it finds. Law has its own temporality and pattern of growth. Its formulation and codification impose their own particular demands. The points of view of 'the sphere of morals and logic', it has been said, 'are not readily paraphrased through a general formula expressed in legal terms'.[6] On the other hand, law is always situated within a broader ethical and cultural milieu. 'A truly realistic analysis of the law', as one scholar has written, 'shows

(1991), 2537–615, at p. 2585; Margaret McAuliffe deGuzman, 'The Road from Rome: The Developing Law of Crimes Against Humanity', *Human Rights Quarterly* 22 (2000), 335–403, at p. 336; Beth Van Schaack, 'The Definition of Crimes Against Humanity: Resolving the Incoherence', *Columbia Journal of Transnational Law* 37 (1999), 787–850, at pp. 790–1.

[6] Bing Bing Jia, 'The Differing Concepts of War Crimes and Crimes Against Humanity in International Criminal Law', in Guy S. Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie*, Clarendon Press, Oxford 1999, pp. 243–71, at p. 249; and cf. Richard Vernon, 'What is Crime against Humanity?', *Journal of Political Philosophy* 10 (2002), 231–49, at pp. 232–3.

us that every positive order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis'.[7] If this is so, then in appraising the juridical concept of crimes against humanity an exploration of what its moral presuppositions might be is clearly relevant.

The present essay is intended as a work, not in legal theory, in which I do not have the necessary competence, but in political philosophy. My focus will be on the logic of the ethical conception, on the normative and other philosophical assumptions, underlying the offence in law of crimes against humanity. I shall be trying to domesticate this concept within the domain of political thought, and by doing this to clarify it for a wider audience. For in a large and still growing literature about it, the contribution of political philosophers has so far been relatively sparse, the main input having been from writers with an expertise in international law. I do not, for my own part, bypass either the legal concept of crimes against humanity or the specialized literature that deals with it. On the contrary, I rely heavily on this literature and I track the concept's emergence and development within international law as the basis for my attempted reconstruction. Indeed, in one respect I concede to the specific requirements of that law over what strike me as the demands of a more consistent theoretical logic, proposing (in Chapter 3) alongside a 'pure' concept of crimes against humanity a more practical, or state-of-play, concept – one for the political and legal environment as it stands. It is nevertheless the moral and philosophical grounding of the idea that will be my principal concern in the pages that follow.

There is a justification for this approach in what are generally given as being the sources of international law itself.

[7] Alfred von Verdross, 'Forbidden Treaties in International Law', *American Journal of International Law* 31 (1937), 571–7, at p. 576.

Enumerated in Article 38 (1) of the Statute of the International Court of Justice, these sources are: international conventions; international custom; the general principles of law recognized by civilized nations; and – as 'subsidiary means for the determination of rules of law' – judicial decisions and 'the teachings of the most highly qualified publicists'. The latter rubric has been interpreted as being 'synonymous with scholarly work, with a correspondingly greater deference to leading authorities in a field'; or as meaning 'the doctrines developed by the most recognized legal scholars'.[8] I do not pretend to any such authority or recognition in an area to which I am myself quite new. All the same, the treatment of doctrine and the opinion of authoritative commentators as a recognized source of law, albeit a subsidiary one, formalizes in the sphere of international law an understanding of the law's relation to the wider legal and moral culture within which it develops. If the analysis offered here can make a modest, even oblique, contribution to the specialized legal literature on crimes against humanity, that will be contribution and satisfaction enough from my own point of view. The same goes for it as an essay in political theory.

The structure of the work is this. In Chapter 1, I sketch something of the prehistory of the idea of crimes against humanity up to the end of the Second World War, its official emergence in the Nuremberg Charter and Trial, and some further landmarks in its development. The chapter is essentially preparatory; it may be seen as laying out the raw materials for the conceptual analysis and argument to follow.

[8] Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford University Press, Oxford 2001, pp. 17–18; and M. Cherif Bassiouni, 'International Law and the Holocaust', *California Western International Law Journal* 9 (1979), 201–305, at p. 218. The text of the Statute can be found at http://www.icj-cij.org.

At the same time as registering some basic facts in the history of a new legal concept, this first chapter raises a question to which it does not provide the answer. For it introduces an idea fundamental to the offence of crimes against humanity – namely, that states are not above all law in the way they treat those under their jurisdiction – without explaining in virtue of what they are held to be so constrained by a 'higher' law.

Chapter 2 then seeks to answer this question by analysing the meaning of the claim that there are crimes that are said to be against *humanity*. That meaning is not transparently obvious, and the chapter examines the several ways in which it has been construed. I put forward an adjudication between them – an argument as to which of the construals proffered are the most compelling. I propose, in doing so, that if such crimes can intelligibly be spoken of as crimes against humanity, it is in part because of the premise that there are fundamental human rights.

In Chapter 3 the logical consequences of this conceptual underpinning are explored. I try to resolve the issue, signalled at the end of the previous chapter, of how to distinguish between crimes against humanity under international law and ordinary crimes under domestic law. I here consider the most important features that have been argued to be – and not to be – defining jurisdictional requirements of the offence of crimes against humanity: discussing the connection with war, the idea of a crime of state, the would-be requirement of a discriminatory component, the need for a threshold of scale and, throughout, the relation between crimes against humanity and basic human rights. With respect to these several features I propose a conceptualization of the offence of crimes against humanity that is consonant with the reading of 'against humanity' given in Chapter 2. I show, as well, that an important problem remains within current crimes-

against-humanity law – a contradiction, indeed, between the human-rights basis of this law and the threshold of scale that is standardly held to apply to the definition of the offence. I suggest a way of handling the contradiction.

Together Chapters 2 and 3 make up the core of my case for a reconstructed concept of crimes against humanity.

In Chapter 4, I go on to consider the relation between crimes against humanity and the idea of humanitarian intervention, and I ask, more specifically, if there is a right of humanitarian intervention. The idea of humanitarian intervention is an integral part of the intellectual and legal prehistory of the concept of crimes against humanity, and that is one reason for discussing it here. But a second reason for doing so is that it is a source of much political controversy today, and the questions that are in dispute about it are closely related to the purposes of crimes-against-humanity law.

Chapter 5, finally, looks at a number of issues connected with the state of international humanitarian law as it has evolved to this point, and the prospects of its further development. After considering whether international law is, properly speaking, law, I explore the problem of political agency – that is to say, of how the achievement of a juridical regime targeting crimes against humanity is to be taken forward. To this end I discuss, in turn, the sort of global community presupposed by such a regime, the nature of the movement needed to bring it about, and the political ethics suitable to such a movement. The chapter – its concern the ambition 'to transform international morality into a revolutionary legality'[9] – may be seen as a conclusion that matches the book's opening: having begun with the

[9] Yogesh K. Tyagi, 'The Concept of Humanitarian Intervention Revisited', *Michigan Journal of International Law* 16 (1995), 883–910, at p. 887.

prehistory of the offence of crimes against humanity, I end by looking at the global movement to strengthen the framework of crimes-against-humanity law in the future.

A review article, in which I discuss Larry May's book, *Crimes Against Humanity: A Normative Account*, is appended at the end of the volume, as being relevant to the argument of Chapter 3.

The literature about crimes against humanity is by now a large one. Much of it, however, is specialized – the work of international lawyers and scholars of international law. There is little on the subject by political theorists, and little in the way of general commentary for a non-academic readership. My aim in this book is to examine the concept of crimes against humanity in the light of the traditions and methods of the moral and political philosopher, and thereby to make it more accessible to a general audience. For although the term 'crimes against humanity' is now in common use in political debate, many of those who use it appear not to know much about the origins of the offence in international law, its subsequent development, the principles most commonly invoked to justify the notion, and the limits within which they are held to do so. I have tried therefore to give an account of all this in a clear and economical way, beginning with the history, moving on from that to conceptual justifications and some incoherences (which I attempt to resolve), and investigating, finally, how the concept of crimes against humanity relates to some contemporary political debates. My hope is that, by making such matters more accessible, this short book may bring a vital set of normative concerns to a wider audience and so contribute to the movement for a more just and law-governed world.

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or arguments I make. My primary support, as always, has been from Adèle and our daughters Sophie and Jenny. I dedicate this book to them.

Manchester, May 2010

Contents

1

Origins and development

It is an important principle of the rule of law that there is no crime except under law, that is, except when an action is in breach of some obligatory norm passed or recognized as being one by the body or bodies with proper authority so to pass or recognize it. Most generally this has meant that crimes are crimes under one or another system of municipal law and, since the origin of the modern state, that the definition and the punishment of crime have been seen as being the business of the sovereign authority of the state. It is not a new idea, all the same, that there exist higher, or prior, normative principles limiting the scope of what any sovereign polity may itself lay down or do, principles which even it, and its agents and functionaries, can be in breach of. As Geoffrey Best has written, 'In however unspecific a form, the notion that rulers could fall below a bearable standard in the handling of their subjects was as ancient as the notion that rulers who became unbearable forfeited the right to remain in charge.'[1]

[1] Geoffrey Best, *Nuremberg and After: The Continuing History of War Crimes and Crimes Against Humanity*, University of Reading, Reading 1984, p. 13.

In the history of political thought, conceptions of natural law and natural right constitute an obvious source here, pointing as they do beyond local specificity and variety towards general principles valid for all humankind. In the textbooks of international law as well, from Grotius and Vattel onwards, the view has been widely supported that there are limits to what a sovereign authority may legitimately impose within its own domain, so underwriting an option of humanitarian intervention there, by other sovereign powers, in exceptional circumstances. These circumstances have been variously formulated: '[i]f a tyrant ... practises atrocities towards his subjects, which no just man can approve' (Grotius); 'if tyranny becomes so unbearable as to cause the Nation to rise' (Vattel); in pursuit of a 'higher policy of justice and humanity' (Harcourt); 'in behalf of a grievously oppressed people, which has never amalgamated with its oppressors as one nation' (Creasy); 'when a state ... becomes guilty of a "gross violation" of the rights of humanity' (Engelhardt); 'where the general interests of humanity are infringed by the excesses of a barbarous and despotic government' (Wheaton).[2] Speaking to the notion of crimes against humanity during the trial of the major Nazi war criminals at Nuremberg, the Chief Prosecutor for the UK, Sir Hartley Shawcross, directly referred to this tradition of argument. Though acknowledging as the general position that 'it is for the state to decide how it shall treat its own nationals', Shawcross went on to invoke the view of Grotius, among other texts and precedents, asserting:

[2] Cited in Jean-Pierre L. Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U. N. Charter', *California Western International Law Journal* 4 (1974), 203–70, at pp. 214–22.

> Yet international law has in the past made some claim that there is a limit to the omnipotence of the state and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind ... [T]he right of humanitarian intervention by war is not a novelty in international law – can intervention by judicial process then be illegal?[3]

Still, even if the universality of natural law and human rights, of justice and humanity, was well established as a theme in political thought and as a current of respected opinion in the literature of international law, until the Nuremberg Trials it had not definitively established itself as the basis of, precisely, judicial process. As Alan Finkielkraut has written, it had 'never been able to descend from the heights of theory ... for it had always collided with another founding principle of modern politics – the absolute sovereignty of the state.'[4] It was the Nuremberg Trials which marked the official birth of the concept of crimes against humanity, inaugurating its effective, its *practical*, emergence into the world of law and the law of the world. This chapter outlines some part of its prehistory and subsequent path.

[3] *Trial of the Major War Criminals before the International Military Tribunal. Nuremberg 14 November 1945–1 October 1946*, International Military Tribunal, Nuremberg 1947, Vol. 19, pp. 471–2.

[4] Alain Finkielkraut, *Remembering in Vain: The Klaus Barbie Trial and Crimes Against Humanity*, Columbia University Press, New York 1992, p. 5.

I

The first use of the term 'crimes against humanity' which I have come across occurs in a letter of 15 September 1890 from George Washington Williams to the then US Secretary of State, James G. Blaine. Williams was an African-American with a chequered career as soldier, religious minister, journalist and public speaker. He served for one term as a member of the Ohio state legislature and was the author of a well-regarded early history of black people in the USA. In 1890 he visited the Belgian Congo and wrote an open letter to Leopold II and a report to US President Harrison, detailing the conditions and practices he had witnessed there. In the open letter to Leopold II, Williams appealed to 'the Powers, which committed this infant State to your Majesty's charge ... the great States which gave it international being and whose majestic law you have scorned and trampled upon'; and he called for an international commission to investigate the charges 'preferred herein in the name of Humanity, Commerce, Constitutional Government and Christian Civilization'.[5] In his letter to Blaine a few weeks later, he wrote: 'The State of Congo is in no sense deserving your confidence or support. It is actively engaged in the slave trade and is guilty of many crimes against humanity'.[6]

The slave trade is a central reference point, too, for another early usage, this one by Robert Lansing. In an article of 1906 on the subject of world sovereignty, and affirming the genuinely legal status of the law of nations, Lansing (who was

[5] The open letter is in John Hope Franklin, *George Washington Williams: A Biography*, University of Chicago Press, Chicago 1985, pp. 243–54, quoted matter at p. 253. See also, on Williams, Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa*, Macmillan, London 2000, pp. 101–14.

[6] Cited in François Bontinck, *Aux Origines de l'Etat Indépendant du Congo: Documents Tirés d'Archives Americaines*, Nauwelaerts, Louvain and Paris 1966, p. 449.