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# Humaneness, Humankind and Crimes Against Humanity

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## Abstract

Due to its vagueness, the notion of humanity has created some discomfort within the system of international criminal law ever since it was codified as a legally binding concept in the mid 1940's. In Prosecutor v. Kantanga/Chui the Pre-Trial Chamber I of the International Criminal Court (ICC) has given its own interpretation of the term. The Chamber claimed that the related provision of 'other inhumane acts' is more strictly construed in the ICC Statute than in previous Statutes of the ICTY and ICTR, and cannot be regarded as a catch all provision, and should predominantly be interpreted from the wording of the ICC Statute. The author argues in this article that a broad interpretation of 'other inhumane acts' pursuant to Article 7(1) (k) of the ICC Statute is required. The notions of humanity and 'other inhumane acts' should be concretized by relying closely on the legal historical and linguistic roots of the provision. Coming from this analysis, it is suggested that a serious injury to human dignity should count as an 'other inhumane act' and thus, as a crime against humanity.


## A. Introduction

The notion of humanity has opened up misunderstandings in legal analysis ever since it was included in the so called *Lieber* Code[1] and The Hague Conventions.[2] It is not surprising that the same applies for the term crimes against humanity, which has its legal origins in the *Hagenbach* Trial of 1474.[3] Unlike the international crimes of genocide and war crimes, there seems to be trouble in grasping in simple terms what a crime against humanity is. The problem is grounded on the fact that the legal framework of crimes against humanity is complicated. It will be seen that the crime is

1 F. Lieber, *Instructions for the Government of Armies of the United States in the Field*, Originally Issued as General Orders No. 100, Adjutant Generals Office, 1863 (1898).

2 *Convention with Respect to the Laws and Customs of War on Land*, 29 July 1899, 32 Stat. 1803, T.S. No. 403, 26 Martens Nouveau Recueil (ser. 2) 949; *Convention Respecting the Laws and Customs of War on Land*, 18 October 1907, 36 Stat. 2277 (1907), T.S. No. 539, 3 *Martens Nouveau Recueil* (ser. 3) 461.

3 R. Woetzel, *The Nuremberg Trials in International Law* (1960), 19; N. Birkett, 'International Legal Theories Evolved at Nuremberg', 23 *International Affairs* (1947), 317; G. Schwarzenberger, *International Law Volume II: The Law of Armed Conflict* (1968) 462; J. Paust et. al., *International Criminal Law Documents Supplement* (2000), 857.

built on two different pillars of micro- and macro-criminality. To apprehend the notion of humanity in international criminal law, it is thus necessary to have a closer look at both pillars of the crime, including its divergent usage of humanity and 'other inhumane acts', and analyze relevant reciprocal effects. From there, suggestions for legally interpreting the provision can be drawn. The essay is structured in such terms. As the notion of humanity includes non-legal components, the first question to be answered is, to what extent interdisciplinary considerations should be taken into account when analyzing humanity in international criminal law. Thereafter, the basic structure of the term humanity, with its basic components of humaneness and humankind is analyzed; followed by a discussion of the legal structure of the crime, including the interpretations brought forward by ICC Pre-Trial Chamber I.

## B. Openness for Non-Legal Considerations?

Court practice involving international criminal law has regularly shied away from making profound interdisciplinary findings on the notion of crimes against humanity, which is not surprising as it might open up a *Pandora's Box* of uncertainty in legal analysis. Indeed there is much misunderstanding on the notion. It is not uncommon to hear statements, which equate inhumane behavior to crimes against humanity *in generalis*. In this light, politicians, activists, and even representatives of the United Nations have declared various acts to be crimes against humanity which clearly can't be regarded as such: the distribution of cigarettes by the tobacco industry,[4] the systematic use of crops for bio-fuel instead of food,[5]

4 N. Francey 'The death toll from tobacco; a crime against humanity?', 8 *Tobacco Control* (1999), 221.

5 Statement of Jean Ziegler: "Noting that the price of wheat has doubled in one year, Mr. Ziegler warned that if the prices of food crops continued to rise, the poorest countries will not be able to import enough food for their people. While the arguments for biofuels is legitimate in terms of energy efficiency and combating climate change the effect of transforming food crops such as wheat and maize into agricultural fuel is 'absolutely catastrophic' for hungry people and will negatively impact the realization of the right to food, he said. 'It is a crime *against humanity* to convert agricultural productive soil into soil which produces food stuff that will be burned into biofuel." (emphasis added) in *UN independent rights expert calls for five-year freeze on biofuel production* (26 October 2007) available at http://www.un.org/apps/news/story.asp?Ne %20ws%20ID=24434&Cr=food&Cr1 (last visited 9 June 2010).

or the call of the German Government to Turkish fellow citizens to assimilate better into German society.[6]

It is clear that the notion of humanity has to be understood in a somewhat restricted way to make legal analysis possible. A reasonable start would be to have a closer look at the notion of 'other inhumane acts' – the catch all provision within the ICC Statute, which has been included in the text to increase the effectiveness of prosecuting crimes against humanity. According to Article 7(1)(k) of the ICC Statute, 'other inhumane acts' are acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. The concretization is generally known as the *ejusdem generis* principle.

The problems do not stop here. One may ask what an 'act of a similar character' is supposed to be. Surely, the notion of a similar character applies to the crimes, which have been enumerated in the crimes catalogue of Article 7(1) of the ICC Statute; particularly: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, as well as persecution in connection with any other crime referred to in Article 7(1), enforced disappearance of persons, and the crime of apartheid.

Footnote 30 of the ICC Elements of Crimes concretizes the notion of character by declaring that "it is understood that 'character' refers to the nature and gravity of the act". Insofar, first and foremost, the term inhumane as it is understood in the ICC Statute rests on a character of two prongs. An act is only then inhumane, if it reaches a comparable threshold in gravity and is somewhat similar in nature in comparison to the crimes included in the crimes catalogue mentioned above.

It remains questionable however, what indicators and concretizations should be used to determine the stipulated threshold. One could claim that i.e. the abortion policy of the People's Republic of China that restricts its population from having more than one child per family could be subsumable under the notion inhumane, since the fundamental rights to life and freedom of giving birth – which are comparably secured under the ICC Statute by criminalizing murder and enforced sterilization – is negated on grounds of a

[6] Declaration of the Turkish Prime Minister during his visit to Germany in February 2008 'Erdogan warnt Türken vor Anpassung', 36 *Süddeutsche Zeitung*, (11 February 2008), 1, 1.

decision by the Chinese Government on sole considerations of a quantitative excess of population,[7] thus making the right to life dependent upon object-like assessments. Certainly, the question could be answered on strict normative grounds by relying on the decision of the framers of the ICC Statute not to criminalize such birth control measures. With regard to the Chinese one-child policy it can be argued that according to Footnote 19 of the ICC Elements of Crimes, measures of birth control should not fall under the notion of 'other inhumane acts'.[8]

However, a strict normative approach does not lead to a greater insight of what is meant by 'inhumane' *in abstracto* with regard to the ICC Statute. Part of the problem is that definitions of crimes are *in se* tautological. It has been rightfully held that what is prosecuted is defined as a crime, and *vice versa* an action is considered as a crime on the basis of its prosecution.[9]

It follows that if the answer to the problem of what inhumanity constitutes is solely made dependent upon the will of the framers of the ICC Statute, the argument is restricted to the formal authority of the law. Such an approach may claim to have legal force. But it may not claim to be compliant with legal reasoning, because it cannot answer the question on what substantive bases a particular act shall be considered inhumane, and thus criminal. Insofar – even though a normative analysis may be helpful to determine the criminality of an act – it cannot solve the problem adequately *why* a particular act should be regarded as inhumane. This is where interdisciplinary considerations (may) come into play.

7 It is unclear until today whether the killing of an embryo is subsumable under "murder" as a crime against humanity; see The *Prosecutor v. Mikaeli Muhimana, Judgement and Sentence*, ICTR-95-1B-T, International Tribunal for Rwanda, 28 April 2005, para. 570. For considerations on the general status of embryos under public international law see N. Petersen, 'The Legal Status of the Human Embryo in vitro: General Human Rights Instruments', 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005), 447. For a German view on the issue of embryos and right to dignity see H. Dreier, 'Artikel 1', in H. Dreier (ed.), in *Grundgesetz Kommentar, Volume I*, 2nd ed. (2004), Article 1 I para. 39; see further M. Nettesheim, 'Die Menschenwürde zwischen tranzendentaler Überhöhung und bloßem Abwägungstopos', 130 *Archiv des öffentlichen Rechts* (2005) 1, 71, 96; Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 39, 1, 41.

8 ICC Elements of Crimes, *Official Journal of the International Criminal Court*, ICC-ASP/1/3(part II-B), 9 September 2002, Article 7(1) (g)-5 "1. The perpetrator deprived one or more persons of biological reproductive capacity [n.] 19." note 19: "The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice."

9 H. Jäger, *Makrokriminalität* (1989), 21.

*Pieroth* and *Schlink* ascertained that ethically-impregnated legal terms such as humanity and human dignity are directly connected to philosophical traditions.[10] Indeed, a trace from legal rules to fundamental values of society cannot be denied in the field of criminal law (mirror theory).[11] As for defining such notions, the problem of separating legal analysis and philosophical thought is intensified by the fact that components of compassion seem to play a relevant role. *Luban* concludes in the course of his analysis of crimes against humanity that

"the atrocities and humiliations that count as crimes against humanity are, in effect, the ones that turn our stomachs, and no principle exists to explain what turns our stomachs".[12]

It follows that the notion of humanity as it is used in international criminal law includes a wide spectrum of non-legal components. Apparently, problems with regard to the sufficient foreseeability for the accused and violations of *nullum crimen sine lege* may arise. This however is not to say that a restriction to normative legal analysis would be more favourable for the accused. When taking a closer look at the case law of previous tribunals with regard to their findings on the term of 'other inhumane acts', it can be seen that a precedent method is favoured. Regularly it was noted that the International Military Tribunal of

10 B. Pieroth & B. Schlink, *Staatsrecht Volume II, Grundrechte*, 21st ed. (2005), para. 353.

11 P. Legrand, 'The Impossibility of Legal Transplants', 4 *Maastricht Journal of European and Comparative Law* (1997) 111; W. Ewald, 'Comparative Jurisprudence (II): The Logic of Legal Transplants', 43 *American Journal of Comparative Law* (1995), 489, 493. In the strict sense, a single mirror theory does not exist. Instead there are variations or classes of mirror theories, depending on the assumption of how deeply legal rules and social values are interconnected. On the contrary, Watson – one of the most acknowledged legal writers on legal transplants – believes that legal rules are mostly independent from society, as they are primarily used by experts (lawyers, judges, members of the public service etc.). However, even Watson believes that certain fields of law – such as constitutional law and criminal law – are of general interest for the society as a whole, and thus a reflection of social values; see A. Watson, 'Aspects of Reception of Law', 44 *American Journal of Comparative Law* (1996), 335, 335; A. Watson, 'From Legal Transplants to Legal Formats', 43 *American Journal of Comparative Law* (1995), 469; A Watson, Society and Legal Change (1977), A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974).

12 D. Luban, 'A Theory of Crimes Against Humanity', 29 *Yale Journal of International Law* (2004) 1, 85, 101.

Nuremberg (IMT) or Nazi War Crimes Tribunals classified a certain act as inhumane. When a precedent was missing, the ICTY and the ICTR regularly *stated* that particular acts should fall under the catch-all provision, but lacked a satisfactory explanation on what grounds they came to their conclusion.[13]

Insofar, a restriction to legal normative analysis when defining the term 'inhumane' added up to a simple *feeling*, and thus arbitrary judgement, of what should be unjust and hence criminalized. Whereas the IMT has aligned the individual criminal responsibility for crimes against humanity to its understanding of the *malum in se* principle according to natural law theory, thus giving the accused an explanation why he has committed a *crime*, the ICTY and the ICTR have not given concretized explanations. It thus seems to be puzzling, why it is generally acknowledged that 'other inhumane acts' is an accepted notion in the legal sense from which criminal responsibility can be inferred.[14]

When looking from this angle, an inclusion of interdisciplinary considerations does not endanger the foreseeability for the accused with regard to having committed 'other inhumane acts' as a crime against humanity, but rather reduces its vagueness in his or her favour. Surely, it may be a Herculean task for the ICC to display in comprehensive terms what an 'other inhumane act' constitutes. It is doubtful whether this is possible at all and it is not the intention of this article to display possible non-legal indicators, such as *Maslow's* hierarchy of needs theory. What shall be noted however is that it does not harm, if interdisciplinary considerations are taken into account to describe the inhumanity of the act.[15] It will be up to i.e. anthropologists, biologists and philosophers to work in this area and – if possible – create certain guidelines for lawyers and courts. It can't be left out that an inclusion of interdisciplinary considerations bears two major risks. On the one hand, an interdisciplinary approach may find its own boundaries of competence, resulting in the potential danger of

13 V. Sautenet, 'Crimes Against Humanity and the Principles of Legality: What Could the Potential Offender Expect?', 7 *Murdoch Electronic Journal of Law* (2000) 1, paras 26-28.

14 *The Prosecutor v. Tharcisse Muvunyi*, Judgement, ICTR-2000-55A-T, International Tribunal for Rwanda, 26 September 2006, para. 527.

15 Article 7 of the ICC Statute partly relies on interdisciplinary considerations by stating in paragraph 3 "'gender' refers to the two sexes, male and female, within the *context of society*. The term 'gender' does not indicate any meaning different from the above." (emphasis added).

misinterpretation and other shortcomings.[16] On the other hand, there is the risk of wrong emphasis, potentially resulting in a distorted picture for legal analysis; one may point to the (debatable) legal conclusions of the neuroscientists *Singer* and *Roth* in regard to the question, in what way scientific findings on the determination of causal actions and its consequences may affect the principle of guilt and blameworthiness in criminal law.[17] Yet, a good coordination between the various fields of science and a respectful understanding of its own strengths and weaknesses may offer valuable – and practical – insights of how the term humanity within the notion of crimes against humanity can be understood.[18] Such an approach would also create synergic effects for a better understanding of the term dignity, which is included in the notion of humanity. It is interesting to note that a link between humanity and dignity is – at least indirectly – implicated in the wording of the ICC Statute (with regard to war crimes).[19] Furthermore, ICC Pre-Trial Chamber II held in its Confirmation of Charges in *Bemba* that the elements of 'outrages upon personal dignity' pursuant to Article 8 of the ICC Statute can be fully encompassed in a rape charge as a crime against humanity pursuant to Article 7 of the ICC Statute, if grounded on essentially the same facts of coercion or force (yet in this case the rape charge prevails due to its greater normative specificity of describing the criminal conduct).[20] ICC Pre-Trial Chamber II has thus acknowledged some connection between the terms humanity and dignity. On the contrary, as it will be discussed later on in this article, arguably, Pre-Trial Chamber I in *Katanga/Chui* seems to have *not* incorporated the notion of dignity into the term 'other inhumane acts'.

16 Jäger, *supra* note 9, 9.

17 M. Kriele, 'Hirnforschung und Rechtsreform', *Zeitschrift für Rechtspolitik* (2005) 6, 185, 185; C. Geyer, *Hirnforschung und Willensfreiheit: Zur Deutung der neuesten Experimente* (2009); W. Singer, *Der Beobachter im Gehirn: Essays zur Hirnforschung* (2009); W. Singer, *Ein neues Menschenbild? Gespräche über Hirnforschung*, 5th ed. (2003); G. Roth, *Das Gehirn und seine Wirklichkeit: Kognitive Neurobiologie und ihre philosophischen Konsequenzen* (2005); G. Roth, *Fühlen, Denken, Handeln: Wie das Gehirn unser Verhalten steuert* (2003).

18 D. Fabricius, 'Natur – Geschichte – Recht: Evolution als Rechtsquelle?', in C. Prittwitz (ed.), *Festschrift für Klaus Lüderssen zum 70. Geburtstag* (2002), 55.

19 Article 8 para. 2(b)(xxi) and (c)(ii) of the ICC Statute.

20 *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the confirmation of charges, ICC-01/05-01/08-424 (Pre-Trial Chamber II), 15 June 2009, para. 312; also see K. Boon, 'Rape and Forced Pregnancy Under the ICC Statute', 32 *Columbia Human Rights Law Review* (2001), 625.

## C. Humanity and Its Links to Dignity, Humaneness and Humankind

On grounds of their interpretative authority, the ICTY and the ICTR have made a suggestion of what should be understood by 'other inhumane acts' when analyzing Article 5 of the ICTY Statute, respectively Article 3 of the ICTR Statute. According to the *ad hoc* Tribunals, 'other inhumane acts' shall mean

"acts […] that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity".[21]

Taking the ICTY/ICTR definition into account, the notion of humanity consists of two different concepts. On the one hand, the upholding of humanity shall preserve the fundamental mental and physical human condition; on the other hand, it shall protect from a serious attack on human dignity. According to the ICTY/ICTR understanding of humanity, a violation of either notion is sufficient to conclude that an 'other inhumane act' has been committed. Naturally, there will be overlaps between the two concepts as one and the same act may constitute a serious mental or physical suffering as well as an attack on the human dignity.

Yet the disjunctive nature of both concepts may be decisive in certain constellations, as a serious attack on the human dignity must not be made dependent upon the agreement of the victim.[22] If according to the ICTY/ICTR specification, a perpetrator debases a victim, even under consent, he may be guilty of a crime against humanity nevertheless; even if the victim has not suffered any severe physical or mental suffering. Such an understanding is acknowledged in international criminal law *inter alia* for

21 *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgement, ICTR-95-1-T, International Tribunal for Rwanda, 21 May 1999, para. 151; *The Prosecutor v. Ignace Bagilishema*, Judgement, ICTR-95-1A-T, International Tribunal for Rwanda, 7 June 2001, para. 91; *The Prosecutor v. Tihomir Blaškić*, Judgement, IT-95-14-T, International Criminal Tribunal for the Former Yugoslavia, 3 March 2000, paras 240-240; Article 18(k) of the *ICL Draft Code of Crimes Against the Peace and Security of Mankind* (1996); and *Draft Code of Crimes against the Peace and Security of Mankind with commentaries* (1996), International Law Commission 1996 Report, 103.

22 *International Covenant on Civil and Political Rights* (I.C.C.P.R.), General Comment No. 29 States of Emergency (Article 4), UN Doc CCPR/C/21/Rev.1/Add.11 (2001), para. 13a.

the crimes of enslavement (Article 7(1)(c) of the ICC Statute) and apartheid as crimes against humanity (Article 7(1)(j) of the ICC Statute), which are criminalized regardless of whether the victim agrees to the act of being enslaved or being held in a system of apartheid. Hence, human dignity in international law is not to be understood as in sole individualistic terms. It includes traits of humankind. Accordingly, i.e. the UNESCO Declaration on Bioethics and Human Rights has split the notion of dignity into an individualistic and collective – genre related – part, and makes arrangements for both fields.[23]

Recapitulating, the notion of humanity is understandable as an individualistic specification of humaneness – rendered more precisely by the upholding of the mental or physical human condition – as well as the protection of human dignity. The component of humankind emanates from humanity, too. In concert, crimes against humanity are generally regarded as crimes, which due to their heinous nature shock the collective conscience of the peoples and therefore are of concern for the international community as a whole,[24] resulting in the right for each state to prosecute crimes against humanity under the universality principle.[25]

[23] See *UNESCO Declaration on Bioethics and Human Rights*, SHS/EST/BIO/06/01 (2006), Articles 2, 3, 5 and 6 for individual, and Articles 1 para. 2, 10, 11 and 24 for genre related rules. Also see the *Universal Declaration of Human Rights*, UN Doc A/810 (1948), Article 1 (”all human beings“) and Article 22 (“everyone, as a member of society“). Further see R. Andorno, 'Human Dignity and the UNESCO Declaration on the Human Genome', *Medicina e Morale* (2005) 1, 2; O. Schachter, 'Human Dignity as a Normative Concept', 77 *American Journal of International Law* (1983), 848, 848; R. Howard, 'Dignity, Community and Human Rights', in A. An-Na’im (ed.), *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (1992), 81 “collective dignity”. The separation between individual and collective dignity was already made by M. T. Cicero, *De officiis I*, paras 105-107. A translation and explanation of this passage provides H. Cancik, ‘‘Dignity of Man’ and ‘Persona’ in Stoic Anthropology: Some Remarks on Cicero, De Officiis I 105-107', in D. Kretzmer & E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (2002), 19, 20.

[24] *The Prosecutor v. Dusko Tadić*, Decision on the Defence Motion on Jurisdiction, IT-94-1, International Criminal Tribunal for the Former Yugoslavia, 10 August 1995, para. 42: “affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.”

[25] Elaborated upon elsewhere, B. Kuschnik, 'Deutscher Sand im völkerstrafrechtlichen Getriebe? Eine Betrachtung des § 153f StPO im Lichte des in § 1 VStGB festgeschriebenen Weltrechtsprinzips', 21 *Journal of International Law of Peace and Armed Conflict/Humanitäres Völkerrecht - Informationsschriften* (2008) 4, 230.

The dualistic structure of humanity is corroborated by the legal framework of crimes against humanity.

On the one hand, the international community may certainly have an interest in fighting and preventing the fundamental destruction of the environment. Arguably, such an act can even constitute an international crime.[26] Yet, the value destroyed is – at least when looking at the direct damage caused – not strictly human-specific but rather organic, resulting in no violation of humanity. In this light, it is a welcoming development that the fundamental destruction of the environment has not found its way into the catalogue of crimes within crimes against humanity even though such an argument was made several times in the 1980's and 1990's.[27] This is not to say that the fundamental destruction of the environment should not be criminalized by international criminal law. Yet an inclusion as a crime against humanity would be a criminalization in the wrong place due to its divergent nature.

On the other hand, various serious injuries to the mental or physical human condition exist, which cannot be regarded as crimes against humankind. Isolated rapes surely are cruel to a high extent and blatantly violate the human dignity of the victim. Nevertheless, such uncoordinated acts – as cruel as they may be – do not reach the quantity to shock the conscience of the international community. Isolated rapes (unfortunately) are part of the human existence. This does not mean that one should tolerate such acts. They do not however justify an intervention of foreign states on grounds of a concern for the international community as a whole via the universality principle. Accordingly, the legal framework of crimes against humanity requires that a rape that is being committed by the perpetrator needs to be *part of* a widespread or systematic (broader) attack directed against any civilian population.

Interestingly, the legal history of crimes against humanity also indicates the proposed dualistic understanding. On the one hand, strong connections between humanity and humankind – respectively mankind – stem from the fact that shortly after World War II, the UN General Assembly assigned the International Law Commission (ILC) with the task to prepare Drafts of Offences against the Peace and Security of Mankind. The ILC Draft Codes of Offences – since 1988 Crimes – against the Peace and Security of *Mankind included* crimes against *humanity*. It is thus

[26] M. Reichart, *Umweltschutz durch völkerrechtliches Strafrecht* (1999).
[27] Luban, *supra* note 12, 90.

reasonable to hold that when sticking to strict legal normative analysis, a crime against humanity is considerable as a crime against the humankind. On the other hand, crimes against humanity, ever since they have been defined in Article 6(c) of the IMT Statute, never solely criminalized (any sorts of) offences against humankind, such as piracy. Instead only such acts were included in the catalogue of crimes bit by bit, which – due to their specific nature – became a general concern for the international community. In this sense the Joint Allied Declaration of 1915 Condemning the Turkish Genocide of Armenians made a distinction between humanity and humankind by stating that

"in view of those new *crimes of Turkey against humanity and civilization*, the Allied governments announce publicly […] that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres".[28] (emphases added)

In the German language – which made use of the notion 'crimes against humanity' for the very first time in legal history in the 15th century – the existence of the dualistic nature of the term humanity has lead to a never ending controversy of how the term should be understood literally. Certainly, the starting point for interpreting legal norms should be the wording of such norms.[29] However, as has been stated, humanity on the one hand can mean, 'to relate to all mankind'.[30] Consequently, a crime against

28 France, Great Britain, and Russia Joint Declaration, 24 May 1915, in *United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesties Stationary Office, 1948, 35 (in French). Whereas the original declaration was drafted in French, the English version of this quote can be found in a telegram, which the US Department of State received from the US Embassy in Constantinople on 29 May 1915. It should be noted that the English version of the declaration was also published in the New York Times on 24 May 1915, omitting the relevant phrase "crimes […] against humanity and civilization" (scans of both original texts on file). The French original of the declaration, which reads "*crimes contre l'humanité et la civilisation*" clarifies, that the version, which was published in the New York Times, is inaccurate.

29 But also see M. Bohlander, 'Völkerrecht als Grundlage internationaler Strafverfahren?', in J. Hasse et al. (eds), *Humanitäres Völkerrecht* (2001), 393, 396 n. 9.

30 Also see T. E. Hill, 'Humanity as an End in Itself', 91 *Ethics* (1980) 1, 84, 85.

humanity would predominantly be a crime against the human race,[31] or in German *Verbrechen gegen die Menschheit*. This approach was taken in the *Hagenbach* Trial of 1474, where the conviction was grounded on a violation of the laws of god and humankind ("*Verbrechen gegen das Gesetz Gottes und der Menschheit*").[32] Comparably, the Preamble of the ICC Statute states:

"**Mindful** that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." (emphasis in original)

In comparison, the German translation of this passage as published in Number 35 of the Official German Gazette (*Bundesgesetzblatt* Part II) of 7 December 2000 includes the notion of *Menschheit*:

"eingedenk dessen, dass in diesem Jahrhundert Millionen von Kindern, Frauen und Männern Opfer unvorstellbarer Gräueltaten geworden sind, die das Gewissen der Menschheit zutiefst erschüttern."

Humanity can also be understood as to mean a characteristic of humaneness,[33] encoded by the fundamental standards of human behavior. In

31 C. Hollweg, 'Das neue Internationale Tribunal der UNO und der Jugoslawienkonflikt', 48 *JuristenZeitung* (1993) 26, 980. 986 n. 57, claims that "'Menschlichkeit' ist kein völkerrechtlich geschütztes Rechtsgut"; also G. Manske, *Verbrechen gegen die Menschlichkeit als Verbrechen an der Menschheit* (2003), 29; A. Zimmermann, 'Die Schaffung eines Ständigen Internationalen Strafgerichtshofs', 58 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1998), 47, 50. See further E. Schwelb, 'Crimes against Humanity', 23 *British Yearbook of International Law* (1946), 178, 195 "The word 'humanity' (l'humanité) has at least two different meanings, the one connoting the human race or mankind as a whole, and the other humaneness, i.e. a certain quality of behavior. It is submitted that in the Charter […], the word 'humanity' is used in the latter sense. It is, therefore, not necessary for a certain act, in order to come within the notion of crimes against humanity, to affect mankind as a whole. A crime against humanity is an offence against certain general principles of law which, in certain circumstances, become the concern of the international community, namely, if it has repercussions reaching across international frontiers, or if it passes 'in magnitude or savagery any limits of what is tolerable by modern civilisations'."

32 H. Ahlbrecht, *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert* (1999), 19 n. 56. See also A. O'Shea, 'Ad hoc Tribunals in Africa', 12 *African Security Review* 4 (2003), 17, 18 for "crimes against God and man".

33 Already stated in the 18th century, see XII *The Gentleman's Magazine for October* 1742, 536 "The Word; Humanity may be defined to be The generous Warmth of a

this sense, the term humanity could foremost be equated to the readiness to help others that is performed on grounds of benevolence and a felt duty out of compassion, custom, or opinion, to respect others as human beings in se, instead of making assistance dependent upon a judgment on grounds of such persons' standing in society.[34] These principles, which are circumscribed in German by the term *Menschlichkeit*, could be concretized by the notions of charity, respect and preservation of human life, and the protection of human dignity.[35] The ICC Statute also reflects this line of understanding. In Article 7(1)(k) of the ICC Statute 'other inhumane acts' are referred to as a punishable crime. The same applies for the crime of apartheid (Article 7(1)(j) read in conjunction with Article 7(2)(h) of the ICC Statute – "inhumane acts"). In comparison, the German translations of Articles 7(1)(k) and 7(1)(j), read in conjunction with Article 7(2)(h), include *andere unmenschliche Handlungen* and *unmenschliche Handlungen*, making it clear that the term *(andere) unmenschliche Handlungen* derives from the concept of *Menschlichkeit* and not from *Menschheit*. Otherwise the term would have been coined *as (andere) unmenschheitliche Handlungen*, which is a rather strange expression to the German ear that does not seem to imply a rational meaning; arguably comparable to an English neologism like '(other) inhumankindly acts'.

Due to the dualistic concept in semantic and conceptual understanding, neither the component of humaneness nor humankind may be excluded to determine humanity in international criminal law, but need to be seen as two sides of the same coin. In simple terms, crimes against humanity are neither crimes against humaneness nor crimes against humankind, but both.[36] *Makino* came to a similar finding by stating

"In the German original of the paper is to be found an excursion concerning a separate development in German-speaking countries, a description and criticism of an erroneous translation, i.e. translating crimes

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good Heart that distinguishes a Man for a more than ordinary Affection to his Fellow Creatures, to Justice, Mercy and every Social Virtue." available at http://www.bodley.ox.ac.uk/cgi-bin/ilej/image1.pl?item=page&seq=1&size=1&id=gm.1742.10.x.12.x.x.536/ (last visited 9 August 2010); also see K. Ambos, *Internationales Strafrecht* (2008), 207.

34 See *Brockhaus Enzyklopädie*, Volume 12 (1971), 412.

35 A. Becker, *Der Tatbestand des Verbrechens gegen die Menschlichkeit* (1996), 114 and 117.

36 See *American Heritage Dictionary* (2000), *Kernermann Multilangual Dictionary* (2006), *Collins Thesaurus of the English Language* (2000), each under "humanity"; also see *Yearbook of the International Law Commission*, Volume II (1950), 13.

against humanity (or *humanité*) by 'Verbrechen gegen die Menschlichkeit'. The English and French terms 'humanity/humanité' include both the ideas of 'mankind' and a sense of 'human dignity', for example in a phrase like 'human' treatment of civilians or prisoners of war, whereas the German *Menschlichkeit* only covers the latter connotation".[37]

*Makino's* conclusion whereby the notion of *Menschlichkeit* shall be part of the notion *Menschheit* is open to debate. By relying on the conceptual differences, which both notions embody, I personally feel that neither notion can be respectively subsumed under the other. Yet for the problem raised, a decision on a correct term in the German language, which would incorporate both notions, does not have to be decided upon as long as it is clear that at least nowadays (also in Romano-Germanic jurisdictions) crimes against humanity (*Verbrechen gegen die Menschlichkeit*, respectively) contain both concepts of humaneness and humankind.

After all, *Aroneanu* advocated the usage of the term 'crimes against the human person' as early as in 1947, since this notion would open up the possibility to emphasize the nature of the crime to a greater extent, thus creating a more precise differentiation to war crimes.[38] Becker (rightfully) concluded that *Aroneanu's* approach however falls short of specificity. Not only macro-criminal practices like systematic rape or widespread torture directed against any civilian population would fall under the notion "crime against the human person", but everyday assault, too.[39]

# D. From Linguistic Analysis to Normative Arrangements

## I. Antecedents and Drafting History

The notion of humanity has developed remarkably throughout its international legal history. In the beginning, it was primarily used as a loose term to circumscribe certain acts which were believed to be generally unacceptable in the state of war. Both, the Instructions for the Government of Armies of the United States in the Field of 1863; also called General

37 U. Makino, 'Final solutions, crimes against mankind: on the genesis and criticism of the concept of genocide', 3 *Journal of Genocide Research* (2001) 1, 49, 54.

38 E. Aroneanu, *Das Verbrechen gegen die Menschlichkeit* (1947), 49.

39 Becker, *supra* note 36, 114.

Orders 100 or *Lieber* Code,[40] as well as the Hague Conventions of 1899 and 1907 – particularly the so called *Martens* Clause[41] – made use of the term humanity and laws of humanity without further elaborating on these notions.[42] In the course of the Armenian Genocide of 1915, the Joint Declaration of France, Great Britain and Russia introduced the English term crimes against humanity for the first time.[43] A definition for crimes against humanity was firstly given in the Statute of the IMT, which was set up to punish the elite of the German Nazi criminals for their deeds against the Jews and other members of the European civilian population. Article 6 of the IMT Statute reads:

"The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following acts: […] (c) crimes against humanity: namely, murder, extermination, enslavement, deportation, and 'other inhumane acts' committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime

40 Lieber, *supra* note 1; Section I, Number 4.: "As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and *humanity* - virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed." Section I, Number 29.: "Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace. The more vigorously wars are pursued the better it is for *humanity*. Sharp wars are brief." Section III, Number 76.: "Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with *humanity*." Section X, Number 152.: "When *humanity* induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power." (scan of original text on file, emphases added).

41 Convention with Respect to the Laws and Customs of War on Land, *supra* note 2, Preambles of the First Hague Convention of 1899 and 1907 on the Law and Customs of War, "populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the *laws of humanity*, and the requirements of the public conscience".

42 M.C. Bassiouni, *Crimes against Humanity in international Criminal Law*, 2nd ed. (1999), 61 "normative prescriptions on […] unarticulated values".

43 France, Great Britain and Russia Joint Declaration, *supra* note 28.

within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

Article 5(c) of the Statute of the International Military Tribunal for the Far East (IMTFE) in Tokyo,[44] and Article II 1.(c) of the Control Council Law No. 10[45] gave a somewhat similar yet not identical definition of crimes against humanity. Yet, with regard to the terms humanity and inhumane, no changes were made.[46] On the contrary, the Draft Codes from the ILC display an interesting picture on the development of the notion humanity. The ILC Draft Codes of 1951 and 1954 defined crimes against humanity as inhuman acts in se, and dropped the catch all provision of 'other inhumane acts'.

44 'Charter of the International Military Tribunal for the Far East of 19 January 1946', reprinted in: J. Pritchard & S.M. Zaide, *The Tokyo War Crimes Trial*, Volume I (1981), Annex VI.

45 'Gesetz Nr. 10 Bestrafungen von Personen, die sich Kriegsverbrechen, Verbrechen gegen den Frieden oder gegen die Menschlichkeit schuldig gemacht haben', Berlin, 20 December 1945, 3 *Amtsblatt des Kontrollrates in Deutschland*, 31 January 1946, 50-55 (Control Council Law No. 10); also see T. Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10, 1949 available at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf (last visit 9 August 2010); J. Brand, 'Crimes against Humanity and the Nürnberg Trials', 28 *Oregon Law Review* 2 (1949), 93, 97.

46 Contrary to S.R. Ratner & J.S. Abrams, *Accountability for Human Rights Atrocities in International Law – Beyond the Nuremberg Legacy* (2001), 73, who hold that Article 6(c) of the IMT Statute reads "other inhuman acts", the correct wording is "other inhumane acts". The correct wording of Article II 1.(c) of the CCL No. 10 is "other inhumane acts" as well. In Taylor's Final Report (*supra* note 45), both, the Appendix B, which covers the wording of Article 6(c) of the IMT Statute (Taylor, page 239) and the Appendix D, which contains the wording of Article II 1.(c) of the CCL No. 10 (Taylor, page 250) include the phrase "other inhumane acts". Whereas the term "inhuman" can be found in Taylors Final Report – once on page 273 ("inhuman conditions") and again on page 274 ("inhuman use of slave labor") – the term "inhumane" is correctly cited when discussing Article 6(c) of the IMT Statute (Taylor, page 239); see further *International Military Tribunal Nuremberg, Trial of the Mayor War Criminals before the International Military Tribunal Nuremberg* 14 November 1945 – 1 October 1946, Volume I Official Text in the English Language (1947), 11 displaying the text of Article 6(c) of the IMT Statute with the phrase "other inhumane acts". Also note that the original text of Article II 1.(c) of the CCL No. 10, which can be found in the *Enactments and Approved Papers of the Control Council and Coordinating Committee*, Allied Control Authority Germany, Volume I, Legal Division Office of Military Government for Germany (US) (1945), 306, reads at page 307 "other inhumane acts". Despite the fact that parts of the original CCL No. 10 document are unreadable (due to aging), the phrase "other inhumane acts" is still well visible (scans of all original texts on file).

Apparently, there has been a different usage of the terms inhuman and inhumane over the times. Whereas the Nuremberg principles, which were drafted by the ILC and acknowledged by the UN General Assembly to formulate and approve the IMT law and set guidelines for the determination of international crimes[47] stated in Principle VI:

"The crimes hereinafter set out are punishable as crimes under international law: […] (c) Murder, extermination, enslavement, deportation and other *inhuman* acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime."[48] (emphasis added)

Article 6(c) of the IMT Statute, Article 5 of the ICTY Statute, Article 3 of the ICTR Statute as well as Article 7 of the ICC Statute all make use of the term 'other inhumane acts'.

To my knowledge, the ILC has not given an explanation why it has codified the term other 'inhuman' acts instead of other 'inhumane' acts when drafting the principles. It seems the problem is simply grounded on a mistake in writing. In the 1950's report, the Special Rapporteur of the ILC *Spiropoulos inter alia* cited Article 6(c) of the IMT Statute, stating "[Article 6] (c) [IMT Statute] Crimes against humanity: namely murder, extermination, enslavement, deportation and other inhuman acts […]",[49] whereas, the correct wording of Article 6(c) reads 'other inhumane acts'.[50] It is probably due to this error that the notion 'other *inhuman* acts' found its way into the official text of the principles, which are annexed on the very next page to the ILC report. Presumably, the ILC Draft Codes of 1951 and 1954 thereby adopted the wrong wording of Principle VI.[51]

47 *Yearbook of the ILC*, *supra* note 36, 2.

48 *Yearbook of the ILC*, *supra* note 36, 376 - 377.

49 *Yearbook of the ILC*, *supra* note 36, 194.

50 Also see *supra* note 46 with further specifications.

51 *Yearbook of the ILC*, *supra* note 36 263. Also see Article 2 of the International *Convention on the Suppression and Punishment of the Crime of Apartheid*, UN Doc GA RES 3068 (XXVIII) of 30 November 1973; "For the purpose of the present Convention, the term 'the crime of *apartheid'*, which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following *inhuman* acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them" (emphases added); compare with Article

In its 1991 Draft Code the ILC made the unsuccessful attempt to widen the scope of crimes against humanity by rephrasing it to "systematic or mass violations of human rights". Due to criticism from states and legal commentators, the ILC went back to the original phrase in its 1996 ILC Draft Code. Its Article 18(k) contained a definition of crimes against humanity, which formed the very basis of Article 7(1)(k) of the ICC Statute, including 'other inhumane acts'.

## II. The Legal Framework of Crimes Against Humanity

Apart from the divergent literal usage of 'inhuman' and 'inhumane', the codification of crimes against humanity within Article 7 of the ICC Statute has created normative problems in the understanding of the legal provision of 'other inhumane acts'. With regard to Article 7 of the ICC Statute, this is partly due to the fact that the legal elements of crimes against humanity were formally split into different subsections within paragraph 1. Different tasks are assigned to the respective sections and subsections.

Article 7(1) of the ICC Statute defines the overall legal framework of crimes against humanity. A differentiation is made between a required macro-criminal context *eo ipso* – the so called *chapeau*; and a micro-criminal participation in a crime by the perpetrator. The macro-criminal context is codified as "widespread or systematic attack directed against any civilian population". The micro-criminal participation is codified via the phrase "any of the following acts" followed by an enumeration of crimes, which have been included in a particular catalogue of crimes, including 'other inhumane acts'. Finally, the notion "committed as part of […] with knowledge of the attack" was incorporated to serve as a *nexus* between the macro- and micro-criminal sections of crimes against humanity.

Article 7(2) of the ICC Statute clarifies some of the legal notions used in Article 7(1) of the ICC Statute. Accordingly, Article 7(2) starts with the phrase "For the purpose of paragraph [7] 1". Assistance in interpretation is given by the so called ICC Elements of Crimes; a (very short) commentary on the legal notions of the Statute, which according to Article 9 of the ICC Statute should serve the ICC judges as a basis for interpretation. The framework laid out is codified as follows in Article 7 of the ICC Statute:

> 7(2)(h) of the ICC Statute "The 'crime of apartheid' means *inhumane* acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups committed with the intention of maintaining that regime" (emphasis added).

"Crimes against Humanity

1. For the purpose of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

   (a)Murder; […]

   (j)The crime of apartheid;

   (k)*Other inhumane acts* of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1 […]

   (h)"The crime of apartheid" means *inhumane acts of a character similar* to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups committed with the intention of maintaining that regime; […]" (emphasis added)

In order to understand the notions of humanity and 'other inhumane acts', one should be familiar with the purpose of the splitting between the macro- and micro-criminal elements. The *chapeau* of Article 7(1) of the ICC Statute was included to shift crimes against humanity to a level that would justify an application of criminal law on grounds of public international law, thereby giving the ICC judges a right to use rules of international law instead of the respective national criminal laws – i.e. the one which the accused is acquainted with. The macro-criminal "attack directed against any civilian population" is thus not to be understood as the attack by the perpetrator, but rather as the "broader attack"[52], respectively "attack as a whole"[53], which is directed against any part of the civilian

[52] *The Prosecutor v. Bagilishema*, *supra* note 21, para. 75.

[53] *The Prosecutor v. Emmanuel Ndindabahizi*, Judgement and Sentence, ICTR-2001-71-I, International Tribunal for Rwanda, 15 July 2004, para. 477.

population; such as the aggregate of all micro-criminal acts that were – as part of *Hitler's* final solution – committed in *Auschwitz* against the Jews and other civilians during World War II.

As it is clear that the notion "attack directed against any civilian population" is – first and foremost – a contextual element, it follows that no perpetrator can be found guilty solely for the mere existence of a macro-criminal context. From a normative perspective the attack is not an international crime in a legal sense. This being said, a case can be made for Kirsch's conclusion that the macro-criminal contextual element is (predominantly) a jurisdictional element, and thus a mere precondition for prosecution.[54] The fact that the attack (as a whole) is embedded into the micro-criminal perpetration of the perpetrator may indicate that there is some sort of an element of blameworthiness, as the *mens rea* of the perpetrator needs to be proven for *both* the micro-criminal commission of the crime as well as the awareness that the crime was committed as part of the attack. *Finta* makes a similar point by stating that

"there are certain crimes where, because of the special nature of the available penalties or of the stigma attached to a conviction, the principles of fundamental justice require a mental blameworthiness or a *mens rea* reflecting the particular nature of that crime."[55]

Nevertheless, I hold that the inclusion of the *mens rea* element in the notion of attack should not lead to an assumption *in generalis* whereby the blameworthiness may be regarded as the *legal core* of the contextual element. Clarifications in that regard can be made by taking reference to the ICC Statute. According to Article 7(1) of the ICC Statute,

"'crimes against humanity' means any of the following acts when *committed as part of* a widespread or systematic attack directed against any civilian population, *with knowledge of the attack*". (emphases added)

54 S. Kirsch, 'Two Kinds of Wrong: On the Context Element of Crimes against Humanity', 22 *Leiden Journal of International Law* (2009) 3, 525; S. Kirsch, *Der Begehungszusammenhang der Verbrechen gegen die Menschlichkeit* (2009); S. Kirsch, 'Zweierlei Unrecht – Zum Begehungszusammenhang der Verbrechen gegen die Menschlichkeit', in R. Michalke et al. (eds), *Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008* (2008), 269.

55 *Regina v. Finta* 1 S.C.R. 701 (1994), 132.

The notion "when committed [...] with knowledge of the attack" is of special interest for the problem raised. Particularly, the argument could be made that due to the interconnection between the *mens rea* (knowledge) of the perpetrator and macro-criminal context (attack), the latter should serve as an element specifying the aggravated wrongfulness or blameworthiness of the perpetrator's criminal behavior. The notion "*when* committed as part of […] the attack" may underline this finding, as the term 'when' describes a conditioned arrangement between both elements. However, such a reading of Article 7 of the ICC Statute would probably be flawed. The notion "part of" within the phrase "when committed *as part of* […] the attack" demonstrates, that both levels of criminality are dependent upon each other, and in fact, the micro-criminal participation of the perpetrator is embodied into, and thus – part of – the macro-criminal context. If read together with the notion "when committed", it can be concluded that both levels are arranged in equal hierarchy. Furthermore, a subordination of one level of criminality – in this case the macro-criminal component – under the other – the micro-criminal perpetration of a catalogue crime – leads to a false understanding of the legal framework of the crime, as it suggests that one level would be of less importance than the other to determine the criminal liability for crimes against humanity. Finally, legal history does not show that the macro-criminal contextual element should only be a subordinate part of the crime with regard to the element of blameworthiness. On the contrary, since its first definition in Article 6(c) of the IMT Statute, micro-criminal and macro-criminal elements were arranged in a rather mixed – than subordinated – order within crimes against humanity.

The problem of interpreting the notion of inhumane within 'other inhumane acts' is directly connected to a profound understanding of the micro- and macro-criminal splitting of the legal framework of crimes against humanity. As a matter of fact, much misunderstanding is rooted in the legal history of the provision of 'other inhumane acts'. Article 6(c) of the IMT Statute did not strictly separate between a micro- and a macro-criminal level, nor did it give concretizations when the catch-all provision should be applied. A strict distinction between specific macro-criminal, chapeau elements and micro-criminal, enumerated crimes was not made. In consequence, the notion of 'other inhumane acts' was needed to reasonably make safeguards that only incidents of comparable nature and macro-

criminal gravity would fall under crimes against humanity.[56] Article 5 of the ICTY Statute introduced the split between the macro-criminal *chapeau* and the enumeration of micro-criminal crimes in the early 1990's. Thereafter in 1998, Article 7(1)(k) of the ICC Statute introduced the concretizations of 'other *inhumane* acts' by upholding the split. When drafting the concretizations of Article 7(1)(k), the element of 'inhumane' within 'other inhumane acts' was not adjusted. In consequence, today one could be of the opinion that the notion of inhumane within 'other inhumane acts' remains to be solely declaratory, without field of application and most likely was included due to mere legal history,[57] yet not without normative flaws.[58] The

[56] Also note that H. Feldmann, *Das Verbrechen gegen die Menschlichkeit* (1948), 44 distinguishes within the crimes-catalogue of the CCL No. 10 between *Einzelverbrechen* (singular crimes) and *Massenverbrechen* (mass crimes). Indeed there are quantitative differences. Whereas 'murder' as a crime against humanity would belong into the singular crimes category, 'extermination' as a crime against humanity rather fits into the category of 'mass crimes'. Feldmann's (rightful) distinction can certainly be upheld without giving up the differentiation between micro-criminal perpetration and macro-criminal context. With regard to the crime of extermination as a crime against humanity, the ICTR has held that a mass killing event needs to take place, yet the quantitative threshold of people to be killed is rather low; see *Prosecutor v. Kayishema*, *supra* note 21, para. 145. In *Prosecutor v. Akayesu* it was declared that the killing of 16 people is sufficient to show that an "extermination" had been committed, see *The Prosecutor v. Jean-Paul Akayesu, Judgement*, ICTR-96-4-T, International tribunal of Rwanda, 2 September 1998, paras 735 - 744. As can be seen in *The Prosecutor v. Milan Lukić & Sredoje Lukić*, Judgement, IT-98-32/1, International Criminal Tribunal for the former Yugoslavia, 20 July 2009. The quantitative threshold of "extermination" as a crime against humanity is anything but settled. The actual problem circles around the question to what extent the required "quantity" of extermination is directly connected to the normative splitting of macro- and micro-criminal levels. On the one hand, 6(c) of the IMT Statute did not split both levels of criminality. Therefore, the quantitative threshold of "extermination" was seen as rather high, since the macro-criminal component had to be attached to the crime of extermination *eo ipso*. Figuratively, the macro-criminal component of what is today known as *chapeau* found its inclusion in the interpretation of "extermination". On the other hand, Article 5 of the ICTY Statute [as well as Article 3 of the ICTR Statute/Article 7 of the ICC Statute] transferred the macro-criminal component to the *chapeau* elements and introduced a split between macro-criminal context and mirco-criminal perpetration. It is thus reasonable to hold that the quantitative threshold for "extermination" pursuant to Article 5 of the ICTY Statute [as well as Article 3 of the ICTR Statute/Article 7 of the ICC Statute] can be reduced when comparing it with the requirements that are laid out by the IMT.

[57] See statement by Italy during the Rome Conference, UN Doc A/CONF.183/13 (Vol. II), *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment*

lack of applicatory ground for the term 'inhumane' would be grounded on the fact that the *raison d'être* of the *ejusdem generis* principle, which was essentially once codified in the term inhumane within Article 6(c) of the IMT Statute, has now been replaced by the concretizations of Article 7(1)(k) of the ICC Statute. Simply speaking, the notion "other inhumane acts of a similar character", when read in conjunction with the specifications of 'character' in the elements of crimes, could be shortened to the phrase 'other acts of a similar character' without running the risk of losing any specific meaning. I will argue in the following section against such a redundant understanding of 'inhumane'. The term 'inhumane' within Article 7(1)(k) has its own field of application particularly with regard to covering serious injuries to the collective and/or individual human dignity.

## E. From Normative Arrangements to the Interpretation of 'Other Inhumane Acts' by ICC Pre-Trial Chamber I

The interpretation of 'other inhumane acts' pursuant to Article 7(1)(k) of the ICC Statute became relevant for the first time in the *Katanga and Ngudjolo Chui* joinder pending before the ICC, where the Office of the Prosecutor charged both defendants with 'other inhumane acts'. In its 30 September 2008 decision on the confirmation of charges,[59] ICC Pre-Trial Chamber I gave some insights of how that notion should be interpreted from its point of view. It was particularly interesting to see whether the Chamber would take into account the legal history of the notion, or rather stick to a self governed reading.

After reiterating the wording of Article 7(1)(k) of the ICC Statute and the respective ICC Elements of Crimes, the Chamber notes:

*of an International Criminal Court, Official Records, Volume II, Summary records of the meetings of the Committee of the Whole*, 153, para. 164.

58 The insecurity to properly arrange the catch all provision of Article 7(1)(k) of the ICC Statute can be seen by the fact that – whereas Article 7 of the ICC Statute normally splits between the enumeration of the crime in Article 7(1) and the definition of the crime in Article 7(2) – the concretizations of "other inhumane acts" have been included in Article 7(1) instead of Article 7(2), which, from a normative perspective, is the wrong place.

59 *Situation in Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717 (Pre-Trial Chamber I), 30 September 2008.

"448. In the view of the Chamber […] inhumane acts are to be considered as serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1) of the Statute.

449. The Chamber notes that, according to the jurisprudence of the ICTY […] the conduct of intentionally causing serious physical or mental injury constitutes a serious violation of international customary law and of human rights of a similar nature and gravity to the crimes referred to in article 7(1) of the Statute. […]

450. The Chamber notes, however, that the Statute has given to ''other inhumane acts'' a different scope than its antecedents like the Nuremberg Charter and the ICTR and ICTY Statutes. The latter conceived ''other inhumane acts'' as a 'catch all provision', leaving a broad margin for the jurisprudence to determine its limits. In contrast, the Rome Statute contains certain limitations, as regards to the action constituting an inhumane act and the consequence required as a result of that action. […]

452. […] article 7(l)(k) of the Statute defines the conduct as 'other' inhumane acts, which indicates that none of the acts constituting crimes against humanity according to article 7(1)(a) to (j) can be simultaneously considered as an other inhumane act encompassed by article 7(l)(k) of the Statute.

453. Article 7(l)(k) of the Statute and article 7(l)(k)(l) of the Elements of Crimes further require that great suffering, or serious injury to body or to mental or physical health occur by means of an inhumane act".[60]

When taking a closer look at the findings of ICC Pre-Trial Chamber I, it is worth noting that the Chamber omitted to deal with the most substantial concretization of 'other inhumane acts' by the ICTY and ICTR, which are described as

"acts that deliberately cause serious mental or physical suffering or injury *or constitute a serious attack on human dignity*".[61]

60 *Prosecutor v. Katanga*, *supra* note 59, paras 448 - 453 (footnotes omitted).

61 *Prosecutor v. Kayishema*, *supra* note 21, para. 151 and a similar wording in *Prosecutor v. Bagilishema*, *supra* note 21, para. 91; *Prosecutor v. Blaškić*, *supra* note 21, paras 240-242; Article 18(k) of the *ILC Draft Code of Crimes Against the Peace and Security of Mankind*, and *Commentary to the ILC Draft Code 1996*, ILC 1996 Report, 103. Also see M. Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, 531 (2001), mentioning the

On the contrary, despite the fact that according to Pre-Trial Chamber I, Article 5 of the ICTY Statute and Article 7 of the ICC Statute set the ground "for violation of international customary law and of human rights of a *similar* nature and gravity"[62] (emphasis added), the Chamber stuck to the very wording of Article 7(1)(k) of the ICC Statute, as well as to the wording of the ICC Elements of Crimes, which exclude the latter specification. The Chamber did not elaborate on the issue of whether a serious injury to the human dignity should fall under the notion of 'other inhumane acts', but concluded that due to the (allegedly more specific) wording of the ICC Statute in terms of 'other inhumane acts', the notion is more strictly construed, and cannot be regarded as a catch all provision. Furthermore, the notion "other" within 'other inhumane acts' presupposes that one and the same act cannot simultaneously constitute an act encompassed in the catalogue of crimes within Article 7 and an 'other inhumane act' at the same time.

When analyzing the notion of 'other inhumane acts' pursuant to Article 7(1)(k) of the ICC Statute by taking into account the legal history of the term, the conclusions of the ICC Pre-Trial Chamber seem debatable. The notion of crimes against humanity has already been interpreted above as to consist of a set of fundamental violations against the humaneness and against the humankind; including injuries to the individualistic and collective dignity.

It seems to be difficult to come to more restrictive specifications for the term 'inhumane' by analyzing Article 7. The concretization within Article 7(1)(k) of the ICC Statute, whereby 'other inhumane acts' are "acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health", mostly recites the *ejusdem generis* principle, which was already applied by IMT to restrict a boundless application of the catch-all provision. Insofar, the concretization within Article 7(1)(k) is predominantly grounded on established case law dating back to the World War II era.[63] Looking at it that way, it is problematic to

differences between the jurisprudence of the ICTY and the wording of Article 7(1)(k) of the ICC Statute and raising the question, whether serious injury of the physical and mental integrity and the human dignity are be included in Article 7(1)(k).

62 *Prosecutor v. Katanga, supra* note 59, para. 449 (footnotes omitted).

63 *The Prosecutor v. Zoran Kupreskić, Mirjan Kupreskić, Vlatko Kupreskić, Drago Josipović, Dragan Papić, Vladimir Šantić*, Judgement, IT-95-16-T, International Criminal Tribunal for the former Yugoslavia, 14 January 2000, para. 564: "In interpreting the expression at issue, resort to the *ejusdem generis* rule of interpretation

conclude that due to the more concrete wording of Article 7(1)(k) of the ICC Statute – particularly the codification of the similar gravity and nature of the act requirement – one could draw any limiting factors for its application. The same applies for the notion of "other", since "other" has been included within 'other inhumane acts' ever since it was firstly codified in Article 6(c) of the IMT Statute.

Insofar, as for the understanding of the ICC Pre-Trial Chamber with regard to the catch-all, I doubt whether the wording of 'other inhumane acts' pursuant to Article 7(1)(k) of the ICC Statute allows for the interpretation that has been brought forward. The catch-all provision has always been seen as what it is: a clause that should only come into play when a subsumption under all of the other catalogue crimes turns out to be unsuccessful, or are of no greater legal specificity. "Catch all" in this sense was never intended to mean being "applicable without limits", but was – ever since it was firstly used by the IMT – restricted by the principle of normative complementarity application.

As for the (allegedly limiting) concretizations of Article 7(1)(k), it actually remains unclear what stance the Chamber is taking with regard to an redundant understanding of 'inhumane' within 'other inhumane acts'.

On the one hand, Article 7(1)(k) seems to be interpreted with major reliance on the wording of the Statute and the Elements of Crimes. The ICC Pre-Trial Chamber held that the term 'other inhumane acts' is more strictly construed in the ICC Statute than in the ICTY (and ICTR) Statutes. It is also held that acts, which are subsumable under a catalogue crime within Article 7(1)(a) to (j) of the ICC Statute, cannot be charged under 'other inhumane acts' in principle, thus narrowing the scope of application of 'other inhumane acts'. Finally, the Chamber connected the term "inhumane" with the term "character" as it is codified in the Elements of Crimes. When taking these points together, it seems to be doubtful, that the Chamber wanted to give the term "inhumane" an independent field of application.

On the other hand the ICC Pre-Trial Chamber held that 'other inhumane acts' "are to be considered as *serious violations of international*

> does not prove to be of great assistance. Under this rule, that expression would cover actions similar to those specifically provided for. Admittedly such a rule of interpretation has been relied upon by various courts with regard to Article 6(c) of the London Agreement. [...] This interpretative rule lacks precision, and is too general to provide a safe yardstick for the work of the Tribunal." para. 566: "Once the legal parameters for determining the content of the category of 'inhumane acts' are identified, resort to the *ejusdem generis* rule for the purpose of comparing and assessing the gravity of the prohibited act may be warranted".

*customary law and the basic rights pertaining to human beings*, drawn from the norms of international human rights law"[64] (emphases added), which would allow for an inclusion of acts that are not strictly covered by the concretizations of Article 7(1)(k). There are many violations of basic human rights imaginable, such as acts of debasement, which are not covered by the wording of the concretizations.

By taking into account the legal history and *raison d'être* of crimes against humanity, I argue that a redundant understanding of the term 'inhumane' within 'other inhumane acts' – and thus a too narrow interpretation of Article 7(1)(k) – violates both the origin of the provision as well as the inner legal system of Article 7 of the ICC Statute. An interpretation for the notion of 'inhumane', which is guided by its literal meaning, purpose and systematic interplay with other provisions should be favored to give this legal element its independent field of application. Precisely, an interpretation, which favors an inclusion of serious injuries to dignity in the notion of "inhumane" integrates criminal acts that are historically, legally developed and rightfully deserve to be included today, also due to their comparable nature and gravity with other catalogue crimes; particularly, the crime of apartheid.

Due to the limitation of the wording of Article 7(1)(k), supposedly only such acts should fall within 'other inhumane acts' which are "of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". The wording of this provision, and its strict application by the ICC Pre-Trial Chamber, may suggest that the indicator for the evaluation of the comparability of the nature and gravity of the act must be related to an attack against the "mental or physical health" of the victim, or at least cause "great suffering".

Such a bi-causal approach for determining the nature and gravity of the respective act hardly corresponds with the diversity of the *Schutzgüter* of the crimes enumerated in the catalogue of crimes, such as life, health, liberty and dignity.[65] The latter *Schutzgut* of dignity, which exclusively[66] forms part

64 *Prosecutor v. Katanga*, *supra* note 59, para. 450.

65 It is hence questionable if the monolithic formulation of "'other inhumane acts' of a similar character" (emphasis added) in Article 7(1)(k) ICC Statute should be applied literally; also see Elements of Crimes, supra note 9, Article 7(1)(k), n. 30 "It is understood that 'character' refers to the nature and gravity of the act."

66 Elaborated upon elsewhere, B. Kuschnik, *Der Gesamttatbestand des Verbrechens gegen die Menschlichkeit* (2009), 438 citing UN Doc S/RES/392 19 June 1976; UN Doc S/RES/473 13 June 1980 with referencing sources UN Doc S/RES/417 31 October 1977; UN Doc S/RES/418 4 November 1977; UN Doc S/RES/591 28

of the crime of apartheid pursuant to Article 7(1)(j) of the ICC Statute, creates particular problems in that regard. If the nature and gravity of 'other inhumane acts' should only be concretized by an attack on the health or physical or mental suffering of the victim, one may ask how (due to the principle of *ejusdem generis* with its requirement of comparability), the crime of apartheid (and thus an exclusive serious injury to dignity) should fall under the given threshold of Article 7(1)(k).[67] From a normative point of view, it seems to be too farfetched to interpret the crime of apartheid as an act which causes great suffering of a similar nature and gravity in comparison to the other crimes listed in the catalogue of crimes within Article 7, let alone to subsume it under the notion of "serious injury to body or to mental or physical health". If one follows the interpretation of the ICTR, which held that the crimes of rape as a crime against humanity, and the crime of torture as a crime against humanity are predominantly violations of the personal dignity,[68] similar problems arise.

Insofar, the concretizations within Article 7(1)(k) should be understood as to only give predominant indicators for the comparable gravity and nature of the act, but do not restrict the applicability of the catch-all provision *stricto sensu* to these constellations.[69] Particularly, a serious injury to human dignity should fall under the notion of 'other inhumane acts' as well. It follows that the term "inhumane" is particularly useful for making (broader) concretizations with regard to the comparable nature requirement. This suggestion is supported by the semantic analysis of the term humanity given above, which includes notions of humaneness and the preservation of human dignity.

## F. Conclusion

This article intended to give some insights on the notion of humanity within crimes against humanity, and its interaction with the terms humaneness, humankind and 'other inhumane acts'. Notably, crimes against

November 1986 and Article 1 of the *Declaration on Race and Racial Prejudice*, UN Doc E/CN.4/Sub.2/1982/Add.1 Annex V (1982): "1. All human beings belong to a single species and are descended from a common stock. They are born in dignity and rights and all form an integral part of humanity."

67 Also see for the strict understanding of "suffering" in relation to the crime of torture, Elements of Crimes, *supra* note 9, Article 7(1)(f), No 1.

68 See K. D. Askin, Gender Crimes Jurisprudence in the ICTR, 3 *Journal of International Criminal Justice* (2005), 1007.

69 Also see H. J. Koch & H. Rüßmann, *Juristische Begründungslehre* (1982), 119.

humanity should be considered as crimes both against humaneness and humankind. Such understanding influences the normative interpretation of 'other inhumane acts', which are predominantly acts that violate the human condition physically, mentally, and spiritually; particularly dignity-wise. It will be interesting to see if the ICC will stick to the rather strict wording of the ICC Statute to exclude serious injuries to the human dignity from the scope of crimes against humanity, or will make adjustments. The legal framework of crimes against humanity, as well as its legal history, would call for the latter.