Introduction

Although crimes against humanity have been prosecuted in national and international fora for over sixty years, both the normative foundations and the definitional elements of this category of crimes remain unclear. Unlike war crimes and genocide, crimes against humanity are not yet the subject of a dedicated international convention. Crimes against humanity are defined in the Rome Statute of the International Criminal Court (‘Rome Statute’), but that treaty stipulates that it should not be construed as limiting the progressive development of international law. However, a convention on crimes against humanity may be adopted in the near future. A group of international experts has been working to promote such a convention; and, in July 2014, the International Law Commission (‘ILC’) decided to begin working on draft articles that will form the basis for a convention.

For a convention to strengthen the law of crimes against humanity, rather than entrench current ambiguities, the ILC and the broader international community must clarify the conceptual underpinnings of these crimes. This chapter seeks to contribute to that process by elucidating a tension between the twin goals animating the definition of crimes against humanity. One purpose of creating a category of crimes called ‘crimes against humanity’ is to identify crimes that ‘shock the conscience of humanity’ so that the international community can express that shock through prosecution and punishment. At the same time, the definition seeks to distinguish crimes against humanity from ‘ordinary’ crimes that are subject only to national jurisdiction. These two goals are related and, indeed, are generally conflated. It is the gravity

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1. See Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544 (‘ICC’) art 10 (‘Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.’) (‘Rome Statute’).

2. The effort is led by Professor Leila Sadat at the Washington University School of Law and is described in Leila Sadat (ed), Forging a Convention for Crimes Against Humanity (CUP 2011) (Sadat, Forging a Convention for Crimes Against Humanity).
of the crimes—humanity’s shock—that is usually cited to justify international jurisdiction.

However, these two goals are distinct and potentially in tension. The need to delimit international jurisdiction in contrast to national jurisdiction suggests the definition should include clear limitations. This goal is often cited to support a requirement that crimes against humanity be committed in furtherance of a state or organizational policy. Such a policy element helps to distinguish crimes against humanity from ‘ordinary crimes’ because states are unlikely to prosecute crimes in which they are complicit. In contrast, the goal of articulating which crimes ‘shock the conscience of humanity’ favors a broader definition. Many people are reluctant to agree that only crimes committed by governments or similar organizations pursuant to policies shock humanity’s conscience. Moreover, if crimes against humanity are defined broadly, they are better able to adjust to the evolution of humanity’s conscience over time.

Roger Clark’s work on crimes against humanity hints at the distinction between the goals of delimiting international jurisdiction, and of encompassing all crimes that shock humanity’s conscience. In analyzing the definition of crimes against humanity, Professor Clark labels two of the elements ‘jurisdictional’. These are the Nuremberg Charter’s requirement that crimes against humanity be committed in connection with armed conflict and the Rome Statute’s requirement of an ‘attack’ against a civilian population. Professor Clark asserts that these elements do not constitute substantive limitations on the concept of crimes against humanity, but merely restrict the jurisdictions of the particular courts adjudicating such crimes.3

Professor Clark’s assertion that some elements of crimes against humanity are jurisdictional rather than substantive does not reflect the majority position. Most of the commentary on crimes against humanity assumes that the questions of jurisdiction and substance are inextricable. That is, that each of the elements of crimes against humanity tells us both what crimes merit the label ‘crimes against humanity’ and what crimes warrant international adjudication.4


4 See eg, Robert Dubler, ‘What’s in a Name? A Theory of Crimes Against Humanity’ (2008) 15 Aust J Int’l L 85, 95 (‘As part of this process, in 1994, the Security Council adopted the test of a ‘widespread or systematic attack against any civilian population’ for a crime against