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ARTICLE

Domestic Implementation of Crimes against Humanity in Central Asia

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Abstract
Crimes against humanity constitute mass crimes against civilian populations and represent the so-called 'core crimes' of international criminal law. Central Asian states have so far abstained from incorporating the *corpus delicti* of crimes against humanity in their criminal legislation. After a short overview of the current status of crimes against humanity under international law, this article analyses the domestic legislation of five Central Asian countries: Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. It looks at current Criminal Codes to suggest how those could be strengthened by the inclusion of properly formulated crimes against humanity dispositions, taking into account the peculiarities of these national legal systems. The article also offers a brief review of possible factors which might have precluded the states in question from proper implementation. It argues in favour of such implementation, delineating its legal benefits and potential advantages for both State Parties and non-State Parties to the Rome Statute in Central Asia.

Crimes Against Humanity as Crimes Under International Law

Crimes against humanity, along with genocide, war crimes and the crime of aggression, constitute the so-called 'core crimes' under contemporary international criminal law (ICL). They are mass crimes committed against civilian populations.[1] According to Professors Werle and Jessberger, the most serious crimes against humanity encompass the killing of entire groups of people which is also characteristic of the crime of genocide.[2] However, crimes against humanity are not necessarily directed against a concrete group of people but against a civilian population as a whole; hence, they constitute a wider category of crimes than genocide.[3] The prohibited acts amounting to crimes against humanity include not only extreme criminal acts such as murder and extermination but also other serious crimes: enslavement by way of forced labour, expulsion of people from their native places, torture of political opponents, mass raping of defenceless women, enforced disappearance[4] and so on.

The establishment of crimes against humanity as a matter of positive law did not take place before 1945 when their first definition was included in the text of the *Charter of the International Military Tribunal* at Nuremberg. Article 6(c) of the Nuremberg Charter defined crimes against humanity as a constellation of prohibited acts committed against civilian populations.[5] This category of core crimes was added to the Charter in order to guarantee that many of

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[1]Gerhard Werle & Florian Jessberger, *Principles of International Criminal Law* (Oxford University Press 2014) 328, para 867.

[2]ibid.

[3]ibid.

[4]ibid.

[5]Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, 8 Aug 1945, 82 UNTS 279 (entered into force 8 Aug 1945), art 6(c).

the Nazis' most characteristic acts would not go unpunished, in particular, to include acts committed by Germans against other Germans which did not fall under the category of war crimes. Ever since this codification was made, the phenomenon of crimes against humanity continues to spark a lot of scholarly and practical debates. Their historical development, practical application, material and mental elements, their protective scope, role in (international) law, pertinent jurisdiction(s) and many other aspects have been subjects of both general and detailed analyses.

The modern definition of crimes against humanity is found in what is now Article 7(1) of the *Rome Statute of the International Criminal Court*:

> … For the purpose of this Statute, 'crime 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;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (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. [6]

Furthermore, in its paragraphs 2 and 3, the article contains clarifications for different terms and elements of the crimes and for the individual underlying acts constituting these crimes ('attack directed against any civilian population', 'extermination', 'enslavement', 'deportation', 'torture', and so on). Perhaps, compared to other definitions of crimes against humanity in various legal instruments, either before or after the adoption of the Rome Statute, Article 7 represents the most restrictive one. Even a brief comparison between the notions of crimes against humanity laid down in customary international law and Article 7 demonstrates that it is mostly based on the former, also drawing heavily on the case-law of the International Criminal Tribunal for the Former Yugoslavia.[7]

According to Ambos, Article 7 of the Rome Statute represents both a codification and a progressive development of international law within the meaning of the United Nations Charter[8] because it unites the distinct legal features which may be thought of as the 'common law of crimes against

[6]Rome Statute of the International Criminal Court, opened for signature 17 Jul 1998, 2187 UNTS 90 (entered into force 1 Jul 2002) (henceforth 'Rome Statute').

[7]Rustam Atadjanov, *Humanness as a Protected Legal Interest of Crimes against Humanity. Conceptual and Normative Aspects* (TMC Asser Press & Springer 2019) 123.

[8]Kai Ambos, *Treatise on International Criminal Law* (vol II, Oxford University Press 2014) 49; Charter of the United Nations, opened for signature 26 Jun 1945, 1 UNTS XVI (entered into force 24 Oct 1945), art 13.

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humanity'.[9] The Article is also important because it is thus far the only definition agreed upon and adopted by a relevant number of states. Moreover, when states take measures to implement international criminal law in their domestic legislations dealing with crimes against humanity (even if those are not so numerous yet) they often look to Article 7 for guidance. It therefore already carries significant authority.[10]

While the modern definition of crimes against humanity is firmly elaborated in the Rome Statute,[11] some of its abovementioned aspects can hardly be considered as clear-cut or fully established and clarified in law and practice. A very good example is the question of protected interests. 'Humanity' as a protected legal interest of crimes against humanity has never been defined from a positive legal perspective. No explicit and accepted definition of the word currently exists in international legal documents or in international or domestic case-law. It appears that since the beginning of the 20th century, its precise meaning has been left to an intuitive understanding which is to a large extent conditioned by political, social, cultural, or possibly some other important factors.[12] This aspect of crimes against humanity is also considered, albeit briefly, in the subsequent section.

The domestic implementation and prosecution of these core crimes are vital to the emerging system of international criminal justice.[13] While the Rome Statute openly acknowledges the idea of a decentralised administration of justice,[14] it does not establish any obligations on States with respect to the incorporation of crimes under international law into domestic law. It has been claimed that more than ninety states in the world have included at least one crime against humanity as a crime under their respective domestic law.[15] But this number – even if reliable – is nowhere close to universal. Many states including Central Asian states have so far abstained, for various reasons, from incorporating the *corpus delicti* of crimes against humanity in their criminal legislation; hence contributing to the lack of (international) rule of law, inefficient prevention of the most serious international crimes, weakening of the legal system in general and absence of a deterrent effect on potential perpetrators. Out of five Central Asian states, only Tajikistan has ratified the Rome Statute so far.[16]

After a short overview on the need for crimes against humanity to be implemented at the domestic level and briefly tackling the issue of their protective scope and relationship with other crimes under international law, the article analyses the domestic legislation of the five Central Asian countries, ie, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan. It looks at relevant provisions of their respective Criminal Codes with a view to suggest where and in what manner those could be strengthened by including properly formulated definitions of crimes against humanity, taking into account the nature and peculiarities of their respective national legal systems. The article also offers a brief review of possible factors which might have precluded the states in question from proper implementation. The article's overall purpose is to argue in favour of implementation, and delineate its legal benefits and potential advantages for both State Parties and non-State Parties to the Rome Statute in Central Asia. It also aims at revitalising the academic discussion on penalising

[9]Ambos (n 8) 49.

[10]Atadjanov (n 7) 123; Margaret DeGuzman, 'Crimes against Humanity', in William Schabas & Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 126.

[11]Even so, it is far from being utmostly clear or consistent: Ambos, for example, reasons that the definition of crimes against humanity in modern instruments of ICL has been vague and inconsistent in many respects. See Ambos (n 8) 47.

[12]Atadjanov (n 7) 6.

[13]Werle & Jessberger (n 1) 144, para 374.

[14]Rome Statute, art 1.

[15]Amnesty International, 'Universal Jurisdiction: A Preliminary Survey of Legislation around the World – 2012' (Oct 2012) <https://www.amnesty.org/en/documents/ior53/019/2012/en/> accessed 1 Jun 2021. No subsequent reports with information similar to this one has been released by Amnesty International or other organisations compiling the data pertaining to crimes against humanity in one single document.

[16]See the ratification status of the Rome Statute by Tajikistan at the following link: International Criminal Court, 'Tajikistan' <https://asp.icc-cpi.int/states-parties/asian-states/tajikistan> accessed 1 Jun 2021.

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crimes against humanity – a topic which have been somewhat forgotten or neglected of as late in this region.

Providing an overview of the central aspects of crimes against humanity, including their legal nature, protective scope, and relationship with other crimes under international law is necessary before moving to a focused consideration of applicable Central Asian legal provisions. This is necessary because domestic implementation of crimes against humanity is a specific topic that requires knowledge of certain background information such as this crime category's key elements. Such a foundation is useful for introducing readers, especially those from Central Asia with practical legal backgrounds, to the main discussion in the article, and better explaining the major conclusions and suggestions made by the author. Moreover, it is also important to do so in light of the existing confusion in Central Asia regarding what exactly crimes against humanity represent. This confusion is due, at least in part, to how such crimes are portrayed in the media (eg, with many mass human rights violations in the world mislabelled in the news as crimes against humanity). This also affects the way these crimes are perceived and often misunderstood by local authorities and lawyers. Oftentimes, they are equated to the collective concept of 'crimes against the peace and security of mankind', which most criminal codes in the Russian-speaking world categorise as crimes under international law that include genocide, war crimes and the crime of aggression. Hence, it is important that the differences between crimes against humanity and other core crimes are clarified before discussing the specifics of the relevant domestic legislation.

The methods applied in writing this article include an analytical legal method as it involves the scrutiny of pertaining provisions of domestic legislations in the region. They also involve the employment of non-legal perspectives when looking, in particular, at some relevant causes and issues potentially hampering efforts toward a better or more comprehensive integration of international legal standards in the region. These could include, for example, political and linguistic factors, among others. Finally, in order to arrive at the key conclusions and recommendations of the article, a contextual approach is employed when dealing with particularities or unique features in each country's context; it helps in making sure that the work's analysis remains concrete, relevant and realistic, and not abstract.

Protective Scope of Crimes Against Humanity

The question of the exact protected legal interest(s) of crimes against humanity is perhaps one of the most open and unresolved issues in ICL, especially, on a normative plane. There are numerous normative visions and conceptual descriptions of crimes against humanity that compete for recognition in law, jurisprudence, and scholarship.[17] The definitions and interpretations of the concept of 'crimes against humanity' vary, to different degrees, from one project to another since their first codification in the Nuremberg Charter.[18] According to DeGuzman, almost every definition used by the various jurisdictions differ in some important aspects from the others.[19] Many questions still remain as a result of this multiplicity of definitions and legal diversity; these questions reveal a lack of universal consensus on the fundamental normative basis for crimes against humanity[20] – even if there is a modern and generally accepted definition for this category of crimes in the Rome Statute.

[17]DeGuzman (n 10) 128. Some of those descriptions are centered around the view of crimes against humanity as a threat to international peace and security; others are focused on their gravity and the negative effects they have on the 'conscience of humanity' as mankind. Yet others include such a characteristic feature of these crimes as their group-based harm (ibid 127–130).

[18]Atadjanov (n 7) 125. The competing normative visions of crimes against humanity are well but not too inclusively described in DeGuzman (n 10) 127–130.

[19]DeGuzman (n 10) 127.

[20]ibid; Atadjanov (n 7) 125.

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This lack of consensus and multiplicity of theoretical and normative descriptions is partly attributed to the absence of a comprehensive unified vision of the precise interest protected against crimes against humanity. While this was not the case with the generally used and common term 'humanity' which has several notions embedded under one umbrella term ('mankind', 'humaneness', 'human nature'), no explicit and accepted definition of the word 'humanity' currently exists in international legal documents or in international/domestic jurisprudence. It appears that since the beginning of the 20th century, its precise intrinsic meaning has been left to an intuitive understanding conditioned by political, social, cultural, or possibly some other important factors.[21]

There are currently many theories of crimes against humanity that discuss, to varying degrees, the nature of these crimes' protected interest (aside from those that consider the nature and manner of the assault, or the material elements).[22] Some argue that the offence's defining feature is the *value* injured, namely humaneness as a basic universal value.[23] Some focus on human diversity without which the very words 'humanity' or 'mankind' would lose their meaning.[24] Others, such as the theory proposed by May, advance that group-based harm violates a strong interest of the international community and thus harms humanity, or mankind itself (ie, the 'international harm principle').[25] One popular theoretical construction offered by Luban maintains that crimes against humanity attack one particular aspect of a human being, namely his/her character as a political animal.[26]

The element of humanity is a fundamental concept. It is so both for the word's general (or non-legal) meanings as understood by mankind and for its more specific implications for crimes against humanity as a legal category. But this point raises significant questions. What exactly is this 'humanity' that is attacked by the acts that constitute the crimes in question? Is it 'mankind', or 'human dignity', or 'human status', or 'humaneness'? Furthermore, does 'civilian population' in the definition of the crimes represent 'humanity' in its fullest meaning? If 'humanity' comes up as a sort of blurred abstract entity and is so unclear, then what exactly makes 'humanity' useful and justified within the context of the term 'crimes against humanity'? The fundamental underlying question would be: what is it about the concept of 'humanity' that puts all those divergent material acts (murder, extermination, enslavement, and others) under the one heading of 'crimes against humanity'?[27]

This article's author has proposed his own theory explaining the protective scope of crimes against humanity based on the fundamental nature of the concept of 'humanity'. Since the 'humanity' attacked by crimes against humanity is a comprehensive concept, a theory describing such crimes must, by logical extension, be comprehensive too. In other words, crimes against humanity are harmful to human beings' most fundamental interests. Therefore, the umbrella concept encompassing all those interests must be fundamental and comprehensive. Such an umbrella concept avails itself of the form of 'humanity' understood as 'humanness'. It reflects and explains all the elements characteristic of these crimes' protective scope, and it also unites all the doctrinal components in the authoritative theoretical efforts already undertaken by different scholars and jurists to describe crimes against humanity.[28]

Following this logic, the theory of humanness may be presented as follows. The protected legal interest of crimes against humanity is humanity as 'humanness'. Humanness is a human status, human condition, or quality of being human; in other words, it is what makes us human. Crimes against humanity are inhuman acts which attack each and every element of humanity,

[21]Atadjanov (n 7) 6.
[22]ibid 9.
[23]ibid 149–151.
[24]ibid 146–151.
[25]ibid 10; Larry May, *Crimes against Humanity: A Normative Account* (Cambridge University Press 2005) 80–95.
[26]Atadjanov (n 7) 10; David Luban, 'A Theory of Crimes against Humanity' (2004) 29 Yale Journal of International Law 85, 111–114.
[27]Atadjanov (n 7) 10–11.
[28]ibid 312.

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those elements being freedom, human dignity, civilised attitudes, humanness, and reason. The commission of these acts eventually aims at rendering their victims 'inhuman', in the sense of depriving them of that very status.[29] All parts of this status come under attack, that is:

(1) The victims' individual freedom is denied;
(2) They are deprived of their human dignity;
(3) Their civilised attitudes are negated, removing the link between the victims and humankind;
(4) Their sentiment of active good will, or humaneness, ceases to exist with the commission of inhumane acts, and
(5) The victims' human nature in the form of reason is denied as well since those acts do not allow them to possess the status of rational creatures anymore.[30]

From this conceptual definition it becomes clear which interests are under threat when these crimes are committed. While some crimes, either international or domestic, may be said to encroach upon one or more of these elements, this theory maintains that crimes against humanity breach all of them. This breach is inflicted upon the *whole* humanity of victims – as humanness, or the condition of being human. That is why they are crimes against 'humanity' as such.[31] Furthermore, the current interpretation of the 'civilian population' element of crimes against humanity suggests that there is no pressing need to rename this group of core crimes as 'crimes against a civilian population' or rephrase it otherwise. 'Crimes against humanity' already serves the purpose of denoting some of the worst and most serious criminal offences under international law while also carrying with it a strong emotional resonance.[32]

Relationship to Other Crimes Under International Law

This small section looks at some major similarities and differences between crimes against humanity and other core crimes. This is not a purely academic exercise: even a brief look at the domestic criminal norms of Central Asian countries, with the notable exception of the Kyrgyz Republic, would indicate that legislators here still grapple with the specific elements of the *corpus delicti* of different categories of international crimes. Apart from other factors mentioned in the conclusion of this article, it also shows clearly that an international legal perspective on what is denominated as crimes against peace and security of mankind is still lacking in the approaches employed by national authorities to their implementation when drafting criminal legislation. Distinguishing crimes against humanity – an already established legal category in international law – from other core crimes helps bring in, inter alia, that missing international perspective for the purposes of domestic implementation.

Regarding the crime of genocide, the several similarities it shares with crimes against humanity include: common historical roots (genocide was initially regarded as an odious form of crimes against humanity);[33] context of application, ie, the two types of crimes apply both during peacetime and armed conflict;[34] both genocide and crimes against humanity encompass very serious offences;[35] as a rule the two categories of crimes do not constitute isolated events but are instead

[29]ibid 187.
[30]ibid.
[31]ibid.
[32]Atadjanov (n 7) 312–313. The author has also previously analysed the issue of how the five constituting elements of humanness relate to the material part of these crimes (ibid 190–204).
[33]United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (HMSO 1948) 196–197; Robert Cryer et al, *An Introduction to ICL and Procedure* (Cambridge University Press 2010) 234.
[34]Atadjanov (n 7) 283.
[35]ibid; Antonio Cassese, *International Criminal Law* (Oxford University Press 2003) 144.

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part of a larger context;[36] finally, even if there is no specific legal requirement that genocide and crimes against humanity must be perpetrated by state-actors, the element of the state is very often present in the commission of both.[37]

Regarding the major differences between them, three may be noted in particular. The first major difference lies in the objective elements of the two crimes: crimes against humanity have a broader scope since they include individual acts which are not encompassed by the existing definition of genocide.[38] The second difference concerns the international element of the crimes. For crimes against humanity, that element consists of the widespread or systematic attack against a civilian population, or the so-called 'contextual element' discussed in the preceding sections; for genocide, the context of organised violence, ie, the international element of the crime, is linked to its *mens rea* – that, the violence committed must comprise the intended destruction of a protected group.[39] And the third main difference between the two categories lies in the difference between their protected interests. In the case of genocide, apart from threatening global peace and security, the people groups' right to existence, the interests of individuals, the rights of the members of the people groups attacked, and the victims' dignities, are concurrently threatened.[40] In the case of crimes against humanity, as the reader may recall, what is primarily threatened is humanness and its constituent elements of freedom, human dignity, humaneness, civilised attitude and reason, as well as fundamental human rights.[41]

As regards the comparison between crimes against humanity and war crimes, both categories have overlaps in their description and application. For example, a mass killing of civilians during armed conflict can constitute both types of crimes.[42] Moreover, the law of crimes against humanity which are committed in the context of an armed conflict continues to be shaped by the law of war.[43]

If we look at the significant differences between these crimes and war crimes (as an informative exercise) we can see that there are, indeed, many. It is possible to single out at least five of them. First, crimes against humanity may be committed in the absence of an armed conflict, while war crimes necessarily require this contextual element of an armed conflict.[44] Second, war crimes can occur as single isolated incidents while a context of widespread or systematic commission is required for acts to be deemed crimes against humanity.[45] Third, the law concerning crimes against humanity protects victims no matter their nationality or affiliation – which is not the case for the law concerning war crimes which primarily concentrates on protecting 'enemy' nationals, or persons who are affiliated with the other party to the conflict.[46] Fourth, the law concerning crimes against humanity deals with acts directed against a civilian population whereas law concerning war crimes regulate conduct on the battlefield against military objectives.[47] Finally, crimes against humanity are broader in their definition than war crimes: the inclusion of 'other inhumane acts' in

[36]Atadjanov (n 7) 284; cf Florian Jessberger, 'The Definition and the Elements of the Crime of Genocide', in Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (Oxford University Press 2009) 95.

[37]Atadjanov (n 7) 284.

[38]ibid 285.

[39]ibid.

[40]Christian Tams et al, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (CH Beck-Hart-Nomos 2014) 85–86.

[41]For a comparative analysis of the protective scopes of genocide and crimes against humanity, see Atadjanov (n 7) 286–291.

[42]ibid 296.

[43]Payam Akhavan, 'Reconciling Crimes against Humanity with the Laws of War. Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence' (2008) 21 Journal of International Criminal Justice 21, 21–22.

[44]Cryer et al (n 33) 233.

[45]ibid.

[46]This is logically explained because the law concerning war crimes was originally based on reciprocal premises between parties to the conflict. See ibid; Atadjanov (n 7) 296.

[47]Cryer et al (n 33) 233.

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its modern definition in the Rome Statute, coupled with the very detailed and complicated nature of the acts constituting the war crimes, make it so.[48]

Finally, with respect to the crime of aggression, there are too many principal differences between this crime and crimes against humanity. It suffices for our purposes, however, to mention four. The first (and the biggest) difference relates to how the former directly concerns the legality of use of force, or *jus ad bellum*, hence raising issues relevant to the international law of State responsibility for acts of aggression.[49] Second, aggression may be said to represent an even broader category of core crimes than crimes against humanity because it provides a favourable 'environment' or 'occasion', according to Cryer, for other crimes under international law to take place.[50] Third, the crime of aggression can only be committed on behalf of a state and as part of a state's plan or policy; unlike crimes against humanity, for which it can often be the case but not always necessarily so.[51] Finally, the crime of aggression is a crime committed by states' leadership, ie, it can be committed exclusively by those who occupy decision-making positions.[52]

As can be seen from the foregoing comparative review, there are important distinguishing elements found in the modern (but also in the historical) definition of crimes against humanity under international law, as compared to other core crimes. Such a review is done not only for comparative purposes; it can be useful in terms of better appreciating the scope and legal aspects of one of the most controversial but also topical and fascinating categories in contemporary international law.

Implementation of Crimes Against Humanity at The National Level: *Raison D'être*

As noted above, more than ninety states have included at least one of the acts falling under the category of crime against humanity in international law as a crime under domestic law. According to other, more modest estimates, only sixty-two countries in the world have adopted criminal legislation penalising crimes against humanity, either fully or in part (ie, certain acts) and labelled precisely as 'crimes against humanity'.[53] Slightly less than half of those sixty-two states are European states (twenty-six) while only seven are represented by Asian states. Africa is represented by fourteen states, both Americas – by ten, and Australia and Oceania – by five.[54] However, one must be careful with this type of data: when discussing national legislation criminalising crimes against humanity it must be made clear whether the implication is that the acts in question have been specifically defined as crimes against humanity per se, or whether the survey deals with criminal actions corresponding to the particular acts of crimes against humanity (ie, murder, torture, rape, persecution, and so on) but are deemed ordinary domestic crimes. The first implication would be more appropriate for the purposes of legal certainty and specificity.

The rationale behind undertaking domestic implementation measures follows the logic of decentralised administration of justice: national implementation and prosecution of core crimes are vital to the emerging system of international criminal justice as compared to having a universal adjudicatory mechanism such as that of the ICC, while the indirect enforcement of ICL via domestic court mechanisms remains the backbone of the modern international criminal justice system.[55] Such enforcement should

[48]Micaela Frulli, 'Are Crimes against Humanity More Serious Than War Crimes?' (2001) 12 European Journal of International Law 329, 330.

[49]Atadjanov (n 7) 301.

[50]ibid; Cryer et al (n 33) 317.

[51]Cryer et al (n 33) 318; Atadjanov (n 7) 297.

[52]Cryer et al (n 33) 318–319.

[53]M Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011) 660–663. The originally proposed numbers in the referenced source have been checked and updated by this article's author.

[54]Bassiouni (n 53) 660-663.

[55]Werle & Jessberger (n 1) 144–145, para 374.

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allow states to effectively investigate and prosecute core crimes including crimes against humanity themselves without having to resort to employing the prosecutorial system of the ICC.

In deciding about the manner in which to include the crimes against humanity into their respective national legal systems, states have a wide discretion and various incorporation options under criminal law at their disposal. They may choose in favour of complete incorporation (the most international law-friendly solution), or prefer to apply domestic criminal law, or select a method of modified incorporation, or even try combined solutions thereto.[56] As to the exact forms of incorporation, states can either amend existing laws in order to accommodate the legislation to encompass crimes against humanity in a criminal (penal) code, or adopt a separate law, ie, settle on self-contained codification. These will depend on the nature of the state's legal system as well as techniques worked out and applied in its legislative practice.

Despite the advantages of opting for proper implementation – in addition to the legal benefits of being able to effectively prosecute and punish the perpetrators of crimes against humanity – there are also other obvious gains of non-legal nature, such as improving the state's image at the international level, and sending a clear message to the international community that the state adheres to the principled stance of fighting impunity and restoring justice. Unfortunately, the majority of states in the world have chosen not to do so, as is shown above. This is, indeed, an unfortunate status quo.

The region of Central Asia, constituted by the five countries of Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, is not an exception in the statistics above. Out of these five, only one State – Kyrgyzstan – has introduced the dispositions of crimes against humanity into its criminal law. The others have yet to undertake the necessary legislative steps and measures in this regard. What follows is a brief characterisation of the domestic legal systems of these Central Asian states, with a more detailed analysis of the situation in each country in terms of the current level of integration of core crimes in their criminal codes, especially crimes against humanity. Proposals will be made as to the respective measures to be taken for improvement in each case.

Overview of Central Asian States' Domestic Legislation

The domestic legal systems of the five Central Asian States belong to the continental civil law tradition (or Romano-Germanic legal family). Normative legal acts, ie, laws adopted by the legislative bodies, are considered the main source of law, with their respective written constitutions serving as the supreme law of the state that provide the legal basis for all the other laws, codes and bylaws. Judicial precedent in Central Asian legal systems do not have a status as a source of law. While all five states' legal systems operate based on the continental civil law tradition, for the last thirty years, those systems have developed their own distinguishing characteristics, in terms of both doctrine and practice.

All Central Asian States recognise international law as a source of law, to varying extents. For example, Article 4(1) of the Constitution of Kazakhstan stipulates that 'international agreements and other commitments of the Republic' are a part of the functioning law in the Republic of Kazakhstan.[57] According to Sayapin, it may be assumed that 'other commitments' include, in particular, customary international law and the law of various international organisations of which Kazakhstan is a member.[58] Furthermore, all Central Asian states have enacted laws on treaties, which regulate the order of their conclusion, observance and application, domestic implementation,

[56]ibid 146–148, paras 377–386 (Professors Werle and Jessberger aptly and succinctly describe these methods).

[57]Sergey Sayapin, 'Central Asia. State Report Overview', in Seokwoo Lee (ed), *Encyclopaedia of Public International Law in Asia* (Brill 2021) 2.

[58]ibid.

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amendments and modifications, invalidity, suspension or termination of their operation, etc,[59] with due regard to the *Vienna Convention on the Law of Treaties*.[60]

As for the criminal law of the countries in the region, the protective and preventive tasks of this legal branch play a central role while criminalisation remains one of the prioritised functions of the law. It must be noted that, in certain Central Asia states such as Uzbekistan, concrete steps have recently been taken to liberalise criminal legislation and bring it closer to pertinent international standards.[61] Many principles of ICL which constitute their general parts and formulate the foundations of and conditions for holding individuals criminally responsible for the commission of crimes under international law (genocide, crimes against humanity, war crimes and the crime of aggression) have largely been implemented in the criminal legislation of, eg, Kazakhstan.[62] The relevant laws of Central Asian states criminalise all core crimes under international law, with the exception of crimes against humanity (which is not the case at present only for Kyrgyzstan), as well as some transnational crimes.[63] Also, there is no case-law involving crimes under international law in Central Asia, and, as maintained by Sayapin, judges and law enforcement officials are likely to require substantial training on the subject.[64]

Kazakhstan

Of the four core crimes under international law, genocide, war crimes and the crime of aggression have been, to a certain extent, implemented in Chapter 4 of the Special Part of the *Criminal Code of the Republic of Kazakhstan* under the heading of 'crimes against the peace and security of mankind' (Articles 160–168).[65] At the moment, the concept of 'crimes against humanity' does not appear in Kazakhstani criminal legislation. This may be due to the fact that Kazakhstan is not a State Party to the Rome Statute, meaning that its provisions are not binding on Kazakhstan from the viewpoint of international treaty law. But it must be kept in mind that the criminalisation of crimes against humanity is not only a matter of treaty law; it may be carried out pursuant to customary international law whose rules' binding nature cannot be denied. In this respect, the Rome Statute codifies most of the customary rules of *material* ICL. Taking into account the stipulations of Article 8 of the *Constitution of the Republic of Kazakhstan* where it states that 'the Republic of Kazakhstan shall respect principles and norms of international law'[66] and that the general phrasing of 'principles and norms of international law' includes customary international law,[67] one might assume that, in the future, Kazakhstan will revisit the matter of crimes against humanity's domestic implementation into its criminal legislation.

[59]Kazakhstan adopted a law on treaties on 30 May 2005, Kyrgyzstan on 24 April 2014, Tajikistan on 23 July 2016 (in its new edition), Turkmenistan on 10 May 2010, and Uzbekistan on 6 February 2019 (in its new edition).

[60]Sayapin (n 57).

[61]Sergey Sayapin, 'Crimes against the Peace and Security of Mankind in the Revised Edition of the Criminal Code of the Republic of Uzbekistan' (2019) 44 Review of Central and East European Law 527.

[62]Sergey Sayapin, 'Implementacija principov mezhdunarodnogo ugolovnogo prava v ugolovnom zakonodatel'stve Respubliki Kazahstan [The Implementation of Principles of International Criminal Law in the Criminal Legislation of the Republic of Kazakhstan]' (2018) 1-2 Law and State no 153, 1.

[63]Sayapin (n 57).

[64]ibid.

[65]The current edition of the Criminal Code of Kazakhstan was adopted on 3 July 2014; it entered into force on 1 January 2015. For the text of the Code in Russian, see: 'Ugolovniy Kodeks Respubliki Kazakhstan [Criminal Code of the Republic of Kazakhstan]' (Zakon) <https://online.zakon.kz/Document/?doc_id=31575252> accessed 1 Jun 2021. For a brief overview and analysis of the implementation of the four core crimes in the Kazakhstani Criminal Code, see Sayapin (n 62).

[66]'Konstitutsia Respubliki Kazakhstan [Constitution of the Republic of Kazakhstan]' (Zakon) <https://online.zakon.kz/Document/?doc_id=1005029> accessed 1 Jun 2021.

[67]Restricting this interpretation only to international treaties would be too limiting and incorrect; it would contradict a proper inclusive understanding of international law whose sources include, first of all, treaties, rules of customary law, and general principles of law.

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A cursory reading of the Kazakhstani Criminal Code might give the impression that it already includes dispositions or elements of several criminal acts that constitute crimes against humanity within the meaning of Article 7 of the Rome Statute of the International Criminal Court. These elements encompass murder, deliberately causing grave harm to health, rape, violent acts of a sexual character, kidnapping a person, unlawful deprivation of liberty, human trafficking, and torture.[68] It may thus appear to have established criminal responsibility for their commission, and imply that the Kazakhstani government has implemented laws concerning crimes against humanity, albeit in part.

Such a reading is not completely wrong: Kazakhstan's criminal legislation does include certain 'equivalents' of many crimes against humanity within the meaning of the Rome Statute. As an example, three of the so-called 'extremist' crimes in the Criminal Code are reminiscent of some individual acts constituting crimes against humanity under the Rome Statute.[69] But almost all of these domestic crimes under the criminal law of Kazakhstan, with the exception of incitement of social, national, clan-based, racial, class-based or religious hatred, will not fall under the purview of crimes against the peace and security of mankind.[70] Moreover, they are not formulated in the Code as crimes against humanity per se. This means they will not be subject to relevant provisions of international and domestic criminal law with respect to the non-applicability of statutes of limitations.[71] Such common crimes are also exempted from applicable rules of ICL on extraterritorial jurisdiction that apply to crimes against the peace and security of mankind.[72] Therefore, work on the express and comprehensive implementation of crimes against humanity in the criminal legislation of Kazakhstan still awaits its legislators, if the purpose of providing for proper conditions to effectively prevent and prosecute crimes against humanity at the domestic level is to be reached.

Kyrgyzstan

The work carried out in the Kyrgyz Republic with respect to crimes against the peace and security of mankind and separately-grouped war crimes under the section on crimes against international legal order in the *Criminal Code of the Kyrgyz Republic* ('Kyrgyz Criminal Code') – a result of major criminal legal reforms since 2017 – is to be particularly noted.[73] A detailed list of individual acts constituting these crimes in the Code is certainly to be praised, though not all of the acts are enumerated in accordance with the Rome Statute's Article 7 (see below).[74] Moreover, here the phrase 'crimes against humanity' has been properly translated into Russian, which is rarely the case: the Russian '*prestupleniya protiv chelovechnosti*' as found in the Kyrgyz Criminal Code literally means 'crimes against *humaneness*' (not humankind!). This concretises the protected interest of crimes against humanity[75] and shows a more up-to-date and progressive understanding of the nature of these crimes by the drafters of the modern edition of the Code. Also, the fact that a separate chapter in the Code (ie, Chapter 53) is dedicated to the dispositions and sanctions for the

[68]Kazakhstani Criminal Code, arts 99, 106, 120, 121, 125, 126, 128 and 146.

[69]These would include: incitement of social, national, clan-based, racial, class-based or religious hatred (art 174), establishing, leading and participating in the activities of unlawful public and other associations (art 404) as well as organising and participating in the activities of a public or religious association or another organisation after a judicial decision to the effect of banning their activity or liquidation in connection with their carrying out terrorism or extremism (art 405).

[70]Of which crimes against humanity are a part.

[71]Under international criminal law, the statute of limitations does not apply to crimes under international law (core crimes).

[72]Sayapin (n 62) 6.

[73]Criminal Code of the Kyrgyz Republic, arts 380–395. The current edition of the Criminal Code was adopted on 2 February 2017 and entered into force on 1 January 2019. See 'Ugolovniy Kodeks Kirgizskoy Respubliki [Criminal Code of the Kyrgyz Republic]' (Zakon) <https://online.zakon.kz/document/?doc_id=34350840> accessed 1 Jun 2021.

[74]ibid art 381.

[75]For a detailed analysis of this important aspect of crimes against humanity, see Atadjanov (n 7).

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commission of war crimes and other violations of the laws and customs of warfare in a detailed manner is worthy of mention.

Criminal responsibility for the commission of crimes against humanity is established in Article 381 of the Kyrgyz Criminal Code. This Article, which is located within Chapter 52 of the Code pertaining to crimes against the peace and security of mankind, contains the following definition of this category of core crimes, under the heading 'Crimes against humanity':

> Illegal deportation, illegal detention, enslavement, mass or systematic executions without trial, deliberate systematic widespread attack on any civilians, forced displacement, kidnapping, torture or acts of persecution committed with the aim of discrimination based on gender, race, language, disability, ethnicity, religion, age, political and other beliefs, education, origin, property and other status of the civilian population, - are punishable by imprisonment of category VI or life imprisonment with a fine of category VI or without it.

While the inclusion of these individual criminal actions within the ambit of crimes against humanity in domestic criminal legislation is a positive, indeed, promising development, one should be aware that there are gaps in its current definition in the Code as compared to the contemporary formulation in Article 7(1) of the Rome Statute.

First of all, the so-called 'contextual element' of crimes against humanity (or its *chapeau* element), ie, the circumstances of a widespread or systematic attack against any civilian population, alongside knowledge of the attack, which must be proven in order to qualify the alleged acts as crimes against humanity proper, does not apply to *all* individual acts under the overall formulation of Article 381. This requirement is precisely what distinguishes a crime against humanity from an ordinary domestic crime (or from other international crimes). The contextual element, especially the widespread or systematic nature of the attack, has not been made a comprehensive umbrella aspect describing each and every act included in the Kyrgyz Criminal Code's definition. Only two of these acts include that element: (1) conducting mass or systematic executions without trial and (2) conducting a deliberate systematic widespread attack on civilians. It means that *any* type of, for example, illegal deportation or illegal detention is punishable under Article 381 even though they do not involve the contextual element. This does not correspond with the principle of legal certainty.[76] This is hardly compatible with modern international criminal legal standards; not to speak of the potential overburdening of the punitive justice system.

Second, the non-exhaustive nature of the definition raises the issue of comprehensiveness. Murder, extermination, rape and other criminal acts of sexual violence such as sexual slavery, enforced prostitution, forced pregnancy and others, the crime of apartheid,[77] and other inhumane acts of a similar character are not covered by the formulation of Article 381. It means that even if these individual acts currently absent in Article 381 qualify as crimes against humanity under ICL, they would not qualify as such under domestic criminal law.[78] Moreover, the lack of a catch-all provision for 'other inhumane acts' implies that the present list of criminal acts under Article 381 is restricted only to the existing nine crimes, thus preventing the Kyrgyz criminal justice system from prosecuting other potentially qualifying actions. This may satisfy the requirement of legal certainly in Article 3 of the Code but such a restriction hardly represents a progressive legal development.

[76]Kyrgyz Criminal Code, art 3.

[77]However, apartheid is provided as a separate crime against peace and security of mankind under Article 386 of the Code.

[78]Needless to say, murder and rape constitute crimes in the Kyrgyz Criminal Code but not under the heading of crimes against international legal order, or crimes against the peace and security of mankind, but as domestic crimes against life (murder) and crimes against sexual integrity and sexual freedom (rape). In other words, they represent *ordinary* domestic crimes in the eyes of the national legislator but not international crimes.

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Third, the definition of one of the individual acts of crimes against humanity – ie, the 'deliberate systematic widespread attack on any civilians' – may require additional proper commentary and interpretation by legislators. From the ICL point of view, a widespread or systematic attack directed against any civilian population is a qualifying element for *all* the individual acts of crimes against humanity starting with murder to torture to other inhumane acts. The *attack* itself does not constitute an independent separate action under Article 7(1) of the Rome Statute; rather, it serves as an objective criterion to determine whether the acts in the subsequent list constitute crimes against humanity. Hence, 'the deliberate systematic widespread attack on any civilians' under Article 381 needs to be clarified: How should the 'deliberate systematic widespread attack on any civilians' be precisely understood? For example, in the contemporary law and practice of ICL, the attack does not necessarily have to involve the use of armed force and may include any mistreatment of the civilian population.[79] Does it mean that the requirement of widespread and systematic violence would not apply to other individual acts mentioned in the provision – which can be understood from a logical (or literal) reading of the provision?

Be that as it may and all of its existing shortcomings notwithstanding, the definition of crimes against humanity under Article 381 of the Kyrgyz Criminal Code represents the first-ever full-fledged domestic criminalisation of crimes against humanity in Central Asia. It is all the more notable that Kyrgyzstan has not yet ratified the Rome Statute. It is definitely a positive precedent to be followed by other states in the region, especially where criminal legislative reforms are currently underway (ie, Uzbekistan).

Tajikistan

The *Criminal Code of Tajikistan* was adopted on 21 May 1998 and entered into force on 1 September the same year.[80] The Code is the sole source of criminal law in Tajikistan, establishing individual criminal responsibility for crimes committed within the Republic. Its final part (Part XV) and final chapter (Chapter 34), both curiously titled 'Crime against Peace and Security of Mankind',[81] consist of ten provisions (Articles 395–405). The chapter includes crimes such as aggressive war (Article 395), public incitements to unleash aggressive war (Article 396), illicit trafficking and financing of proliferation of weapons of mass destruction (Article 397), genocide (Article 398), biocide (Article 399), ecocide (Article 400), mercenarism (Article 401), illegal involvement and participation of citizens of the Republic of Tajikistan and stateless persons in armed units, armed conflict or hostilities on the territory of other states (Article 401(1)), attack on persons and institutions under international protection (Article 402), intentional violations of norms of international humanitarian law committed in the course of an armed conflict (Article 403), intentional violations of norms of international humanitarian law committed during an international or internal armed conflict with a threat to health or resulting in physical injury (Article 404), and other violations of norms of international humanitarian law (Article 405).

With respect to core crimes, several of these provisions implement the crimes of genocide, war crimes and the crime of aggression to some extent. Of these, the integration of war crimes into the Code appears to be the most detailed and comprehensive when compared to other Central Asian states, although there are some gaps. This circumstance may be partially explained by the fact that, during its uneasy history after gaining independence from the Soviet Union, Tajikistan had

[79]See Rustam Atadjanov, 'Crimes against Humanity', in Sergey Sayapin et al (eds), *International Conflict and Security Law* (forthcoming Jul 2022).

[80]Criminal Code of the Republic of Tajikistan, current edition available in Russian at the following link: 'Ugolovniy Kodeks Respubliki Tajikistan ot 21 Maya 1993 goda no 574 [Criminal Code of the Republic of Tajikistan dated 21 May 1998 No 574]' (Zakon) <https://online.zakon.kz/document/?doc_id=30397325#pos=3859;-54> accessed 1 Jun 2021.

[81]'Crime' in singular form, unlike all other sections of the Code where the titles contain 'crimes' in plural.

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to experience a devastating five-year long civil war.[82] The aforementioned provisions, therefore, may reflect the State's desire to make sure that the most serious violations of international humanitarian law do not go unpunished and are properly prosecuted at the domestic level moving forward.

However, the Code does not contain any express provision on crimes against humanity proper. Certain individual acts that can constitute crimes against humanity under ICL do figure into other parts and chapters of the Code: murder (Article 104), forcible transfer of the population during armed conflict (Article 403), torture (Article 143(1)), rape and other forms of sexual violence (Articles 138–142(1)), and the practice of apartheid during armed conflict (article 403). A plain reading of these provisions, however, would either constitute ordinary domestic crimes or crimes against the peace and security of mankind, and not crimes against humanity: their *corpus delicti* lack the necessary qualifying elements of widespread or systematic attack and subjective knowledge of the attack against the civilian population (as the *mens rea* element). A strict reading of the law is important here.[83] Hence, for the time being the current criminal legislation of Tajikistan does not allow for proper and effective prosecution of this category of crimes. The inclusion of crimes against humanity in the Code only appears as a logical step, taking into account the fact, Tajikistan is the only signatory to the Rome Statute in Central Asia.[84]

Turkmenistan

Chapter 21 of the *Criminal Code of Turkmenistan* lists criminal offences against the peace and security of mankind under the same heading as in the Tajikistani Code.[85] It includes propaganda for war (Article 167), planning, preparing, unleashing or waging an aggressive war (Article 167 (1)), propaganda for unleashing an aggressive war and open incitement thereto (Article 167(2)), the manufacture, acquisition or sale of weapons of mass destruction (Article 167(3)), the use of prohibited means and methods of warfare (Article 167(4)), the violation of laws and customs of war (Article 167(5)), the criminal violations of norms of international humanitarian law during armed conflict (Article 167(6)), inaction or issuing of a criminal order during armed conflict (Article 167(7)), the illegal use of symbols protected by international treaties (Article 167(8)), genocide (article 168), ecocide (article 168(1)), mercenarism (Article 169), calls for mercenarism and the creation of specialised training sites for mercenaries (Article 169(1)), participation in armed conflicts or hostilities in foreign states (Article 169(2)), and attacks against internationally protected persons (Article 170).

While the Code's provisions concerning core crimes such as war crimes laudably include rather detailed definitions they do not include crimes against humanity. As in the case of the Tajikistani Code, some of the criminal acts in the 'Special Part' of the Code[86] correspond to some specific acts of crimes against humanity, for example, murder (Article 101), enslavement in the form of human

[82]For a brief overview and history of the non-international armed conflict in Tajikistan (1992–1997), see Rustam Atadjanov, 'Non-International Armed Conflict in Tajikistan', in Seokwoo Lee (ed), *Encyclopaedia of Public International Law in Asia* (Brill 2021).

[83]According to the ICC published guide to the Rome Statute *Elements of Crimes*, 'since article 7 pertains to international criminal law, its provisions "…" must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole.' See *Elements of Crimes* (International Criminal Court 2011) 5 <https://www.icc-cpi.int/resource-library/Documents/ElementsOfCrimesEng.pdf> accessed 1 Jun 2021.

[84]The Statute does not require its State Parties to adopt an implementing legislation with respect to any crime under the jurisdiction of the Court. It is certainly encouraged to do so even if there is no legal obligation under the treaty law.

[85]The Criminal Code of Turkmenistan was adopted on 12 June 1997 and entered into force on 1 January 1998. 'Ugolovniy Kodeks Turkmenistana ot 12 iunya 1997 goda No 222-I [Criminal Code of Turkmenistan dated 12 June 1997 No 222-I]' (Zakon) <https://online.zakon.kz/document/?doc_id=31295286#pos=1224;-49> accessed 1 Jun 2021.

[86]For clarity, all criminal codes in Central Asia are formally divided into two main parts: General Part and Special Part. The Special Parts contain/describe the criminal offences proper.

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trafficking (Article 129(1)), torture (Article 182-1) and some others. However, those do not fall under the definition of crimes against humanity and cannot qualify as such. The express inclusion of this category of core crimes into the Code is therefore recommended.

Uzbekistan

The *Criminal Code of Uzbekistan* was adopted on 22 September 1994 and entered into force on 1 April 1995.[87] The Code has been amended on multiple occasions.[88] The Code, or rather its Chapter VIII on crimes against the peace and security of mankind, has been amended four times.[89] At present, the Chapter provides for, among others, the following criminal offences: propaganda for war (Article 150), aggression (Article 151), violations of the laws and customs of war (Article 152), genocide (Article 153), mercenarism (Article 154), enrolment or recruitment to the military service, security service, police, military justice, or other similar organs of foreign States (Article 154), terrorism (Article 155 et seq), and incitement towards national, racial, ethnic or religious hatred (Article 156).

As is the case with Kazakhstan, Tajikistan and Turkmenistan, crimes against humanity do not figure into the criminal legislation of Uzbekistan. However, the dispositions of some other core crimes in the current edition of the Criminal Code leave much room for improvement. For example, as regards war crimes, there are only seven individual acts that fall under the definition of war crimes.[90] Uzbekistan is currently not a signatory to the Rome Statute, which means the Statute's provisions are not binding on it.

For the sake of fairness, efforts are underway at present to revise the Criminal Code for its provisions to correspond more closely with international law and be more appropriately suited to modern realities. These efforts were kick-started with the enactment of Regulation No PP-3723 'On Measures for Cardinal Improvement of the System of Criminal and Criminal Procedure Legislation' that has an accompanying 'Concept' issued by the Uzbek President in May 2018. More particularly, Section 3 paragraph 6 of the Concept provided for 'the introduction in penal legislation of responsibility for the commission of transnational and international crimes, with due regard to emerging challenges and threats in the world community'.[91] That work remains ongoing.

In line with these laudable developments, it only makes logical sense to expand the chapter on crimes against the peace and security of mankind by introducing a separate category for crimes against humanity, including their qualified contextual element. This could be done in the following formulation as a separate provision in the corresponding chapter or section:

> Crimes against humanity, namely, intentional murder, extermination, enslavement, illegal deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape or any other form of sexual violence of comparable gravity, persecution against any group of persons on political, racial, national, ethnic, cultural, religious, gender or other grounds that are impermissible under international law, enforced disappearance of persons, the crime of apartheid, other inhumane acts of a similar character, when directed against any civilian population and committed in a widespread or systematic manner, – shall be punished by …[92]

[87]The present official edition of the Criminal Code of the Republic of Uzbekistan is available in Russian at the following link: 'Ugolovniy Kodeks Respubliki Uzbekistan' (LexUz On-line) <https://lex.uz/docs/111457> accessed 1 Jun 2021.

[88]See Sergey Sayapin, 'Crimes against the Peace and Security of Mankind in the Revised Edition of the Criminal Code of the Republic of Uzbekistan' (2019) 44 Review of Central and East European Law 527.

[89]For a brief description on the nature of those amendments, see ibid 527–528.

[90]For a more detailed analysis of the issues arising out of these gaps, and possible solutions, see ibid 536–537.

[91]Sayapin (n 87) 528–529.

[92]The proposed definition's language and style correspond to the textual language used in the criminal legislation of Uzbekistan as a matter of practice.

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In this way, the crime's proper qualification issue (as in the case of Article 381 of the Kyrgyz Criminal Code) would be resolved. The same could be said in response to the potential argument that many of the individual acts in the proposed formulation are already covered by other provisions in the Special Part of the Uzbek Criminal Code. That is, the contextual qualifying element is introduced in the last part of the definition of the article. This means that each of the listed criminal acts are considered crimes against humanity only when they are committed in a widespread or systematic manner. In this way, the ambiguity of the term 'attack' is completely removed. Even if introducing crimes against humanity into Uzbek law is not yet a requirement for its government under the applicable treaty law, this category of core crimes is an established part of customary international law. A fuller implementation at the domestic level, if properly done, would make Uzbek criminal law more advanced and even exemplary among other criminal legislations in the region vis-à-vis core crimes in general, and crimes against humanity in particular.

Conclusions and Recommendations

Based on the foregoing research, it is clear that the five Central Asian states have already carried out significant work implementing the substantive law of international crimes (ie, core crimes) in their respective domestic law. While the formulated definitions of some of those crimes still require further fine-tuning (eg, war crimes), in general, their *corpus delicti* are basically reflected in the Criminal Codes in the region. However, this cannot be said for crimes against humanity: four out of five Central Asia states have not introduced this category into their national law, and the one legislation which has done so, ie the Kyrgyz Criminal Code, require additional clarification in terms of, eg, how the contextual attack element contributes to qualifying these crimes properly (see above).

Several specific factors might cast some light on the reasons behind this state of affairs. First, crimes against humanity often – but not always – involve the commission of their individual acts by high-level state representatives. Thus, unlike many domestic or ordinary criminal offences, crimes against humanity involve a significant political element.[93] The concept of crimes against humanity embodies the idea that individuals who either make or follow state policy can be held accountable by the international community; it therefore modifies traditional notions of sovereignty according to which a state's leaders and those who obeyed them enjoyed immunity.[94]

Second, designating this category of crimes as 'crimes against humanity' leaves open the question of what the precise protected interests of these crimes are because the term 'humanity' does not have one unambiguous designation. It may be understood as 'mankind', or as 'humaneness', or as 'humanness/status of being human'.[95] When translated into Russian, ie, one of the official languages of legislation enacted in Central Asian states, 'mankind' (человечество) and 'humaneness' (человечность) are often used interchangeably, with preference given to the former. Moreover, there is no proper translation of the word 'humanness' in Russian. Therefore, when deciding whether or not to include a separate provision in their Criminal Codes incorporating crimes against humanity, these states may feel reluctant because of the established practice of grouping crimes under international law under a single heading of crimes against peace and security of *mankind*. Since all of these crimes under international law are presently figuring in the section on crimes against the mankind, why bother introducing a new crime category and making that section even more complicated than it is?

[93]According to Professor Bassiouni, national prosecutions of crimes against humanity would remain few, and there may be political reasons for this reluctance. States have proven unlikely to prosecute their own leaders: Bassiouni (n 53) 721–722.

[94]Richard Vernon, 'Crime against Humanity' (Encyclopaedia Britannica, 2 Jun 2017) <https://www.britannica.com/topic/crime-against-humanity> accessed 1 Jun 2021.

[95]Atadjanov (n 7).

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Third, many of the individual acts listed in Article 7 of the Rome Statute figure into the existing criminal codes as ordinary domestic crimes: murder, rape, torture, and others. While it may be clear to international criminal lawyers that those criminal offences need to include the so-called 'contextual element' in their objective side (ie, widespread or systematic manner of the attack against the civilian population)[96] in order to qualify as crimes against humanity *per se*, this may not necessarily be the case for lawyers trained in domestic criminal law. The simple inclusion of 'widespread systematic attack' in the list of individual acts within a relevant provision in the criminal code will not suffice, or the introduction of an 'umbrella' or *chapeau* (cap) element in the disposition may seem redundant.

An obvious question for the four Central Asian states with respect to crimes against humanity's inclusion in their domestic law would be: what are the benefits and advantages of implementation thereto? Why complicate the already complex system of criminal legal norms with another new category of crimes on which there has been no case law/precedential practice in the region so far and which is largely unfamiliar to national lawyers?

There can be several answers to these questions. It suffices to mention here a few, as some are already partially considered above. First, it is worth doing so for proper legal reasons: a full-fledged and comprehensive implementation of crimes against humanity would undoubtedly strengthen the rule of law by allowing for and creating necessary conditions to carry out domestic prosecutions of these crimes. Second, securing them into their domestic criminal laws would help prevent some of the most serious international crimes. Third, it would advance the criminal justice systems in the region and turn them into exemplars for other systems across the Commonwealth of Independent States (CIS). After all, the majority of CIS members also lack such provisions in their domestic laws.[97] Fourth, from a diplomatic point of view, this would help improve the global image of the region's countries and send a clear positive message to the international community that no impunity for perpetrators of one of the most egregious categories of international crimes will be tolerated in Central Asia, thus demonstrating an even stronger commitment to uphold the rules and principles of international law.[98] Fifth, proper criminalisation at the national level saves States the trouble of having the alleged perpetrators – citizens of those States – prosecuted and tried under international criminal justice mechanisms, such as the International Criminal Court which is foreseen to be a complementary mechanism – ie, only secondary to the main domestic judicial system, and not a dominating one, ie, prevailing or overriding international system. Domestic prosecution is always a more preferable option because (a) it has direct access to evidence, witnesses and victims, (b) it is much cheaper to pursue than international trial, and (c) it does not raise concerns of state sovereignty – as International Criminal Court does in the eyes of states that have not ratified the Rome Statute.

Having said that, one important thing must be kept in mind: oftentimes, issues pertaining to key and dynamically developing branches of public international law, such as principles and rules of international humanitarian law, international human rights law, and especially ICL, tend to be perceived in this region to not be globally relevant (ie, legal rules aimed at the protection of fundamental values of international community and the whole mankind). Rather, they are regarded to be convenient issues in the political/geopolitical agenda of certain influential states in other regions of the world that are raised to advance their own narrow interests. This perception might be apparent particularly when it comes to domestic implementation of these international rules/norms, specifically crimes against humanity. Furthermore, and from a cultural standpoint, ICL can be viewed

[96]Which is, again, a matter of both treaty and customary international law.

[97]Moreover, that would may turn out useful for national criminal justice systems of the states in other Asian regions. It is suggested that the implemented formulations of crimes against humanity in Central Asia can be taken as positive examples for improving the domestic implementation in those states.

[98]It would be relevant to mention here that crimes against humanity represent some of the most serious violations of international human rights law as well.

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as a Western concept alien to the region, which is predominantly characterised as 'Eastern' and where its democratic traditions are somewhat different from those of the Western world.[99] Hence, the process of implementing ICL in Central Asia should necessarily take into account these important political and cultural nuances.

It appears that the benefits and advantages of implementing crimes against humanity at the domestic level outweigh the potential (real or perceived) risks of doing so. At the end of the day, there is nothing in the national legislations of Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan, as well as in their Constitutions, that would prevent the implementation of crimes against humanity. To the contrary, if international law is recognised as a full-fledged source of law in the region, then it is only logical that some of its gravest violations can be domestically prosecuted, alongside other core crimes.

[99]It is worth mentioning here that, most of the time, Central Asian authorities try to avoid publicly discussing or officially covering developments in the International Criminal Court (ie, ongoing cases and investigations, jurisdictional issues, support for the cause of international criminal justice, etc). This attitude should be understood in conjunction with the lack of motivation by Central Asian states (except Tajikistan) to ratify the Rome Statute – which is possibly regarded by them as an encroachment upon their sovereignty and according immunity upon their representatives. While analyses of geopolitical factors are not the main focus of this article, they definitely play a significant role in this context and affect decision–making processes on international legal issues, including the domestic implementation of crimes against humanity.

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