

Preface

The 1st of July 2022 will mark the twentieth anniversary of the coming into force of the Rome Statute of the International Court. At the time of writing, in June 2021, Karim Khan is in the process of taking over as the third Chief Prosecutor of the International Criminal Court, following Luis Moreno Ocampo and Fatou Bensouda. As the Statute approaches its 20 years of coming into force and the third Chief Prosecutor in the Court's history assumes his duties, it is an opportune time to reflect on one of the core crimes covered within the Statute.

It is in this context that the Centre for the Study and Practice of Conflict Resolution at the University of Malta undertook an initiative to reflect critically on one of the core crimes within the Court's jurisdiction: Crimes Against Humanity (CAH). Thus, the Centre in collaboration with the Mediterranean Academy of Diplomatic Studies and the Department of International Law at the same university, organised an academic seminar on the theme: *Crimes Against Humanity: Towards A More Comprehensive Approach?* The seminar brought together a number of scholars working in Malta, the United Kingdom, Ireland and the USA, all of whom share an interest in the evolution of CAH.

This collection of essays stems from the seminar, which was held in April 2021. The purpose of this publication is twofold: to examine some of the ways in which CAH has developed over time; and to explore some future directions which CAH may follow. Essentially, this publication seeks to chart the course of CAH from inception to their current manifestation, while signposting some approaches in their understanding which may be pursued in the coming years.

To put it in terms dear to lawyers, the authors have been encouraged not only to explain the *lex lata* (the law as it exists) in respect of CAH but also to imagine some of the contours of the *lex ferenda* (the law as it should be). Moreover, it is apposite to point out that this collection brings together not only legal scholars but also academics interested in the field of political science as well as its intersection across statistics, politics and law. In reflecting on how CAH have evolved until now, the authors were encouraged to highlight areas where deficiencies exist in the definition, understanding or interpretation of CAH.

The first essay in the collection by Irvin-Erickson maps out the lineage of CAH as an idea that sought to challenge one of the oldest principles of the international legal order, i.e. that states (and by extension state officials) acting within their territory exercise absolute sovereignty over their citizens without any impediment. In his essay, Irvin-Erickson explores the interplay between legal scholars, state practice and judicial decision-making in the crystallization of CAH as a crime under international law. In particular, he highlights the role of Hersch Lauterpacht in the evolution of this process through his academic writings and his interaction with state officials. As Irvin-Erickson argues, laws are not made by legal scholars but rather by states and they are interpreted by the appropriate courts and tribunals.

Nevertheless, the role of brilliant scholars such as Lauterpacht or Lemkin was critical in distilling some of the key elements which were to constitute CAH. Specifically, the fundamental principle that state officials may be held criminally responsible in international law for, at least, some crimes even when committed within their own territory and against their own people forms part of Lauterpacht's legacy to international criminal law in general and CAH in particular. Irvin-Erickson's essay also sheds light on the dynamic nature of international legal principles as they are shaped by the personalities, events and prevailing state interests at any given time.

The evolutionary nature of CAH is the guiding thread running through this collection. In my own essay on the evolution of CAH from the Nuremberg Tribunal to the Rome Statute, I sketch some of the key developments which led to the definition of CAH being disassociated from armed conflict as other contextual elements (such as its widespread or systematic nature) were refined through the operation of treaty norms as well as judicial interpretation.

The essay seeks to provide an overview of how the focus of CAH moved from a connection to armed conflict towards an emphasis on CAH representing 'a concerted effort by a state or organisation to commit grievous human rights abuses against civilians.' It argues that this contextual element has become the distinguishing characteristic of CAH, which both elevates CAH from other crimes but also places some limits to its possible further evolution.

The essays by Avellino-Pule', Gauci and Farias as well as Quadt examine three distinct case-studies within the context of CAH. These case-studies serve both to take stock of developments to date but also to highlight pending questions and challenges in expanding the definition CAH to include specific types of conduct. Avellino-Pule'

examines the notion of terrorist acts as CAH, indicating the advantages of including such acts within the definition of CAH. In doing so, she underlines the problems associated with the definitional deficiencies of terrorism in the realm of international law. Even more saliently, she highlights how the contextual elements of CAH may limit the prosecution of sporadic terrorist acts as CAH.

Gauci and Farias focus on human trafficking as CAH. They assess the extent to which human trafficking may be prosecuted as CAH and outline situations where such prosecutions may be feasible. In respect of options for prosecuting human trafficking as CAH, they provide interesting commentary on the judicial interpretation of Article 7 (1) (c) and 7 (1) (k) of the Statute, i.e. enslavement and other inhumane acts.

Quadt, on the other hand, deals with the more controversial question of whether migratory policies adopted by states at or beyond their borders, may fall within the ambit of CAH. At this point in time, the contours of this essay perhaps fall more easily within the notion of *lex ferenda*. Quadt argues that the execution of certain restrictive migratory policies adopted by a number of states fulfil the requirements of CAH. She holds that acts committed in the course of implementing such migratory policies may fall within the parameters of the list of acts provided in Article 7 (1) (a-k) of the Statute. However, Quadt acknowledges that, currently, the Office of the Prosecutor of the International Criminal Court is shying away from moving in this direction and refraining from opening investigations into such situations referred to it by Non-Governmental Organisations.

In the concluding essay, Dowd provides a reflection on starvation as CAH. Even more tellingly, she presents a number of valuable insights on the use of data, specifically statistical and geospatial data, in the context of investigating and prosecuting CAH. This essay departs from the qualitative methods traditionally preferred by legal scholars and utilised by the other authors in this collection. Using the attacks by Boko Haram on food resources as a case-study, Dowd offers an example of how, in practice, this type of data-driven analysis may assist in identifying and quantifying the widespread and/or systematic nature of such attacks. While acknowledging the difficulties and reluctances of using such types of data in judicial fora, the essay makes an insightful call for an intensification of the engagement between the international legal community and data-driven methodologies.

It is self-evident that several other aspects of the development of CAH as well as potential future directions are not addressed in this collection. CAH has since its inception proven

to be a wide-ranging legal concept. For example, the Yugoslavia and Rwanda Ad Hoc tribunals witnessed massive developments in the context of sexual violence as a CAH; developments which were then reflected in the Rome Statute. Nevertheless, this collection does illustrate how certain discrete elements of CAH have evolved in the past seven decades while offering reflections on some of the potential directions which CAH may take in decades to come.

The future development of CAH will depend on numerous factors. These include, whether or not the Chief Prosecutor and the judges of the International Criminal Court are inclined to take bold investigative steps and broader interpretations of CAH and whether state parties to the Rome Statute are willing to adopt wider definitions in future review conferences. These factors will in themselves be much influenced by what Harold Macmillan referred to as 'events, dear boy, events' or what Donald Rumsfeld prosaically referred to as 'stuff happening'.

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