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Ceylin ÖZYURT

Ph.D. Candidate

Department of Sociology

Middle Eastern Technical University

<https://orcid.org/0000-0002-0901-130X>

**A REVIEW ON RUSTAM ATADJANOV'S
"HUMANNESS AS A PROTECTED LEGAL
INTEREST OF CRIMES AGAINST
HUMANITY: CONCEPTUAL AND
NORMATIVE ASPECTS"**

***(RUSTAM ATADJANOV'UN "İNSANLIĞA
KARŞI SUÇLAR BAKIMINDAN KORUNAN
BİR DEĞER OLARAK İNSAN OLMA
NİTELİĞİ: KAVRAMSAL VE NORMATİF
BİR BAKIŞ" KİTABINA DAİR BİR
DEĞERLENDİRME)***

Author: Rustam Atadjanov

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“Humanity. It is hard to imagine a more compelling and global idea for appeal in the modern public discourse worldwide”
(Atadjanov, 1).

Assst. Prof. Rustam Atadjanov, LLB, LLM, Dr. jur., as a former legal adviser of the International Committee of the Red Cross (ICRC) in Central Asia, specifically in the area of International Humanitarian Law and Public International Law issues, emphasizes the ambiguity of the concept of humanity with these words at the very beginning of his monograph called “Humanness as a Protected Legal Interest of Crimes Against Humanity: Conceptual and Normative Aspects.” His emphasis on both aspects of the concept is noteworthy as it invites the reader at first glance to question such a familiar yet enigmatic notion. Despite the term’s vagueness, Atadjanov interprets the term in line with the firmly established “crimes against humanity” (CAH), according to his friend and colleague, Dr. Assoc. Prof. of International and Criminal Law Sergey Sayapin. Sayapin states that “writing a book on the concept of *humanity* takes more than just *professionalism*: one has to be *human* and *humane*” (xii), two features which he uses to refer Dr. Atadjanov not only as a successful academic but as a passionate and loving human (xii).

His overall argumentations and language appeal to an audience even without background knowledge as the rest of his book. In other words, one could recommend the monograph to anyone who would be interested in the main problem. A significance of this book within the literature is the fact that it is “the first comprehensive monograph on the subject written by a Central Asian author for an international audience” (viii). Since there is no exemplifying implementation of CAH in any domestic penal law in the region, this subject becomes crucial to analyze. Another significant point is that the book attempts to cover the lacking definition of humanity in the positive law through an adaptable analysis. The book’s purpose of drawing a doctrinal framework with *Rechtsgut* is considered to be an essential step for the author to “justify penalization of [CAH] at both domestic and international levels” (xiv). The fact that it offers “a first-ever comparative analysis of the protective scopes of CAH and other core crimes under international law” (xiv) is counted among remarkable contributions of the book. Other than these, the fact that he does not only delve into the normative aspect of the issue but his meticulous efforts for a conceptual framework is worthy of praise.

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Though his endeavors to fill a gap in the literature are noticeable, they come with challenges in many ways. Indeed, it is quite challenging to resist the obstacle of "cultural relativism" to figure out a universal understanding of humanity within the scope of CAH and international law. Western values hardly overlap with multiple cultural domestic values and norms around the world such as "the footbinding of young girls in China; widow-burning (*sati*) in India; apostate-hunting in Iran; or the stoning to death of adulterers in Saudi Arabia" (Robertson, Epilogue)¹. Indeed, Atadjanov notes that humanity, as a multi-dimensional and interdisciplinary concept, is challenging to frame and conceptualize both within the context of domestic law and international law. Aside from its interdisciplinary challenges, the "fundamental differences and possible similarities" (3) between multiple sub-concepts and diverse definitions must be handled carefully. The term involves different cultural interpretations, which puts strains on proposing a comprehensive but detailed perspective. Regarding this challenge, the author manages to reach a more abstract and conceptual definitions yet not much culturally relativist points. Other than definitional and conceptual challenges, he points out the vitality of the concept of humanity when it comes to practical and normative use. Since CAH are perhaps the most commonly known type of core international crimes – as they are used to label every time a mass atrocity is referred to – tackling the notion of humanity becomes more challenging (3). Considering this challenge, Atadjanov's detailed attitude is observable.

The author's initial proposition in the introductory chapter is that the fundamental yet ambiguous notion of "humanity" has not been defined nor holistically neither thoroughly in the positive law. The first chapter of the book is allocated to an introduction of why and how the notion of humanity has to be elaborated. He primarily underlines the following point:

"Without a full understanding of this basic underlying concept many important questions will continue arising on the precise nature of the crimes under question, first of all, on their legal nature and the main interest they purport to protect. It is precisely this practical aspect that renders the undertaking of a corresponding legal analysis justified." (7)

1 "Epilogue." *Crimes Against Humanity: The Struggle for Global Justice*, by Geoffrey Robertson, 4th ed., The New Press, 2013.

For this cause, he aims to interrogate “what humanity is” conceptually and “why crimes against it must be criminalized” normatively (xiii). Atadjanov’s primary purpose is to analyze the term without altering its definition. “[T]he term ‘crimes against humanity’ is by now recognized and firmly established, and the matter is not about replacing it with a new term but about interpreting the concept of ‘humanity’ agreeably [...]” (xi). With this aim, Atadjanov respectively introduces the reader with the main problem analyzed in the book; clarifies conceptual definitions of and differences between central substantive notions; discloses a comprehensive historical overview of the development and evolution of the concept of humanity within international law and CAH; delves into the existing theories and contemporary approaches contextually; opens up the notion of humanity normatively within the doctrinal account of *Rechtsgutstheorie*; conducts a comparative analysis to instrumentalize the offered conceptual theory of humanness with the contextual element of CAH; and finally strives to clarify some of the unclear issues raised in the protective scope of those crimes. Starting from the beginning of the monograph, the author adopts a precise and formal attitude with convincing points profoundly raised to reach his interrogation.

Chapter 2 conceptually defines humanity, laws of humanity, the principle of humanity, and CAH. Dr. Atadjanov underlines that there are multiple and distinct meanings of humanity in different languages, which obstruct the concept to be utilized as a common international referent with legal certainty. (vii) He reveals five different meanings of humanity in English: “humanity as humankind, [...], i.e., as a collectivity”, humanity as “*the quality of being human, or humanness, or the very human condition itself [...]*” humanity as a virtue (benevolence), i.e., *humaneness*, humanity as “a combination of natural human characteristics (such as ways of thinking, feeling, acting and reasoning),” or as human nature, and humanity as “the physical nature of people as compared/opposed to other species of the animal kingdom” (19, 20). He points out that the Nuremberg Charter stands as a turning point for it involves the very first connotation of the concept. Since the charter was conducted, the meanings of “*mankind*” –the author’s wording here is hardly politically correct-, “human status,” and “humaneness” have been considered primarily in explaining CAH (20). Indeed, his main focus is humanity as a human status or “humanness” in this monograph.

The author briefly defines the laws of humanity as the representation of “unwritten and non-fixed rules of an active goodwill towards fellow

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human beings which recognize the inherent humanity (i.e., human status) in them" (22). He refers to Fyodor Martens, a well-known law expert to reveal the term's genesis in the Martens Clause. These points are raised due to examining the related concepts. Eventually, he underlines that unlike humanity and the laws of humanity, CAH do represent a legal concept in international law. Implications for their definition springs up from the Nuremberg Charter, where the first proper codification of CAH can be found. In this chapter, his purpose of defining and comparing the relevant concepts provide a ground for upcoming discussions. For contextual concerns, the retrospective view throughout the mentioned historical legal turning points and thus, the evolution of the concepts is to be opened up more in the following chapter. The author underlines his efforts to handle the concepts contextually, i.e., in accordance with the circumstances of the given period of time (27). He states that his working hypothesis consists of the following:

“‘Humanity,’ defined as the quality of being human, or humanness, represents a fully valid legal interest protected under the context of application of the law of crimes against humanity.” (29)

In Chapter 3, it is intended to review the evolution of relevant conceptual and ideological developments. This voluminous chapter reveals the roots of humanity from the regulations by ancient civilizations to the recent jurisdictions. Though it is a voluminous one, the chapter fluently reveals the concept's historical evolution with an easy-to-read language. Coming to the organization of the chapter, Atadjanov adopts Nuremberg Charter as the cornerstone to the historical overview, as he acknowledges that the first prosecution of CAH took place at the Nuremberg trials. Thus, the chapter is divided into two; before and after the charter. With this historical overview, the reader understands that “the history of idea is not history of the word” (126); it is about temporal and spatial circumstances and the contextual aspect as much as the conceptual, theoretical roots in philosophy, ethics, and law. Although he does not consider this chapter to be a fully exhaustive review, he takes the reader on a detailed and comprehensive historical journey by including the overall contextual aspect. In every ancient idea, law doctrine, theoretical consideration, and philosophical explanation, he finds the same fundamental values or humanitarian sentiments. Despite this ambiguous common ground, he strives to prove that although humanity was defined differently in diverse jurisdictions, “neither one of those dealt with the present

academic (and practical) problem” (125), i.e., the problem of an international conceptual and normative definition of humanity. Even the most recent attempt “to converge the most essential elements of crimes against humanity in Article 7(1) of the Rome Statute of the International Criminal Court (ICC) [...] could not be regarded as complete from the point of view of the principle of legal certainty” (viii). It is evident in this chapter that the author utilizes primary legal sources such as the original text of the Rome Statute of the ICC, which contributes to the monograph more accurate highlights.

Chapter 4 proposes a new theory of crimes of humanity in light of a review of contemporary discussions. The author examines contemporary theories under two categories – the philosophical-legal perspective and the purely legal approach. Furthermore, his classification is grounded with a binary criterion – Massimo Renzo’s proposed distinction between a conceptual question and a normative one.

“[A]ny theory of crimes against humanity must provide an adequate answer to the two fundamental questions – if it aims to be successful: the first one is the conceptual question of how exactly we should understand the notion of crimes against humanity, i.e., what do we mean when we label certain crimes as ‘against humanity’? And the second one is the so-called normative question which consists in explaining what is it that justifies the international prosecution and punishment of these crimes (in Renzo’s words), but even more so, why they need to be criminalized at both international and domestic level (in my own words).” (180)

Atadjanov notes that, on the one hand, some accounts (philosophical-legal theories) prioritize conceptual, semantic or philosophical explanations, such as operating the distinction between different meanings of the concept of humanity –like humankind or humaneness– in order to address an attack as a crime “against humanity.” On the other hand, the other group of discussions (purely legal theories) prioritizes questioning of the purpose (end) of criminalization and to demonstrate explanation (justification) for their criminalization (138), such as problematizing the tangibility of the attack to justify its prosecution as a “crime” against humanity. Both have various merits and shortcomings (140) and “differ greatly” (179). However, these accounts are often mixed, connected, and not easy to distinguish since they sometimes borrow some of the concepts from each other (179).

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All in all, he manages to deliver the distinction between the two in a transparent way.

In the light of existing theories and his conceptual examinations, the author introduces "The Theory of Humanity as 'Humanness, or Human Status'" (179). He builds a conceptual foundation by defining the elements of humanity (humanness) that are collected through contemporary discussions. These are freedom, human dignity, civilized attitude, humaneness, and reason (182). Namely, humanness status comes under attack when these five elements are assaulted, such as the denial of individual freedom or deprivation of human dignity. This step by step figuration of associating CAH with humanness is methodologically elaborate and consistent. Indeed, among comprehensiveness, non-exclusiveness, and expressiveness, he counts consistency as an advantage for his way of "looking at crimes against humanity as acts which attack our humanness (with all these elements described [...])" (187). His further elaborations make up the justification for the theorization. The correlations between individual acts/types of CAH as contained in the Rome Statute and the elements of humanity (humanness) demonstrate his detailed yet broadly applicable conceptual contribution to the existing literature.

In Chapter 5, the author delves into the other side of the coin, the normative foundation for criminalization of CAH, regarding a German social contract doctrine the *Rechtsgutstheorie*. He acknowledges the challenge of fitting this domestic criminal law doctrine into an international discussion along with his efforts to justify "why or how is [*Rechtsgutstheorie*] better than its 'counterparts' in other legal systems?" (213). Another challenge underlined is the translation of the relevant excerpts into English by the author, which are up to his "language skills" (214). Considering this, it could be noticed that his language-related exertions are effective.

The chapter starts with the origins and evolution of *Rechtsgut*, which is used interchangeably with "legal good." The author defines *Rechtsgut* referring to Karl Bindung as "anything that the legislature considers valuable and the undisturbed retention of which it, therefore, must ensure through norms" (216). Among main approaches in the treatment of the doctrine of *Rechtsgut*, the author picks out a liberal and normative account developed by Claus Roxin due to its representativeness, its normative nature, and its significant aspects serving to the functioning and application, i.e., it includes "fundamental values such as humanness

under the category of *Rechtsgut*” (221). Atadjanov successively convinces the reader about this theoretical preference. He brings forward the critical, methodological, and analytical functions of the doctrine. The fact that he discusses *Rechtsgutstheorie* with its conceptual criticism enables the reader to view the theory more broadly regarding constitutional principles.

It is noteworthy that he comes up with possible alternatives (the principle of harm and relative accountability principle) to the theory in other criminal law systems and shows how they would not fit into his analysis as adequately as the *Rechtsgutstheorie* in this monograph. To illustrate, he declares that the principle of harm requires the concretization of values, i.e., it would better suffice to account for the need to protect a specific person rather than the abstract concept of humanity. In light of examining the alternatives, the reader could eventually be assured that the *Rechtsgut* doctrine fits well to address the universalist problem related to “humanity” in CAH thanks to its value-oriented scope and focus on society’s most important interests.

Atadjanov divides the normative foundation of the theory of humanness into two sub-sections; domestic and international levels. The analytical exercise he conducts about the former level confirms that humanity, with its constituent elements, can be defined as a *Rechtsgut*. His argumentation on the legal consequences of *Rechtsgutstheorie* and the theory of humanness is as follows:

“humanity a.k.a. humanness defined as a *Rechtsgut* entitled to a protection of criminal law, satisfies both main functions of the *Rechtsgut* doctrine: the methodological function (description and interpretation of the precise legal interest protected by law) as well as the critical function (definition of the *Rechtsgut* as such and sufficient explanation of how a threat against this *Rechtsgut* affects or undermines the eventual aim of the law)” (269).

At the international level, the author touches upon the risk of bringing forth a West-oriented attitude towards the concept of humanity. Although he strives to eliminate this problem on an abstract and conceptual level with the distinction of the international community (a global group of states bound together by common values) and *mankind* (collective aggregates of all human beings) (270), it is hardly possible to follow a practical solution to prevent this risk, at least in this sub-section.

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The sixth chapter aims to compare the protective scope of core crimes other than CAH and point out their differences with CAH in terms of protective scopes. Thereby, for the author, the instrumentality of the offered theory of humanness could be demonstrated. Other than CAH, there are three types of core crimes; genocide, war crimes, and crimes of aggression.

For the definition of genocide, Atadjanov refers to the Rome Statute of the ICC², reflecting the customary legal nature of its prohibition in international law. In the light of this definition, similarities between genocide and CAH are as follows; having common historical roots, being applied in both the times of peace and war, being recognized as crimes under international law, being parts of a larger misconduct practice context, and having the element of State in their commission at most of the time. Following the similarities, the differences between CAH and genocide are revealed. Firstly, the two have different objective elements in terms of their scope of acts. Namely, unlike the broader scope of CAH, the list of acts is exhaustive in the definition of genocide. Though the two crimes have overlapping aspects, they represent "reciprocally special categories" (285). Secondly, while the international element of CAH has an objective nature, that of genocide consists of a subjective one being more related to a mental intention. Thirdly, both have different protective interests. To open this difference up, the author examines genocide as a specific *Rechtsgut*, and he intends to examine genocide's *Rechtsgüter* (the plural form of the term) with the theory of humanness. In the light

2 In addition to Rome Statute of the ICC, "Genocide" is a very strictly described legal concept and refers to clearly defined crimes, which can only be established by a competent court as defined in the 1948 Genocide Convention.

For more consult Convention on the Prevention and Punishment of the Crime of Genocide (1948)

"Article 2: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Article 6: Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article 9: Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

of the three major dimensions of genocide – the international dimension, the group dimension, and the individual dimension – the author concludes that genocide as a narrower category with a more explicitly described and agreed upon protective scope of interests does not necessarily require the theory of humanness to work out.

In the following sub-section, the protective scope of war crimes and CAH are compared. The author focuses on the relationship between them “to arrive at a proper comprehension” of their protective scopes (295-296). He underlines that there are many differences between the two. For example, war crimes require the context of an armed conflict, while CAH do not. Likewise, while CAH require the contextual element, i.e., a context of widespread or systematic commission, yet it is not necessarily required in war crimes. He also underlines that war crimes primarily aim to protect the other party to the conflict while the law of CAH is predominantly concerned with the civilian population. The protected legal interests of war crimes are “international peace and security,” “fundamental individual rights such as human dignity,” and concretization of *mankind* via the phrase “enemy group” (297). The following sub-section compares the protected interests of CAH and crime of aggression through taking similar steps with the other core crimes’ correlative examinations. For the author, the crime of aggression has a broad protective scope, which both differs and overlaps at particular points with the law of CAH.

With the perspective of the theory of humanness, he infers that all core crimes either directly or indirectly share the two *Rechtsgüter*; the protection of international peace and security, and a range of individual rights such as “the right to life, dignity, bodily integrity, freedom, prohibition of torture” (304). Secondly, he argues that “the definition of human dignity lends a helpful argumentation in favor of recognizing [the concept of *Rechtsgut*] as a valid legal interest of the crime of genocide” (304). Regarding the war crimes, “*mankind*” and “humaneness,” which are the two other elements of humanity, contribute to war crimes’ protective scope. However, another point raised by the author regarding the theory of humanness and the mentioned core crimes is that there are limitations of the theory and that it should not be considered a way of doctrinal justification but a clarification of the international crime types. Finally, he concludes this chapter by arguing that the conceptual elements of the theory of humanness turn out to be instrumental, considering “at least some *Rechtsgüter* of crimes under international law other than CAH” (305). With this chapter, Atadjanov

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leaves the reader with a sense of witnessing how he has conducted his research step by step throughout the book, which indicates his transparency and clear narration.

In the concluding and the final chapter of the monograph, Atadjanov meticulously summarizes the crucial remarks made throughout the chapters. He starts by reminding us of the initial aim of the book; to "describe the protective scope of one particular type of core crimes under international law," CAH. He underlines that the theory in this attempt has required both broadness and a thorough nature as much as it needed to answer both conceptual and normative questions. Thus, this has necessitated bringing forward etymological complications for conceptual instruments, historical analysis for contextual comprehension, and the existing theoretical literature for understanding how to treat the concept of humanity. Further, it has been essential to put an argument considering "humanity [...] as a fully valid *Rechtsgut* whose protection ought to be ensured by criminalizing the most serious attacks on it, namely crimes against humanity, at both domestic and international levels" (311). He tests this argumentation with a comparative analysis of the different protected interests of core crimes.

His concluding remarks highlight that "humanity" has been a standard feature, a common imperative through civilizations. However, humanity as humanness, being a shared value, has not strictly carried a legal nature. Despite this, the notion allows a common way of understanding the protective scope as much as it allows us to gather the doctrinal components to describe CAH. He also reminds us of the elements of humanness and concludes that the material part of the protective scope of CAH in the treaty law is immense. By retracing the posed normative and conceptual questions, a wholesome conclusion of the proposed theory of humanness is established. Namely, it is emphasized that "humanity" does not exist for the purposes of international law neither as a protected interest within criminal law (normatively) nor as a comprehensive legal definition, concept, or principle (conceptually) (314). Although he manages to answer both questions within the proposed theory of humanness, it would be even more interesting to merge these two answers in practical exemplifying domestic and international cases. As a universally compatible analysis attempt, the monograph leaves the reader with strong theoretical argumentations but at the same time with the expectation of a more practical analysis that would embrace the challenge of cultural

relativism as a critical aspect. If “[t]he overarching concept of humanity is what has been driving the processes of humanization” (315), in my humble opinion Asst. Prof. Atadjanov would also agree that further studies leaning particularly towards the practical challenges between the domestic and the international are desperately needed for the *human’s* good in the future.

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