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# Towards a Philosophical Account of Crimes Against Humanity

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## Abstract

*In this article I discuss the nature of crimes against humanity. The various definitions that have been used, or alluded to, in the legal literature are outlined, and it is suggested that they fall neatly into two camps by interpreting 'humanity' differently. It is proposed that any theory which adequately captures the nature of this crime must distinguish it qualitatively from other 'lower' crimes, and that only members of one camp can do this. I go on to argue for one particular way of treating the crime – regarding it as a crime which hurts all humanity – and recommend adopting a view under which we would regard all humanity as one entity.*

## 1 Introduction

Within political philosophy, especially that operating in the Anglo-American tradition, there has been very little consideration given to the nature of crimes against humanity. The same can be said about genocide, and indeed many other crimes referred to in international criminal law, though these offences shall not concern us here.<sup>1</sup> With a swelling of interest in international political theory, this is beginning to be redressed by some thinkers. Still, it seems, the overwhelming majority of critical attention is given to issues of humanitarian intervention and enforcement of human rights across borders, treating these subjects as floating free from the philosophically neglected offences that are their most obvious antecedents. This seems confused.

Within the disciplines of law and legal theory, far more attention is given to the subject. A large body of work on crimes against humanity has been built up by those

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<sup>1</sup> See Roth, 'Prelude: Philosophy and Genocide', in J.K. Roth (ed.), *Genocide and Human Rights: A Philosophical Guide* (2005), at p. i, xvi–xxi for a discussion of the lack of treatment of these crimes in philosophy.

working on international criminal law. Yet close inspection of this crime on a philosophical level is rarely attempted here, and this, while understandable, is regrettable for at least two reasons.

First, it means that many genuine disagreements between legal scholars go undiscussed. Different readings of ‘crimes against humanity’ are routinely employed, without acknowledgment that there is very little agreement as to the substance, and indeed whether there can be said to be a substance as distinct from the case law, of this crime. Disagreements of this sort should certainly be of interest to legal theorists and, while their relevance to legal practice may be contested, even to determine whether they *are* of practical import requires far more analytic attention to the concept than has been thus far given.<sup>2</sup>

Secondly, without close philosophic scrutiny of the nature of this crime, it seems unlikely that the goal of marrying up the legal to the moral can be met. Indeed, it seems unlikely that any stable link at all can be drawn between legal and moral without serious attention being paid to what is to constitute the specific wrong committed in these crimes. To those of us who feel that legal categories and moral categories should, in at least some way, be related, this must be considered a serious problem. But even to those without any such commitments it should be obvious that, insofar as motivational arguments are to be deployed as to why these still developing categories of crimes should be taken seriously, consensus as to the nature of the crime is extremely helpful.

It is the aim of this article to help clear the ground for a philosophical account of crimes against humanity. It attempts this, to some extent, by jumping in head first and offering a defence of perhaps the most *prima facie* controversial interpretation of the nature of the crime. In being so direct, this article makes a number of contentious assumptions and leaves many gaps. I can merely hope that in being contentious, and being most definitely an attempt to move *towards* a philosophical account of crimes against humanity, it will motivate others to think and write about the issues touched on.

The task throughout this article is that of defining and understanding crimes against humanity: the issues of the conditions for prosecution of and response to instances of these crimes will remain untackled. While it is tempting to hold that all crimes against humanity should be prosecuted (or even pre-emptively quashed), this marks a substantive position that will not be assumed here: the issue is merely that of how we best *identify* crimes against humanity. The article has the following basic structure. I first elucidate the various possible meanings of this term, arguing along the way that there is little consensus as to the term in the legal literature (section 2), and defend the project of looking for a definition of the crime (section 3). Throughout these sections, questions of the plausibility of the definitions will be left to one side. This question of

<sup>2</sup> Though we may note that the case for the practical import of philosophic scrutiny significantly bolstered by the existence of separate and dissenting judgments which seem to turn on the theoretical issues we are considering. See particularly *Prosecutor v. Erdemovic*, Separate and Dissenting Opinion of Judge Li, Case No. IT-96-22-A, Ap. Ch., 7 Oct. 1997, at para. 26, citing Schwelb, ‘Crimes against Humanity’, 23 *British Yrbk Int’l L* (1946) 178, at 195, and cited by *Prosecutor v. Tadić*, Separate Opinion of Judge Robinson, Case No. IT-94-1-Tbis-R117, Tr. Ch., 11 Nov. 1999, at 4.

plausibility is subsequently taken up (sections 4–5), when parameters for the decision between these rival accounts are suggested. I then go on to propose that one particular account holds the most promise, carrying with it not the immediate drawbacks that one might imagine (section 6) and, indeed, some benefits (section 7).

## 2 Problems of ‘Humanity’

The principal difficulty in interpreting the term ‘crime against humanity’ is the ambiguity of the word ‘humanity’. This word, of course, has two distinct meanings. It can be used to refer to the species to which we all belong: the human race, all human beings, the block of all humans. (Using this first sense, one might say ‘humanity is endangered by an oncoming asteroid’.) Yet it can also be used to refer to that thing which is common to the class of all persons, in virtue of which they are human: humane-ness, human-ness, within the spirit of being human. (Using this second sense, one might say ‘have some humanity’.) For the sake of clarity, let us label the first sense ‘human-kind’ and the second sense ‘human-nature’.

There is little or no consensus as to which of these meanings is drawn upon when we refer to crimes against humanity. Cassese, for instance, holds a view whereby humanity refers to human-nature, writing that the category of crimes against humanity ‘include[s] all acts running contrary to those basic values that are, or should be, considered inherent in any human being (in the notion, humanity did not mean “mankind” or “human race” but “the quality” or concept of human being)’.<sup>3</sup> Gaita strongly denies this, seeming at points to adopt a definition in which humanity refers to human-kind, writing that the reason a crime is said to be against humanity is ‘not, as many people – including jurists – appear to believe, because [they are] especially inhumane’.<sup>4</sup>

Though, as we shall see, the disagreement is more fine-grained than any simple distinction between human-nature and human-kind will allow for, it seems that this difference captures a basic division in how we can think about the crime. How one reads ‘humanity’ seems indicative of what one takes to be the essence of the crime: whether the specific wrong is something to do with the mass that violence is perpetrated upon (a human-kind reading) or rather that it is something to do with the evil needed by an agent to commit the act (a human-nature reading). Deciding between these options, however, requires looking more closely at how human-kind or human-nature is to be invoked in a definition. Using these terms, let us explore various possible treatments of crimes against humanity. Though it is not claimed that the seven meanings outlined here are exhaustive of what the crime could or has been taken to be, it seems to me that these are the strongest and most obvious candidates.

CAH1: an action is a crime against humanity if and only if it is an action contrary to the human-nature of the perpetrator.

<sup>3</sup> A. Cassese, *International Law* (2001), at 249.

<sup>4</sup> Gaita, ‘Refocusing Genocide: A Philosophical Responsibility’, in J.K. Roth (ed.), *Genocide and Human Rights* (2005), at 153, 163.

CAH1 claims that a certain action constitutes a crime when and only when performing the action runs counter to that thing in virtue of which he is human. This is to say, perhaps, that when a person commits a crime against humanity he performs an action that goes against his own human nature or, as is often taken to be equivalent, in a manner that is inhumane.

CAH1 has proved extremely popular among legal scholars. This meaning can be found being alluded to in any number of textbooks of international law. Cassese indicates that, although at its initial conception there was no fixed idea of what a crime against humanity could be said to be, when codified for the International Military Tribunal the crime came to refer to ‘inhuman acts’.<sup>5</sup> Schabas views an act’s status as ‘inhuman’ as important in its being a crime against humanity.<sup>6</sup> The popularity of this definition, then, is most likely to be explained by its apparent resonance with the term as used in the Nuremberg Charter, in which the offence is generally thought to have come of age. Here, the crime is said to be ‘namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population’.<sup>7</sup> Similar invocations of inhumanity are present in later statutes for the International Tribunals of the Former Yugoslavia<sup>8</sup> and Rwanda<sup>9</sup>, and in the Rome Statute itself.<sup>10</sup>

In CAH1, the wrong of the crime is located within the criminal’s failing to meet up to his own human nature. An act is here thought to be inhumane because the perpetrator behaves in a way that ignores that he is himself a human being: his action is sub-human. There is a symmetrical wrong to inhumanity, namely dehumanization, which generates a close variant on CAH1. Whereas with acts inhumane it is the criminal’s own human-nature which has been disregarded in his performance of the action, with acts dehumanizing it is that of the victim. This sort of an action, the disregarding of others’ status as humans, is embodied in CAH2.

CAH2: an action is a crime against humanity if and only if it targets the human-nature of the victim(s).

CAH2 is often used alongside and fused with CAH1.<sup>11</sup> Cassese, for instance, despite appearing, as was noted above, to endorse CAH1, writes that ‘crimes [against humanity] are particularly odious offences in that they constitute a serious attack on human dignity or grave humiliation or degradation of one or more human beings’<sup>12</sup> and implies that this is at least in part what defines them. This confusion has been noted

<sup>5</sup> A. Cassese, *International Criminal Law* (2003), at 67–69.

<sup>6</sup> W. Schabas, *Genocide in International Law* (2000), at 160–161.

<sup>7</sup> London Charter of the International Military Tribunal (1945), Art. 6(c).

<sup>8</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc S/Res/827 (1993), Art. 5(i).

<sup>9</sup> Statute of the International Tribunal for Rwanda, UN Doc S/Res/955 (1994), Art. 3(i).

<sup>10</sup> Rome Statute for the International Criminal Court (1998), Art. 7(k).

<sup>11</sup> See, e.g., *Prosecutor v. Galić*, Judgment, Case No. IT-98-29-T, T.Ch. I, 5 Dec. 2003, at paras 152–154, where we see the inhumanity of an act being fused with discourse centred on the dignity of the victim.

<sup>12</sup> Cassese, *supra* note 3, at 250.

in previous court judgments.<sup>13</sup> Conflation of CAH1 and CAH2 is most likely explained by the fact that the term 'inhumane' is often (mis)used to mean having a disregard for others' humanity. (This is perhaps understandable, because most, if not all, dehumanizing actions are in fact inhumane: 'inhuman treatment and inhumane acts basically require proof of the same elements'.<sup>14</sup> The recognition that it is at least coherent to talk about acting inhumanely towards an animal shows that the terms are not equivalent, however.) Because the two meanings are often confused, CAH2 can seem to draw support from the same authoritative legal statutes as CAH1, though it seems clear that a conscientious reading of these documents will not grant CAH2 support, as CAH1 and CAH2 are conceptually quite distinct.

Nevertheless, CAH2 remains a quite respectable position in its own right. Gaita, throughout his *A Common Humanity*, sets the agenda robustly for denial of humanity as being the defining feature of a crime against humanity, though he eventually turns to another definition.<sup>15</sup> Geras writes that 'crimes against humanity may be defined as offences against the human status or condition',<sup>16</sup> by which he indicates that he means something similar to CAH2. Ratner and Abrams write that '[c]ertain acts are so heinous and destructive of a person's humanity that they *per se* are crimes [against humanity]'<sup>17</sup> and that 'acts constituting crimes against humanity will generally be those characterized by the directness and gravity of their assault upon the human person, both corporeal and spiritual'.<sup>18</sup> Judgments are often couched in terms of the language of degradation, humiliation, and human dignity, which focuses on having disregard for the significance of the victim as a human.<sup>19</sup>

Schabas suggests a similar way of viewing the offence when he writes that '[i]t may be convenient to view crimes against humanity as being broadly analogous to serious violations of human rights'.<sup>20</sup> (Though we should note that translation of CAH2, as with any of our definitions, into the discourse of human rights is not entirely unproblematic. We need not equate disregarding somebody's human-nature with a violation of their human rights, any more than we need equate acting contrary to our own human-nature with a violation of somebody's human rights. We may, for instance, find reason to be suspicious of the concept of positive human rights, or even human rights *tout court*, while maintaining that there can be crimes the specific evil of which resides in the fact that they disregard an individual's human-nature.)

<sup>13</sup> *Prosecutor v. Krnojelac*, Judgment, Case No. IT-97-25-T, T.Ch. II, 15 Mar. 2002, at n.382.

<sup>14</sup> *Ibid.*, at para. 130.

<sup>15</sup> R. Gaita, *A Common Humanity: Thinking about Love and Truth and Justice* (2002).

<sup>16</sup> Geras, 'Review of *Crimes Against Humanity: A Normative Account* by Larry May', 3 *Democratija* (2003), available at: [www.democratija.com/review.asp?reviews\\_id=13](http://www.democratija.com/review.asp?reviews_id=13).

<sup>17</sup> S.R. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2001), at 62–63.

<sup>18</sup> *Ibid.*, at 69.

<sup>19</sup> See, e.g., *Prosecutor v. Delalić*, Judgment, Case No. IT-96-21-T, T. Ch., 16 Nov. 1998, at para. 126; *Prosecutor v. Nikolić*, Judgment, Case No. IT-94-2-S, T. Ch. II, 18 Dec. 2003, at para. 195; *Prosecutor v. Lukić*, Judgment, Case No. IT-98-32/1-T, T. Ch. III, 20 July 2009, at para. 960.

<sup>20</sup> Schabas, 'Crimes Against Humanity', in D.L. Shelton (ed.), *Encyclopedia of Genocide and Crimes Against Humanity* (2005), at 209.

Completing the triad of possibilities as to where the neglect of human-nature must occur for an action to be a crime against humanity, a meaning can be found referring not to the criminal or the victim, but to the onlookers.

CAH3: an action is a crime against humanity if, in ignoring it, we would ourselves be acting contrary to human-nature.

Under CAH3, the claim is that even *overlooking* the crime is unhuman. Some crimes, the claim goes, are so extreme that they cannot under any circumstances be ignored by the outside world. To my knowledge, this has never been proposed directly as a definition of the crime, though it is instructively similar to another possible definition, which seems to capture a very similar thought and which has been taken seriously by many. In examining this definition, we turn to those interpretations which invoke the second sense of ‘humanity’ given above, to human-kind rather than human-nature. Here, as in CAH3, it is the onlookers upon the crime who are used to define it, though emphasis is now given to the fact that they constitute the species as a whole.

CAH4: an action is a crime against humanity if and only if it is an action that shocks the conscience of human-kind.

This meaning was called upon by Hartley Shawcross, the Chief Prosecutor for the UK at Nuremberg, who claimed that the individual ‘is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind’.<sup>21</sup> The idea has been repeated by many, and a similar meaning is to be found in *Black’s Law Dictionary*.<sup>22</sup> Bassiouni indicates that at least one aspect of a crime against humanity is that it will ‘shock the conscience of humanity’.<sup>23</sup>

Bassiouni also draws on another meaning, writing that ‘certain crimes affect the interests of the world community as a whole because they threaten the peace and security of humankind’.<sup>24</sup> We will label this definition CAH5.

CAH5: an action is a crime against humanity if and only if it is a crime that endangers the public order of human-kind.

Under this interpretation, we are to think of humanity as referring to all persons as something like a society of nations or as the international community. The crime lies in rebelling against, and disrupting or endangering, the fragile structures which maintain peace in the world. In a sense, the criminal act is a denial that one is subject to an external law of any sort, and amounts to an attack on the concept of universally binding law itself. This seems to be the thrust behind Justice Jackson’s opening statement at Nuremberg, when constantly describing the perpetrators as ‘lawless’.<sup>25</sup>

May, in his *Crimes Against Humanity*, endorses CAH5 as a central understanding, arguing that crimes against humanity are ‘serious harm to the international

<sup>21</sup> M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999), at 184.

<sup>22</sup> B.A. Garner (ed.), *Black’s Law Dictionary* (2004), at 400–401.

<sup>23</sup> Bassiouni, ‘International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*’, 49 *Law and Contemporary Problems* (1996) 63, at 69.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Trial of the Major War Criminals before the International Military Tribunal* (1947), ii, at 98–155.

community'.<sup>26</sup> Offering a minimalist Hobbesian account, he attempts to derive international norms to protect against the possibility that '[s]tates would be in a state of constant warfare among each other that would resemble Hobbes's "war of all against all"'.<sup>27</sup> As individual criminal acts destabilize the order on which local public life depends, so international crimes destabilize the international order.<sup>28</sup> The 'international harm principle' is necessary as an analogue of local norms of justice.<sup>29</sup>

CAH6: an action is a crime against humanity if and only if it is a crime that diminishes human-kind.

The claim in CAH6 is based on the familiar idea that crimes of certain seriousness tarnish us all. As Robertson writes, 'crimes against humanity, because [of] the very fact that a fellow human being could conceive and commit them [diminish] every member of the human race'.<sup>30</sup> It is often said of crimes committed during the Holocaust, for instance, that the very fact that other human beings could commit such atrocities speaks not only to those individuals, but to humanity as such. This, one presumes, is why these events prompt philosophical examination and existential reflection in a way that other crimes do not.

This can be read simply as the claim that these crimes reveal some heinous anthropological fact about human nature, and in this way say something about all individuals. Under this reading, it seems that a pre-existing nature is only disclosed, and is itself left unaltered. This is not, I think, the sense in which crimes against humanity are usually taken to diminish human-kind, for *this* sense involves a change occurring as a result of the crime. A stronger and more interesting sense takes the sort of diminishment referred to in CAH6 as a blotting of the record of humanity, or as a secular parallel of the acquisition and transmission of original sin: a stain that all of us, even those with no substantive linkage with the atrocities, bear. In committing a crime against humanity, a fellow human being does something that tarnishes us all.

CAH7: an action is a crime against humanity if and only if it is a crime that damages human-kind.

CAH7 claims that when thinking about crimes against humanity, the victim is properly conceived to be the whole of human-kind, rather than individual persons. A crime against humanity is defined to be, in a very literal sense, an offence committed against humanity as such. Consider a crime against humanity composed of the murder of 1,000 civilians. While each murder, it is true, damages the person murdered, it is human-kind as such, rather than each individual, which is properly considered the casualty of the act *qua* crime against humanity. CAH7 seems to be what Arendt

<sup>26</sup> L. May, *Crimes Against Humanity: A Normative Account* (2005), at 83.

<sup>27</sup> *Ibid.*, at 8.

<sup>28</sup> *Ibid.*, at 82.

<sup>29</sup> Readers familiar with May's work will notice that he often invokes other readings as derivative of CAH5. Though he discusses the crime in terms of CAH4 (*ibid.*, at 86) and CAH7 (at 81–84), it is clear that CAH5 is fundamental, with reductions to CAH5 offered for other definitions.

<sup>30</sup> G. Robertson, *Crimes Against Humanity: The Struggle for Global Justice* (2006), at 253.



appeals to when she claims that the Holocaust included ‘crimes against mankind committed on the body of the Jewish people’,<sup>31</sup>

Such are the meanings of ‘crimes against humanity’, it seems to me, which deserve serious consideration. As has been suggested, there is little consensus in the literature as to which is the most satisfactory definition, each garnering support from somewhere. Schabas notes of the crime that ‘[i]ts scope is quite obviously vague’, and points out that for this reason ‘[e]ven judges of international criminal tribunals have indicated their discomfort with applying criminal law whose meaning is not sufficiently certain’.<sup>32</sup> Indeed, CAH1–7 are often overlapped and conflated in discussions, with little explicit acknowledgment that there are serious differences in usage of the term. It will be the task of sections 4–7 to determine which of these definitions is preferable, and on what grounds the dispute is best arbitrated. Before turning to this task, however, it is perhaps worth pausing to consider the project of looking for a definition of the crime.

### 3 The Project of Defining ‘Crime Against Humanity’

This article advances on the basis that finding a definition of ‘crime against humanity’ to clarify our understanding of the offence is both possible and desirable. This claim might seem questionable, casting doubt on the entire project. There are various objections to the project of attempting to find a definition, which have varying degrees of strength.

The first is a simple worry that the category of crimes against humanity is too messy an entity to be successfully elucidated. We will not, the claim goes, find necessary and sufficient conditions as to what constitutes a crime against humanity, as our use of that term is somewhat *ad hoc*. Its application is, more often than not, mixed up with state interests, and there is no *real* category for a definition to map onto neatly. No tidy definition is ‘out there’ to be found, because we are merely expressing a loose body of feelings of abhorrence when using the term.

This objection misconceives the philosophical project of offering a definition, however, and is not therefore as strong as it might seem. There is, of course, no absolute meaning of ‘crime against humanity’ waiting to be discovered, and we should not expect to be able to give a perfect definition of crimes against humanity in the same way that we can of ‘prime number’. This is of no matter: neither are we able to find a perfect definition of ‘murder’. We may be able to offer family-resemblance features of such notions, but catch-all definitions are unlikely to be forthcoming. Yet the project of attempting to define these terms is valuable nonetheless. Definition-hunting is of dialectical use: through it, we find and form meanings; uncover and expand salient uses of the term. A discussion about the defining characteristics of murder is far more usefully viewed in terms of consensus building than of dictionary writing. So too for crimes against humanity: the project is to refine our thinking and use of the term.

<sup>31</sup> H. Arendt, *Eichmann in Jerusalem: A Report of the Banality of Evil* (2007), at 7.

<sup>32</sup> Schabas, *supra* note 20, at 215.



Once the ultimate objective of definition-hunting is realized, a related objection is also seen to misfire. One might claim that the term 'crime against humanity' has merely a genealogy, and that its meaning is best revealed through historical research. This is true in a sense, but should not be taken as a case against performing conceptual analysis on the term. It is true both in the trivial sense that almost every meaning has first and foremost a genealogy of use rather than a preconceived definition, and in the more interesting sense that 'crime against humanity' has a particularly chequered and awkward past, its conception being at least partially motivated by political considerations. Yet still we gain by attempting to uncover a definition of how we do (and how we ought to) use the term. The search for a definition is an investigation of how we can sensibly think about the crime, if at all; within what boundaries we feel comfortable utilizing a term already in play. For this reason, we should feel secure performing conceptual analysis while acknowledging the value of genealogical analysis also.

Another worry is far more serious, however. This objection questions not whether the project of defining crimes against humanity is intellectually credible, but whether this credibility is overruled by the undesirability of the project on broader grounds. Granted, one might say, that if we attempt to think rigorously and rationally about what constitutes a crime against humanity we had better do so philosophically and with close attention to the concepts involved. But this entire approach is dubious: we would be far better off relying on unfiltered moral intuition and outrage to tackle these issues. All an overtly rational approach does is muddy the issue.

Along these lines, we find Koskeniemi concerned about the project of thinking legalistically about the possible use of nuclear weapons:

These techniques, however, are considerably weaker than the values or interests at stake in the killing of the innocent whose conflict that they seek to regulate. For example, even if there were agreement that the threat of use of nuclear weapons were illegal, such agreement would soon be dispelled by a controversy on what amounts to 'threat' in the first place. The normative force of such techniques is no match to the force of the values that demand a particular understanding of 'threat' in a particular context.<sup>33</sup>

Similarly, one might claim, the pressure to analyse and find a philosophically satisfactory interpretation of the term 'crime against humanity' is dwarfed by the need to do justice to our feeling of moral abhorrence.

This objection, I think, is answerable only if we can maintain that the analytic process need not disrupt the course of giving our feelings of outrage their proper place. The worry is strongest where we cannot concurrently recognize the authenticity of our instinctive response and commit energy to technical analysis. Koskeniemi's analysis succeeds because he demonstrates that legal analysis seems to dissolve our moral intuition and impetus towards action, showing how 'rational argument breaks the *taboo* surrounding the use of nuclear weapons and thus, inadvertently, makes it easier to contemplate it'.<sup>34</sup> Yet without such a demonstration this type of objection would

<sup>33</sup> Koskeniemi, 'Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons', 10 *Leiden J Int'l L* (1997) 137, at 144.

<sup>34</sup> *Ibid.*, at 154.

amount to the claim that we should feel and act rather than think, without showing why it is not possible to do both.

Minimally, we must operate with moderate competence when using the words we do. In Koskenniemi's case, we share an (approximate) understanding of what we mean by 'threat of use of nuclear weapons'. Attaining this much does not make atrocities easier to contemplate or stifle action in response to them: it is the further process of extending our moderate competence beyond the natural boundaries of language that does this. When we already possess a moderate competence, engaging in legal-technical disputes may indeed be disruptive of our moral instincts and resultant action. But we possess not even this moderate competence in using 'crime against humanity', and it is this which is the goal here. Though, it is true, the boundary between acquiring moderate competence and performing dissolving analysis must be a vague one, we can generally recognize obvious cases, and searching for a meaning of 'crime against humanity' seems to be such a case. How to draw this line in more difficult cases is a deep problem indeed, but is not one which can be tackled here.

#### 4 CAH1–3 and the Arendt Test

Any definition successful in capturing the concept of a crime against humanity must account for the seriousness of this crime. In order for something to be considered a crime against humanity it must be, it is clear, far more terrible than those crimes which are an everyday occurrence. For this reason, CAH1–3 must be subject to an obvious amendment. As the definitions stand, any crime in opposition to human-nature counts as a crime against humanity; clearly, an adequate interpretation will set the bar much higher. A single murder or rape must surely be regarded, if anything is, as disregarding the victim's humanity, and certainly counts as acting in an inhumane manner. It seems also that it might be inhumane to disregard the crime and ignore the obligation to bring the perpetrator to justice. Yet neither of these crimes on its own should be considered a crime against humanity.

The preferred legal solution to separating 'mere crimes' in opposition to human-nature from crimes against humanity has been to add various requirements to the definition. These additions, taken individually, do not seem adequate to capture the difference needed. Limiting the crime, as the Statutes for Nuremberg, Rwanda, and Former Yugoslavia do, to those committed on the basis of religion, ethnicity, or political belief seems open to the charge of arbitrariness, and additionally to come close to conflating the crime with that of genocide. One assumes, also, that single acts in opposition to human-nature can be perpetrated on these discriminatory grounds, without being elevated to the status of crimes against humanity. (Indeed, the requirement that a discriminatory motive be present for classification as a crime against humanity is not present in the Rome Statute.<sup>35</sup>) The condition that the crimes take place within a context of systematic or widespread attacks on a group also seems to mis-locate the

<sup>35</sup> D. Robinson, 'Defining "Crime Against Humanity" at the Rome Conference', 93 *AJIL* (1999) 43, at 46.

special nature of the crimes: a single serial killer (or even a pair of serial killers) who target(s) one section of the population (the working class, for instance) act(s) in systematic opposition to human-nature, but these actions do not seem to fit into the category of a crime against humanity.

A third suggested prerequisite, that the crimes emanate from a body wielding (*de facto*) state power, also seems on its own inadequate. Not only, if left as the only amendment, does it leave the bar very low as to what constitutes a crime against humanity – if committed by the state, one murder still qualifies as a crime against humanity when this amendment is made – but it appears to make the dubious claim that the specific evil in a crime against humanity is the misuse of state power. While it is fair, perhaps, to say that only a body wielding state power could in practice execute a crime monstrous enough to be considered a crime against humanity, this should be distanced from the claim that a defining feature of the crime is that it originates from a state body. As with genocide, although it seems unlikely in practice that an individual, group, or corporation could muster the power to execute the crime, this does not seem a theoretic impossibility. One can imagine a scenario in which genocide is perpetrated by one of these non-state bodies and nevertheless remains genocide; similarly, one can, I think, imagine crimes against humanity being committed by these bodies.

It seems unclear that, given that they do not do so separately, even taken together, these requirements can locate what is exceptional about a crime against humanity and separates it from ‘normal’ criminal acts. If it is neither its systematicity nor its origin from the state that makes an act a crime against humanity, we are at least owed an explanation by anyone who maintains that it is the combination of these two things that makes the crime of a far more serious nature than others, and how this can be so.

I am unsure that there can be an instructive amendment to any of CAH1–3, composite or otherwise, to capture the notion that the crime must be very much more serious than everyday crimes. Even allowing a trivial place-holding amendment to fill the void, there still seems to be an insurmountable difficulty in rendering crimes against humanity as CAH1–3 attempt to. Grant, for the sake of argument, that the appendage ‘of a sufficiently serious nature’ can be added to any of CAH1–3 to do the work that we require from the amendment, and extend to cover whatever requirements we deem appropriate. It seems that the definitions will still not capture that there is a *qualitative* difference between crimes against humanity and ‘mere’ crimes in opposition to human-nature.

That there is a qualitative difference, and not merely a quantitative difference, at stake is, I think, what Arendt is suggesting when she notes that the Nuremberg judgment ‘refused to let the basic character of the crime be swallowed up in a flood of atrocities’.<sup>36</sup> When one commits crimes against humanity, the thought seems to be, one does not commit *merely* a particularly large scale campaign of individual criminal acts; one does something which cannot be fully captured by a simple inventory of these crimes. Claiming that crimes against humanity cannot be defined in terms of a

<sup>36</sup> Arendt, *supra* note 31, at 275.

high quantity of inhumane, dehumanizing, or inignorable crime is in no way to say that the crime defies characterization, as has been claimed is an appropriate stance towards the Holocaust in view of its suggested uniqueness.<sup>37</sup> The claim is rather that, in a similar way that a description of murder cannot be given solely in terms of assault – though serious enough assault can certainly add up to murder – the nature of a crime against humanity cannot be revealed by the enumeration of crimes of a lower order.

Arendt believed that the individual acts of murder and other inhumanities should not distract from the nature of the crime against humanity which emerged from these acts. I share this intuition. Any definition of the crime, then, will have to pass what we might term the *Arendt Test*: does the definition successfully capture and account for the gap between this crime and other lower-order crimes.

CAH1–3, I think, fail the Arendt Test, and have no reasonable hope of passing it, because of the centrality of human-nature to their account. Many crimes go against human-nature, and any attempt to spell out the nature of crimes against humanity by focusing on this aspect will descend into treating a crime against humanity as merely a particularly egregious enactment of a lower-order crime. Any augmentation of CAH1–3 which retains these definitions' focus on human-nature must elevate the seriousness of the crime by appealing to the context or volume in which it occurs, but this does not seem an appropriate mechanism to alter the *quality* of the crime.

## 5 CAH4–7, the Arendt Test, and Human-kind

The Arendt Test, it should be noted, does more than merely codify our intuition that crimes against humanity have a seriousness beyond that of normal crimes. As has been noted many times, the charges at the Nuremberg trials were, *prima facie* at least, based on retroactive legislation. There were, that is to say, no charters defining the crimes prosecuted when these atrocities were committed, neither was there any real precedent for the charge of crimes against humanity. Retroactive legislation is normally held to be unjust. Arendt offers the thought, however, that retroactivity can be held to be unacceptable only if the crimes in question were capable of being conceptualized beforehand: it is only insofar as the legislator was capable of envisaging the act that he can have had the opportunity to outlaw it. Yet the crimes under consideration were, Arendt claims, prior to their performance, literally unthinkable. They were, in an important sense which Churchill perhaps did not mean when he coined the phrase 'crimes with no name'. Unprecedented crimes, Arendt claims, required unprecedented laws.<sup>38</sup>

<sup>37</sup> The historians Eberhard Jäckel and Saul Friedländer, amongst others, have been associated with this claim: see Margalit and Motzkin, 'The Uniqueness of the Holocaust', 25 *Philosophy and Public Affairs* 25 (1996) 65 and Geras, 'In a Class of its Own?', in E. Garrad and G. Scarre (eds.), *Moral Philosophy and the Holocaust* 25, for useful discussion.

<sup>38</sup> Behabib, 'Arendt's *Eichman in Jerusalem*', in D.R. Villa (ed.), *The Cambridge Companion to Hannah Arendt* (2000), at 65, 77.

The argument that the crimes under discussion at Nuremberg were unimaginable, and that they could therefore be a valid subject of retroactive legislation, can be sustained only if our conception of those crimes passes the Arendt Test. It is only if a crime can be held to be of an entirely different quality from any before it that it can be held to be unimaginable. If the crimes against humanity are held to be qualitatively similar to other 'normal' crimes, they would clearly be conceivable to a prior legislator by extension of already existing crimes. It is only by buying into the Arendt Test, then, that we will be able to use Arendt's line of escape from the undesirable conclusion that the Nuremberg trials were unjust.

It can be argued, I believe, that all of CAH4–7 pass the Arendt Test. The capturing of a qualitative difference is achieved here by the claim that a wrong is committed involving human-kind, rather than an individual human. This could never be said to occur in crimes of a lower order, and raises the wrong committed to a new level. Though an everyday incident of murder, for example, might be thought to be horrific, its defining features could hardly be said to involve human-kind, as such.

In order to sustain the claim that crimes of a lower order do not properly involve human-kind, it will be useful to draw a distinction which, in any case, is fundamental to the next section, to clarify the meaning of CAH4–7. When talking of human-kind we could mean one of two things. We could mean every human person, treated collectively but remaining conceived of as a composite set of individuals (call this every human-being), or we could mean every person, thought of as a collective and singular body (call this the *grand-être*, borrowing from Comte). Ascribing the property to every human-being, every individual assumes a property; ascribing the property to the *grand-être*, one being assumes the property. The distinction is important and, though on first sight somewhat obscure, a commonly used one.

In a similar way in which one might claim that France has certain values without claiming that every citizen of France has certain values, or claim that a corporation has certain goals without assigning those goals to each of its members, it seems at least coherent to apply the property over human-kind conceived of as the *grand-être* without ascribing those properties over each individual human. (Whether it is useful to do so we shall return to later.) It seems plausible, then, that although by CAH4 we might mean to refer to the shocking of every human-being's conscience, we might equally well mean to indicate that the conscience of the collective *grand-être* is shocked.

Returning to the Arendt Test, with this distinction in mind we can see that each of CAH4–7 do pass the test. CAH4, interpreted as either every person's conscience being shocked or the conscience of the *grand-être* being shocked, seems thereby to be of a very different type from ordinary crimes in opposition to human-nature. When normal crimes occur, this simply does not occur. Neither can it be claimed, when an ordinary crime is committed, that every human-being or the *grand-être* is thereby diminished (CAH6) or damaged (CAH7), hideous though the crime may be. CAH5's meaning does not seem to turn on the distinction that has been made, though it can be seen that a lower-order crime does not endanger the international order, which is where CAH5 finds and accounts for the qualitative gap between normal crimes and those of a higher order.

Though all of CAH4–7 pass the Arendt Test, there is more to be said about each of these definitions. It can be argued that neither CAH5 nor CAH6 is a likely candidate for selection as a preferred meaning, for CAH7 captures all that is good about these definitions and widens both of them in a plausible way. In order to see this, we must consider what it is for human-kind to be damaged.

According to the standard theory of damage, a person is damaged when one of his or her interests is hurt.<sup>39</sup> (This may be taken as a cognized interest, represented by a psychological investment in the concern, or it may be taken to be independent of any such awareness. Personal security, for instance, might be said to be an interest of a person because he or she actively covets it, or it may be said to be a person's interest, whether or not he or she has regard to it. I shall remain neutral between these accounts.) Applying this 'interest theory' of damage, we can see what it might mean for human-kind to be damaged. Human-kind will be damaged exactly when one of its interests (whether seen as an interest of every human-being or as an interest of the *grand-être*, in a way to be discussed in the next section) is violated.

It seems that human-kind can be said to have both an interest in retaining an undiminished status, and an interest in the international order being secure. It is at least plausible to hold that each individual, or human-kind as a whole, has a vested interest in a stable international order, and in its own status. This is to say, of course, that diminishing human-kind, or disrupting the international order is a species of damage to human-kind. The condition for CAH7, then, encompasses the conditions for CAH5 and CAH6. If an action qualifies as a crime against humanity under CAH5 or CAH6, this is to say, it will be counted as a crime against humanity under CAH7 too.

Clearly, then, CAH7 is a much wider definition than CAH5 or CAH6, and this will prove a stumbling block for anyone wishing to maintain the 'only if' of either one on its own. Yet this wish itself seems ill-founded, as a comparison of the two definitions reveals: either on its own seems too narrow to capture actions we might consider crimes against humanity. A civilian massacre or enslavement might well be considered a crime against humanity, for instance, without posing serious danger to the outside world. Indeed, there seem to be categories of crime inherently local, such as that of apartheid, which are highly unlikely seriously to endanger the international order. These crimes nevertheless are crimes against humanity, and might be captured by CAH6, while failing the test of CAH5. Similarly, an event might not be so egregiously inhumane as to diminish man-kind, but nevertheless violate, irreversibly, the international order, and thereby be considered a crime against humanity. CAH5 may capture the crime that CAH6 misses.

There is, then, much to be said for a broader interpretation than either CAH5 or CAH6 can offer: as such, it seems to me, CAH7 is appealing. The notion of damaging human-kind, or of human-kind as having interests, however, has been left somewhat opaque, and if CAH7 is to be convincing these ideas must be given more attention.

<sup>39</sup> See, for instance, Meckled-Garcia's entry on 'harm' in T. Honrich (ed.), *The Oxford Companion to Philosophy* (2nd edn, 2005), at 359. The fullest philosophic treatment of harm remains J. Feinberg *The Moral Limits of the Criminal Law* (1987–1990), an interest based account.



The same complaint can be made about our other remaining definition, CAH4. In what sense is it that we might say that human-kind's conscience is shocked by a crime against humanity? Let us, then, consider in more detail what it might mean to make claims predicating over human-kind.

## 6 Predication over Human-kind

There seems, on the face of it, little reason to prefer an interpretation of CAH4 or CAH7 which appeals to human-kind as the *grand-être*. First, it is an unnecessary complication when a theory can pull on the resource of every human-being and, secondly, the entity seems to be a strange metaphysical object which does no favours to any theory which postulates it. Other things being equal, a parsimonious ontology is to be preferred, so unless referring to the *grand-être* does something to simplify our understanding of CAH4 and CAH7, the concept is of no use.

It can be argued, however, that making reference to this entity does, in fact, simplify CAH4 and CAH7, for appealing to every human-being is less straightforward than it first appears. Predication – the ascription of properties – over every human-being is a complicated matter. Consider, for instance, the claim that CAH4 makes, that a crime against humanity involves the conscience of human-kind being shocked. Under an interpretation of human-kind as every human-being, the simplest reading of this definition implies that every single individual's conscience must be shocked in order for an act to count as a crime against humanity. It seems clear that this requirement assumes an unrealistic uniformity in matters of conscience in people. It cannot be that the resistance of a small number of people to being moved by a barbaric act stops that act from being classified as a crime against humanity. A similar point can be made for CAH7 under an every human-being interpretation of human-kind: if the existence of a hermit in a cave who hears about the incident but is totally unaffected by it acts as a falsifier against every human-being being damaged, the theory sets the bar unattainably high on what counts as a crime against humanity.

Any convincing theory referring to every human-being being in a certain state, then, must be modified to indicate that it is not in fact the entirety of individuals, but merely a sufficient population, which is being referred to. It seems, however, extremely difficult to spell out what this mandatory proportion is. Any account detailed enough to clarify what fraction of every human-being must be damaged for us to have warrant for calling an act a crime against humanity will be subject to the criticism of arbitrariness. ('Why this percentage, and not *this* percentage?') Conceding, however, that this requisite level can in principle be given, it remains a problem that the theory, which seemed desirable on account of its simplicity, has been significantly complicated.

We can avoid these problems by appealing to the idea of the *grand-être*. Humanity, thought of as one entity, can be said to have a conscience or interests on its own terms, and it is these that are appealed to in CAH4 and CAH7. There is, then, no need, from within a theory of what constitutes a crime against humanity, to show how many individuals' shocked consciences add up to human-kind's shocked conscience. This might



seem like a naïve way of dealing with the issue, which unhelpfully pushes the problem back into a different arena. For, of course, in addition to positing the entity, it will be said, we must give an account, from within the theory that grounds our discussion of the *grand-être*, of what adds up to damage or a shocked conscience. We have, in other words, by appealing to the *grand-être* not avoided the problem of predicating over human-kind, but merely relocated this problem from the territory of those attempting to account for crimes against humanity to the territory of those giving an account of the *grand-être*.

This would, I think, be good reason to doubt the move towards considering the human-kind referred to in CAH4 and CAH7 as the *grand-être*, if it were not already the case that an account of the *grand-être* can be used to account for our discussion of human-kind in other areas. With or without a theory about what constitutes a crime against humanity, it seems, a theory like this will be helpful, for we describe human-kind as having achievements, interests, and goals in unrelated discourses. (An account of what it means to say that human-kind has landed on the moon, human-kind is trying to create a peaceful and just world, and human-kind needs to find a sustainable form of energy would be useful independent of our present topic.) It is, therefore, a pre-existing and conceptually distinct resource to pull on – a unified tool for predicating over human-kind – and does not simply amount to shifting the problem elsewhere.

Moreover, although it might initially strike us as odd to think of human-kind as one entity, we do not diverge significantly from our everyday propensity to ascribe ethical properties and agency to groups as groups, in speaking this way. We are used to talking of corporations having moral and legal liability without referring to their members, and of companies having beliefs and characters divergent from those of any subset of their employees. We often treat universities, nations, and clubs as having attitudes and objectives which do not seem in any clear way identical to those of the persons who make them up. Talking of human-kind in this way is merely to talk of another group. The plausibility of regarding other, smaller, groups as property bearing objects and agents might well vindicate thinking about human-kind in these terms.

The debate surrounding the validity of ascribing agency and ethical properties to groups as groups is too vast to survey here. The scholarly debate is extensive and divided enough, however, for us to note that it is a credible position to regard some groups (states, companies, international organizations) as being capable of acting and having responsibility in their own right. The reasons we might find such claims plausible are generally said to rest upon the irreducibility of our everyday discourse about groups to the individuals who compose them. We claim that Company X, let us say, has certain beliefs and desires (desires relating to cornering the market, beliefs about the means to do so), but no one employee shares all of those attitudes. Nation Y bears responsibility for some action, without responsibility or the action being attributable to any set of contributing individuals (who may still of course be responsible for contributing events).<sup>40</sup>

<sup>40</sup> The literature surrounding these claims may usefully be approached through L. May, *The Morality of Groups* (1987) and P. French, *Collective and Corporate Responsibility* (1984). T. Erskin (ed.), *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (2003) and L. May (ed.), *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (1991) helpfully collect together many important contributions to the secondary literature on the topic.

There is no reduction in these cases, for two reasons. One is simply that we have no distributive mechanism by which to share out the properties in question. We cannot credibly claim that the properties borne by a group reduce to those of individuals without a procedure by which to allocate those properties. The second is that, under the condition that we attribute coherent intentional states to a group – a precondition for it being said to be an agent and acting at all – no distributive mechanism *can* be found. Any formulaic criterion for reducing a group's intentional states to the individuals who compose it is unsatisfactory on the grounds of generating contradictory intentional group states from non-contradictory intentional individual states. No rendering of individuals' consistent mental states will provide an account of the group's beliefs which reliably remains consistent.<sup>41</sup>

None of this is to say that these group properties need be metaphysically strange, of course. Irreducibility need not imply non-supervenience in our group ontology. Group properties might well *depend* on the properties of individuals: there would be no group properties without individuals, and no change in group properties without a change in individual properties. The claim made is merely that these must be emergent properties which are not in any clear way reducible to those of its members, and as such must be treated as belonging to the group in its own right.<sup>42</sup>

I do not wish to enter into the substance of this debate here, but merely highlight it in order to show that the claim appealing to human-kind as one entity is at least a reasonable move to make. It can be seen that, at the very least, it is a defensible position to regard groups as being in this sense significant in their own right. *If* there is good reason to believe that some groups can properly be regarded as having emergent properties on their own terms, it seems not unreasonable to hold that human-kind can also be so regarded. *If* we find it plausible that groups can be assigned responsibility, act, and be the victim of damage, that is to say, there is at least a *prima facie* case for thinking that the *grand-être* can be similarly treated.

There are two objections to this claim, resting on purported disanalogies between human-kind and the other groups. The first relates to human-kind's organizational structure. The groups that are most often the subject of debate in discussions of group properties – states, corporations – one might argue, can bear properties only because they are well defined and ordered, having means of internal and external communication and action. Human-kind, by contrast, is merely a collection of dispersed individuals, not coherent enough an entity to be assigned ethical properties. A reply can be made to this objection, however. One can dispute the claim that human-kind is too loosely organized to constitute an agent, pointing in evidence to unifying structures such as the United Nations which appear to play a deliberative role for human-kind. These structures are in place with ready-made decision-making procedures, and can coordinate projects and formulate

<sup>41</sup> Petit, 'Groups with Mind of their Own', in F. Schmitt (ed.), *Socializing Metaphysics* (2004), at 167.

<sup>42</sup> On the issue of supervenience see Petit and List, 'Group Agency and Supervenience', 44 *Southern J Philosophy* (2006) 85.

goals for human-kind. This defence need not be pressed too hard, however, for there are commentators who have argued that even broadly non-organized collections can be assigned group properties.<sup>43</sup> The analogy we draw upon need not be between human-kind and states or corporations, but rather between human-kind and these more loosely structured groups which are capable of bearing ethical properties.

The second objection relates to the all-encompassing nature of human-kind. The *grand-être*, it might be complained, cannot be truly ascribed agency and ethical properties, because there is no significant 'other' with which it can be contrasted. Following some wide understanding of the Hegelian master–slave dialectic we might think an individual's ability to bear ethical properties is dependent on that individual's standing in relation to other individuals. The argument of the dialectic suggests that one cannot be said to be an agent prior to recognition of other agents: one must contrast oneself with others, realizing a limitation of self, before one can be said to be an *I* in any meaningful sense, rather than simply a manifold of consciousness. Perhaps states or corporations can contrast themselves with other states or corporations, and can attain agent status in some sense, the objection goes. Human-kind, however, has no peer; this blocks any appeal to its agency. This is an interesting objection, but not one which I think can be made with enough force to be convincing. Human-kind has no peer, but it certainly might be said to contrast itself (if this is, in fact, a prerequisite of agency) with non-peer corporations and individuals. The *grand-être* might be said to contrast its agency against 'others' which are in some sense expelled from the society of human-kind by the crimes they commit: the perpetrators of the atrocities which are under consideration in this article. These strategies seem plausible, and require more attention than has been given to them in the secondary literature and than can be given here.

Human-kind, I have claimed, can be plausibly said to have interests and be capable of damage as one agent. Defining a crime against humanity to be damage to the *grand-être*, then, looks philosophically respectable. Damage may be said to be done when a serious violation of the *grand-être's* interests occurs – interests in a diversity of culture, in being unmarked by moral atrocities, and in the stability of the international order would seem particularly important here – or may be said to occur when a more brute sort of harm is done to it by physically injuring so many individuals. When, therefore, a state massacres a population, damage is done to the *grand-être* because its interests are seriously violated – interests, perhaps, in that large number of individuals, or some more abstract interests in maintaining a stable, morally reputable, and culturally varied international community – or because a large block of persons are harmed. Although it may be implausible to claim that the *grand-être* has an interest in any one individual, or is seriously harmed by one murder, it certainly can be said to

<sup>43</sup> See, e.g., Held, 'Can a Random Collection of Individuals be Morally Responsible?', 68 *The Journal of Philosophy* (1970) 471; May, 'Collective Inaction and Shared Responsibility', 24 *Noûs* (1990) 269; Copp, 'Responsibility for Collective Inaction', 22 *Journal of Social Philosophy* (1991) 71; Petersson, 'Collective Omissions and Responsibility', 37 *Philosophical Papers* (2008) 243.

have an interest in large blocks of it, and in its own maintenance in relative diversity and security.<sup>44</sup>

The *grand-être* might also be argued to have something akin to its own conscience, as in CAH4. While this seems to me defensible, by considering what a conscience should be taken to be in individuals – something like a disposition to react to certain events in a certain manner and to form certain judgements – and what a possible group parallel would amount to, this shall not be defended here. For though it is likely that groups can be said to have a collective conscience, I think CAH4 to be less attractive than CAH7 for unrelated reasons, to be discussed in the next section.

I leave this theme of predication over human-kind behind now, though the subject clearly requires more defence than has been given here. It has hopefully been demonstrated that it is at least credible to take human-kind as the *grand-être*, with the potential, as a group agent with intentional states divergent from its members, to be damaged. Whether or not, however, one accepts this reading of human-kind, there is reason to believe that CAH7 is better placed to define what it means to commit a crime against humanity than CAH4.

## 7 Intervention, Prosecution, and CAH7

Besides having the virtue of being a very literal interpretation of the term, treating crimes against humanity as CAH7, rather than CAH4, has two significant explanatory advantages. CAH7 gives us a mechanism by which to explain both why intervention in the affairs of other sovereign nations is warranted and why legal prosecution by third-party states is acceptable. If we take as a starting point that the outside world *should* see a particular crime against humanity which is taking place on the other side of the globe as their concern, and *should* intervene and prosecute when some atrocity is perpetrated, any definition of the crime which provides an account of and justification for these facts should be preferred to one which does not.

As was noted in the introduction, it is a matter of debate whether all crimes against humanity warrant intervention or prosecution, or only a subset of such crimes. I do not, in linking the project of defining the crime to the issues of intervention and prosecution, intend to engage in this entirely separate debate. My account, I believe, remains neutral on whether there should be stricter standards for prosecuting the crime than for identifying it, and stricter standards for intervening than for prosecution, or rather if one set of circumstances suffices for identification, prosecution, and intervention. The issue remains wholly how to *define* the crime. Yet if a proposed definition of the crime provides an account of the tie between the nature of the crime and why there is in some cases reason for intervention or prosecution, this provides support for that definition. For we have at present no good understanding of the relationship of instances of the crime to the norms surrounding our response to them. The ability

<sup>44</sup> There is scope, indeed, for assigning other more controversial interests to human-kind. One might argue that the *grand-être* has an interest in the environment, for instance, and that although ecocide is not legally considered a crime against humanity, the gravity of the offence means that it ought to be.

to vindicate prosecution and intervention, that is to say, counts as evidence in favour of a definition, though of course we may wish for stricter standards than are proposed merely to *identify* the crime, in order to pursue prosecution and intervention.

Although human-kind is distinct from any individual – whether we take human-kind as every human-being or as the *grand-être* – individuals can be seen to relate to it. In the same way that I partake in and identify with any collective of which I am a part – a university, a sports team, a nation – I partake in and identify with human-kind. In this sense, I share in its successes, its failures, and its injuries, as I do with other groups which I belong to in this way. One feature of this sort of membership is its conveying of damage across members. When an injury befalls my nation, an injury befalls me; when the interests of my university are violated, I have warrant to consider my interests violated to. Likewise, insofar as I identify with human-kind, damage that is done on it is also damage done on me. This, to be sure, is a secondary sort of damage, but damage, nevertheless, it is. It can be maintained that when a crime against humanity under CAH7 occurs – when damage is done to the *grand-être* or every human-being – I am damaged.

Buying into CAH7, then, secures us a reason to practise intervention in times of gross misconduct by a state on its own people. Crimes against humanity can be seen to hurt human-kind itself, and therefore members of states not directly involved are damaged secondarily. When a state's own members are being damaged appreciably, it seems clear that the state has a right to intervene and protect them. Here, then, we find our justification: citizens of the UK would be damaged in significant numbers by a crime against humanity half a world away because of the damage that this act inflicts upon human-kind, and this itself merits UK intervention. This is not merely to say that crimes against humanity in a distant part of the world can cause or lead to damage elsewhere – an empirical claim that severe and widespread violence breeds severe and widespread violence elsewhere. It is rather to say that violence abroad, when severe enough, *just is* violence at home.

Though the argument seems quick, its potential to sanction gratuitous intervention is limited. The task of showing that human-kind's interests are actively hurt by a state is onerous, and this is the mechanism by which warrant is gained, rather than by arguing directly from damage upon individuals of the intervening nation. This distinction is important. The argument relies not on relatively small-scale damage being done to individual citizens of an intervening nation (for damage to single individuals rarely in practice justifies large-scale intervention), but on damage being done to the interests of a large section (in fact, all) of the intervening nation's population.

The argument that an 'uninvolved' state is entitled to intervene when crimes against humanity are being enacted applies even to those international realists or isolationists working from the premise that we should intervene only when we are ourselves affected. We also seem to be granted the right to pre-emptive involvement where there exists a reasonable expectation that a crime against humanity will take place. A state cannot, it can be argued, stand by in situations where there is a high chance that human-kind and therefore its own citizens will be damaged.

Moral reason, then, is provided for intervention by CAH7. Justification for regarding crimes against humanity as within the legal purview of those who have been supposed to be mere third parties is also afforded by this definition. Such a justification has been thought desirable by many who have considered the processes involved in bringing perpetrators of these atrocities to justice. Where crimes against humanity are enacted, more often than not, local political reality prevents justice being done where the acts were originally committed: either because those who are responsible for the acts remain in power until their own death, or because they retain a significant following and cannot be charged with offences by their own state for pragmatic reasons. The international community has often found this troubling, and 'universal jurisdiction' has been applied to cases of this level of seriousness.

Universal jurisdiction is the principle by which any state can prosecute and punish a person regardless of whether the alleged crime took place outside its own borders, regardless of the alleged perpetrator or victim's nationality or country of residence, and, indeed, regardless of a lack of any relationship of the crime to the prosecuting state at all.<sup>45</sup> Universal jurisdiction is generally said to hold for crimes against humanity. The principle, of course, is theoretically and practically problematic, raising many issues in legal theory and seeming to clash with state sovereign jurisdiction upheld by the UN Charter. It remains highly controversial.

By adopting CAH7, however, we purchase the benefits of universal jurisdiction for crimes against humanity, without the theoretical cost of subscribing to the controversial principle. CAH7 undercuts the need for universal jurisdiction, for if all human beings are victims of any crime against humanity, the principles of passive personality jurisdiction or protective jurisdiction, both of which are less difficult by far, can do the same work necessary for a prosecution far removed from the crime. The principle of passive personality jurisdiction holds that crimes committed abroad against another state's nationals can be prosecuted by that state where the first state is unable or unwilling to. The principle of protective jurisdiction is that a state can prosecute a foreign national who committed crimes abroad where that national injured the forum state's interests.<sup>46</sup> Both of these conditions seem to be met where crimes against humanity can be said to inflict damage on human-kind as a whole, and damage on every citizen of every state residually. Either of these weaker principles seems strong enough to derive something akin to universal jurisdiction of prosecution for crimes against humanity under CAH7.

<sup>45</sup> See Hall, 'Universal Jurisdiction: New Uses for an Old Tool', in M. Lattimer and P. Sands (eds.), *Justice for Crimes Against Humanity* (2003), at 47, and Bassiouni, *supra* note 21, at 227–241 for a discussion of universal jurisdiction for crimes against humanity. The principle has become less *practically* important since the establishment of the International Criminal Court, though certainly not redundant: the ICC can bring only crimes committed after 1998 to court. In any case, the principle retains its theoretical and normative import, not only because it remains in precedent and written law of individual states, but also because it helps as guarantor that the ICC will prosecute crimes where the standard international political complications makes it difficult to do so.

<sup>46</sup> See Hall, *supra* note 45, at 48.



Given that CAH4 can yield neither of these benefits, I believe we should opt for treating crimes against humanity as defined in CAH7. There may, of course, be competing reasons to prefer CAH4 – arguments that CAH4 can secure us legitimacy for intervention and universal jurisdiction for prosecution, or that it can do other and more useful explanatory work than CAH7 – though I am not aware of them, and they are not cited by advocates of CAH4.

## 8 Conclusion

This article began by providing an account of the various meanings that ‘crime against humanity’ might be taken to have. It was then proposed that any satisfactory definition of the crime would have to pass the Arendt Test, giving an account of the special nature of the crime, and suggested that no account appealing primarily to human-nature could do this. It was further argued that there emerged two contenders, CAH4 and CAH7, from the selection of theories which took humanity to refer to human-kind. Reasons were then recommended for adopting an interpretation of human-kind as one single body, rather than merely a collection of all individuals. Finally, it was argued that understanding the crime as CAH7 carried the significant advantage of giving a justification for intervention and universal jurisdiction.

The article has, as was promised at the start, left various gaps. There remains room to claim that CAH7 does not carry all the advantages that I have suggested, that there are unanswered problems for this definition, that other interpretations I have proposed fare better than I have suggested, or indeed that there remain attractive definitions of the crime that I have left unexplored. Yet hopefully it has been established that the question of what we can take this crime to be at a philosophical level deserves more attention than it has received. Hopefully, also, this article has gone some way towards providing the apparatus with which a more productive discussion about the crime can be conducted. Insofar as these aims have been met and others are stimulated to think about how to provide a philosophical account of crimes against humanity, the article has been successful.