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Refining the Structure and Revisiting the Relevant Jurisdiction of Crimes against Humanity

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1. Introduction

Crimes of the scale of genocide, war crimes or crimes against humanity do not just strike us as violations of international law. They primarily appear as the most abominable acts of massive violence against individuals. We therefore find intuitive appeal in that the international community brings those perpetrators to a court when state authorities are unable or unwilling to take criminal action. The International Criminal Court (hereafter, the ICC), *ad hoc* tribunals or national courts (through the principle of universal jurisdiction) ensure that the perpetrators account for the particularly atrocious crimes they may have committed. The Preamble to the Rome Statute specifies in this sense that the parties are determined to 'put an end to impunity of the perpetrators' of these 'most serious crimes of concern to the international community'.[1]

There are two questions of philosophical significance that the current state of international criminal law leave unsettled, however. First, why should international legal agents intervene and 'pierce the veil' of state sovereignty only for those crimes? The international community's 'concern' does not apply to all atrocious crimes, not even to all massive crimes. What makes those crimes distinctive? Answering this *conceptual* question (call it 'Q1') primarily implies interpreting the particular structure of those crimes in their legal sources. Second, what should be the function of the national, international or *ad hoc* tribunals judging perpetrators for those crimes? This *normative* question (call it 'Q2') is foundational to criminal law theory. It asks what kind of good is to be fostered by the (international) criminal procedure. The two questions are clearly interdependent: how we are to think about the good that an international trial brings depends on how we understand the crimes that justify establishing them.

In this article, I apply those two interrelated questions to one category of crimes, crimes against humanity (Art. 7 of the Rome Statute). The legal definition of crimes against humanity (hereafter, CAH) displays a particular structure. In addition to their particularly atrocious nature (sixteen major multiple offences including murder, extermination, enslavement, deportation, torture, rape, etc.), CAH must be committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack' (Art. 7(1)). The definition therefore requires that the crimes are not isolated offences but form part of a large attack on a civilian population. Art. 7(2)(a) specifies what drafters

1. Rome Statute of the International Criminal Court, 17 July 1998 at Preamble (entered into force 1 July 2002), online: ICC https://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx. [Rome Statute].

meant by 'attack directed against any civilian population': 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.[2]

The structure of CAH can be therefore divided into two core elements: the *nature of the criminal acts* (call it 'E1'), which specifies how the victims are assaulted, and the *nature of the criminal agent* responsible for those acts (call it 'E2'), which circumscribes the kind of agent that lies behind both the preceding attack and the crimes. Both elements have been thoroughly explored in the philosophical literature. As far as E1 is concerned, Massimo Renzo for instance argues that CAH are distinctive in that they 'deny their victims the status of being human'.[3] The denial of this status leads Renzo to support a wide revision of E2. Given that this status is inherent to the human condition, any violation amounts to a CAH (irrespective of *who* commits it and *why*). Hence CAH should not just apply to institutional or massive crimes (what Renzo calls the 'collectivist nature' of CAH). What distinguishes those crimes is that they attack the very core of the human condition. This specification has important implications for the justification of extra-territorial prosecution (Q2): the violation of an inherent 'dignity' creates a universal moral community to which wrongdoers should respond in the course of the 'questioning and answering' process constitutive of the trial (following Anthony Duff's relational model of criminal accountability).[4]

As far as E2 is concerned, David Luban's seminal account of CAH as 'politics gone cancerous'[5] captures the perversion of the basic role of the state as distinctive of those crimes. While the state is established to protect its subjects from external threats, CAH captures a situation in which state or state-like resources are massively exploited to atrociously attack and harm those same subjects. As Vernon nicely puts it in another classical article, CAH amount to 'an abuse of state power involving a systematic inversion of the jurisdictional resources of the state'.[6] But when it comes to determine the scope of extra-territorial prosecution (Q2), however, Luban surprisingly extends the relevant jurisdiction of CAH to any 'vigilante jurisdiction' as long it meets the procedural standards of 'natural justice'. Despite that state or state-like organizations remain the categorical agents of CAH, 'the interest in repressing crimes against humanity is universal among people, not necessarily among states'.[7] Luban's answer to Q2 relies on the thought that we all are potential victims of CAH because we all have an

2. *Ibid* at Article 7(2)(a).
3. Massimo Renzo, "Crimes Against Humanity and the Limits of International Criminal Law" (2012) 31:4 Law & Phil 443 at 448.
4. For Duff"s framework applied to international criminal law, see in particular Antony Duff, "Authority and Responsibility in International Criminal Law" in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (New York: Oxford University Press, 2010) 589 [Duff].
5. David Luban, "A Theory of Crimes Against Humanity" online: (2004) *Georgetown Law Faculty Publications and Other Works*. Paper 146 at 90 http://scholarship.law.georgetown.edu/facpub/146/.
6. Richard Vernon, "What Is Crime against Humanity?" (2002) 10:3 J Pol Phil 231 at 242.
7. Luban, *supra* note 5 at 141.

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interest in 'healthy politics'. Therefore, the whole of humanity is concerned and becomes the relevant jurisdiction. In other words, although Renzo and Luban radically disagree over which element should be privileged (E1 or E2), they both identify humanity as the relevant jurisdiction of CAH.

The specific objective of this article is to test those predominant normative approaches to CAH against the notion's deployment in law. In section 2, I examine how international criminal courts have specified the core elements of the definition and then assess in section 3 *if* and *how* the predominant philosophical literature can account for it. Embarking on this cross-disciplinary project is needed primarily because those philosophical accounts fail to address (or were just articulated before) the waves of cases brought before international criminal courts (the ICC and the Special Tribunals) throughout the last decade. There is no reason why normative theorists interested in the definition of CAH should neglect the application of CAH to concrete and recent cases. Whether the latter supports the predominant answers given to Q1 and Q2 needs to be thoroughly assessed. Surely, this project does not subordinate normative theory to law. The aim is to create a space where abstract normative analysis and concrete legal application can inform one another. This can concern both minor and major issues. For instance, Luban and Vernon assume that the collective membership of the victims of CAH is distinctive of those crimes. In contrast, international judges and lawyers take this standard as peripheral. Conversely, international judges and lawyers struggle to explain what is normatively cogent about 'organizations' that are not formally recognized states.

Overall, my legal-empirical inquiry leads to both refining the structure (Q1) and revisiting the relevant jurisdiction of CAH (Q2). As far Q1 is concerned, I distinguish in section 4 a third but neglected element in the structure of CAH, which I identify as the *preparatory conditions of the crimes* (hereafter, the 'PCs'). The PCs offer a typology of the organizational steps and institutional patterns (from the production of maps to the establishment of autonomous political and military structures) that must be in place for the odious acts to occur. Those conditions denote the capacity not only to control a large portion of territory, but also to systematize the terrorizing of an entire population with the help of extra-ordinary human and material resources before odiously attacking them. I draw two intermediary conclusions from this inquiry. First, the PCs better elucidate the concrete conditions of possibility of CAH and thereby explain how E1 connects to E2. While this preparatory dimension is mentioned in the literature (most clearly by Vernon's notion of 'institutional pre-requisites'),[8] it needs to be legally and empirically refined. Second, the crucial role of the PCs suggests that Luban's vivid metaphor of 'politics gone cancerous' and Vernon's seminal idea of 'systematic inversion' should not just apply to the odious acts listed in the definition but in fact originates in the PCs. In other words, the odious acts are only the terminal (but atrocious) stage of the cancer of CAH. The metastasis is located in the PCs.

8. Vernon, "What Is Crime against Humanity?", *supra* note 6 at 245.

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However, one cannot normatively reflect on CAH just by arranging and refining a chain of events. The subjects' internal point of view must be thoroughly investigated. The 'travesty of roles'[9] cherished by Luban and Vernon certainly remains the guiding idea. But what does the travesty exactly apply to? Is it merely the fact that the agent of CAH uses state-like resources to massively murder, rape or enslave when those resources are supposed to protect them? If one simply considers the odious acts, the nature and role of the perpetrator does not matter much and the very idea of state perversion loses its significance. We therefore need to more precisely explain *where* and *how* the perversion occurs. I argue that reconstructing the PCs helps to specify what it is about states that those crimes deeply pervert. Empirically, the PCs identify (better than the odious acts alone) the categorical attribute of the state, namely the monopoly of institutional coercion over an entire civilian population in the name of a particular policy or ideology. But again, the normative role of the state cannot be explained only by pointing to empirical attributes. What makes states normatively distinctive, from the subjects' standpoint, is that those subjects do not constantly need to evaluate the soundness of the state's actions and directives with regard to this basic domain. This quality obtains by systematically issuing directives that help subjects better comply with the reasons that apply to them (according to Joseph Raz' concept of authority).[10] Viewing the PCs through this lens reveals the extent to which the agent of CAH perverts the subjects' relation to political authority. While the PCs strikingly mirror the systematic and pre-emptive role of the state, those patterns are established to massively persecute, terrorize and finally odiously attack. In other words, the PCs epitomize the perversion of the reason-giving role of states.

Further, I argue that exploring the notion's deployment in law leads to revisiting the relevant jurisdiction of CAH (Q2). Despite their disagreement about the relevant agent of those crimes, Renzo and Luban both suggest that the accused perpetrators of CAH are accountable to 'humanity'. In particular, Luban's 'vigilante jurisdiction' obtains by identifying a universal interest in 'healthy politics'. But finding an interest among all (potential) victims of CAH does not automatically establish the authority to prosecute accused perpetrators. I here rely on Anthony Duff's critique that in order to identify a criminal wrong, one has first to identify the community to which the wrongdoer is 'answerable'—to recognize him 'as a fellow member of a normative community who is called to answer to his fellows'.[11] Renzo precisely follows this path by identifying dignity as distinctive of humanity. In contrast, what kind of normative community does the notion's deployment in law point to? By refining the role of the agent of CAH as the one of (perverted) state authorities, I argue that the agent of CAH and the state in which those crimes occur (if different from the agent) become 'answerable' to the normative community of responsible states. In contrast to Luban's skepticism towards states having moral interests of their own, I take the law as

9. Richard Vernon, 'Crime against Humanity: A Defence of the "Subsidiarity" View' (2013) 26:1 Can J L & Juris 229 at 232 [Vernon, A Defence of the "Subsidiarity" View].
10. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986) at ch 3.
11. Duff, *supra* note 4 at 603.

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community-creator. States used to claim a general and exclusive right to rule over their subjects. By signing and ratifying the Rome Statute and recognizing the jurisdiction of the ICC, states both make this right conditional and thereby formally create a distinctive normative community. By establishing international trials, this normative community does justice not only to the victims by proving the crimes but also to the perpetrators by treating them as responsible members. This argument then explains why the relevant jurisdiction of CAH falls on states or state-derived entities (ICC, *ad hoc* tribunals or national courts).

2. The structure of CAH in law

The central task of this article is to confront the predominant philosophical literature on the normative concept of CAH to the fast-developing law of CAH. Accordingly, the first step is to interpret the structure of CAH as found in the Rome Statute (Art. 7) and in the case law of international criminal courts. To interpret the structure of CAH, and later to navigate through the philosophical literature, I distinguish between two core elements of the definition: the *nature of the crimes* (E1), which captures what is done to the victims (each individual victim being attacked in a distinctive way), and the *nature and capacity of the agent* (E2) committing the crimes, which distinguish the kind of agent that lies behind the crimes and the broader context that enables them.

As far as E1 is concerned, CAH include the most abominable acts of violence against individuals such as murder, enslavement, rape, torture, or deportation, among others. What brings commonality to all those offences is their extreme level of violence and suffering (including death) endured by the victims both physically and psychologically. Therefore, for one to be a victim of a crime against humanity, one must be attacked in a particularly atrocious way. The extreme nature of the offence certainly raises the concern of the international community. As Renzo puts it, 'the seriousness of these crimes, in turn, is what normally accounts for the fact that they are international crimes. It is because these crimes are particularly serious that they cannot be left unpunished when domestic courts fail to prosecute them'.[12] As the Preamble to the Rome Treaty puts it, those crimes refer to 'unimaginable atrocities that deeply shock the conscience of humanity'.

As to E2, CAH must be committed as part of a 'widespread or systematic attack directed against any civilian population, with knowledge of the attack' (Art. 7(1)). This is what has been called the 'contextual element'[13] in the literature and in the case law. The contextual element also requires that the agent is aware both that *her* actions are part of the larger attack and that those actions would result in the acts constitutive of the crimes (*mens rea* requirement). The contextual element has remained central to qualify the crimes in the case law and to distinguish international criminal law from domestic criminal law. As Jalloh explains, the

12. Renzo, *supra* note 3 at 445.
13. *Ibid* at 444.

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negotiations leading to the Rome Statute clearly indicated that the clause 'was one way to distinguish attacks of a widespread or systematic nature, rather than acts carried out by some random persons or bands of criminals acting on their own initiative for their own purely selfish motives'.[14] As we shall see in more detail later, the 'systematic' criterion plays a more important role than 'widespread' in distinguishing the class of international crimes.

In addition, Art. 7(2)(a) specifies what is implied by an 'attack directed against any civilian population': 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.[15] This is what is referred to as the 'policy element' in the literature. This clause further circumscribes the kind of agent (state or state-like organization) responsible for the planning and the execution of the attack. There is a continuous debate among international lawyers, however, on the appropriate nature of the entity (e.g., a state or a state-like entity), on the nature of the policy (e.g., formalized or not, 'policy' or 'plan') and on whether the clause constitutes an independent requirement (e.g., in contrast to just supporting evidence that the 'systematic or widespread' attack occurred).[16] Cherif Bassiouni, who chaired the drafting committee at the Rome Conference (leading to the adoption of the Rome Statute), argued that Art. 7(2)(a) 'clearly refers to state policy, and the words 'organizational policy' (…) do not refer to the policy of an organization, but the policy of a state. It does not refer to non-state actors'.[17] The debate is still ongoing among more recent contributions[18] and some voices suggest that the policy requirement can be inferred from the systematic nature of the crimes, as we shall later see.

Over the last two decades the proliferation of courts adjudicating CAH (international, *ad hoc* or national) have significantly specified the core elements of the definition. Rather than providing a comprehensive overview of the case law, at this stage I want to highlight one crucial standard that the ICC has identified to further specify both the contextual and the policy elements of the definition (E2). As far the contextual element is concerned (the 'widespread or systematic' attack), the ICC held in the *Bemba* case that the attack must be 'massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.[19] More importantly, it held that the attack must be

14. Charles Jalloh, "What Makes a Crime Against Humanity a Crime Against Humanity" (2013) 28:2 Am U Int'l L Rev 381 at 414.

15. Rome Statute, *supra* note 1 at Article 7(2)(a).

16. For an overview of this debate, see Darryl Robinson, 'Crimes Against Humanity: A Better Policy on "Policy"' online: (December 5, 2013), Queen's University Legal Research Paper No. 2015-022 at 9-10 http://www.ssrn.com/en/ [Robinson, A Better Policy on "Policy"].

17. M Cherif Bassiouni, *The Legislative History of the International Criminal Court* (New York: Transnational Publishers, 2005) vol 1 at 151-52.

18. See, e.g., Matt Halling, "Push the Envelope—Watch It Bend: Removing the Policy Requirement and Extending Crimes against Humanity" (2010) 23:4 Leiden J Int'l Law 827 and the reply by William A Schabas, "Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes" (2010) 23:4 Leiden J Int'l Law 847.

19. *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision on the Confirmation of the Charges (15 June 2009) at paras 83-84 (International Criminal Court, Pre-Trial Chamber), online: ICC https://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx [*Jean-Pierre Gombo*].

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'made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against any civilian population'.[20] In other words, the perpetrator's identity is defined neither by its formal nature (state or non-state) nor limited to the capacity to commit a multiplicity of odious acts (murder, rape, deportation, enslavement, etc.), but by the capacity to control an entire territory (hence the people) on which the attack eventually occurs. This capacity clearly makes the agent of CAH akin to state or state-like entities.

Interestingly, the existence of a 'State or organizational policy' has also been derived from the distinctive capacities of the agent. To determine whether a group qualifies as an organization within the meaning of Art. 7(2)(a), the ICC held that it has to determine 'whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population'.[21] This standard was also taken by the International Criminal Tribunal for the Former Yugoslavia (hereafter, the ICTY) in *Tadic*, where the *ad hoc* tribunal held that 'if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not and can be deduced from the way in which the acts occur'.[22] In addition, the ICTY made clear *contra* Bassiouni that the agent neither needs to be a state agent nor even a state-sponsored agent; it can just be tolerated by the state.[23] The same tribunal also held in the *Kordic* case that the policy element does not need to be explicit or definite but that it remains an 'important indicative factor'.[24] In the more recent Kenya situation, the ICC held that the existence of a policy should still play a role and should be derived from a series of particular events, among which are found 'the establishment and implementation of autonomous political structures at any level of authority in a given territory (…)' and 'the establishment and implementation of autonomous military structures (…)'.[25] Here again, it appears that the class of agents that satisfy the clause is distinguished not just by the horrendous acts committed but by the wide range of coercive action(s) that they (have the capacity to) undertake on a given territory and its people. This is also confirmed in a recent study of the ICC's case law: 'by interpreting the organizational requirement in its context, the chamber found that it is the capacities—meaning the means, resources, and co-ordination capabilities—of the group that are decisive'.[26]

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20. *Ibid* at para 81.

21. Situation in the Republic of Kenya, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (31 March 2010) at para 93 (International Criminal Court, Pre-Trial Chamber), online: ICC https://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx.

22. *Prosecutor v Tadic*, IT-94-1-T, Opinion and Judgment (7 May 1997) at para 653 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY http://www.icty.org/.

23. *Prosecutor v Kupreškic*, IT-95-16-T, Judgment (14 January 2000) at para 552 (International Criminal Court for the Former Yugoslavia, Trial Camber), online: ICTY http://www.icty.org/ [*Kupreškic*].

24. *Prosecutor v Dario Kordic*, IT-95-14/2-T, Judgment (26 February 2001) at paras 181-82 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: ICTY http://www.icty.org/.

25. Situation in the Republic of Kenya, *supra* note 21 at para 87.

26. Tilman Rodenhäuser, "Beyond State Crimes: Non-State Entities and Crimes against Humanity" (2014) 27:4 Leiden J Int'l Law 913 at 923.

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The intermediate conclusion to be drawn is that if CAH do not necessarily imply a legally recognized state, it does imply a state or state-like form of agency. The efforts of the ICC to specify the contextual and policy elements have been heavily scrutinized in the legal literature. More precisely, it has been argued that the extension of the agent of CAH to non-state actors 'follows a tendency in the more recent international case law to downplay the significance of the contextual requirement of crimes against humanity'.[27] Claus Kress thereby supports the dissent opinion of the late Judge Kaul in the Kenya decision, which points to the risk of endangering the 'demarcation line'[28] between international and domestic crimes. Judge Kaul suggests a more fine-grain list of standards for 'organization' that ' should partake of some characteristics of a state'[29]: '(a) a collectivity of persons; (b) which was established and acts for common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale'.[30] Kress supports this restrictive view and suggests that 'the contextual requirement of crimes against humanity reflects the wish of states that these (and others) rather heavy restrictions on their sovereignty only apply in particular instances of human rights violations'.[31] One may view Judge Kaul and Kress' views as supporting each other. But while Kress ultimately relies on a positivist standard to justify this limited scope (state intent), Judge Kaul is more attached to capture a conceptual category (by listing the standards of 'organization'). In the same vein, Robinson holds that the policy element is 'conceptually valuable'[32] in that in it helps distinguishing CAH from ordinary patterns of crimes.

Finally, we should note that the nature and capacity of the agent also distinguishes CAH from other international crimes—most importantly, war crimes and genocide. The same odious acts in times of war (international or non-international conflict) would constitute war crimes (Art. 8 of the Rome Statute). CAH, in contrast, are attacks against a civilian population at the exclusion of combatants. Genocide (Art. 6 of the Rome Statute) understood as the planned extermination of a whole population on racial and ethnic grounds requires neither a widespread attack nor a state or organizational policy. As Robinson notes, 'genocide focuses on the collective character of the *victims* (and hence may not formally require a policy element), whereas crimes against humanity focus on the collective character of the *perpetrators* (and thus require state or organizational

27. Claus Kress, "On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision" (2010) 23:4 Leiden J Int'l Law 855 at 856.
28. Situation in the Republic of Kenya, *supra* note 21, Dissenting Opinion of Judge Hans-Peter Kaul at para 9.
29. *Ibid* at para 51.
30. *Ibid.*
31. Kress, *supra* note 27 at 861.
32. Robinson, A Better Policy on "Policy", *supra* note 16 at 2.

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policy)'.[33] However, to set 'a higher threshold of associative activity and effort to coordinate crimes'[34] again does not yet explain why this form of association is worthy of international criminal concern. It is factually agreed that CAH are committed in 'circumstances where the victims are deprived of any prospect of protection by territorial authorities'.[35] What is still missing is a reflection on what makes those authorities normatively distinctive from the subjects' standpoint. This is where one needs to turn to the normative theory of CAH.

3. The structure of CAH in the philosophical literature

Having identified the basic legal structure of CAH, I now turn to exploring how the predominant philosophical literature has covered the core elements of the definition (E1 and E2) and whether it can remedy the normative *lacuna* identified above. For the sake of concision, I concentrate on two predominant accounts that explore the two elements of the definition in depth, those of Massimo Renzo and David Luban. In a recent article, Renzo argues that the current structure of CAH is deeply unsatisfactory. This is because the collective qualification (E2) of the crimes is at odds with our commitment to protect human rights. More precisely, the qualification of the crimes does not fit with the human rights' core idea to which is assigned 'the function of protecting the dignity of each human person'.[36] Therefore, the very existence of CAH being contingent upon the existence of a systematic attack together with the requirements that the victims are attacked *qua* members of a specific group of civilians (the discriminatory intent), does not fit with the individual dimension of human rights, which are discovered independently of any social, political or legal attribute.[37] According to Renzo, the sole infliction of such violence and suffering upon *any* individual—irrespective of there being a widespread attack or a discriminatory intent—should count as a CAH: 'each of the acts listed in the definition of crimes against humanity of the Rome Statute and other international documents constitutes a serious attack on the human dignity of the victims—one that can be said to deny their status of human being'.[38] Since 'dignity' is an inherently human *and* fundamental status, every single violation justifies international criminal action. An isolated act of rape committed by any individual would fall under this category: 'any case of rape, torture, forced prostitution and so on is a crime against humanity, no matter whether committed as part of wider or systematic attack or not'.[39]

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33. Darryl Robinson, "Essence of Crimes against Humanity Raised by Challenges at ICC" (27 September 2011), EJIL: *Talk!* (blog), online: http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/ [Robinson, Essence of Crimes Against Humanity].
34. Robinson, A Better Policy on "Policy", *supra* note 16 at 10.
35. Rodenhäuser, *supra* note 26 at 916.
36. Renzo, *supra* note 3 at 447.
37. While discriminatory intent originated in the ICTY's case law, it is not stringent in the predominant literature and was rejected in the drafting of the Rome Statute. See Robinson, A Better Policy on "Policy", *supra* note 16 at 11.
38. Renzo, *supra* note 3 at 449.
39. *Ibid* at 461.

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It quickly appears that Renzo's approach to CAH exclusively focuses on exploring the first element in the definition (E1), which he refers to as violations of basic human rights. The threshold to distinguish those basic human rights captures 'the conditions that are necessary for a minimally decent life'.[40] Arguably what exactly constitutes those conditions is subject to a vast disagreement among normative theorists. The exponential literature in human rights theory indicates how persistent the 'threshold' question continues to be.[41] Consequently, the indeterminacy in the notion of human rights is built into the notion of CAH. My critical point is more limited in that Renzo's project radically disconnects the notion from its legal embodiment. In particular, the state or state-like nature of the agent of CAH, the resources needed to prepare and commit their preceding attack (e.g., territorial control, autonomous political and military structures, etc.), and hence the claim that CAH are confined to 'particular instances of human rights violations'[42] go in an opposite direction to Renzo's revisionist project. This should not dismiss the project itself, of course. As Chehtman rightly comments, 'these considerations might not be fatal to his conception, but they certainly undermine its plausibility vis-à-vis our contemporary understanding of these basic concepts'.[43] Renzo's suppression of one of the two core elements of the definition (E2) equally impacts on the justification of extra-territorial jurisdiction (Q2). Following Anthony Duff's relational model of accountability (and in contrast to Larry May's *harm model*),[44] the universal character of 'dignity' creates a universal moral community to which violators are to be held accountable. CAH are 'wrongs for which we are accountable to our fellow human beings in virtue of the membership in the wider community of humanity'.[45] In conclusion, Renzo's answers to both Q1 and Q2 are limited to exploring E1.

It would be blatantly false to hold that Renzo's revisionist approach speaks for the whole philosophy of CAH. In searching for an account that addresses the deployment of CAH in law, one does much better by examining the older but still very influential account of David Luban. In contrast to Renzo, Luban's account precisely aims to inductively reconstruct the structure of CAH based on the relevant statutes (the Nuremberg Charter, the Rome Statute) and some important judicial decisions. Among the five distinctive features of CAH inferred by Luban, the nature and capacities of the agent (E2) hold a prominent place: 'crimes against humanity are committed by politically organized groups acting under color of policy'.[46] Not only does Luban acutely identify the state

40. *Ibid* at 453.
41. I am referring here to the debate opposing the "moral" and the "political" conceptions of human rights. See in particular the threshold critique (in defence of the political camp) provided by Raz in Joseph Raz, "Human Rights without Foundations" in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (New York: Oxford University Press, 2010) 321.
42. Kress, *supra* note 27 at 861.
43. Alejandro Chehtman, "Contemporary Approaches to the Philosophy of Crimes against Humanity" (2014) 14:4-5 Int'l Criminal L Rev 813 at 831.
44. See Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005) in particular ch 5.
45. Renzo, *supra* note 3 at 456.
46. Luban, *supra* note 5 at 110.

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or state-like nature of the agent of CAH. He also points to the broader role and capacities of that agent in line with the jurisprudential findings presented above: 'what makes [those] crimes distinctive lies in the fact that they are atrocities committed by governments and government-like organizations toward civilian groups under their jurisdiction and control'.[47] More than just a circumscribed list of odious acts, CAH denotes a larger pathological state of affairs that Luban terms 'politics gone cancerous'.[48] This pathology captures the perversion of the role of the state in its basic protective mandate. While the state is established to protect its subjects from external threats, CAH captures a situation in which the state's internal resources are massively exploited to attack and atrociously harm those same subjects: 'the legal category of 'crimes against humanity' recognizes the special danger that governments, which are supposed to protect the people who live in their territory, will instead murder them (…)'.[49] The inversion of the role of the state is also acutely grasped by Vernon in another important article: the attacked group of civilians 'is absolutely worse off than it could be in the worst-case scenario of statelessness'.[50]

Schematically, Luban's and Renzo's approaches diverge over which element of the definition (E1 or E2) makes CAH distinctive. However, I argue that this opposition significantly dissipates when one moves from the question of the core structure of CAH (Q1) to the justification of extra-territorial jurisdiction (Q2). As we have briefly seen, Renzo adopts a *relational* approach to criminal accountability (championed by Anthony Duff) according to which being accountable implies being 'answerable' for something in virtue of her occupying a certain role or holding a certain status. The identification of this role is contingent upon what Renzo takes as distinctive of those crimes, namely the violation of the 'dignity' of human beings by any of odious acts listed in the definition (E1). As this status is independent of any social or political affiliation, the relevant community to which wrongdoers account becomes the community of humanity: 'crimes against humanity are those that properly concern the whole of humanity, where this means that they are wrongs for which we are responsible (i.e., accountable) to the whole of humanity'.[51] Although states would still be responsible for the prosecution of those crimes (for practical reasons), any murder or rape committed anywhere in the world for any kind of reason becomes a CAH.

If one were to apply the relational model of criminal accountability to Luban's account of CAH, it follows that the agent of CAH is called to account in virtue of the distinctive role it plays—a role rightly identified as the one of state or state-like entities (E2). But Luban's answer to Q2 does not adopt this logic. This is because Luban is skeptical toward the very idea of states having moral interests of their own. To better understand Luban's view, it is necessary to address another central feature of CAH listed by Luban, namely that 'crimes against

47. *Ibid* at 120.
48. *Ibid* at 90.
49. *Ibid* at 117.
50. Vernon, "What Is Crime against Humanity?", *supra* note 6 at 243.
51. Renzo, *supra* note 3 at 460.

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humanity are inflicted on victims based on their group membership rather than their individual characteristics'.[52] This feature leads Luban to capture in more substantive terms the target of the perpetrators' attack, which Luban metaphorically defines as the 'political animal'. The political animal refers to our need to live in and belong to a particular group. Since CAH necessarily imply discriminatory intent, they attack 'humanness': 'living in some group or another is a human inevitability, and attacking people on the basis of their group affiliation violates humanity (…)'.[53] On this account, the reliance upon 'humanity' does not lead to extending the scope of the crimes (as in Renzo). It rather identifies the very first reasons why subjects establish a state-like institution—reasons that should apply to everyone.

In other words, from inferring the categorical agent of CAH (E2), Luban moves to providing an independent account of what the label 'humanity' stands for—in analogy to Renzo's 'dignity'. This move has been noted in the literature. As Chehtman puts it in his review, 'Luban explicitly admits that he came up with these features by proceeding inductively from the various relevant statutes and decisions. However, these features seem to have a deeper meaning in his conception than simple abstractions or generalizations about the law'.[54] If this 'deeper' investigation amounts to reconstructing the fundamental reasons why human beings enter the civil condition, then it should be welcome. As suggested in the last section, the legal literature points to a *lacuna* when it comes to explain what is normatively cogent about state-like entities. What is problematic is how Luban extends the relevant jurisdiction of CAH (Q2) to any 'vigilante jurisdiction'. Luban holds that

> a universal jurisdiction offense is one that all states have an interest in prosecuting, but I am arguing that the interest in repressing crimes against humanity is universal among people, not necessarily among states.[55]

The thought is that we are all potential victims of CAH because we are all in need of state- or state-like protection (we are all 'political animals'). Therefore, we all have an interest in repressing CAH and any 'vigilante jurisdiction' can prosecute those crimes provided that it respects the procedural tenets of 'natural justice'.[56] For Luban, the fact that states or international tribunals conventionally have jurisdiction follows from the assumption that they can guarantee those procedural principles: 'the primary reason is to protect the accused against mistakes and not because states have a direct interest in punishment'.[57] For this extension of extraterritorial jurisdiction (Q2) to hold states and vigilantes must be constructed as

52. Luban, *supra* note 5 at 109.
53. *Ibid* at 117.
54. Chehtman, *supra* note 4 at 819.
55. Luban, *supra* note 5 at 141.
56. Such principles include the rights to a speedy, public trial; the right to offer a defence or the right to be informed of the charges. See Luban's list in David Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law" in Samantha Besson & John Tasioulas, eds., *The Philosophy of International Law* (New York: Oxford University Press, 2010) 569 at 580 [Luban, Fairness to Rightness].
57. Luban, *supra* note 5 at 143.

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equivalent. They are equivalent in the normative sense that they both embody the universal interest in state or state-like protection (derived from 'political animality'). As Luban puts it, 'putting perpetrators on trial means putting their politics on trial'.[58] And they are equivalent in the qualified sense that they both meet the standards of natural justice. But what this equivalence entails is that states are just the surrogates of their subjects. In a more recent contribution, Luban specifies that 'perpetrators of infamies offend not against state interests but human interests—the perpetrators are indeed 'enemies of all mankind'—and that states prosecuting infamies under UCJ act merely as surrogates'.[59] This assumption is puzzling. Presumably, if states really have no 'direct interest in punishment'[60] and in fact have no moral interest of their own, then the Preamble's reference to the 'most serious crimes of concern to the international community' does not confer any existence to such community. The fact that the jurisdiction for CAH falls upon *state* or *state-derived entities* (the ICC, an *ad hoc* tribunal or a national court) specifically reinforces this problem. Alternatively the established role of the agent of CAH (state or state-like entities) in the case law and the entity legally responsible (state or state-derived entities) indicates a striking similarity of status. Normatively, it invites one to adopt Duff's relational account and construct a relation of criminal responsibility in which a normative community calls their members to account. I develop this approach in the next sections.

4. Concentrating on the preparatory conditions of CAH

In the last section, I concluded that despite strong divergences over which element of the legal definition (E1 or E2) should count as distinctive of CAH. Renzo and Luban converge when it comes to identify the relevant jurisdiction of CAH (Q2), namely humanity. This overlapping conclusion is reached via a different route, though. In Renzo's case, it is the emphasis on the odious acts and the identification of 'dignity' as the inherent status or value violated by them that creates the universal moral community to which wrongdoers have to answer. In Luban's case, it is the universal interest in 'healthy politics' and the strong skepticism toward states having moral interests that triggers the jurisdiction of any 'vigilante' embodying 'humanity'. In this section and the next, I aim to further test those predominant answers to Q1 and Q2 against the law of CAH. In this section more specifically, I first return to the case law and identify what I call the 'preparatory conditions' of CAH, which denote the concrete organizational steps and institutional patterns established for the 'widespread or systematic' attack preceding the odious acts to take place.

To introduce the PCs of CAH, let me start by briefly returning to Luban's illuminating idea of 'politics gone horribly wrong'. CAH epitomize cases in which the state's internal resources are used to atrociously attacked harm the subjects they are supposed to protect. An important step of this process (required by Art.

58. *Ibid* at 144.
59. Luban, Fairness to Rightness, *supra* note 56 at 571.
60. Luban, *supra* note 5 at 143.

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7(1)) is that the odious acts are part of a 'widespread or systematic' attack. The ICC takes this attack as indicative of a 'State or organizational policy' (required by Art. 7(2)). What I call the PCs of CAH denote the broader institutional conditions that the agent of CAH has established in preparation of and/or in conducting this attack. Luban rightly explains that the attack 'suggests [that] something dynamic, something moving and on-going—a persecution in the process of getting worse (…)'[61] but he does not elaborate on this formative process and does not explore the subjects' internal point of view in depth. My study of the PCs aims to fill this gap. I distinguish below three interrelated PCs before drawing some important implications for the normative theory of CAH:

a) The systematic and persecutory control

The ICC's case law makes clear that the systematic exercise of physical control over an entire civilian population is a necessary but not sufficient condition to commit the 'widespread or systematic' attack (and the crimes). The crimes at issue may also be State-sponsored or at any rate may be part of a governmental policy or of an entity holding *de facto* authority over a territory'.[62] This implies for the agent the ability to alter the condition of its subjects at will (including killing them) over a certain time period (before, during, and after the odious acts). This control may or may not be immediately followed by the 'widespread and systematic' attack. The civilian population may or may not be kept in confinement for some time. What matters most are the systematic character of the control and the organized character of the entity exercising this control over a certain time period. This is in line with Robinson's suggestion that the 'systematic' branch of the definition 'focuses not only on the organized nature of the activity but also on the character of the entity organizing it'.[63] The case law is flooded with descriptions of the processes through which the agent progressively establishes its systematic control over its subjects. Those descriptions suggest not only that the systematic control prepares the odious acts but also that it spreads terror across the civilian population. In *Bemba* for instance, it is reported that alleged perpetrators (the *Mouvement pour la Libération du Congo*),

> when taking control of former rebel-held CAR territories, carried out attacks following the same pattern. They regularly threatened civilians for hiding rebels in their houses or committed crimes against civilians considered as rebels by MLC soldiers. They followed an established house-to-house search system of attack aimed at creating of a climate of fear (…).[64]

This further suggests that physical control *per se* is not sufficient. The fact that it is institutionalized through autonomous political and military structures and that it creates a climate of terror also crucially matters.

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61. *Ibid* at 102.
62. *Kupreškic*, *supra* note 23 at para 552.
63. Robinson, Essence of Crimes against Humanity, *supra* note 33.
64. *Jean-Pierre Gombo*, *supra* note 19 at para 115.

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b) The extra-ordinary material and human resources

It follows from the systematic character of this prior control that the agent had the appropriate material and human resources to establish and maintain it (before, during, and after the odious acts). Unlike isolated acts of murder or rape, which also involves physical control over someone, CAH necessitate extra-ordinary means and organizational resources—both human and material. The ICC's case law is here again very informative. In the recent confirmation of the charges against *Bosco Ntaganda*, the ICC held that the alleged perpetrators, the *Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo* (UPC/FPLC), is found to have 'the means and the capability to carry out military operations over a prolonged period of time'.[65] This suggests that the attack and the crimes do not exhaust the resources of the attackers. From the subjects' standpoint, this matters as the attacks may replicate in the future. Those resources also imply the availability of a massive number of personnel and a high level of organisation and coordination. In the recent confirmation of charges against *William Samoeiruto, Henry Kiprono Kosgey and Joshua Arap Sang*, the ICC listed the various organizational steps leading to the attack:

- the appointment of commanders and divisional commanders responsible for the operations on the field;
- the production of maps marking out the areas most densely inhabited by communities perceived to be or actually siding with the PNU;
- the identification of houses and business premises owned by PNU supporters with a view to target them;
- the purchase of weapons as well as of material to produce crude weapons and their storage before the attack;
- the transportation of the perpetrators to and from the target locations; the establishment of a stipendiary scheme and a rewarding mechanism to motivate the perpetrators to kill and displace the largest number of persons belonging to the target communities as well as to destroy their properties.[66]

c) The 'State or organizational' policy

The requirement of a 'State or organizational policy' remains an important indicator of the preparatory dimension of CAH. The ICC requires that a policy or plan be found in order to satisfy the definition, although the policy does not need to be formalized. More importantly, the ICC chains the policy element not to the nature of the agent (e.g., state or non-state) but to the wider capacity to physically

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65. *The Prosecutor v Bosco Ntaganda*, ICC-01/04-02/06, Decision on the confirmation of charges against Bosco Ntaganda, (9 June 2014) at para 17 (International Criminal Court, Pre-Trial Chamber) online: ICC https://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx [*Bosco Ntaganda*].

66. *The Prosecutor v William Samoeiruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11, Decision on the confirmation of the charges (23 January 2012) at para 219 (International Criminal Court, Pre-Trial Chamber), online: ICC https://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx [*Samoeiruto*].

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control a territory (hence the people). As Rodenhäuser notes in his recent case study, 'the tribunals—by reference to the wording of their respective statutes as well as customary international law—applied a capacity-oriented approach in order to respond to atrocities 'in the modern age'.[67] Consequently, the policy element can be simply inferred from the widespread and systematic test as an 'improbability of coincidence'.[68] As Robinson further explains, 'the request for direct evidence of formal adoption of a policy is contrary to past jurisprudence, which consistently emphasizes that a policy need not be formally adopted and can be inferred from the manner in which the acts occur'.[69] The policy requirement adds to the preparatory dimension of CAH and suggests that the agent of CAH is also able to exercise authority on its subordinates. Similarly, the ICC also derives the policy from 'the establishment and implementation of autonomous political structures at any level of authority in a given territory (…)'.[70]

There is in principle a second important aspect to the policy element: the requirement of discriminatory intent. The agent of CAH carefully identifies its victims and discriminates them from the rest of the civilian population under its control. One can infer that the plan or the policy relies on a view of society where the targeted group is permanently denied basic rights to an equal standing (including the right to life)—that is, 'the organization must normally have the capacity to promulgate an ideology against the victim population'.[71] The ICC's case law is explicit here: in the recent Kenya situation, the court referred to an organizational policy that 'aimed at targeting members of the civilian population supporting the PNU, in order to punish them and evict them from the Rift Valley'.[72] In *Ntaganga*, the ICC reported that 'the general message conveyed in the context of the attack by UPC/FPLC superiors to their troops and, as the case may be, to the civilian supporters, was to consider the non-Hema, in particular the Lendu, as the enemies and, thus, to kill them'.[73] However, while this discriminatory standard can further consolidate the evidence of a policy, it is not stringent in the predominant legal literature and was rejected in the drafting of the Rome Statute. As Robinsons suggests, 'a policy of attacking civilian victims at random in order to inflict maximal terror'[74] is already a crime against humanity.

5. Refining the structure and revisiting the relevant jurisdiction of CAH

Having presented a typology of the PCs of CAH, I need now to explain how this legal-empirical inquiry can provide two benefits for the purpose of theorizing the notion of CAH. First, such inquiry helps building a more accurate account of the prototypical conditions conducive to the odious acts (in legal-empirical terms)

67. Rodenhäuser, *supra* note 26 at 920.
68. Robinson, A Better Policy on "Policy", *supra* note 16 at 16.
69. *Ibid* at 13.
70. Situation in the Republic of Kenya, *supra* note 21 at para 87.
71. Rodenhäuser, *supra* note 26 at 926.
72. *Samoeiruto*, *supra* note 66 at para 216.
73. *Bosco Ntaganda, supra* note 65 at para 21.
74. Robinson, A Better Policy on "Policy", *supra* note 16 at 11.

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and thereby refines the structure of those crimes (Q1). Those conditions denote the systematic and persecutory exercise of physical control (or coercion) over an entire civilian population with the help of extra-ordinary (including lethal) resources (material and human) by an agent enjoying *de facto* authority over a large portion of territory in the name of a particular policy or ideology. The range of coercive actions this agent may undertake in those conditions is enormous. This disposition has been mentioned (but not developed) in the literature. In the words of Vernon, the agent of CAH 'can apply unilateral force; it can prevent you from escaping it; it can prevent outsiders from coming to your aid; it can induce many of your fellow citizens to take part in your persecution or at least to stand by ineffectually, out of deference to authority'.[75] My legal-empirical inquiry concretely and precisely typifies the PCs that conduct to the odious acts and therefore fills the missing gap between the two core elements of the definition (E1 and E2). There is not simply *coincidence* or *correlation* between the systematic control and the odious acts. The very possibility of the latter depends on the former.

But refining a chain of events does not suffice to articulate the normative significance of CAH. If the odious acts are inseparable from the PCs (spatio-temporally, causally and intentionally), then one should explain what is normatively distinctive about this sequence from the subjects' standpoint. The core idea of 'role inversion' has been brilliantly ascertained by the Luban-Vernon view. Vernon argues that the triad of 'administrative capacity, local authority and territoriality'[76] distinguishes the travesty of states when they attack their subjects: 'when, therefore, they play an essential role in an attack on a group of a state's subjects, that group is absolutely worse off than it could be in the worst-case scenario of statelessness'.[77] From the subjects' standpoint, however, if one just considers the odious acts then the idea of role inversion loses its significance as 'to be enslaved or tortured or killed by a state is not very different from suffering the same thing at the hands of a sadist or serial killer'.[78] We therefore need to more precisely explain *where* and *how* the perversion occurs from a subject-based perspective (in addition to the odious acts, of course). Reconstructing the PCs better explain from this standpoint what it is about states that those crimes deeply pervert. This specification however requires saying a bit more about what states stand for in the first place.

Most of us constantly live under the authority of states that *de facto* enjoy a monopoly of institutional coercion. Most of us presume, however, that the systematic patterns that state authorities establish with regard to this monopoly serve our collective interest in physical security. If we have to constantly evaluate the soundness of the state's actions in this basic domain, the very purpose of having a state would be in question. Instead of trying to coordinate our efforts on our own and decide what we each need to do, we establish a coordinating authority that

75. Vernon, A Defence of the "Subsidiarity" View, *supra* note 9 at 231.
76. Vernon, "What Is Crime against Humanity?", *supra* note 6 at 243.
77. *Ibid*.
78. Vernon, A Defence of the "Subsidiarity" View, *supra* note 9 at 230.

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helps us comply with the reasons we all already have. The authority then establishes its legitimacy by systematically improving our conformity to those reasons. This view is owed to Joseph Raz and his *Normal Justification Thesis* (NJT). For an authority to be legitimate is to give its subjects *pre-emptive* and *content-independent* reasons for action. Those reasons are *pre-emptive* in that the authority's directive replaces all the reasons that count against the action. And those reasons are *content-independent* because there is no 'direct connection between the reason and the action for which it is a reason'.[79] The directive is followed without the subject evaluating the soundness of the directive. This is again because subjects better comply with the reasons that apply to them if they accept the directive as authoritative.[80] If any, political authorities must provide this service with regard to the basic domain of institutional coercion over an entire civilian population—the domain that the PCs are specifically concerned with.

I suggest adopting the Razian concept of authority to reconstruct the internal point of view of the subjects placed under the PCs of CAH. Viewing the PCs through this lens allows us to capture the extent to which the agent of CAH perverts the subjects' relation to political authority. The PCs strikingly mirror the systematic and pre-emptive role of the state (conditions *a)* to *c)* above). The agent holds and is able to maintain a monopoly of institutional coercion over an entire civilian population—a population over which it must have the 'capacity to promulgate an ideology (…)'.[81] The agent thereby not only holds a *de facto* authority but also makes a claim to legitimate political authority (before, during, and after the odious acts). But while the agent plays the same systematic role with the same pre-emptive intention with regard to the same basic domain, this role serves to persecute, terrorize and finally odiously attack its subjects. Subjects need to evaluate every single directive issued to them while at the same time being at the mercy of this highly coercive agent. This applies for instance when victims of CAH are selected based simply on a *perception* that they form part of a targeted group. This is seen for instance in *Bosco Ntaganga*, in which it is reported that 'the UPC/FPLC adopted an organisational policy to attack civilians *perceived* to be non-Hema'.[82] Similarly, in the Kenya situation the ICC held that 'as a whole, the evidence shows that the criterion used by 'the perpetrators to identify and attack their victims was essentially their perceived political affiliation with the PNU'.[83] In this sense, the PCs epitomize the perversion of the authoritative role of states.

Second, does this view also suggest a different answer to Q2? In a nutshell, the predominant rationale (in Renzo and Luban) is that the accused perpetrators of CAH are answerable to 'humanity' despite the disagreement about the relevant

79. Raz, *The Morality of Freedom*, *supra* note 10 at 35.
80. As Raz explains, legitimate authority "involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly." *Ibid* at 53.
81. Rodenhäuser, *supra* note 26 at 926.
82. *Bosco Ntaganda*, *supra* note 65 at 19.
83. *Samoeiruto*, *supra* note 66 at para 172 [emphasis added].

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agent of those crimes. In Renzo's account, this extension obtains by identifying a substantive and universal feature of human beings that CAH reach—a purely 'victim-based' approach—which also extends the scope of the notion itself. In contrast, Luban does circumscribe the agent of CAH to state or state-like entities but extends the relevant jurisdiction to any 'vigilante jurisdiction' provided that it meets the procedural standards of 'natural justice'. The normative basis for this extension is simply that we all share an interest in 'healthy politics'. We are all political animals in need of state or state-like protection. But this normative basis cannot hold when one examines how the vigilante establishes its authority vis-à-vis the accused perpetrator(s) of CAH. The question of authority has been at the center of the recent literature. In the words of Duff,

> An answer must show that the court acts in the name of some group to whom the defendant is answerable for its alleged crimes. It is not enough to argue that the wrongs he allegedly committed are terrible wrongs whose perpetrators ought to be punished: the trial's legitimacy depends upon the acceptability of the court's claim to act in the name of those who have the right to call the defendant to account. In whose name, then, can the ICC claim to act?[84]

In others words, establishing the relevant jurisdiction of CAH first implies identifying a normative community to which wrongdoers are 'answerable'. This approach requires viewing the criminal procedure as doing justice not only to the victims, but also to the perpetrators. Rather than straightforwardly depict the accused perpetrators of CAH as 'everyone's legitimate enemy' in Luban's vein, it emphasizes the defendant's status as responsible member of a distinctively political community—as Renzo does with regard to dignity. In this sense, I suggest taking the law of CAH as community- or polity- creator. The premises of this community are explicit in the Rome Statute where the drafters refer to the 'most serious crimes of concern to the international community' (Preamble). Yet the predominant approaches to CAH do not explore the law further to identify what could possibly form this distinctively inter-state community. Renzo favours the community of humanity by revising the definition itself. In turn, Luban cannot assign any meaning to this community because states cannot have moral interests of their own. Finally, Duff examines the idea that the ICC's authority obtains on behalf of the political community in which these crimes were committed—as 'delegated jurisdiction'[85]—but rapidly dismisses it. This is because in universal jurisdiction procedures triggered by national courts or the Security Council, there is no delegation being formally authorized by the state in which CAH occur.[86] In all cases, however, the relevant community is determined independently of the notion's deployment in law.

This is precisely where I want to stop and place the conclusions I reached in refining my answer to Q1. By cataloging, documenting and interpreting the PCs of CAH, I have shown that the directives the agent imposes on its subjects

84. Duff, *supra* note 4 at 598.
85. *Ibid* at 599.
86. Rome Statute, *supra* note 1 at Article 13 (b).

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patently make a claim to legitimate political authority before atrociously attacking them. I have inferred that in examining potential agents of CAH, international criminal courts identify that claim as distinctive of the agent committing the odious acts. I have also concluded that the agent perverts the reason-giving role of the state. Arguably this refinement reinforces the view that even in 'unauthorized' cases, the perpetrators become 'answerable' to the normative community of states by having played that particular role thanks to which and in the name of which the odious acts are committed. I therefore suggest viewing extra-territorial jurisdiction as doing justice not only to the victims (by proving the crimes) but also to the accused perpetrator by treating him as responsible member of the normative community of states—in Duff's words, 'we respond to his wrongdoing, however terrible and 'inhuman' it was, not by simply destroying him, but by trying to bring him to answer for it'.[87] This account of CAH informed by the PCs can thereby better explain why state or state-derived entities (the ICC, an *ad hoc* tribunal or a national court) can take action against accused perpetrators of CAH. When states in which CAH occur are unwilling or unable to prosecute and punish, the community calls its responsible members to account and organizes an extra-territorial trial in the name of their common membership. This marks the evolution of the normative aspiration of this inter-state community from the exclusive right to rule (external sovereignty) on which public international law was traditionally founded.

6. Conclusion

The legal definition of CAH is distinguished by its dual structure. On the one hand, CAH are characterized by the most abominable acts of massive violence against individuals. The fact that those acts are listed, specified and prohibited in international law signals that they cannot be left unpunished by the international community despite this community's foundational attachment to state sovereignty. If a state in which CAH occurred is unable and/or unwilling to investigate, prosecute and adjudicate those crimes, extraterritorial jurisdiction can be triggered. On the other hand, the legal definition points to the conditions enabling the odious acts. Those conditions are also extraordinary. CAH must be committed as part of a 'widespread or systematic attack', which itself needs to be based upon a 'State or organizational policy'. This dual structure is conventionally taken to demarcate international from domestic patterns of crimes.

Theorists of CAH however diverge over which element of the dual structure should count as distinctive of those crimes. But they surprisingly converge when it comes to identify the relevant jurisdiction to which perpetrators ought to account, namely humanity. In this article, I have examined how those predominant normative approaches to CAH test against the notion's deployment in law. To this end, I have first shed light on a third element of CAH that both the legal definition and the predominant literature leave underdeveloped: the concrete and

87. Duff, *supra* note 4 at 604.

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systematic preparatory steps that must be achieved for the odious acts to take place. The PCs not only reveal that the odious acts are inseparable from the systematic and persecutory exercise of physical control established by the agent of CAH over an entire civilian population and in the name of a particular policy or ideology. They also acutely illustrate that only state or state-like entities can commit CAH—thereby refining the seminal Luban-Vernon's seminal idea of 'systematic inversion'.

However, while it is agreed that the 'role inversion' extends beyond the odious acts themselves, it is not clear exactly where and how the perversion occurs. Inquiring the PCs of CAH helps to specify what it is about states that CAH pervert. Drawing on the Razian account, the PCs of CAH deeply pervert the subjects' relation to the basic domain of political authority: while the PCs strikingly mirror the systematic and pre-emptive role of the state, those patterns are established to persecute, terrorize and finally odiously attack subjects. One could object that there are multiple ways in which political authorities fail to pre-empt their subjects' judgments without odiously massively murdering, raping or torturing. Here it is important to note that the Razian notion of authority has been used only to specify the typical kind of command that the agent of CAH issues without contesting the very necessity and centrality of the odious acts. It appeared to me that the Luban-Vernon account of 'systematic inversion' can be enriched by distinguishing—in a sociological fashion—what this inversion extends to in concrete cases brought before international criminal courts.

Moreover, this refinement in turn conducts to revisiting the relevant jurisdiction of CAH. To the question 'in whose name, can the ICC claim to act?', the predominant answer is that CAH are an affront to humanity and that extra-territorial prosecution is conducted in its name. But this answer can be given only if one revises the very definition of CAH (Renzo) or dismisses the very idea of states can have moral interests of their own (Luban). In contrast, in relying on my study of the PCs I argued that agents of CAH become 'answerable' to the normative community of responsible states. In the words of the late Norman Geras, the law on CAH 'should emphasize the proleptic principle that there is a higher sovereignty than that of the individual state and from which the latter derives its competence'.[88] What forms this community is the claim to legitimate political authority—a claim in the name of which and thanks to which the agent of CAH commits those acts. This indicates a striking similarity of status between the defendant and the plaintiff and invites to adopt Duff's relational account and construct a relation of criminal responsibility in which a normative community calls its members to account. This view thereby also preserves the distinction between international and domestic offences and better explains why only states or state-derived entities can take action against accused perpetrators.

88. Normas Geras, *Crimes against humanity: birth of a concept* (Manchester: Manchester University Press, 2011) at 94.

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