

THE CRIME AGAINST HUMANITY AND ITS EVENTUAL RECONFIGURATION¹

Abstract: This paper aims to specify whether international law can achieve a technical notion of “humanity”, or if it will always remain open to interpretation and disposition by States and other actors in international relations. While the Rome Statute of the International Criminal Court and other legal instruments have constrained the definition of the crime against humanity, the behaviors indicated in these instruments, which are numerous, must always be related to the criterion of humanity. In short, this work approaches some new visions regarding the crime against humanity and its configuration in the Rome Statute.

Keywords: crime against humanity, international criminal law, international criminal courts, human rights, Rome Statute.

1. INTRODUCTION

The definition of the crime against humanity still presents difficulties in international law, albeit not as much in criminal legal systems. This occurs despite verifying two undeniable facts: Firstly, crimes against humanity are an especially grave offense for which individuals may be tried by international courts and held

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1 This paper takes as reference previous works, especially: E. Díaz Galán, “Venezuela ante la Corte Penal Internacional (CPI): algunas cuestiones sobre el crimen de lesa humanidad”, *Revista de Derecho YACHAQ* 14, 2022, 165–184. Additionally, the original article is in Spanish. The article has been prepared within the framework of The 24th International Conference of the International Criminal Law Association will be held in Palić, Serbia, from June 14th to June 17th 2024, on the topic “Relation Between International and National Criminal Law”; and within the Grupo de investigación de alto rendimiento en Libertad, Seguridad y Ciudadanía en el Orden Internacional of the University Rey Juan Carlos de Madrid.

accountable under international law. According to A. Gil, “crimes against humanity constitute the central category of international crimes in contemporary international criminal law. This means that their commission entails direct individual criminal responsibility under international law”². This consequence of responsibility is fundamental, as it implies granting the individual international legal personality as the holder of international obligations.³ This appreciation, which might be irrelevant in domestic legal systems, nevertheless, carries profound significance on the international stage. The acceptance of international crimes, not only against humanity, signifies a qualitative leap in the international system. Furthermore, from a normative perspective, significant advances have been made to define and regulate the crime against humanity⁴. The scholarly doctrine has addressed the components of this crime and has detailed the defining features of the criminal offense. Furthermore, the adoption of the Rome Statute in 1998 provides a useful definition of the crime against humanity.

In both state practice and scholarly discourse, there is no consensus regarding the definition and determination of the “concept of humanity” that characterizes this type of crime.⁵ Over a century ago, A. Rouger, in a celebrated analysis of humanitarian interventions, emphasized the difficulty of establishing a notion of humanity universally accepted in the international order, and questioned who should assume the representation of humanity. The issue remains unresolved. This author stated that “there is a rule of law that is imperative, general, mandatory for every State and every individual, superior to national legislations and international agreements, constituting a common right of humanity”⁶. He even noted, not insignificantly, that “the notions of humanity and inhumanity vary with races, climates, religions, and epochs, with the psychic and moral sensitivity of individuals”⁷.

This work aims to specify whether International Law can achieve a technical notion of “humanity”, or if it will always remain open to interpretation and disposition by States and other actors in international relations. While the Rome Statute of the International Criminal Court and other legal instruments have constrained the definition of the crime against humanity, the behaviors indicated in these instruments, which are numerous, must always be related to the criterion of humanity.

2 A. Gil, “Crímenes contra la humanidad”, *Eunomía. Revista en Cultura de la Legalidad* 10, 2016, 202 (own translation).

3 Según F. Mariño Menéndez en el “Contemporary International Law has progressively recognized that in some cases an individual may incur responsibility *stricto sensu* under international law”, *Derecho Internacional Público. Parte General*, Madrid, 2005, 219 (own translation).

4 K. Ambos, S. Wirth, “The current law of crimes against humanity. An analysis of UNTAET regulation 15/2000”, *Criminal Law Forum* 13, 2002, 1–90.

5 F. Mariño Menéndez, following the thought of R. J. Dupuy, it is stated that the “concept of humanity is interspatial and intertemporal”, thus “providing highly speculative and future-oriented dimensions”, *op. cit.*, 240 (own translation).

6 A. Rouger, “La Théorie de l’intervention d’humanité”, *RGDIP*, 1910, 19., <https://gallica.bnf.fr/ark:/12148/bpt6k56988235/f22.image> (own translation).

7 *Ibid.*, 46 (own translation).

As D. Luban pointed out, it must be ensured that “Crimes against humanity are simultaneously offenses against humankind and injuries to humanness”⁸.

Without specifying what is meant by humanity, the task of qualifying behavior as a crime against humanity would always remain ambiguous. Hence, two questions of interest arise: First, is humanity a subject of international law, so that these types of crimes have humanity as passive subjects? Second, what acts are repugnant to the conscience of humanity to be encompassed within the notion of crimes against humanity? In other words, it must be clarified which acts constitute offenses against humanity as a whole and who qualifies them; and which acts attack the quality of human being and should be categorized as crimes against humanity.

2. THE INTERNATIONAL POLITICAL CONTEXT CONDITIONS THE NOTION OF HUMANITY

When addressing the crime against humanity in legal terms and detailing its components, there is always the impression that there is a lack of common agreement on which behaviors truly undermine humanity, and who has legitimacy, not legitimization, to accuse in the name of humanity.⁹ Therefore, the withdrawal of African countries from the International Criminal Court (ICC) should be a subject of reflection, as “the rhetoric of rejection, according to which the ICC is an instrument of neocolonialism or neo-imperialism, that is, an anti-African instrument, can damage the institution to the extent that it is finally abandoned”¹⁰. The assumptions of crimes against humanity may be well detailed in domestic or international legal instruments. However, practice could exceed boundaries in cases where the commission of a crime against humanity is specifically alleged. The absence of a widespread agreement regarding what constitutes an affront to humanity and who represents it, exacerbates the political use of this notion in international relations and hinders full understanding of the crime against humanity, preventing its proper application. It is sufficient to cite two examples, among many, to confirm this assertion, as profound political discrepancies arise regarding whether those accused of committing crimes against humanity actually did so.

On one hand, even though it is stated that changes in Spanish jurisprudence in this matter are exclusively due to technical reasons and normative foresight, there always remains the doubt whether political motivations are also hidden behind them. In October 1998, Spanish judge Baltasar Garzón ordered the unconditional provisional detention of Augusto Pinochet and issued an international arrest warrant on the grounds that his behaviors “could constitute an alleged

8 D. Luban, “A theory of crimes against humanity”, *Yale Journal of International Law* 29, 2004, 90.

9 J. Sarkin, “El Tribunal Penal Internacional y los países africanos”, *Anuario Internacional CIDOB*, 2016-2017, 176.

10 *Ibid.* (own translation).

crime of genocide under Article 607 of the current Penal Code¹¹. Moreover, the ruling of the National High Court (Audiencia Nacional), of 24th September 1999, which confirmed the detention of Augusto Pinochet¹², held this assertion which was largely based on the criterion that “the definition of a national group does not exclude cases in which the victims are part of the perpetrator group itself, that is, cases of -auto-genocide-”, even proclaiming that “not accepting this interpretation is to disregard the living nature of the concept of genocide, which cannot remain in line with a static interpretation contrary to the nature of things, and unaltered by its anchoring in doctrinal positions, determined by the immediate precedent of the Second World War but which have evolved today, as aggressions against humanity have become refined, selected, and -conditioned- to new different situations from those that prompted the Convention of 9.12.48”¹³.

Among the reasons motivating such reasoning was to prevent Chilean authorities from evading Spanish jurisdiction. However, this position was modified some years later in the judgment that convicted Adolfo Scilingo for crimes against humanity. In this case, it was argued that “among the defining elements of the criminal type are the purpose of totally or partially destroying a national, ethnic, racial, or religious group (...) The partial destruction of a national group is not equivalent to, nor should it encompass, -auto-genocide-, that is, the partial destruction of the own national group, although there may be differentiated -subgroups- based on ideology”¹⁴. A quite different interpretation from what occurred in the Pinochet case, in which raises the question of whether there were political motivations.

On the other hand, in September 2018, five Latin American countries and Canada submitted a document to the ICC requesting an investigation of the Nicolás Maduro regime for crimes against humanity in Venezuela¹⁵. Time will tell how to characterize the actions of this regime in relation to its population, but these issues arose in the context of an international environment where the situation in Venezuela sparked the interests of a significant portion of the international community, particularly, the tensions between the United States

11 Juzgado Central de Instrucción Nº 5, auto de 16 de octubre de 1998, Procedimiento: Sumario 19/97-J. (own translation).

12 Audiencia Nacional – Sala de lo Penal – Sección 3ª, Juzgado Central de Instrucción Nº 5, Sumario 19/97, Apelación 80/99.

13 Auto del Juzgado Central de Instrucción Nº 5, de 10 de diciembre de 1998, por el que se procesa a Augusto Pinochet por delitos de genocidio, terrorismo y torturas. Juzgado Central de Instrucción Nº 5 (own translation).

14 Sentencia de la Audiencia Nacional de 19 de abril de 2005, A. Gil, “La sentencia de la Audiencia Nacional en el caso Scilingo”, *Revista Electrónica de Ciencia Penal y Criminología* 7, 2005, 1–18 (own translation).

15 Informe de la Secretaría General de la Organización de los Estados Americanos y del Panel de expertos internacionales independientes sobre la posible comisión de crímenes de lesa humanidad en Venezuela, Washington D.C., 29 de mayo de 2018, OAS. Documentos oficiales; OEA/Ser.D/XV.19.

and Russia. The crucial point is that the commission of a crime against humanity can be used in one sense or another, depending on political criteria. The violation of human rights in any country does not necessarily imply that crimes against humanity have occurred, and in this case, the political situation also underlies such accusations. The decision to subject the Venezuelan regime to international scrutiny carries significant political implications. However, it is legally relevant that any violation of human rights could fit within a concept like crimes against humanity, much more versatile than genocide or war crimes, as it can encompass behaviors of different types and natures. This also stems from the absence of a single criterion of humanity.

In both cases, serious violations of human rights occurred. However, it would be naive to assume that the criterion of humanity was not employed for political purposes, or at the very least, that such interests were not behind the prosecution of those who may have committed crimes against humanity. Therefore, it is imperative to establish the criteria that allow for discerning when behavior contravenes the criterion of humanity, beyond the clarifications provided by the Rome Statute, which do not resolve the underlying issue. The principle of the sovereign equality of states holds significance in international law.

Therefore, it would be appropriate to assess cases in which crimes against humanity are occurring and in which there is a technical impossibility to bring the perpetrators before an international tribunal. Three examples would suffice: firstly, the situation at Guantanamo Bay detention camp, which was described as a well-established program for the commission of crimes against humanity “sponsored and ordered by the highest officials of the CIA and the U.S. administration”¹⁶. The same occurs regarding the behavior of chinese authorities in Tibet, where massacres and torture described would fall within the cases provided for in the Rome Statute. Also, could be cited what is happening recently in Gaza, where the conduct of the israeli army causes examination of figures such as war crimes, crimes against humanity, and even genocide¹⁷. Some of these matters came before the spanish courts where the modification of the conditions for the exercise of the principle of “universal jurisdiction” led to their dismissal¹⁸. What is relevant is that it is accepted as natural that one of the reasons motivating this modification lies in the spanish state’s desire not to enter into diplomatic conflicts with other states¹⁹.

16 B. Garzón Real, *La Vanguardia*, 19/12/2014, <https://www.lavanguardia.com/topics/baltasar-garzon>, May 27th 2024.

17 S. Lebbe Rifai, “The Genocide in Gaza and the Contempt of International Law: Some Reflections”, *SSNR*, 2024, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4704652.

18 Sentencia del Tribunal Supremo, 869/2016 de 18 de noviembre de 2016 y Sentencia del Tribunal Supremo, 296/2015, de 6 de mayo de 2015.

19 El caso de China “amenazó las relaciones diplomáticas entre España y China e incitó al PP a impulsar, el pasado febrero, la reforma de la ley de Justicia Universal”, *El País*, 23 de junio de 2014.

Certain behaviors may be classified as crimes against humanity, based on the technical indications provided by the Rome Statute, but there will always remain the question of having a notion of humanity accepted by all. According to D. Luban, “In the case of crimes against humanity, there is no robust case law assigning the phrase a technical meaning, and indeed the various statutes defining it—the Nuremberg Charter, Allied Control Council Law No. 10, the ICTY, ICTR, and Rome Statutes, national statutes, and a handful of law commissions’ proposals—all define it differently”²⁰. It is not proposed to change the name but merely suggested that the use of the term “humanity” also has negative practical consequences in defining the crime, and that this expression refers to legitimacy issues in the international order. What is violated in crimes against humanity are human rights, in a serious manner and under specific conditions (essentially: widespread or systematic attacks against the civilian population), but human rights norms are addressed to the human person, not humanity.

3. “HUMANITY” IS NOT THE PASSIVE SUBJECT OF CRIMES AGAINST HUMANITY

International law has not defined the notion of humanity, nor can it even be qualified as a subject of international law. The examination of behaviors described in Article 7 of the Rome Statute concludes that a crime against humanity consists of a “widespread or systematic attack” and, additionally, “against any civilian population, with knowledge of the attack”. Humanity is not found in the term “widespread” nor in the term “civilian population”. The targets of the attacks are individuals and, where applicable, groups such as in the case of crimes against humanity by persecution (to which apartheid could be added), where this situation is explicitly contemplated. The continual references to “a civilian population”²¹ in the crimes elements’ cannot be interpreted as “humanity”²². The primary addressee of international norms will be the individual, not humanity, even though the widespread or systematic attack against a civilian population is considered a crime against humanity.

The key to determining what humanity is does not link with who is the target of the crime against humanity as it would suffice for two or more individuals to suffer one of the envisaged attacks under the conditions of Article 7 of the Rome Statute for the commission of this crime. Humanity is an abstract notion and refers to the entirety of human beings. In no case does it identify one or several individuals, nor a civilian population. Therefore, “it is difficult to frame within

20 D. Luban, *loc.cit.*, 161.

21 Para D. Luban, “crimes against humanity are inflicted on victims based on their membership in a population rather than their individual characteristics”, *loc. cit.*, 116.

22 La Corte Penal Internacional, Los Elementos de los Crímenes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

a concept a crime that constantly eludes what the concept seeks to explain”²³. The term “population” is not intended to identify humanity, but rather has a different meaning, as it seeks to indicate individual victims of the attack, which also poses other difficulties, in terms of whether the individuals belong to a group or not. According to D. Luban, “just as crimes of the murder type are forbidden regardless of the specific nature of the victim population, crimes of the persecution type should be as well”²⁴. In conclusion, humanity is entirely absent concerning the addressees of the violations, so it is absurd to think that the systematic and widespread attack is carried out against all of humanity.

The absence of humanity as the target of the violation weakens the assertion of its status as right holder. No every violation of human rights - no matter how grave and atrocious - necessarily implies the commission of a crime against humanity. The provision in Article 7 of the Rome Statute, regarding the crime of persecution, open the way for unfounded claims. This article defines “Persecution” as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. Numerous countries could find themselves in the situation described by this expression. Let’s imagine, for example, that a claim is brought before the ICC for the serious violation of the rights of a particular linguistic group, although it is true that the Statute says that “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”.

Ultimately, the existence of a crime against humanity is not determined by the addressee of the violation (the humanity), but by the existence of the principle of humanity, which is a different matter. According to F. Mariño Menéndez, in a specific case, this principle “represents a final reason to decide that a practice or an act is advisable and even necessary for the public authority because its non-application would sacrifice the supreme value of a life when it can be safeguarded”²⁵. Therefore, this principle would be the basis for determining that an act seriously undermines and offends the basic components of human beings. When acts of murder, extermination, slavery, deportation or forcible transfer of population, torture, forced pregnancy, or enforced disappearance, among others, are committed under the conditions provided in the Rome Statute, it is an attack on the principle of humanity, not on humanity itself. In domestic criminal law systems, humanity does not exist as a subject, but even if it did, it would be up to international law to define the profiles of this rights and obligations holder.

International legal system has made little progress in defining this notion. Indeed, it has not conceptualized the “international community” as a subject of law, and at most, as N. Quoc Dinh argues there is “a progressive, slow, and cautious

23 M. E. Medina Seminario, C. A. Vásquez Arana, *Los crímenes de Lesa Humanidad y su juzgamiento*, Lex, 2011, 22 (own translation).

24 D. Luban, *loc. cit.*, 106.

25 F. Mariño Menéndez, “El principio de humanidad”, *El Periódico de Aragón*, 2007 (own translation).

recognition of a certain legal personality of the international community, not being clear if it is necessary to limit it to that of states or if it is a more global concept²⁶. The same occurs with the notion of humanity, which can only, and with many difficulties, be defined as a mere addressee of certain international norms. The contribution made by the Rome Statute to the crime against humanity is notable, although it does not define what is meant by humanity. The determination of the detailed crimes is not based on the humanity as the passive subject.

Under the Rome Statute, claims can be brought before the ICC by states and individuals, but it remains to be determined whether this is done on behalf of humanity and, therefore, who represents humanity in the international order. Those who resort to this body, although they have standing, could be subject to criticism of international legitimacy. Hence, the use of the term “humanity” in the so-called crimes against humanity is not the most appropriate, even though it is commonly accepted as a result of historical evolution. The term “international community”, although still imprecise, has narrower contours and would be more useful, which explains the lack of significant resistance to the Security Council, representing the international community, proceeding to create international tribunals to judge crimes against humanity. In summary, the provisions provided by the Statute regarding standing do not resolve the underlying problem.

It is advisable to determine with the utmost precision the foundations of the crime against humanity and identify aspects that hinder a valid definition of this crime. Its formulation incorporates elements of vagueness and elasticity, which could lead to misuse and undermine the contours that States intend to give it in the international order. The ICC Statute constitutes a highly valid but partial legal instrument for expressing the content of this crime. Moreover, conventional practice could produce new instruments where a definition of the crime against humanity does not fully align with the normative indications of the Article 7 of the Statute. Anyways, the word “humanity” introduces more confusion than clarity.

4. DOES ONLY THE CRIME AGAINST HUMANITY TRULY OFFEND HUMANITY?

The target of the norm prohibiting the crime against humanity is not humanity itself, but rather individuals and, where applicable, groups. Therefore, one might ask what sense it makes to appeal to humanity for the classification of this crime as well as regarding the cases of responsibility at the international level. The answer may lie in the fact that this expression “It suggests, in at least two distinct ways, the enormity of these offenses. First, the phrase “crimes against humanity” suggests offenses that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the

26 N. Quoc Dinh, A. Pellet, P. Dailler, *Droit international Public*, L.G.D.J. Paris, 2002, 401 (own translation).

phrase suggests that these offenses cut deep, violating the core humanity that we all share and that distinguishes us from other natural beings²⁷. The wording of Article 7 of the Rome Statute also serves the purpose of highlighting the seriousness and magnitude of this type of crimes.

The behaviors contemplated by this provision are particularly grave and offend the noblest sentiments of humanity, but it does mean that the Rome Statute, and the provisions of Article 7, are fully accepted by the entire international community as the sole instances of crimes against humanity, and it would be an illusion to think that it embraces a universal common criterion of humanity. There is no single international notion of what offends humanity, nor of behaviors that seriously affect the condition of being human and the sentiment of humanity. For this, there should be an agreement, which does not yet exist, in two specific areas: first and foremost, the universality of human rights and, above all, regarding all behaviors that fall under the cases that constitute crimes against humanity. Additionally, the acceptance of a common principle of humanity as a general norm has not yet occurred in all sectors of international law.

i) No state has sole legitimacy in the international system to decide whether a behavior aligns with the sentiments of humanity and to ensure those that are against humanity's criteria. There are still deep disagreements among countries in interpreting the meaning and value of certain human rights, which are generally considered basic and fundamental, such as the right to life or physical integrity. Therefore, "To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects"²⁸. The prosecution of crimes against humanity, therefore, does not refer to humanity, but to states and individuals. In this way should be interpreted the assertion that "To say that humanity has an interest in suppressing crimes against humanity is to say that human individuals share that interest, not that some collective entity called 'humanity' has it"²⁹.

The debate on the universality of human rights impacts the definition of the crime against humanity. Thus, behaviors such as flogging, stoning, or female genital mutilation, among others, are encompassed in the definition of Article 7 of the ICC Statute, provided they occur in the context of a "widespread or systematic attack". However, the practices of some countries and the positions they have expressed regarding certain legal instruments on human rights point in another direction. It is worth recalling that at the Second International Conference on Human Rights held in Vienna in 1993 was included in its Final Declaration an "open" expression that allows for interpretation. Then, it was affirmed that human rights are universal, but it is stated in point 5 that "While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".

27 D. Luna, *loc.cit.*, 86.

28 Citado por D. Luban, *loc.cit.*, 122.

29 *Ibid.*, 137.

ii) The behaviors described in Article 7 of the Rome Statute offend humanity, but it also opens up the debate about what other behaviors could elicit reactions contrary to the criterion of humanity. For example, the decision not to incorporate terrorist acts into the Rome Statute as crimes against humanity could be technically correct, as these acts have their own regulatory autonomy, but it is difficult to deny that in most cases the consequences of a terrorist act seriously violate humanity's criteria. Likewise, although international law imposes the obligation to respect human rights in the fight against terrorism, the response to this phenomenon sometimes involves acts that, in any other circumstance, would undermine humanitarian sentiments, yet it is not commonly considered that these behaviors represent a crime against humanity. In fact, "No good purpose is served by labeling all the world's oppressions crimes against humanity. Doing so would be little more than an invitation to permanent misanthropy"³⁰.

Accusing someone of committing crimes against humanity is always easier than resorting to other international crimes that, having a more precise definition, are legally clearer. All doctrine seems to agree that determining the exact content of the crime against humanity is difficult. At the very least, "reaching an agreement on the content of this category has been, and continues being, a complex process"³¹. Moreover, the ultimate foundation for the recognition of the crime against humanity in international law stems from a notion that is less legal and more adorned with ethical, moral, and political connotations. Indeed, references to the "laws of humanity", which are at the origin of this international crime, lack precision and explain why a multitude of behaviors are accommodated based on the social and political criteria of each historical period.³² Therefore, it could be agreed that all definitions of crimes against humanity "are indebted to a controversial concept, and it is jurisprudentially and doctrinally doubted that the political element is part of the criminal type of crimes against humanity"³³.

In any case, the notion of crimes against humanity is linked to a characteristic that defines it due to its categorization as an international crime, namely, its intimate relationship with the notion of humanity. In other words, only behaviors that shock humanity should be classified as crimes against humanity, and it is difficult to translate this invocation into strictly legal terms. This raises a question that has received little attention from scholarly doctrine. In its origin and evolution, crimes against humanity have always been linked to the notion of humanity, despite the fact that it does not have its own definition in international law.

It is often highlighted that the emergence of crimes against humanity is situated in the Preamble of the 1899 Hague Convention II concerning the laws and customs

30 D. Luban, *loc.cit.*, 102.

31 A. Gil (2016), *loc.cit.*, 203. (own translation).

32 Vid., Ch. Bassiouni, *Crimes Against Humanity Historical Evolution and Contemporary Application*, Cambridge University Press, Cambridge, 2011.

33 J. Pérez Caballero, "Defensa de los elementos contextual y político de los crímenes de lesa humanidad contra la expansión del tipo al terrorismo internacional", *Revista Electrónica de Ciencia Penal y Criminología* 15, 2013, 4 (own translation).

on land warfare, which includes the so-called “The Martens Clause”. With this, it is linked to the commission of acts that seriously violate the “laws of humanity”, which at the time referred to the laws and principles of “civilization”³⁴. Once the expression of civilization has been abandoned, more emphasis was placed on the notion of humanity. However, humanity is not a full subject of international law and neither does it have precise contours. Therefore, without leaving the expression “crimes against humanity”, another more solid point of reference in political-legal terms should be sought, such as: “international community”. That is, crimes against humanity would refer to behaviors that seriously undermine the international community, particularly those related to the fundamental pillars that underpin it in relation to the human being. This leads to the human rights protection. The conception of the international community as a “universal social group with its own fundamental interests”³⁵ would, for these purposes, replace the notion of humanity when it affects the sector related to human rights.

In conclusion, two difficulties are observed in defining precisely the crime against humanity and clarifying its content in international law. The first is that it is a notion subject to ongoing evolution. While evolution does not prevent embracing a solid notion like that contained in the ICC Statute, even those who attach great value to this definition caution that “the ICC Statute’s formulation should be accorded great weight in future codification efforts and national prosecutions for crimes against humanity”³⁶. The second difficulty is linked to the notion of humanity, which must be overcome to embrace the concept of the “international community”, particularly concerning the respect for human rights.

The crime against humanity remains imprecise in some of its components, despite having received a significant degree of clarification through the contribution of the ICC Statute. Currently, its fundamental components can be clarified, but it still incorporates aspects of codification that are open to the acceptance of elements of progressive development³⁷. As it has been stated, the Rome Statute provides “a fairly approximate definition of what the international community understands as a crime against humanity” but “this category is not exhausted in the literal text of Article 7 of the Statute”, so other elements are conceivable, particularly the philosophy “on which this normative category is based”³⁸. This philosophy would

34 Vid., R. M. Coupland, “El principio de humanidad: ¿qué significa y cómo influye en el derecho internacional?”, *Revista Internacional de la Cruz Roja*, 2001.

35 A. Gil, “Los crímenes contra la humanidad y el genocidio en el Estatuto de la Corte Penal Internacional a la luz de ‘los elementos de los crímenes’”, en KAI AMBOS (coord.), *La nueva justicia penal internacional: desarrollos post-Roma*, Tirant lo Blanch, Valencia, 2002 (own translation).

36 B. Van Schaack, “The Definition of Crimes Against Humanity, Resolving the Incoherence”, *Columbia Journal of Transnational Law* 787, 1998-1999, 845.

37 C. Márquez Carrasco, *El proceso de codificación y desarrollo progresivo de los crímenes contra la humanidad*, Servicio de Publicaciones de la Universidad de Sevilla, Sevilla, 2008.

38 J. M. Díaz Soto, “Una aproximación al concepto de crímenes contra la humanidad”, *Derecho Penal y Criminología*, Vol. 33, 95/2012, 140–141.

be nothing but the actor to whom crimes against humanity should be linked, and it should be the international community.

The path to define and clarify the content of the crime against humanity is navigable, but with considerable difficulties. The question is whether this crime exists with normative autonomy and, from here, to focus its definition in precise terms. Scientific doctrine has devoted part of its reflection to distinguishing the crime against humanity from other similar or related figures, or at least to avoiding confusion between different figures. This fact demonstrates that the term “crime against humanity” has been used widely and with the aim of covering cases that, in legal terms, did not fit into other notions that expressed behaviors that produce a serious rejection by the principles that inspire the sentiments of humanity. It can be agreed that “when addressing the issue of international crimes, confusion with other categories of unlawful acts related to international law is common”³⁹ and, at the same time, numerous efforts are made to delineate the different international crimes. y que, al mismo tiempo, se destinan numerosos esfuerzos para deslindar los distintos crímenes internacionales.

In essence, a constant feature of the crime against humanity is the quest for its normative autonomy and its differentiation from other types of crimes or offenses that have significance at the international level. It is increasingly common for certain behaviors to undermine the international community or have effects in the international sphere. One could speak of crimes that “are characterized by their unlawfulness stemming from the violation of a global good or interest”, and they do not differ from the crime against humanity⁴⁰. The debate on this issue could be endless, so we only highlight some indications regarding the distinction between the crime against humanity and other international crimes, and of course, other violations of human rights.

- i) The evolution of the crime against humanity allows it normative autonomy, particularly in relation to war crimes and genocide. The ICC Statute clearly distinguishes these cases. Linked to the criterion of humanity, Alicia Gil concludes that “crimes against humanity would directly violate individual legal interests, but also a collective legal interest, whose holder is the international community as a whole, and this precisely would be what would give this crime its international character. This legal interest is identified with the notion of humanity, understood by some authors as a value closely linked to the concept of human dignity, or, in the opinion of others, as an intrinsic quality of the human being, their intimate essence (...)”⁴¹.
- ii) It must be maintained that not every serious violation of human rights, even if it affects the core essence, should be classified as a crime against

39 C. A. Servín Rodríguez, “La evolución del crimen de lesa humanidad en el derecho penal internacional”, *Boletín Mexicano de Derecho Comparado* 47, 139, 2014, 211 (own translation).

40 *Ibid*, 212 (own translation).

41 A. Gil (2016), *loc. cit.*, 204 (own translation).

humanity. For this to occur, a series of features that define this international crime must coincide. They must be behaviours carried out “as part of a widespread or systematic attack against a civilian population and with knowledge of such attack”. The widespread or systematic nature is one of the defining aspects of the crime against humanity, and only from this consideration can it be analyzed whether certain behaviors that seriously violate human rights should be conceptualized as crimes against humanity⁴².

In this line, the decision not to include terrorist acts as crimes against humanity in the Rome Statute raises a significant debate. It has been stated that “although it is true that terrorism constitutes a particularly serious violation that can affect the international community as a whole (...), it does not meet all the aboved indicated criteria for identifying an international crime”⁴³. The same occurs when considering human trafficking, or some of its behaviors, as a crime against humanity. Although human trafficking has generally been regarded as a heinous practice, there are difficulties in incorporating it into crimes against humanity. It is classified as “a transnational crime (regulated by international norms, with cross-border effects, and whose repression requires cooperation between States)”, although it is specified that “it could, if the required elements are met, be classified as a crime against humanity”. What is proposed, ultimately, is a reference to the content of Article 7 of the Statute, and thus, some of the behaviors involved in human trafficking would fall within the behaviors covered by this provision. However, it would also be essential check the contextual and political elements of the crime against humanity⁴⁴.

In both cases (terrorism and human trafficking), the behaviors constituting these crimes often violate the criterion of humanity; however, they are not legally classified as crimes against humanity, at least in the terms of Article 7 of the Rome Statute, as they are not part of a “widespread or systematic attack” and do not meet the requirements established in the provision. Hence, perhaps, offending against humanity may be a decisive criterion for this type of crime, although it is not the only international offense in which this criterion is incorporated. In summary, the international community still needs to specify whether certain behaviors should be included in the crime against humanity or, on the contrary,

42 It has been said that “while there is no doubt that human rights and international criminal law are closely linked, it is necessary to clarify that it is not the mere violations of human rights, even if massive and systematic, that trigger the essential penal provisions of this branch of international legal order”, J. Chinchón Álvarez, “La responsabilidad internacional penal del individuo: un gigante con pies de barro”, *Revista de Ciencias Jurídicas* 108, 2005, 42 (own translation).

43 A. Gil, E. Maculán, *Derecho Penal Internacional*, Dykinson, Madrid, 2019, 50 (own translation).

44 C. Pérez González, “La tipificación de la trata de seres humanos. Una contribución al debate en torno al elemento político de los crímenes”, *Revista electrónica de estudios internacionales (REEI)* 31, 2016, p. 2, 4, 6 (own translation).

if other types of international crimes are emerging different from those covered in the ICC Statute. In any case, it is advisable not to expand the notion of crimes against humanity too much so that it does not lose its normative autonomy in any way. Various grave and systematic violations of human rights offend against the principle of humanity; however, they do not constitute a crime against humanity in the strict sense.

5. CONCLUSIONS

Determining the content of the crime against humanity requires an agreement regarding the definition of humanity, which should be provided by international law. Only behaviors that shock humanity could be classified as crimes against humanity, but translating this evocation into strictly legal terms is not easy. From its origin and evolution, this type of crime has been linked to the notion of humanity, although it does not have a defined meaning in international law and is, by its very nature, an extremely imprecise criterion. Humanity is not a full subject of international law and is a notion with vague contours and without universal acceptance. Therefore, without abandoning the expression “crimes against humanity”, solid and complementary points of reference should be found in political-legal terms to conceptualize a behavior as a crime against humanity, based on normative indications of human rights. Agreeing on a single and universal criterion for these rights in any circumstance would help clarify the notion of humanity.

Article 7 of the ICC Statute represents a significant advancement in the legal formulation of the crime against humanity, particularly in defining its aspects. However, two clarifications should be made: firstly, what is established in the ICC Statute is the result of a long historical period that shaped the definition of the crime against humanity. The provision represents a qualitative leap as it does not merely codify customary aspects of the notion of the crime against humanity, nor does it merely reproduce what previous international instruments had included. Secondly, the ICC Statute serves as a starting point to achieve a commonly accepted definition of the crime against humanity by the international community.

The notion of the crime against humanity incorporates an evolutionary component that is inevitable. This makes difficult achieving a precise definition because it will always be adorned with elements of ambiguity and elasticity. The evolutionary nature exacerbates the tendency to expand the concept, covering a greater number of scenarios. The ultimate reason is that the crime against humanity is indissolubly linked to the notion of humanity, something imprecise and imbued with political and ethical connotations. The crime against humanity should be linked to the notion of the international community and recognition and protection of human rights. The international community and human rights should be the reference points for the crime against humanity, making it easier to determine its content.

The difficulties in defining the crime against humanity do not prevent a clear distinction from other international crimes, at least those recognized in the ICC Statute. The crime against humanity is distinct from genocide and war crimes, regardless of whether in specific cases, the same behavior may have dimensions of multiple international crimes. The normative autonomy of the crime against humanity is ensured and reinforced by distinguishing it from other similar figures. The ICC Statute has contributed to this, and it is only hoped that interpretations by international courts, including the ICC, do not blur the contours of each international crime, particularly the crime against humanity.

However, the lines separating the crime against humanity from specific serious and systematic violations of human rights, including those that are widespread, remain to be drawn. The connection between crimes against humanity and human rights theory is increasingly necessary. For example, the case of terrorist acts, which may either enjoy normative autonomy and constitute an international crime on their own, or other behaviors that could be encompassed within the crime against humanity. The absence of a definitive position on this issue does not ensure the contours of the crime against humanity and could distort a precise definition.

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