

# CRIMES AGAINST HUMANITY OR CRIMES AGAINST IDENTITY: A SECULAR CRIME THEORY PROPOSAL

## CRÍMENES CONTRA LA HUMANIDAD O CONTRA LA IDENTIDAD: UNA PROPUESTA DE LA TEORÍA LAICA DEL DELITO

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### ABSTRACT

The term crimes against humanity has been evaluated by jurists on a wide scale including production, testing, possession of nuclear weapons, or crimes against properties. This understanding points out unlimited interpretations caused by the definitional inconsistency that devastate the certainty of law. Competent criminal law jurists have explained this inconsistency as the definition of crimes against humanity has drawbacks. Based on this, the study is grounded on principles that classical logic offers for definitions while analyzing the drawbacks of the concept. The study emphasizes that certainty is more efficient and scientific than transcendent justice or ethical understanding. Because the synthesis of “observation” and “prediction” provides testable propositions in a secular legal system.

If the classified acts of crimes against humanity are already regulated as crimes in national systems, what is the “specific difference” of so-called crimes against humanity? A holistic answer that does not violate national law and human rights domains should be adopted by avoiding fragmentation of international law. The study points out that there is a clear social identity motive in acts called crimes against humanity. As a free will and social cohesion component, the proposed social identity approach aims to bring a testable ground for the law of proof rather than

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transcendental humanity understanding. In the plan of the study, the first chapter explains the social identity motivation; the second chapter clarifies the philosophical discussions. The third chapter concludes that the acts of crime against humanity should be considered qualified *corpus delicti* of the relevant offenses that bear social identity motivation. Since states have specific construction processes of social identities, a normative and judicial system based on testable social psychology data is recommended at the national level.

**Keywords:** crimes against humanity – social identity theory – certainty of law – critic rationalism – logic.

## INTRODUCTION

The main principle that ensures that individuals are predictable to one another in the social order is the certainty of law (COL). The fundamental reflection of this principle in criminal law is that individuals are judged by certain norms. The establishment of the law of proof and substantive criminal law on this ground is a requirement of a secular society. Although there is a distinction between substantive and adjective areas in criminal law, these areas are not unrelated to each other. In this respect, the terminology of substantive law should provide refutable propositions for the law of proof. For example, concepts such as justice, morality, purpose, or humanity

should not be allowed to mystify a certainty-based<sup>1</sup> secular criminal system. In terms of proof law, this mystification significantly emerges as the justice<sup>2</sup> and the conscience of the court<sup>3</sup>. Because this approach makes the subjectivity of criminal proceedings a rule<sup>4</sup>. Although the case-specific and observational nature of the law of proof come to the fore today, a purely positivist method would also exclude theory-building. Comte, the founder of positivism, states that “to know in order to predict, to predict in order to control”<sup>5</sup>. However, a nuance should be underlined that prediction is only possible with conjectures. This study presents a case-specific *hypothetical* proof perspective,<sup>6</sup> guided by social psychology and secular criminal law theories.

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1 Certainty refers to neither necessity nor ideal but nominal, predictive, functional, and changeable generalizations or conjectures.

2 Etymologically, justice derives from just that is the “same” (*Adl* in Arabic and Turkish); fair that is the “middle” (*Nisfet* in Arabic and Turkish); *aequo* that is the “even”. The basis for these derivations points to a transcendent, static, balanced model of the universe. This unobservable metaphysical assumption leads to an abuse of alleged “transcendent balance”. The ambiguities stemming from the interpretation and subsuming that feed this transcendent aspect of justice should be mechanized with secular *infra/contra/praete legem* functions. This ensures COL and predictability.

3 For the historical developments of the law of proof, see. (Spencer, 2006)

4 *Roxin* degrades the proof to persuade the judge. See. (Roxin, 2005) pp. 265–289.

5 “*Savoir pour prévoir, prévoir pour pouvoir*”

6 While the law of proof, similar to science, draws certain inferences from observations, the conscience of scientists is basically unscientific. In this respect, the critic rational proof is a system that is based on observational hypotheses, carried out with a calculative way of thinking rather than meditative. There are certain presumptions in the law of proof, and the litigants try to refute these presumptions.

The subject of this study is the ambiguity and inconsistency arising from the expression “humanity” in the concept of crimes against humanity (CAH). The study argues that social identity motivation comes to the fore as the distinguishing factor in CAH acts. Discussing the title of humanity is not a mere objection to the label. Humanity is a term that represents a transcendent and metaphysical understanding of the law and influences the legal discourse in this direction. It has no place in the field of critical rationalism and logic. Indeed, this ambiguity and inconsistency lead to ideas of including forced marriage, acquisition of nuclear weapons, or crimes against property within the scope of CAH. It also causes the determination of criteria that have nothing to do with “humanity” in proving the crime. On the contrary, we argue that social psychology studies will be more effective, observable, and scientific in understanding the CAH acts. Social identities are both a factor in the perpetrator’s free will and an element of social cohesion. In this equation, a crime committed with a clear social identity motivation can destabilize social cohesion. Therefore, these issues need to be considered in criminal proceedings. As a guide for case-specific reasoning, the basic principles of social psychology regar-

ding identities are being firstly presented in the study.

## 1. SOCIAL IDENTITY CONSTRUCTION IN SOCIAL PSYCHOLOGY

Identity is defined as the expression of the self as a potential that is formed by environmental and genetic factors.<sup>7</sup> Cooley sees the self as a looking-glass self, reflecting one’s views of her/himself and how others react to it.<sup>8</sup> Mead expresses the self as a synthesis of the ego in the domain of the social plane and one’s thoughts about her/himself, that is, the “self”.<sup>9</sup> In this context, he considers the self a *posteriori*.<sup>10</sup> He explains the deve-

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7 (Kaya, 2019) p. 3.

8 (Cooley, 2010) p. 189; (Meşe, 1999) p. 13.

9 (Mead, 1967); (Meşe, 1999) p. 13. According to Hegelian philosophy, the will is the unity of pure thought of the “self” on itself and the self as the transition from undifferentiated indetermination to differentiation. See. (Hegel, 2015) pp. 49-52.

10 According to Russell, modern philosophy began with Descartes’ determination of the self/thinking axiom, namely cogito ergo sum as a method for perceiving the external world: “*Modern philosophy begins with Descartes, whose fundamental certainty is the existence of himself and his thoughts, from which the external world is to be inferred. This was only the first stage in a development, through Berkeley and Kant, to Fichte, for whom everything is only an emanation of the ego. This was insanity, and, from this extreme, philosophy has been attempting, ever since, to escape into the world of everyday common sense.*” See. (Russell, 1996) p. 101. Emanationism considers existence as emanating from God, against the belief of creation ex nihilo. However, emanationism does not accept the idea that God is immanent in existence (*vahdet-i vucud*) as in pantheism. See. (Britannica, 1998). These teachings can ancestor the variations of any beliefs. In this understanding, people may become God by denying all secular identities. In fact, “humanity” can be considered a version of this archaism in a transcendent or immanent sense.

**“People mostly define themselves with more than one identity, and these identities do not contradict each other (...)”**

lopment of the self by understanding the role of the “other” and responding to her/himself in terms of the “other”, i.e., the capacity of the individual to see her/himself as an object.<sup>11</sup> Social psychology explains that identity is a synthesis of social and psychological elements in the individual. While enumerating the variables that construct identity, *Lewellen* has highlighted the individual’s perception of the individual and the society’s perception of the individual as well as the perception of the social scientists toward the individual as a factor.<sup>12</sup>

Identities have two different aspects, individual and social.<sup>13</sup> Groups, which are the object of social identity, appear as a

product of social interaction. Social interaction, on the other hand, is explained as the mental interaction established between individuals.<sup>14</sup> *Brewer and Gardner* proposed a three-level taxonomy: individual, interpersonal, and group. The main distinction here is between relational identities active in dyadic interaction and collective identities that arise from membership in broad social categories. These different self-representations are characterized by each individual’s self-evaluations, references, and motivational goals.<sup>15</sup> Another view expresses the element that separates the group from the community as a mutual dependency.<sup>16</sup> *McDavid and Harari* have considered the mutual interaction and functional norms as a determining factor in the group definition.<sup>17</sup> *Smith* has expressed the definition of group as social structures that can be or are expected to behave collectively, emphasizing the concept of collective consciousness.<sup>18</sup> It is a controversial issue whether there is a consciousness and behavior at the group level different from the individual level. Ironically, the sociological model, especially *Stryker*, focused on individual identities, while the psychological model and social identity theory highlighted the intergroup ground.<sup>19</sup> According to *Allport*, examining

11 (Meşe, 1999) p. 13. Hegel states that neither individuals nor peoples can acquire “personality” unless they reach this pure self-consciousness. See (Hegel, 2015) p. 72.

12 (Lewellen, 2002) p. 92; (Dadak, 2018) p. 15.

13 (Coşkun, 2013) pp. 358–359; (Kaya, 2019) p. 3.

14 (Swanson, 1965) pp. 101–102; (Kiraz, 2018) p. 12.

15 (Deaux, 2000) p. 4.

16 (Lewin, 1958) p. 184; (Kiraz, 2018) p. 14.

17 (McDavid & Harari, 1968) p. 237; (Kiraz, 2018) p. 16.

18 (B. Smith, 1945) p. 227; (Kiraz, 2018) p. 17. See also (K. Smith, 2014).

19 (Deaux, 2000) p. 2; regarding the concept of the collective unconscious, see also (Jung, 1968) pp. 42–53. This study considers the concept of secularization as a demystification process of collective unconscious elements that have become mystical beliefs. The secular approach points to critical rationalism and demystification. Critical rationalism, on the other hand, is not ideal, but a method of critically perceiving the outside world. For the first step of secularization, see *Marsilius of Padua and caesaropapism*.

group consciousness and behavior as a concept would mean misunderstanding an “individual” reality.<sup>20</sup> *Lewin*, however, states that group feelings turn into “another” phenomenon beyond common individual feelings.<sup>21</sup> Concordantly, *Sheehy* has emphasized the moral status expressed by a group,<sup>22</sup> while *Sherif* has emphasized the normative nature of a group,<sup>23</sup> and revealed that groups change an individual’s behavior. *Sageman* also supports the group-level approach with the example of the perpetrators motivating each other not to surrender in the terrorist attack in Madrid, 2004.<sup>24</sup> The necessity of a “group” to refer to the social identity motivation in a criminal case makes each of these approaches important.

People mostly define themselves with more than one identity, and these identities do not contradict each other.<sup>25</sup> People determine their behavior with the elements that stand out from their individual or social identities under the influence of their environment.<sup>26</sup> While social identity theory considers social identity as individuals’ positioning and defining themself-

ves in society, it accepts that this process has cognitive and behavioral aspects. For example,<sup>27</sup> prejudice is a cognitive pattern, and discrimination is behavioral. The cognitive explanation of the theory is that individuals relate to society through social classification, social comparison, and social identification processes. Classification is the tendency of individuals to see themselves or others as members of certain displaceable social classes. For example, if a person is a woman, a medical doctor, and a painter. Comparison is the relative values given to a particular group and its members. For example, if medical doctors are seen at a higher social level compared to social workers. Identification is classes and comparisons felt by individuals themselves, not by independent observers in general. Consequently, social identities are accepted as a construction process by *classification, comparison, and identification*.<sup>28</sup> In the cognitive construction of social identities, the relative deprivation approach is closely related to social comparison. This concept, which also finds its place in political sciences, is defined as the perception

20 (F. H. Allport, 1924) pp. 4-5; (Kiraz, 2018) p. 19.

21 (Forsyth, 2014) p. 21. Regarding the group consciousness and behavior see. (Durkheim, 1994) p. 45; (Johnson & Johnson, 1997) p. 20; (Kiraz, 2018) p. 20.

22 (Sheehy, 2006); (Kiraz, 2018) p. 20.

23 (Sherif, 1975) pp. 1-60; (Sherif, 1936); (Kiraz, 2018) p. 21.

24 (Sageman, 2011) pp. 87-88; (Kiraz, 2018) p. 22.

25 (Hogg & Abrams, 2001) p. 126; (Kaya, 2019) p. 4; (Worchel, 2000) p. 17.

26 (Kaya, 2019) pp. 3-4. While the importance of religious identities was evident in medieval Europe, these identities have become political identities in the 16th century. See. (Şenel, 1982) p. 236. Regarding the politicization process of sects, see. (Morrissey, 2015). Regarding the effect of the Protestant identity on the economic structure, see. (Weber, 1930). National identities gained importance after the French Revolution. However, the centralization policy applied in the pre-revolutionary period and the entry of the word *nationalité* into the French Academy Dictionary in 1835 long after the revolution. Concordantly, *Massimo d’Azeglio’s statement “We founded Italy, now we must establish Italians”* indicates not a simple cause/effect relationship. but they indicate the existence of a construction process. See. (Burke, 1992) pp. 24-30; <<https://www.dictionnaire-academie.fr/article/A6N0071>> Access: 04.10.2022.

27 the hermeneutic tradition has brought a new approach to social sciences. *Habermas* states that cultural knowledge is possible not despite pre-understanding but through pre-understanding from the interpreter’s initial state. See. (Rabinow & Sullivan, 1979) p. 17; (Uçar, 2002) p. 129. Also, see the term *proteron* from Aristotle (449b23, 50a21).

28 (Ellemers, 2019).

## “The context of Social Identity Theory has an emotional aspect as well as a cognitive aspect.”

of the distinction between the individual's expectations and her/his competencies.<sup>29</sup> Accordingly, when the individual realizes this perception by comparing her/himself or the group with whom she/he identifies, she/he performs various behaviors to overcome the deprivation feeling.<sup>30</sup> *Edelman* has stated that the distinction between ally and enemy is effective for protecting moments in the formation of social identities. It is necessary to focus on the differences of the enemy group

to maintain these categories.<sup>31</sup> All “authentic” politics actually exist through struggles between enemies.<sup>32</sup> The effect of identities on behaviors is through the role or belonging contexts.<sup>33</sup> Focusing on a particular social group's needs causes a more significant social identity than an individual identity on behaviors.<sup>34</sup> The uncertainty of the priorities that guide individual behaviors and acting with individual interests within the group are among the criticisms directed to the social identity theory.<sup>35</sup>

The context of Social Identity Theory has an emotional aspect as well as a cognitive aspect.<sup>36</sup> Indeed, the emotional aspect of social identities has been emphasized in theory.<sup>37</sup> Fischer and Tangney's perspective on the pride and guilt emotions emerge at the self-level<sup>38</sup> and through social comparison makes it possible that such emotions can also appear at the level of identified social identities.<sup>39</sup> *Branscombe, Spears, and Manstead* have revealed that the behavior of in-group members can also cause emotions such as pride and guilt at the group level.<sup>40</sup> Such an

29 (Tajfel, 1978) pp. 61–76; (Meşe, 1999) p. 24.

30 (Meşe, 1999) p. 24.

31 (Edelman, 1983); (Uçar, 2002) p. 140. Regarding the effect of hostility on the emergence of altruism, see. (Bowles, 2008) p. 326–327. For a study that deals with the change and evolution of language to emphasize the differences in social identities, see. (Dunbar, 1997). As an example from the old testament, people from the tribe of Ephraim could not correctly pronounce the word “shibboleth” as a distinguishing criterion thus, they revealed themselves. See. (Holman Bible, 2014) Judges 12:6.

32 (Schmitt, 1996) p. 26–29; (Luban, 2004) p. 119.

33 (Stets & Burke, 2005) p. 43; (Kaya, 2019) p. 4.

34 (Reicher, 1996) p. 115–134; (Kaya, 2019) p. 4.

35 (Taylor, 1994) p. 88; (Kiraz, 2018) p. 67.

36 (Ellemers, Spears, & Doosje, 1997) pp. 617–626 (Hogg, 2007) pp. 135–142; (Tajfel, 1982) p. 1–39; Regarding the definition and content of the emotion, see. (Öner, 2015) pp. 13–26. The approach of this study is to scientifically handle the emotional references that are effective in crime cases. Regarding the effect of emotional processing on decision-making processes, see. (Bechara, Damasio, & Damasio, 2000) pp. 295–307.

37 (Tajfel, 1982); (Öner, 2015) p. 26.

38 (Fischer & Tangney, 1995); (Öner, 2015) p. 27.

39 (Öner, 2015) p. 28. For example, see. (Herzfeld, 1984) pp. 439–454.

40 (Doosje & al., 1998) p. 872; (Öner, 2015) p. 28.

approach implicitly refers to evaluating the existence of a collective feeling as a sign—not proof—that the identity motivation exists in a particular case. As Nazism began to rise in Europe in the 1930s, *Dollard et al.* have explained the underlying psychology with the psychodynamic-based frustration-aggression hypothesis. Accordingly, frustrated targets (WWI defeat) leave people in a state of arousal towards an elevated target that can only be dispersed through aggression. The aggression developed for these higher targets is tested on the vulnerable and different (Jews) as easier targets.<sup>41</sup>

Social identity theory has been developed by the British social psychologist Henri Tajfel, a Polish-born Jew, with his team at the University of Bristol in the early 1970s through what they called the minimal group paradigm.<sup>42</sup> *Tajfel* joined the French army when he was a student at the Sorbonne University in Paris. He was classified as Jewish in the concentration camps but survived because he was later categorized as French.<sup>43</sup> The minimal group paradigm has been first identified as a method to examine the minimum conditions required for discrimination to occur between certain groups.<sup>44</sup> The minimal group paradigm begins by randomly dividing the participants into two groups. Each participant has information about the other participants only which group

they belong to. The reason for this is to exclude the effect of normative or consensual discrimination.<sup>45</sup> The experiment was designed in which the participants distribute a valuable resource to all participants, and the other participants regain the resource they deem appropriate. The findings of the experiment were that the participants displayed apparent fairness in allocating shares. At the same time, in-group favoritism was evident in the distribution of resources, which was not based on any background.<sup>46</sup> This situation also reveals the tendency of individuals to see their groups as superior to other social groups.<sup>47</sup> The individual, who wants her/his perceptions to be accepted by others, compares her/his perceptions with different perceptions. To be approved, individuals must be based on the perception of others, not their own. Thus, the identification that will form a social identity is established.<sup>48</sup> Individuals constantly compare with other social identities to affirm the social identities to which they belong. As this process continues as they wish, they strengthen their identification with these identities.<sup>49</sup> According to social identity theory, group members also try to separate their identities from the other groups.<sup>50</sup> While individuals tend to see each individual belonging to their own social identity as different from each other, as the level of identity in the group increases, the rate of seeing group mem-

41 (Dollard & al., 1939); (Hogg, 2016) p. 4.

42 (Ellemers, 2019)

43 (Hogg, 2016) p. 3-4.

44 (Tajfel, 1971) pp. 149-177.

45 (Rubin & Hewstone, 2004) pp. 823-844.

46 (Mullen, Brown, & Smith, 1992) pp. 103-122.

47 (Tajfel & Turner, 1979) p. 33; (Kaya, 2019) p. 5.

48 (Arkonaç, 2008) p. 217; (Kaya, 2019) p. 7.

49 (Franzoi, 2000) p. 229; (Kaya, 2019) p. 6.

50 (Hortaçsu, 2012) p. 557; (Kaya, 2019) p. 6.

## “Arbitrary discrimination is a phenomenon seen only in societies where economic surplus value emerges”

bers as similar also increases.<sup>51</sup> *Coombs* explains the emergence of social identities with value theory. Accordingly, the egos of individuals whose values match are threatened by the forcing of their social reality perceptions. Thus, the individual is accepted on a social basis and adapts to the values of a group. The social identity gained as an extension of this harmony also reveals how individuals are expected to behave.<sup>52</sup> Social identities ensure the application of the norms that fill the identity with the punishment–reaction mechanism.<sup>53</sup> Essentially, these norms are the main element of social cohesion within the group and are based on differences from other groups.<sup>54</sup> Group members prioritize their personal inte-

rests when the relevant norms are uncertain and complicated while they act with group norms when the norms are clear, simple, and hard to escape.<sup>55</sup>

Social dominance theory, a distinctive approach to explaining discrimination in intergroup relations, is founded by *Sidanius* and *Pratto*. Accordingly, social groups tend to be organized with a social group-based hierarchy. For example, men have a higher social value than women,<sup>56</sup> or Euro-Americans than other groups.<sup>57</sup> In this system, advantageous groups tend to protect their superiority,<sup>58</sup> while disadvantaged groups also tend to maintain the status quo with the expectation of joining advantaged groups.<sup>59</sup> *Sidanius* and *Pratto* explain the segregation factors of social groups on three bases: age, gender, and arbitrary. Here, groups based on race and ethnicity are considered arbitrary since they are variable, and groups based on belief are also arbitrary because the objective determinant is not imperative.<sup>60</sup> Arbitrary discrimination is a phenomenon seen only in societies where economic surplus value emerges.<sup>61</sup> According to the Social Dominance Theory, group-based hierarchies emerge as a product of the processes of aggregated individual discrimination, ag-

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51 (Hogg & Vaughan, 2007) p. 453; (Kaya, 2019) p. 7.

52 (Coombs, 1966) p. 166–173; (Kaya, 2019) p. 8.

53 (Hogg & Vaughan, 2007) p. 329; (Kaya, 2019) p. 8.

54 (Hortaçsu, 2012) pp. 475–476; (Kaya, 2019) p. 8.

55 (Toi & Batson, 1982) p. 286; (Kaya, 2019) p. 8.

56 (Sidanius & Pratto, 2004) pp. 420–442; (Şen, 2014) p. 24.

57 (Sidanius, 1993) pp. 183–219; (Şen, 2014) p. 22.

58 (Sidanius & Pratto, 1999); (Şen, 2014) p. 23.

59 (Şen, 2014) p. 23.

60 (Sidanius & Pratto, 1999); (Şen, 2014) p. 25.

61 (Sidanius & Pratto, 1999); (Şen, 2014) p. 25.



gregated institutional discrimination, and behavioral asymmetry.<sup>62</sup> The discrimination that individuals apply to each other in daily life is called aggregated individual discrimination. Discrimination by individuals who control social institutions or policy practices is called aggregated institutional discrimination. According to the theory, institutions also have a function to maintain unequal social value sharing. To achieve this, it applies formal, semi-official, and informal systematic terror.<sup>63</sup> The theory identifies terror-related institutional discrimination as tools used by the civil and criminal justice systems to establish and maintain hierarchy in intergroup relations.<sup>64</sup> This inference stems from interpreting the legal order as presented by dominant groups and thinking that “democratic” systems *plausibly deny* the equality of subgroups.<sup>65</sup> Individuals act according to their behavioral patterns (*behavioral asymmetry*) in group-based hierarchical relationships has also been expressed as an element that maintains the dominant group system.<sup>66</sup> As a result, Social Dominance Theory sees the existing social system as an order established by legitimizing myths at the end of these processes.<sup>67</sup>

Identity Process Theory accepts that there is no significant difference between personal identity and social identity in identity motivation at the individual, relational and collective levels of identity. The theory suggests that certain motivational

principles drive identities. Breakwell expressed these principles as self-esteem, continuity, distinctiveness, and efficacy. In ongoing studies, authenticity/integrity, purpose, closeness to others, and coherence have been added to these principles. In their research, *Vignoles et al.* asked individuals to rank their desired and feared identities in the future, rather than asking how they wanted to feel self-respecting, persistent, or distinctive. Thus, they had the opportunity to analyze the identities of the participants. Although the theory does not explicitly assess the impact of social identities, it offers an alternative method for determining identity motivation.

There are various views to reduce discrimination in intergroup relations. According to the Intergroup Contact Theory, group members who are in positive relationships are significantly less prejudiced against not only the contacted group members but also all out-group members. Allport states that intergroup contact, whose effect diminishes over time, should comply with certain conditions. These are the equal status of groups, common goal and cooperation, approval of authority, and informal relations.<sup>68</sup> Another view towards reducing intergroup discrimination is the common identity method proposed by Gaertner et al. This view argues that the factors that enable the two groups to become one group are the positive relations between

62 (Sidanius & Pratto, 1999); (Şen, 2014) p. 26.

63 Here, the word terror means violence or threat of violence directed disproportionately against sub-groups. See. (Sidanius & Pratto, 1999) pp. 41-42.

64 (Sidanius & Pratto, 1999) p. 42.

65 (Sidanius & Pratto, 1999) p. 43.

66 (Sidanius & Pratto, 1999) p. 43.

67 (Sidanius & Pratto, 1999) pp. 45-49.

68 (Kaya, 2019) p. 12.

**“Discrimination is also based on the perception of exposed individuals. However, discriminatory behavior arises due to a social group rather than individual prejudices”**

the groups.<sup>69</sup> The factors are to soften the boundaries of groups tested in a lab setting. Tests such as the variability of the group’s views encouraging individual thinking within the group,<sup>70</sup> the reduction of out-group relations from the intergroup level to the individual level,<sup>71</sup> or the creation of new subgroups,<sup>72</sup> soften the group boundaries and reduce intergroup discrimination. It is justifiable that the common identity of “human” or “humanity” is effective in the legal classification of CAH acts committed based on identity. However, the approach of this study is that commonality of biological “human” or cultural “humanity” should not be taken as an ideal, teleological, transcendent, and untestable ground that does not fit the *actus reus* and definition of CAH.

Social identities formed within the society can be a source for the occurrence of acts expressed as CAH. *Allport* schematics these stages as follows:<sup>73</sup>

1. Expressing opposition
2. Abstinence
3. Discrimination
4. Physical attack
5. Extermination

The processes mentioned above as the first and second stages can be evaluated within the scope of freedom of expression on a legal basis. The emergence of various forms of discrimination in the third stage expands the scale of human rights involved. Discrimination is also based on the perception of exposed individuals.<sup>74</sup> However, discriminatory behavior arises due to a social group rather than individual prejudices.<sup>75</sup> *Tajfel* argues that discrimination is inevitable because it originates from social classification without the need for conflict or competition.<sup>76</sup> As mentioned above, *Tajfel* interpreted the minimal group paradigm as mere classification would cause discrimination. *Sherif*, however, argued that there must be competition in resource sharing for discrimination to occur.<sup>77</sup> In fact, the perception that individuals are exposed to discrimination increases their identification.<sup>78</sup> This identification, which the individual strengthens against discrimi-

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69 (Gaertner, 1994) p. 235; (Kaya, 2019) pp. 12-13.

70 (Wilder, 1978) pp. 1361-1374; (Kaya, 2019) p. 13.

71 (Brewer & Miller, 1984) pp. 281-302; (Kaya, 2019) p. 13.

72 (Brewer, Ho, Lee, & Miller, 1987) pp. 156-165; (Commins & Lockwood, 1978) pp. 383-386; (Deschamps & Doise, 1978) pp. 141-158; (Vanbeselaere, 1987) pp. 143-156; (Kaya, 2019) p. 13.

73 (G. W. Allport, 1979); (Kaya, 2019) pp. 20-21.

74 (Montes, 2010); (Kaya, 2019) p. 29.

75 (Kaya, 2019) p. 29.

76 (Hortaçsu, 2007); (Kaya, 2019) p. 29.

77 (Sherif, 1997); (Hortaçsu, 2007); (Kaya, 2019) p. 29.

nation, supports the individual psychologically<sup>79</sup> and increases the level of identity within the group.<sup>80</sup> The basic approach of this study is that this social equation should not be neglected in criminal law theory and practice.

The concept of collective action related to the behavioral aspect of social identities is essential in the scope of CAH. The idea of collective action associated with the behavioral aspect of social identities is important as it is a general feature of acts within the scope of “crimes against humanity”. *Le Bon’s* studies on mass psychology, published in 1895, significantly impacted the issues of collective action and crowd behavior academically, especially on the WWII process in practice.<sup>81</sup> Although Le Bon sees the behavior in the crowd as unidentified and chaotic, modern collective action studies mostly describe the masses as mechanisms that produce a social benefit.<sup>82</sup> For a collective action, the interests of the group should be at stake beyond individual interests.<sup>83</sup> Thus, the actions performed in the interests of a group are considered collective, even if they seem individual.<sup>84</sup> Multiple variables affect an individual’s tenden-

cy towards collective action, primarily; competence, perception of injustice, and identity.<sup>85</sup> Particularly, the sense of belonging<sup>86</sup> and threat<sup>87</sup> that the individual establishes with identity significantly increases collective action and in-group organization. The perception of threat is directly proportional to the identification.<sup>88</sup> When this threat perception is in question, the tendency to humiliate outside the group increases.<sup>89</sup> It has been observed that group members with low self-perception or who see their self under threat are more prone to discrimination against out-groups.<sup>90</sup> When there is a common threat for different groups, discrimination between groups decreases.<sup>91</sup> Essentially, these studies are guides to test whether social identities are evident in a criminal act. Apart from the suggestion presented in the upcoming section on the regulation of qualified *corpus delicti* in related crimes, references from social psychology include concrete principles also for CAH reasoning.

## 2. PHILOSOPHICAL DISCUSSIONS

The way of handling the concept of humanity lies in the philosophical mains-

78 For example, see. (Branscombe, Schmitt, & Harvey, 1999) pp. 135-149; (Kaya, 2019) p. 30.

79 (Verkuyten, 2008) pp. 121-138; (Kaya, 2019) p. 30.

80 (T. B. Smith & Silva, 2011) pp. 42-60; (Kaya, 2019) p. 30.

81 (Reicher, 1996) p. 116; (Kaya, 2019) p. 30.

82 (Drury & Reicher, 2005) pp. 35-58; (Mummendey, 1999) pp. 229-245; (Wright, Taylor, & Moghaddam, 1990) p. 994; (Kaya, 2019) p. 31.

83 (van Zomeren & Spears, 2008) pp. 504-535; (Wright et al., 1990); (Kaya, 2019) p. 31.

84 (Wright & Tropp, 2002) p. 200; (Kaya, 2019) p. 31.

85 (van Zomeren & Spears, 2008); (Klandermans, 2002) p. 888; (Kaya, 2019) p. 34.

86 (Simon, 1998) pp. 649-650; (Kaya, 2019) p. 34.

87 (Simon, 1998) pp. 652-654; (Kaya, 2019) p. 34.

88 (Hortaçsu, 2012) p. 56; (Kaya, 2019) p. 35.

89 (Kessler & Mumandey, 2008) pp. 290-314; (Kaya, 2019) p. 35.

90 (Hogg & Abrams, 2001) p. 320; (Kaya, 2019) p. 35. According to Schmeichel, self-perception is more effective than cultural belongings in overcoming the fear of death. See. (Schmeichel, 2009) pp. 1077-1087. Terror management theory expresses the basic motivation of social identities and related violence as fear of death.

91 (Sherif, 1966) pp. 544-545; (Kaya, 2019) pp. 35-36.

## “Kant handles the phenomenon of free will concerning the freedom of others and universal law by linking it to the value of humanity”

tream of the idea of crime against humanity. From this perspective, the issue turns into a problem that requires making moral propositions and references. At the basis of Kant’s moral philosophy is a *hypothetical imperative* that shows what needs to be done for the desired results and a *categorical imperative* that serve to analyze the motivation of human movements. The categorical imperative, which produces possible contradictions and offers a “holistic” proposition against individual moral propositions that are valid in itself, is based on three basic principles:

- 1- *“Act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction;*
- 2- *Act in such a way that you treat humanity, whether in your own person*

*or in the person of any other, never merely as a means to an end, but always at the same time as an end;*

*Every rational being must so act as if he were through his maxim always a legislating member in the universal kingdom of ends.”<sup>92</sup>*

Kant handles the phenomenon of free will concerning the freedom of others and universal law by linking it to the value of humanity.<sup>93</sup> Kant draws a prescriptive framework for the voluntary and direct relationship between individual free will and universal law. The transition from individual judgments to universal values implies an oxymoronic term. According to Kant, individual judgments arise with the belief that other people should accept behaviors. The source of this necessity is *sensus communis*. The political philosopher Arendt saw the concept of *sensus communis* as a possible source of political reasoning.<sup>94</sup> The *sensus communis* idea refers to a universal understanding of humanity, and the legitimacy of this understanding means a social acceptance in which the whole is immanent in the parts. This way of thinking even literally procures the originary norm (*Ursprungsnorm*) that ensures the legality or the *opinio juris* that ensures the legitimacy of making customs binding. This framework also lays the groundwork for a universal judgment. On the other hand, the issue is closely related to the problem of free will. Schopenhauer’s assumption that one can

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92 (Kant, 1993) pp. 30, 36, 43; (Atadjanov, 2019) p. 56.

93 (Atadjanov, 2019) p. 59. Regarding immanent morality, see governmentality.

94 (Arendt & Beiner, 1992) p. 136. In Hegelian thought, subjective freedom is separate from the universal but also carries a relation of sameness. Abstract thought reveals a moral belief by freezing this moment. See. (Hegel, 2015) p. 124. Here, it is absurd that the “universal” substance of free will is good, which Hegel put forward in the transition from subjective morality to objective morality see. (Hegel, 2015) p. 163. What Hegel calls objective morality is not scientific objectivity, but an untestable collective subjectivity composed of agreed images, definitions, or rules. In our opinion, the relationship between free will and the “objective morality” or its elements (family, civil society, and the state) is observable, interactive, and chaotic.

do whatever one wants, but want what one has to do, can be thought of as an advanced expression of *Kant's sensus communis* or *Foucault's* governmentality. Essentially, the idealistic and romantic approach is the anchor of the perpetrators of CAH. A focus that thinks its destiny is to “rule the world” cannot do this with high “humanistic” sensitivities that preserve different identities that are not verified in their doctrine.<sup>95</sup> Thus, an explicit theoretical distinction must be made rather than an idealized “humanity” in the judgment of actions taken in this direction. On the other hand, assumptions about universal humanity patterns for building a universal humanity model have practical drawbacks. The nominal assumption of free will, which is practiced in establishing social life and especially in the criminal law system and confirmed by means of communication, is a sine qua non necessity for a consistent secular responsibility regime.<sup>96</sup> Of course, it is justifiable that the system based on this assumption produces efficient solutions in the face of physically, chemically, or biologically fixed pathological crime cases. However, with the assumption of free will in general, we do not acknowledge the effect of untestable immanent norms on behavior and limit it to individual beliefs. Instead, the impact of social identity motivation on behavior can be detailed.<sup>97</sup> In this respect, identities can be expressed as a component of

both social life and individual will. Thus, the possibility of judgment on a concrete platform arises for the criminal law. At this point, this study's approach is that events are chaotic, while norms should be refutable and certain<sup>98</sup> –not determined– in terms of COL. Here, detailing the concepts of “norm” and “certainty” will articulate the subject. No matter norms have the power of sanction, they express certain axioms about “what should be” according to how they perceive certain realities. In this respect, the base of the norms is not a moral *Grundnorm* such as *pacta sunt servanda* but is reality. A historical and functional method should be followed to detect the reality to which the norm is related. For example, the prin-

**“(...) with the assumption of free will in general, we do not acknowledge the effect of untestable immanent norms on behavior and limit it to individual beliefs”**

95 Regarding the determination of the abstract goodness and the “justification” of the goal, see also. (Hegel, 2015) p. 155.

96 It does not refer to the universal imperative of free will but the necessity of building a secular responsibility regime on the assumption of free will. As a matter of fact, free will is the basic reference of the object-subject distinction. According to Hegel, the primary point of law is free will. See. (Hegel, 2015) p. 48.

97 According to Hegel, free will consists of free thought that abstracts itself from everything and adherence to content and material internally or externally. See. (Hegel, 2015) p. 56. The effect of social identities on human behavior and will, including criminal acts, is emphasized in this study.

98 Etymologically “certain” derives from *cernere* “to sift and separate”. This sense refers to an anthropic but not a mystic or an absolute phenomenon. The study considers norms and definitions to synthesize generalizations/conjectures that provide *phrónēsis/symphéron* and limitations/refutations that touch reality through observations.

principle of sovereign equality, which is the basic principle of international law, is not related to the requirement of virtuous politics but to a reality experienced by the parties that cannot destroy each other during the Thirty Years' War. While states can destroy each other today, there are different parameters and different actors such as human rights, global and regional balance theories, multipolar structuring, and Atlantic/Pacific axes. From this point of view, updating the classical sovereign equality norm according to current realities should be taken as natural. This approach is better suited to the scientific system in which observations refute conjectures. Norms, like the conjectures produced by human consciousness based on observations in general, ensure that people have predictions in their relations with each other and with nature. But to hang

the laws in a place where no one can read, as Dionysius of Tyrant did, means that the laws cannot fulfill their function. The emphasis on the COL in this study is about its predictive function –not imperative– for individuals and society. The concept of justice, however, mostly derives from the idea that certainty is never enough. Philosophers have theorized the concepts referenced for justice as an unfulfilled promise, guilt feeling, vengeance, transcendent providence, human nature, possession, or utilitarianism.<sup>99</sup> This justice understanding is the desire to base people's subjective perceptions on the claim of imperative in legal judgment.<sup>100</sup> However, individual or social perceptions can only be a subject of observation, not a tool or purpose of judgment in a secular criminal law system. In this respect, the source of the power of judges to create an

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99 (Kaufmann, 1969) pp. 209–239. As a procedural law term that supports the main sources in Islamic Law, Maslaha implicitly includes justice, so there is no abstract use of justice in Fiqh works, apart from it. While Abu Zehre argued that the term Maslaha and the utilitarianism term of Jeremy Bentham and John Stuart Mill completely overlap, Bütî stated that the perception of “good” in Islam is different. Because it is not limited to material pleasure, see. (Dönmez, 2003). Since secular law is taken as a reference in this study, it is necessary to focus on the concept of *utilitas publica*, which is also applied in Roman law. First of all, when utilitarianism is dealt with in the axis of secular law, it can be determined that it secularizes the religious law and forces rational law to explain the public interest, hence the subject of morality, the “good”. Thus, in a system established based on “certainty in order to predict”, we come across an area where the distinction between law and morality is blurred. The utilitarian school asserted that the classification of crimes and penalties according to the principle of benefit in the criminal law, the grading of the crimes according to the damages to the social interests, and the most severe punishment of the crimes that are most harmful to the social interests are the basis of criminal law. Regarding the utilitarian school see. (Güriz, 1963) pp. 7–8. We can consider the roots of the concept in Aristippos's hedonism. See. (Güriz, 1963) pp. 9– 10. Aristotle's handling of the concept of *phrónêsis* in the sense of grace and the concern of benefit (*symphéron*) will essentially raise various problems for a secular order. See. (Aubenque, 2006) These problems are about the meaning of “benefit”, the limits of individual and social benefit, how to claim the universality of benefit to all humanity, and how to measure a concept that includes transcendence. In our opinion, the benefit has both individual and social aspects. This ethical problem involves an issue that requires mediation but not rational imperatives. However, certain points about scientific knowledge can be emphasized on this subject.

Especially the issue of social benefit is a concept that cannot be easily distinguished from secular life. The base of a deviation from statute law in a case necessarily requires the public or individual benefit. Whereas considering the legal norms in correlation with reality would mean grounding on the scientific method. This is the dilemma between reality and benefit. Although science does not directly concern the benefit of human beings, it also has beneficial consequences such as the development of technology or prediction for civilization. After the pre-Socratic perspective in ancient Greece, the understanding that prioritizes human well-being as a purpose is a significant break that expresses this difference. However, modern systems should consider the concept of benefit in decision making and implementation with a perspective other than proximate causation.

100 According to Hegel, the formal will as an act of gaining self-consciousness becomes the process of giving “objectivity” to its subjective purpose when it comes into contact with an external world that conflicts with it. See. (Hegel, 2015) pp. 52–53. However, in our opinion, objectivity here is not scientific objectivity.

exceptional norm or unify jurisprudence is the existence of a secular reason for deviating from a positive norm or regulating the interpretation of the norm. This also serves the COL. In conclusion, although it is possible to explain the CAH, in contexts such as the violation of the “universal” law or the conflict of freedom fields in Kant’s philosophy,<sup>101</sup> the immanent or transcendent idealism established with non-imperative justifications does not allow the testable reasoning that positive law needs.

Although *Bassiouni* states that a very appropriate term has been obtained, CAH means to seize and monopolize the word humanity. This could lead to the demonization of the perpetrators rather than their conviction. It would be easy to question the “humanity” ground if we consider that classical international law names pirates on the high seas as the enemy of all humanity (*hostis humani generis*)<sup>102</sup> just because local legal systems could not cope, or that the crimes in the context of the initial requests for the establishment of a permanent criminal court in 1989 were drug smuggling and terrorism.<sup>103</sup> Obviously, states’ need for international cooperation in combating these crimes stands out here, rather than humanitarian concern.

The humanity concept states both the quantity of humankind and a value (humanness) for the quality of being human. Besides these two aspects of humani-

ty, there is a humaneness approach as a product of humanitarian consideration.<sup>105</sup> Considering the opposition of all these descriptions, expressing the distinctive aspect of the CAH with “widespread, systematic and civilian population” words only points to the context of humanity morally. These words may emphasize the breadth of harm rather than the human context in a positive sense. However, this breadth is not objectively measurable (rational) under the humanity title.

*Arendt* has stated that the Holocaust is against human status and human nature. *Arendt* borrowed the term crime against human status from French prosecutor François de Menthon in Nuremberg. Menthon has made a genocide definition as an attack against diversity on the characteristic of human status, at least with

**“The humanity concept states both the quantity of humankind and a value (humanness) for the quality of being human”**

101 (Atadjanov, 2019) pp. 59– 60.

102 (Luban, 2004) p. 90.

103 (Günel, 2013) p. 45.

104 (Luban, 2004) pp. 86– 87. Humanism is essentially an education system and research method that puts “human” in the center. See. (Grudin, 2020). The humanitarian approach, however, grounds the development of human virtue. For the impact of the humanitarian course on developments in criminology, see. (Bernard, 2019).

105 (Atadjanov, 2019) p. 20.

**“[T]he fact that the CAH is directed primarily to the public whose right is violated is not a specific difference but an inconsistent assumption”**

clarity that can be tested, by admitting the meaninglessness of the expressions of mankind or humanity in a sense.<sup>106</sup> *Rαdburch’s* interpretation; is that when the destruction of human culture,<sup>107</sup> cruelty to human existence, and disrespect for human dignity occur, it is necessary to accept a violation against all humanity.<sup>108</sup> Arendt states that the actus reus is directed primarily to the public whose right is violated, not the victim.<sup>109</sup> However, there is uncertainty about the source of these inferences or the method of the judge to derive this inference in a concrete case. All criminal cases are prosecuted because the public order is breached. The sensitivity of preserving belief in the rule of

law is not unique to CAH alone. Therefore, the fact that the CAH is directed primarily to the public whose right is violated is not a specific difference but an inconsistent assumption.<sup>110</sup> *Luban* has stated that crimes committed at the national level only breach the national public order, and the relevant side of CAH is humanity itself since there is no world community.<sup>111</sup> However, we cannot claim, neither normatively nor practically, that criminal acts against “humanity” do not disrupt the national public order at the same time.<sup>112</sup> Whether these crimes require universal jurisdiction or exceed the national judicial mechanism, they should be justified not with empathized moral values,<sup>113</sup> but with scientific arguments because rational propositions are the only convenient tools to establish COL.

**3. PROPOSITION: NATIONAL REGULATION OF QUALIFIED CORPUS DELICTI IN CLASSIFIED CRIMES COMMITTED WITH THE SOCIAL IDENTITY MOTIVATION**

The main criticisms towards CAH are;

1. There is no positive context that the victim is humanity. Hence, a normative context cannot be established.
2. Knowing and willingness, which are the *mens rea* elements, are not directed towards humanity.

106 (*Luban*, 2004) p. 87.

107 Regarding the destruction of a group’s cultural heritage as a war crime, see. (“Prosecutor v Ahmad Al Faqi Al Mahdi”, 2016); (*Bilsky & Klagsbrun*, 2018) pp. 373–396.

108 (*Atadjanov*, 2019) p. 42.

109 (*Arendt*, 1965) p. 261; (*Luban*, 2004) p. 88.

110 Regarding the effect of crimes on the spirit of civil society see. (*Hegel*, 2015) p. 214.

111 (*Luban*, 2004) p. 140.

112 Regarding the universal jurisdiction of Belgium, see that the International Court of Justice does not accept the attempt to prosecute the Foreign Minister of the Democratic Republic of Congo *Abdulaye Yerodia Ndombasi* under various charges, including crimes against humanity; (“Case Concerning the Arrest Warrant of 11.04.2000 (Democratic Republic of Congo v Belgium)”, 2002). See also (*Kissinger*, 2001) p. 86.

113 In respect thereof, see Arendt’s imaginary speech to *Eichmann*: “[W]e find that no one, that is, no member of the human race, can be expected to want to share the earth with you.” (*Arendt*, 1965) p. 279; (*Luban*, 2004) p. 140.



3. If the context of the acts under the title of CAH is not established in such a positive plane, a transcendent definition of crime will come into question. This will cause a relative judgment and will be inherently contrary to the principles of COL, equality, and legality. Judgments should differ from case to case, not from the arbitrary interpretation of principles.
4. Although humanity is a moral term, “widespread” “systematic” and “civil population” are positive terms. Therefore, the “specific difference” between the title and the definition does not overlap.
5. What is reliable in terms of proof is to take factual data as a reference. This requirement is an essential element that appeals to the conscience of the public as well as a convenience in terms of procedure. For example, whether a crime is committed with a social identity motive is an open question to answer with concrete evidence. However, whether a crime can also fit into humanity needs to be considered outside the scope of modern law.
6. Based on the above inferences, accepting that humanity is a transcendent concept, it is necessary to legally define humanity and human conscience and establish a positive connection with the relevant acts. Otherwise, a solution such as a national regulation of qualified corpus delicti “in conditions suitable for analyzing logical requirements” should be produced instead of a separate crime under the humanity title.

CAH is the invention of a transcendent concept. Apart from the fact that the classified acts are not limited, this *description* includes crimes already regulated at the national level, such as murder, rape, enslavement, and torture. Seeking a supra-definition for acts whose definitions and names are specified in other types of crime requires that their context and distinction points be solid and clear. Additionally, since the name given to the supra-concept will be composed of these context points, it should be in a form that reflects the common feature of the sub-concepts.

There are opinions of competent authors stating that the definition of CAH has no ground that is beyond any doubt.<sup>114</sup> It reveals this confusion that the Human Rights Committee has associated even production, testing, and deployment of nuclear weapons with CAH while interpreting the right to life.<sup>115</sup> Before reaching a precise definition, the expression of “*other inhu-*

**“[A]ccepting that humanity is a transcendent concept, it is necessary to legally define humanity and human conscience and establish a positive connection with the relevant acts.”**

114 (Dinstein, 1996) p. 908; (Hwang, 1998) p. 487.

115 CCPR/C/21/Add.4, 14 November 1984; (Shaw, 2018) p. 231.

**“In Aristotle’s thought, veritas is not the ideas but the object itself. The forms of objective existence in the mind are images and concepts.”**

*mane acts*”, which is the *eiusdem generis* rule in legal interpretation, increases the inconsistency and uncertainty.<sup>116</sup> Because *eiusdem generis* rules are applied when there is an understandable class, category, or genus, at least in the presence of two specific words that have a common or dominant characteristic, attribute, or feature.<sup>117</sup> If this is a definitive problem, it would be appropriate to refer to classical teachings.

In Aristotle’s thought, *veritas* is not the ideas but the object itself. The forms of objective existence in the mind are images and concepts. While the particular senses in mind form the images, concepts are the universal and rational equivalents of existence. To conceptualize a “thing”,<sup>118</sup> a definition that defines the boundaries of the particulars should be made. A *de-finition* requires limiting particular objects or events to gather them into a single denominator, that is, limiting to generalize. A generalization (*genus*) includes all members of a “thing” and a specific difference excludes all non-member elements.<sup>119</sup> For example, defining humanness with features such as bipedal and upright vertebrates can be tested whether it distinguishes “humanness” under all conditions. Essentially, it is the definition of crimes, the classification of particular acts to establish COL in a case of criminal liability.<sup>120</sup> When defining a crime, the most vital reference point is the *actus reus*, as the most apparent element appealing to the senses. The definition of CAH is expected to distinguish any criminal act from CAH. Thus, if the concept of CAH is to be in-

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116 (Geras, 2015) p. 16.

117 (Samuels, 1984) p. 180.

118 Although the “concept” is essentially called universal, it should be seen as functional and nominal conjectures that provide predicting, not as ideals.

119 (Yücel, 1866). Generalization and limitation functions draw nominal and refutable but not derivational frames. Essentially, means of generalization to predict and limitation to touch with reality can also be regarded as valid for language formation in terms of naming objects. However, the function established by definition should be considered as certainty, but not determinative. While the conjectures in Popper’s theory of science function as generalizations in a sense, the refutations made based on the observations have the function of limitation. In this respect, the logical approach should not be expressed in the form of imperative obtained through the mere induction method. See. (Millgram, 2009) pp. 183–199. Regarding social determinism and populism, see also Nikolay Chernyshevsky. Since Thales first recognized the universal validity of mathematical generalization, many mathematical predictions made in dynamics, astronomy, and theoretical physics were later confirmed by observations. Although generalization and limitation give a syllogistic character to scientific and social laws with similar functions, the mathematics used in the social field cannot formulate the will factor as in physics. In this respect, combining the will of legislation in the optimal synthesis of reality and utility is the fundamental equation of social laws.

120 In Hegel’s philosophy of law, the positive law system is to subordinate the special to the universal. (Hegel, 2015) pp. 41–42. However, Hegel expressed the dialectic of a concept not only as a boundary or an opposition but also as a positive content and result, see. (Hegel, 2015) p. 66. While criminal acts are unlimited, external differences are erased, and equality is established for the essence of what a criminal deserves. (Hegel, 2015) p. 120.

sisted on, it is necessary to make a legal definition of the term humanity under the principles of logic. The absence of such a definition reveals the conceptual weakness of the CAH. In fact, the senses are at the forefront of Aristotle's thought and the conformity of the definitions to the objects and events is established in this way. The idealist approach, however, takes the concepts as a reference and starts from the imperative conformity of the being to the concepts. Contrary, consistency is a problem of our nominal concepts, but not the being. This unscientific method, idealizing the concept of humanity, means referring to an uncertain notion, not the act, in the judgment of particular criminal acts. Such a transcendental method obviously impairs the COL.

The tribunals of Nuremberg, Tokyo, Former Yugoslavia, and Rwanda do not aim to abstractly make definitions of crimes applicable to substantive criminal law, as they primarily set their jurisdiction in their status. The biggest problem with the definition made in the Nuremberg Charter is that substantive law and procedural law are intertwined. Rather than drawing the abstract boundaries of the term CAH, which is a new concept, the Charter has listed the situations that are related to war crimes and crimes against peace under the CAH. The Tribunal might want to use

its jurisdiction in pre-1939 cases associated with political, racial, and religious grounds.<sup>121</sup> If the CAH title expresses this aim, this is an indication of intervening in pre-war acts with a "universal" definition of crime. Indeed, the expression "other inhumane acts" in Article 6(c) of the Nuremberg Charter reflects this inconsistent universality. This universality has required the ex-post constitution<sup>122</sup> of international crimes.<sup>123</sup> This shows that the context of CAH is wanted to be placed on a supranational and transcendent level. The transcendence that provides the plane in question has been expressed with the term humanity. The establishment of this logic was, of course, possible not

**“The biggest problem with the definition made in the Nuremberg Charter is that substantive law and procedural law are intertwined”**

121 (Tribunal, 1947); (“Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal (Adopted by the International Law Commission and submitted to the General Assembly)”, 2000) para. 121.

122 (“Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal (Adopted by the International Law Commission and submitted to the General Assembly)”, 2000) para. 120. The Israeli national court, which appointed its jurisdiction in the Eichmann trial, used the term *delicta juris gentium*, stating that the crimes involved in the case violated not only the laws of Israel but the law of nations itself against all humanity. The court thus found that there was universal jurisdiction, see. (“Eichmann Case (Attorney-General of the Government of Israel v Eichmann) (Israel Sup. Ct.)”, 1962).

123 In terms of war crimes, the 1907 La Haye and 1927 Geneva Conventions, and for crimes against peace, the League of Nations Pact, the 1924 Geneva Protocol, the 1925 Locarno, and the 1928 Paris Treaties are taken as references. However, in the Nuremberg trials, crimes against humanity remained baseless in this regard see. (Tosun, 1954) pp. 423-424; (San, 1966) p. 26.

**“A permanent international criminal court idea that appeals to the international community and brings the principles such as legality and the natural judge into force was just older than the Rome Statutes”**

for substantive reasons but procedural reasons for the Tribunal’s determination of its jurisdiction. Regarding substantive criminal law, questions such as what humanity is or how the perpetrator, who is a human, targets humanity in the elements of knowing and willingness of the *mens rea* await answers. In order to avoid unfounded criminal fiction or “imperative” sense-making, it is essential to prioritize observing the behavior of perpetrators. Observing the social and historical process is also important. For example, in the Statute of the ICTY, under the phrase “against any civilian population”, only one paragraph refers directly to political, racial, and religious identities. Although it is understood from this article that social identities are only one aspect of CAH, it should be reminded that the disintegra-

tion process of the Former Yugoslavia is essentially an identity-based war. It is also clear that in the background of the Ukraine–Russia war, which is the most destructive war after the USSR collapsed, there is the construction of the Ukrainian identity, which clearly differs from the Russian identity and uses its political preferences in this direction.

In the experiences of Nuremberg, Tokyo, the Former Yugoslavia, and Rwanda, there were judicial mechanisms determined by ex-post conditions. A permanent international criminal court idea that appeals to the international community and brings the principles such as legality and the natural judge into force was just older than the Rome Statutes. In addition to the experiences supporting this idea, Trinidad and Tobago’s application to the International Law Commission in 1989 and the developments in the 1990s have led to the establishment of the ICC.<sup>124</sup> The Rome Statute, which established the International Criminal Court to operate permanently in The Hague and envisages an abstract definition of CAH, has come into force in 2002 when it reached 60 States parties. The codification process that shapes the CAH concept consists of 1951<sup>125</sup>, 1954<sup>126</sup>, 1986<sup>127</sup>, 1991<sup>128</sup>, and 2019<sup>129</sup> drafts prepared by the International Law Commission.

In the Rome Statute, the primary conditions for CAH are that a widespread or systematic act is directed against the civilian population and the act with the

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124 (Günel, 2013) pp. 44–45. For detailed information on the historical process of the ICC, see. (Schabas, 2010); (Bassiouni, 2005); (Shaw, 2018).

125 (ILC, 1957).

126 (ILC, 1954).

127 (ILC, 1986).

128 (ILC, 1991).

129 (ILC, 2019).

knowledge of the attack. Here, some updates have been made to the classified acts. The following acts have been added to the definition of crime: Forcible transfer of population; severe deprivation of physical liberty under fundamental rules of international law; sexual slavery; enforced prostitution; forced pregnancy; enforced sterilization or any other form of sexual violence of comparable gravity; enforced disappearance of persons. The Rome Statute does not regulate the census, but includes “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. Examples of other inhuman acts that Ratner and Abrams give are medical experiments, mutilation, severe beatings, food deprivation, sterilization, corpse violations, forced undressing, forced witnessing of atrocities against loved ones, and other horrific physical and mental attacks.<sup>130</sup> There is a more specific approach to social identities in the Rome Statute regarding CAH. The Rome Statute includes apartheid in a separate clause by emphasizing the racial group plane. In the case of persecution, the identity of the group or collectivity is expressed as “reason”.<sup>131</sup>

Established as a permanent international judicial authority, the ICC has a complementary jurisdiction that complements

the national law of the state parties.<sup>132</sup> Here, 13 of 21 cases involving CAH are still in progress. Katanga case is the only CAH conviction in ICC.<sup>133</sup> Katanga was the leader of the Patriotic Resistance Force in Ituri, an opposition group in DRC.<sup>134</sup> Katanga was found guilty of acts of rape and sexual slavery. The Trial Chamber has identified the existence of identity-based motivations that develop for various reasons, rather than an ethnic hatred with roots in the past.<sup>135</sup> In addition, the autonomous structure of group identity in terms of the motivation of the perpetrators was also emphasized.<sup>136</sup> The ICC inevitably does not neglect identity-based inquiries in

**“Established as a permanent international judicial authority, the ICC has a complementary jurisdiction that complements the national law of the state parties”**

130 (Ratner & Abrams, 2001) p. 74; (Luban, 2004) p. 99.

131 (“Rome Statute of the International Criminal Court (adopted 17.07.1998, entered into force 01.07.2002),” 1998) art. 7/1, 7/2g.

132 (“Rome Statute of the International Criminal Court (adopted 17.07.1998, entered into force 01.07.2002),” 1998) art. 1, 17.

133 <[https://www.icc-cpi.int/cases?f%5B0%5D=accused\\_crime\\_case%3A324](https://www.icc-cpi.int/cases?f%5B0%5D=accused_crime_case%3A324)> Access: 06.06.2022.

134 <[https://www.law.cornell.edu/women-and-justice/resource/the\\_prosecutor\\_v\\_germain\\_katanga](https://www.law.cornell.edu/women-and-justice/resource/the_prosecutor_v_germain_katanga)> Access: 06.06.2022.

135 (“Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga,” 2014) para. 699.

136 (“Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga,” 2014) para. 1409.

**“Looking at the Rome Statute, the main factor that distinguishes an ordinary crime of murder from a crime against humanity has been expressed as “against the civilian population”, “widespread” and “systematic””**

trials. National courts have also worked on CAH in Italy, Canada, Spain, Argentina, Indonesia, Chile, Peru, and Iraq.<sup>137</sup>

Looking at the Rome Statute, the main factor that distinguishes an ordinary crime of murder from a crime against humanity has been expressed as “against the civilian population”, “widespread” and “systematic”. In our opinion, the widespread and systematic form of a murder committed against a “person” makes this crime mostly a crime against “people”. The critical point here is that the distinction applied to accept an already defined crime as a CAH should explain why we express a crime with the concept of humanity. Logically, “widespread”, “systematic” and “against civilian population” expressions are descriptive, not definitive

elements. It is not clear how it differs from organized crime, accomplice, or premeditated killing. In this regard, the “definition” itself is not distinctive but manipulative. This situation also created confusion in practice. For example, in Austria, between 1945–1955, the Nazi trials were carried out by establishing a people’s court (*Olksgerichte*). War crimes, torture, cruelty, violation of human dignity, and genocide were taken as the basis instead of the expression of CAH in these trials.<sup>138</sup> In France, Barbie, the butcher of Lyon, Touvier, and Papon were convicted of CAH. The French courts were looking for the condition of ideological hegemony policy, which is a domestic law regulation not included in the Nuremberg Charter.<sup>139</sup> Here, it emerges that the national normative regulations on CAH may lead to significant differences in the judgment. According to the Turkish Criminal Code, the philosophical motive, deliberate injury, and subjecting victims to scientific experiments are mentioned in terms of the classified elements of the CAH.<sup>140</sup> On the other hand, in the *Regina v. Finta* case, the element that distinguishes the CAH from any crime in the Canadian Criminal Code, was expressed as a brutal and terrible attack following the policy of discrimination or atrocity of an identifiable group or race.<sup>141</sup> In this case, an identifiable group or race was considered the key to distinguishing CAH. As a matter of fact, Article 3 of the ICTR Statute sought discrimination intent for both acts of murder and persecution. However, the prosecutors of the ICC do not have to take this essential nuance into account and prove the

137 (Bassiouni, 2011) pp. 679–723.

138 (Bassiouni, 2011) p. 669.

139 (Bassiouni, 2011) pp. 671–678.

140 Turkish Criminal Code, Number. : 5237. Adopted: 26/9/2004. Published: 12/10/2004, -ssue: 25611, Art. 77.

141 (Luban, 2004) p. 104.

existence of the discriminatory intent, for example, in a murder-type crime against humanity.<sup>142</sup> Instead, the ICC practice opted to exclude acts against soldiers and individuals by operating the civil population formula concerning any identifiable group criteria.<sup>143</sup>

Although the systematic and widespread terms are elements of a wrong definition, they guide the analysis of CAH. These expressions can be thought to indicate an organizational liability.<sup>144</sup> At this point, the approach suggested by the study is that the acts of CAH differ by the social identity motivation. Based on the drawbacks of the protected legal value being humanity, it is possible to consider another positive phenomenon, which needs to be protected on the social ground, constructs the idea of CAH. Psychologists have focused on the authoritarian personality point regarding the causes of the perpetrator's behavior, then intensified on combinations of social identity, culture, and historical context.<sup>145</sup> If the protected social phenomenon is accepted as social identities that contain the cultural and historical fabric in the construction process, the exploitation of identity politics that encourages populism would be narrowed to the rational and protective field. This understanding would support social cohesion by protecting identity phenomes. The social identity approach also offers a testable ground for legal evidencing. What is meant by testability here is that the steps of reasoning made by the judge based on the social psychology data contain partially refutable or at least avoi-

dable propositions that may again be the subject of social psychology experiments. On the contrary, if the protected legal value is accepted as humanity, this situation would give rise to a transcendent and ambiguous definition of the crime and ambiguous reasoning. Because the terms systematic, widespread, and civil population have no positive connection with the concept of humanity. Depending on group-based, widespread, and systematic damage findings, claiming that abstract and ambiguous concepts such as international society, humanity, and human conscience are also damaged, and from there, reaching international or universal jurisdiction may be an "option".<sup>146</sup> Since this option is based on the relative and untestable humanity concept, the weakness of the control mechanism would damage the COL. Accepting people's moral

**“Although the systematic and widespread terms are elements of a wrong definition, they guide the analysis of CAH. These expressions can be thought to indicate an organizational liability”**

142 (Luban, 2004) p. 104.

143 (Luban, 2004) p. 104.

144 (Luban, 2004) p. 97.

145 (R. W. Smith, 2005) pp. 790–794.

146 For an example of reasoning in this manner, (May, 2005); (Renzo, 2012) pp. 443–476.

achievements, beliefs, or desires as the milestones of humanity can be considered useful or even necessary in society. Although the practice of humanity as such has an interaction based on persuasion and social legitimacy, such an approach that accepts social perceptions and delusions as imperative reasons rather than data points to the subjectivity of interpretation references in terms of positive law. In our opinion, social sciences are a field that constantly produces data. It is based on the perception of the measurement of behavior, which is the product of perception and consciousness. However, since natural sciences are based on the perception of the measurement itself, its repetition and testing capability is more objective. Absolute laws are no longer natural sciences and critical rationalism subject that produces more consistent conjectures and refutations than social sciences. Several hypotheses can be developed in the social sciences, but they lack imperative, even if they clearly override each other. Therefore, social events should be accepted as data, not results, because cause-effect relation implies an imperative axiom. However, this does not mean that certain correlations cannot be established between social data. At this

point, precision and accuracy should not be confused. As a matter of fact, according to Gadamer, social sciences have a mechanism based on the existence and self-understanding of human beings that ensures their accuracy.<sup>147</sup> This study stresses that rather than the transcendent concepts, the discipline of social psychology contains a testable method for defining the mechanism of social identity motivation.

The distinction between the adjective and substantive law is fundamental to jurists, but they are not unrelated. This study emphasizes the connection between crime theory and the law of proof. The theory of crime and the terms used in this theory should provide logically refutable propositions for the law of proof in a secular criminal system. Otherwise, a secular proof system cannot be established. In order to reason on a testable level, the correct term regarding the social identity element is "motivation". Perpetrator's *purpose*, however, is problematic in terms of testability.<sup>148</sup> When we look at the physical world from a purposeful perspective, this leads to archaic judgments such as *qualitas occulta* even in scientific matters such as gravity. Essentially, the term purpose is

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147 (Gadamer, 1979) pp. 85-86.

148 The word motive means "a specific physiological or psychological state of arousal that directs an organism's energies toward a goal". The concept of the criminal mind (*mens rea*) expresses the existence of consciousness of act (*actus reus*). Intention etymologically includes the idea of abstraction (*Absicht*) and is a priori conscious decision to perform a behavior. In experiments, the intention is usually matched with goals defined by task instructions. A subject's behavioral changes can identify goals after reaching a state. Therefore, it has no ex-ante usage. Since the concept of purpose has teleological and existential uses, such as the purpose of the universe and life in the literature, this concept refers to transcendent and subjective fiction or contexts. Such references of a perpetrator may be involved in performing the act. Still, these references should be viewed observationally, not existentially, in a legal order based on a secular ground rather than untested transcendent assumptions. In this respect, the term "motive" preferred in the study refers to objectively evaluating the elements that motivate the perpetrator in motion, not claiming that the perpetrator takes an element as a purpose. See for definitions: <<https://dictionary.apa.org/>> Access: 26.04.2021. The consistency between the for-itself will and the concept is requested and purposed in Hegelian thought. The externalization of the subjective will is the "act". Hegel stated the connection between the act and the concept is a "necessity". See. (Hegel, 2015) pp. 126-127. However, in our opinion, such a "necessity" and the transition from the subjective will to objective ethical order based on this "necessity" is inconsistent. Because the relation of an act with a concept can only be observed and hypothesized. This study proposes a scientific perspective to chaotic acts and events that cannot be determined before the "accident" by observing the motivations affecting free will.



not an appropriate use in a secular crime theory, as criminology must provide logically refutable propositions for the law of proof in criminal cases. In terms of motive, the main problem is whether to look at the motivation of the criminal act *ex-ante* or its perception after this act (*ex-post*). Especially in the examples of Nuremberg, Former Yugoslavia, and Rwanda, acts are committed during identity conflicts, and motivation is established based on identities. As a matter of fact, the consociational democracy, which is still practiced in Bosnia and Herzegovina, and other countries, shows how deep the traces of these identities are. Regarding a *posteriori* perception of the acts, the reason for accepting these acts against all humanity is the trauma caused by WWII, more precisely by the reaction to the person being subjected to crime because of an identity that she/he has no choice. The victims' being subjected to crime not because of what they did but because of what they were,<sup>149</sup> creates a collective reaction against this crime. Luban expresses the source of this reaction and the reference to the distinction of CAH in human's *political animal* character.<sup>150</sup> In our opinion, evaluating such an act against humanity derives from the idea that every human being has such identities (race, religion, etc.) and that these differences must not lead to a discriminatory crime. When some people establish and idealize this socially beneficial idea stronger than other people, we

encounter "universal" moral assumptions. However, the subjectivity of such justifications creates a highly disordered and relative field for social perception. Therefore, the claim of universality here should be accepted as an element of social persuasion, not law.<sup>151</sup>

The biological human denominator is not strong enough to form an *ipso facto* human identity because a *posteriori* identities are almost always accepted in front of the human identity. For this reason, it is not possible to say that a fundamental consciousness, which has no ideal humanity patterns, has emerged that will accept crimes against the human genre. However, from an objective point of view, the denominator of being a biologi-

**“(... ) it is not possible to say that a fundamental consciousness, which has no ideal humanity patterns, has emerged that will accept crimes against the human genre”**

149 *Samantha Power* expresses the crime of genocide in this way. *Luban*, on the other hand, states that the section to which CAH are directed is also subjected to crime because they belong to a certain group. See. (*Luban*, 2004) p. 107.

150 (*Luban*, 2004) p. 138.

151 Philosophers debate whether the law has a logic of its own based on social persuasion. In our opinion, legality refers to a system based on classical logic, while legitimacy refers to social persuasion. Legality may be an argument that can be used for social persuasion, but the scope of legal logic does not match persuasion. Therefore, legality may contradict legitimacy. Legality merely considers the social structure that determines the characteristics of persuasion as an observer and changes the norms accordingly. This provides communication between legality and legitimacy.

**“The clearest evidence that a *posteriori* identities precede biological human identity is actually the acts known as CAH.”**

cal human is more inclusive and general than all other identities since it's a scientific but not a moral determination.<sup>152</sup> Here, it is necessary to discuss which of the identities acquired by the environmental effect play a more active role in the acts described as CAH. Because the artificial identities that individuals and societies build under the influence of the environment appear again as factors of the events.<sup>153</sup> In other words, the perception of individuals and societies towards identities should also be accepted as a reality subject to observation. The clearest evidence that a *posteriori* identities precede biological human identity is actually the acts known as CAH. For this reason, it would be appropriate to evaluate the acts defined as CAH actually against identities that are a more decisive context. This inference also reveals the importance of identities in criminal law in terms of both being a source of actus reus motivation and being an element of social cohesion.

It is a proposition that should be seen as socially reasonable and beneficial, that a person should not be subjected to a crime because of their identity. However, the solution is not to produce transcendent and unfounded concepts but to secure individual and social identities on the condition lookout for social cohesion. The way to do this is to understand the motivation that creates the crime against humanity correctly. The question of why a definition for CAH is needed is important at this point. The proposed logic is that ordinary crimes committed with the motivation of identity find a response not only in the victim but in everyone who has this identity, namely the in-group. By highlighting the dependent and common structure of society and the potential of social identities to change society, such sensitivity should not be ignored by states in terms of sustainability. Because a social identity is necessarily either a component or the opposite of social cohesion, which is of special interest to states. While keeping this distinction prominent is the main concern of conservative societies, the requirement that the components of society find a response before the state in terms of the sustainability of social cohesion is a more reasonable and generally valid proposition. This approach puts forward that the perpetrator and victims' interpretations and common moral values should be used as data, not imperative reasons, in criminal cases. In this respect, it is essential for COL that the way of thinking of the judicial authority is not as meditative as possible but calculative. Conversely, the sensitivity explained by moral values is the main

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152 For *Carl Linnaeus'* classification of biological humans as hierarchical subspecies according to geography in 1758, see. (Notton & Stringer, 2010)

153 In *Russell* causality, observations lead to perceptions, and perceptions lead to events, even if the post-perception process does not work with formal logic. See. (Russell, 1996) p. 54.

reason for accepting these CAH with a vigilante jurisdiction.<sup>154</sup> However, there is no such imperative in terms of positive law. Regarding these acts, the main factor that needs to be protected is identities. It is inconsistent with regulating the related acts as a separate crime under the humanity title. Instead, a qualified *corpus delicti* regulation for the motive of identity to be added to the relevant ordinary crimes is more suitable for logic principles.<sup>155</sup> It can be criticized here that the effect of identity motive on both perpetrator's free will and the social cohesion is also open to speculation. However, this uncertainty that the trial requires to resolve does not arise from the ambiguity of the definition of the crime. On the contrary, whether there is an identity motivation that breaches social cohesion in a concrete case in the context of social identity theory and other studies in the social psychology literature outlined above is a subject of case-specific jurisdiction. As the objective element of a crime, *actus reus* is the behavioral aspect of social identities. However, the classification, comparison and identification elements that constitute the cognitive aspect of social identities should not be ignored to detect the social identity motivation.

The distinguishing factor that motivates the perpetrator in committing an act considered a CAH is related to the identities outlined above. Individuals construct their own identities with the influence of the environment. As a result of the self-awareness process, individuals begin to define themselves by their identities. This affects their social behavior. They want their identities to live, be expressed, and

be inherited from generation to generation like living organisms without being assimilated. Regarding public administration, identities have dynamics that may lead society to change. Furthermore, each society has different conflict areas in social cohesion equations depending on its construction processes. Although states are essentially a product of people's delusion, they still function to organize educational and doctrine instruments in separating their peoples from other peoples with the classical sovereign understanding. While moving to a digital and individualized society where borders become meaningless, it is necessary to admit that the social identity equation still expresses a composition within territorial boundaries since the power of states to implement their policies on their people has not disappeared yet. In other words, the accumulation of states while constructing their own identities and consolidating the identity of their societies brings along a unique experience of con-

**“As a result of the self-awareness process, individuals begin to define themselves by their identities.”**

154 Referring to the ambiguity in the concept of humanity varies the decision of the judges according to their conscience, see. (Günel, 2013) pp. 14-15; For the difficulties of regularly determining the *dolus specialis* of a perpetrator regarding the genocide, see. (“Prosecutor v Akayesu (Judgment)”, 1998) para. 523.

155 For discussions on the necessity of the discriminatory motive in CAH, see. (Ntoubandi, 2007) pp. 58-63.

flict. Therefore, as long as states have the power to create and maintain their identity composition, the judicial application of aggravating punishment regulation in crimes committed with identity motivation in the context of criminal law should be specific to states, as a substantial base of COL.<sup>156</sup> Indeed, the Rome Statute confirms the complementary jurisdiction of the ICC to national law. However, the inconsistency of the CAH concept requires not only the acceptance of the national-level qualified *corpus delicti* regulation but also the *sublation* of the international norm of CAH. This raises the question of how to eliminate an inconsistency that has become norms and customary law. Customs are mainly derived from the social needs of human beings and are the product of common sense that comes into play in areas where the norm is not clear. When they are not the subject of observation and have normative value, they have to be questioned and changed by the scientific method that produces the most reliable norms.<sup>157</sup> Essentially, this necessity has made it possible to write the history of civilization. As an extension of this argumentation, the universal jurisdiction adopted in national laws has disadvantages due to various aspects. First of all, the concept of humanity is not universal but anthropic. Secondly, the right of states to freely determine the crimes and

their content within the universal jurisdiction damages the legality principle for the perpetrator. Thirdly, there will raise the dilemma of non-bis in idem when there is no “satisfactory” trial. In this respect, universal jurisdiction entails at least a normative uniformity. What is reasonable and sustainable for national criminal jurisdiction in the international system is the nexus based on clear concrete data rather than unfounded assumptions.<sup>158</sup> In this respect, a well-intentioned universal jurisdiction ideal offers only substantial and procedural confusion<sup>159</sup> in the international legal system where not the rules but the actors come to the fore.<sup>160</sup> Because territoriality, which is the main element of criminal jurisdiction from the perspective of international law,<sup>161</sup> can only be overcome in non-hypothetical contexts of the disruption of public order of a state claiming criminal jurisdiction. Because an exorbitant jurisdiction is likely to violate the jurisdiction of another state with stronger nexus.

The social identity approach also resolves how many victims mean humanity by highlighting the identity motive in regulated crimes. Moreover, the confusion between human rights, genocide, armed conflict law, and national law is handled more rationally. Concerning compensation for mass human rights violations, for

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156 In this study, states are addressed in the context of delusion and its impact on identities, not as an imperative form of objective morality subject to proof. See. (Hegel, 2015) p. 234.

157 To assess the concept of creative destruction and sublation (*Aufheben*) in Hegel’s logic system, see. (Bergande, 2014) pp. 28-145. Custom in Hegel’s thought is the general behavior of objective morality. See. (Hegel, 2015) p. 170.

158 Basing universal jurisdiction on customary international law is not possible in terms of content due to normative and judicial discrepancies between states. Since the concept of humanity does not allow us to present propositions that are suitable for testing and the concept contains an irregular interpretation field, the title “humanity” itself is objectionable for normative universality.

159 For the arguments in favor of universal jurisdiction, see. (Hall, 2003) pp. 47-71.

160 The difference between the concepts of *ius gentium* and *ius inter gentium*, which are still influential today, is pointed out.

161 (Shaw, 2018) p. 467. Regarding that territorial criminal jurisdiction is not absolute and does not fully coincide with territorial sovereignty see. (“The Case of the SS Lotus, (France v Turkey) (Collection of Judgement),” 1927).

example, the experiences of the national authorities of Peru, Chile, Argentina, Colombia, Iraq, Bosnia, Rwanda, and South Africa can be used.<sup>162</sup> Judges could obtain expert support from sociology and psychology specialists for a rational trial ground. In the face of international attention, transparency of national trials and keeping communication channels with relevant institutions open is extremely important. Internationalized models<sup>163</sup> can also be applied to ensure transparency and objective reasoning of subjective conditions within the composition of the states. However, it should be ensured that these models do not function to enforce “universal” moral assumptions or turn them into a disadvantage that would affect the impartiality of the judgment.<sup>164</sup> If states fail to prosecute these crimes “properly”, relevant procedures may be implemented at the international level in the defined fields of human rights law, war crimes, crimes against peace, and crimes of genocide.

## CONCLUSION

The social identity approach is more consistent than the current CAH approach in terms of a secular legal order. Although the law of proof stands out with its case-specific and observational structure, it

cannot be handled from a purely positivist perspective and should be built with a theory consisting of certain principles. However, these principles need to express assumptions and functions supported by observations rather than an ideal. Subjective moral terms and immanent or transcendent methods should also be avoided for hypotheses open to refutations. The ground of this study is a logical approach proposing that an immanent, transcendent, and untestable acceptance like humanity would harm the COL. Our study reveals that the term CAH is incompatible with the act of this crime and that the identity motivation, which is distinctively evident in the commission of the act, should take place at a prominent level in the normative and judicial sense. It is aimed to establish more secular reasoning for criminal law by testing the suitability of theoretical and clinical social psychology data on social identities in criminal cases. In terms of conformity with these principles and the scientific method, the case-specific criminal procedure must comply with the criteria of hypothetical proof. Thus, a secular basis has been provided for the law of proof and the substantive law. As an extension of the established logic, qualified corpus delicti regulation of relevant crimes in national criminal codes is considered appropriate rather than a separate type of CAH. ◆

162 (Ferstman, Goetz, & Stephens, 2009) pp. 385–566.

163 For internationalized criminal courts, see. (Romano, Nollkaemper, & Kleffner, 2009).

164 For criticisms towards the Kosovo example, see. (Romano et al., 2009) pp. 73–77.

165 When the effects of these data were noticed in the legal environment, both *Geny* and *Duguit*, from the perspective of natural law and Pound, in social engineering thought, have seen the prominence of sociology, psychology, and anthropology disciplines as undeniable. See. (Shaw, 2018) pp. 37–38. However, these data should express generalizations and limitations open to change that will enable thinking about society rather than producing “ideal” patterns for society or “exact” knowledge that leads to social engineering by induction method. See. (Nacar, 2021).

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