Chapter 3
Humanity Seized by International Criminal Justice

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Contents

For the "post-conflict" governments (and the international community), the twin aphorisms "no peace without justice" and "no justice without peace" assert criminal justice (both national and international) as a central element of the exit from civil and international conflicts. This international criminal justice system was put into place in phases, through first temporary jurisdictions[1] established in the mid-1990s and then, a few years later, a permanent court.[2] The system is constructed around

[1] The first jurisdictions were the International Military Tribunals of Nuremberg and Tokyo following the Second World War. With the resolutions 827 and 955, in 1993 and 1994, respectively, the UN created the International Criminal Tribunal for the ex-Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

[2] The International Criminal Court (ICC) was established on 17 July 1998 by the Treaty of Rome.

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the notion of attacks against humanity, first by the offense of "crimes against humanity" and then by the offense of "genocide," to punish acts that were progressively differentiated from war crimes. Thus, in the field of law, transitions from war to peace are viewed through the prism of the notion of "humanity." This is why the analysis of notions, concepts, and categories through which one can comprehend the post-war transition causes one to pause on the term "humanity." At the heart of its legal usage, the term requires comprehension of the logic of its mobilization, of its utilization within the international criminal justice system, and of its effects. Using the discourse and jurisprudence of judges from both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda,[3] the analysis centers on how the notion of "humanity" has become a legal instrument for measuring how judges interpret the facts before them.

Borrowed from other fields, "humanity" is mobilized at the intersection of discourses, legal practices, and policies. It is the symbol of the scale at which the legal vocation is to be applied at an international, if not universal, level. The introduction into law of this "humanist" reference has not been the object of specific discussion among jurists. Furthermore, the objective of the notion of "humanity" is to introduce consensus by use of a term that is elsewhere incontestable. In effect, the chosen reference must appear legitimate, no matter the country where international law is being applied. Thus, the notion of humanity is present in numerous countries (all of which have integrated "crime against humanity" into their legal system), as well as at the international level with the establishment of the International Criminal Court, considered competent to judge the perpetrators of such infractions. "Humanity," now a legal category, is displayed as the circulation of consensus through a legitimate reference that cannot be questioned. Humanity, mobilized by the jurists and present in discourses—both political and those of the actual operators of international organizations—permitted the establishment of international criminal jurisdictions (from Nuremberg and Tokyo to The Hague and Arusha). An analysis of the doctrine and jurisprudence of contemporary criminal jurisdictions and a study of the genealogy of the notion of Humanity in law permit the comprehension of how this category of nomination preserves the representations of the world and of the law that were collapsed by the crime.

3.1 "Humanity" in the Field of Law: Genealogy

"Humanity" was the attempt at a standard by which the legitimacy of the first *ad hoc* international criminal jurisdictions was judged. The temporality and the processes by which this notion has become a legal category pertain to the choice of a legitimate foundation that drives the law to the core of war.

[3] Since, as of this writing, the International Criminal Court has not rendered a "thorough" decision, this chapter only takes into consideration those affairs thoroughly judged by the two international criminal tribunals.

3.1.1 Humanity of the Choice of a Legitimate Reference

In the field of law, the term "humanity" first appears at the beginning of the twentieth century, in the expression "laws of humanity," and again at the creation of the offense of a "crime against humanity" in 1945. The occurrence of "humanity" appears for the first time in substantive law in the Martens clause, inscribed in the preamble of the 4th Hague Convention of 1907. The clause reads:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it appropriate to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and from the requirements of the public conscience.[4]

This clause is inscribed in the perspective of international human rights law which appeared at the end of the nineteenth century with the objective of recalling the exigencies that were to preside over behavior during war. This disposition announced a codification that would be applied in 1920 with the Statute of the Permanent Court of International Justice (which became the International Court of Justice in 1945), via its Article 38, which consecrates the "general principles of law recognized by the civilized nations."

Thus, when the term "humanity" appears in law, it is quite often associated with the terms of "civilized nations." Sometimes it is the "civilization that is truly accusatory to the [Nuremberg] trial."[5] Sometimes the offense "crime against humanity" is the sign of a state of civilization progressing:

> The crimes against humanity are as old as humanity. The legal concept, however, is new because it presupposes a state of civilization that recognizes the laws of humanity, human rights, or the rights of the human being such that the respect of the individual and of human collectivities are enemies, 'law' and non-codified 'rights' maybe yet, but the violation is considered as morally and legally reprehensible.[6]

The civilized nations affirm both a level of higher law that would protect human beings regrouped within a Humanity district and the will to establish a supplementary degree of protection of its rights.

The association of these occurrences illustrates the issues of a war, but also a broader perception of the world and of the law. In effect, it amounts to an implicit equivalence between substantive law and civilization, in other terms, a vision of unique law formalized by written and oral expression within a forum that takes the guise of a jurisdiction.[7]

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[4] Laws of War: Laws and Customs of War on Land (Hague IV), 18 October 1907. [Translation available at http://avalon.law.yale.edu/20th_century/hague04.asp].

[5] Graven 1950–1951, p. 463.

[6] Ibid., p. 433.

[7] Although the laws and customs of war were taken into consideration, their proscription was not envisioned except through an international jurisdiction. (See Liwerant 2002.) Furthermore, works in the anthropology of law have shown the predominance, in the west, of the recognition of the legal phenomenon by the form of general and impersonal norms.

Law thus seizes the notion of humanity via the expression of "laws of humanity." The term "humanity" is then taken up in the works of the Commission on the Responsibility of the Authors of War and on the Enforcement of Penalties created in 1919 to prosecute the perpetrators of "crimes against humanity." In effect, although the Treaty of Versailles does not mention this term, the investigatory commission should have examined the responsibility of starting the war as well as the violations of laws and customs of war. Submitted in 1919, the Commission's report established a list of crimes committed "according to the barbarous or illegitimate methods, in violation of the laws and customs of war and the elementary principles of humanity." It produced a list of 854 individuals to be prosecuted by the Allied tribunals[8] for war crimes, and it mentions the acts perpetrated by the German army that were characterized as "a singular challenge to the essential laws of humanity, civilization, and of honor."[9]

Relying on the Martens clause, and with the aim of indicting the Turks responsible for the massacre of Armenians, this commission proposed the offense of "crime against the law of humanity" to correspond to the declaration of 18 May 1915, wherein France, Great Britain, and Russia declared these acts as "new crimes against humanity and civilization."[10] In Articles 226 and 227, the Treaty of Sèvres foresaw the judgment of "persons accused of having committed acts contrary to the laws and customs of war,"[11] but this treaty was not ratified and, consequently, there was not a single prosecution of the Turkish leaders.[12]

The years following the First World War were marked by a willingness to condemn Germany. Jurists took over the political discourses that, during the war, had advanced the motivating theme of the trial.[13] The process was now about judging crimes against peace, war crimes, and, above all, "atrocious behaviors contrary to the most elementary rules of humanity."[14] In this perspective, the doctrinal movement was very active between the world wars, militating in favor of the creation of a permanent international criminal court that went the way of codifying punishable acts.[15] In effect, there was agreement between the wars that the "violations of the laws of humanity" were acts punishable according to the national laws of all countries, that is to say, according to ordinary criminal law, here turned against the leaders and the perpetrators who had violated the law of their states.

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[8] Becker 1996, p. 56.

[9] Memoir cited by Aronéanu 1948, p. 184.

[10] Cited by Massé 1989, p. 34.

[11] Article 226 of the Treaty of Sèvres.

[12] See Mandelstam 1922–1924, pp. 361; 414; 425.

[13] See, notably, Deperchin-Gouillard 1996.

[14] Graven 1950–1951, p. 448.

[15] The first draft of the repressive international code was developed in 1925 by Vespasien Pella. Following the Second World War, the climate was favorable to a Code of Crimes project from the 1950s, the United Nations General Assembly suspended the examination of a first draft submitted by the Commission of International Law (CIW) because of discussions about the definition of a crime of aggression. Eventually, the CIW did not take back up a code of crimes until 1981, which was adopted in 1996.

The drafts of the international repressive codes were numerous and constituted the major part of the jurists' efforts during the interwar period. The doctrinal movement permitted the regulation of the war until the declaration of its illicit character by the 1928 Briand-Kellog Pact, which outlawed war. Today the codification is similar to the process of "contributing to the defense of justice and international peace, indeed of civilization, or even to assume the establishment of a minimum of international public order or a form of universal social defense."[16]

During the Second World War, the Allies, by a series of declarations, proclaimed the principle of prosecuting war criminals who committed atrocious acts contrary to the laws of humanity "invoked from April 1940 during an appeal to the world conscience launched by the English, French, and Polish governments."[17] The laws of humanity had been laid down, to use the terms of the British delegation, in order to organize legal proceedings against "those who trampled upon international law and the sacred laws of humanity." As the French government put it, "acts contrary to international law and the essential principles of human civilization must not rest unpunished."[18] During several declarations effected during the Second World War between 1940 and 1941,[19] the idea was invoked to punish Nazi criminals in a special international jurisdiction, which led to the famous Declaration of Saint James on 13 January 1942, considered by Eugène Aronéanu to be "the 'chapter heading' of the first International Criminal Code."[20] Although this declaration does not expressly mention the term "humanity," the contemporary doctrine agreed that this declaration aimed at a "type of new criminality, unknown to international law, indeed, to domestic criminal law."[21] These new crimes were considered as requiring a new appellation and a specific definition (distinct from that of war crime). In effect, only national citizens having committed acts during the war could be punished for war crimes. The question remained of how to judge German nationals for crimes committed before and during the war. The crime against humanity allowed the international community not only to register its disapproval, but also to punish acts that, until then, lay outside any legal category. On 7 October 1943, an Investigative United Nations War Crimes Commission was created for the "punishment of individuals who have violated all principles of humanity."[22] It was followed by the Moscow Declaration of 30 October 1943 defining jurisdictions'

[16] Mahiou 2000, pp. 37–38.

[17] Meyrowitz 1960, pp. 7–8.

[18] Citd by Graven 1950, p. 447.

[19] Roosevelt and Churchill on 25 October 1941; note by Molotov on 27 November 1941; Declaration of the United Nations, speech of 5 December 1941.

[20] Aronéanu 1948, p. 205. In this declaration, the signatory governments expressed their willingness "to set punishment among the principle goals of the war, by the means of organized justice, of guilty individuals or those responsible for the crime that they ordered, that they perpetrated or participated in." Cited by Meyrowitz 1960, pp. 9–10.

[21] See, notably, Grynfogel 1994, p. 15.

[22] Roosevelt cited by Aronéanu 1948, p. 231.

competency.[23] Aronéanu, a key figure in the post-1945 legal doctrine, declared that the laws of humanity and the re-establishment of human rights were at the heart of the Allies' objective: "the cause of humanity dominated all of the reasons for war."[24]

If the laws of humanity introduced this term into the legal vocabulary, it was the International Military Tribunal at Nuremberg that formulated the new offense by Article 6c of the London Agreement of 8 August 1945.[25] This disposition was taken up again in Article 5c of the International Military Tribunal's statute for the Far East and by the Allied Jurisdictions' Law No. 10 of the Allied Control Council, which pertained to "the punishment of persons guilty of war crimes, crimes against peace, and crimes against humanity." The definition of crime against humanity would ultimately exceed that of war crimes: it applied to acts that were not punishable under ordinary law or that were committed before the war by a sovereign state on its domestic soil. All of the authors of the period did not agree on the category "crime against humanity." Eugène Aronéanu, eminent jurist and central figure of the postwar legal doctrine preferred the expression "crime against the human person," while M. de Menthon (representative of the French Public Ministry at Nuremberg), in his introductory report, qualified these acts as "crimes against the human condition," and Jackson (the American judicial representative at Nuremberg) referred to crimes "against civilization."[26] The doctrinal discussions would not modify the appellation of the new offense. "Crime against humanity" would progressively replace "crimes against the laws of humanity" and only two affairs made reference to the laws of humanity as a general principle of law (by the Special Criminal Court of The Hague in May 1948 in the *Rauter* affair and by the Israeli Supreme Court in the *Eichmann* affair). Since then, the international offense of "crime against humanity" has become inscribed in the statutes of two international criminal tribunals[27] and the International Criminal Court.[28]

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[23] This declaration minorly foresaw that national tribunals would judge crimes perpetrated on their soil and for crimes that could not be localized, the Allied governments would render a joint decision.

[24] Aronéanu 1948, p. 210.

[25] This article defines crimes against humanity as: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." Writing the principles of international criminal law in 1950 at the request of the UN General Assembly demonstrated the demand for a new legal reference ratifying/confirming the principles brought out at Nuremberg.

[26] Cited by Donnedieu de Vabres 1947, p. 527.

[27] Article 5 of the International Criminal Tribunal for the former Yugoslavia's statute is competent to judge grave offenses to the Geneva Conventions of 1949 (Article 2), of violations of the laws and customs of war (Article 3), and of genocide (Article 4). The International Criminal Tribunal for Rwanda was competent to judge genocide (Article 2), crimes against humanity (Article 3), and violations of Article 3 common to the Geneva Conventions and the additional Protocol II.

[28] Article 5b of the July 1998 Treaty of Rome establishing the International Criminal Court, of which the statute went into force in July 2002 after being ratified by sixty countries. Besides the crimes against humanity, the court is competent to judge crimes of genocide, war crimes, and crimes of aggression.

3.1.2 Law to the Core of "War"

The laws of humanity were invoked as a basis for the principle of prosecution of "war criminals," moreover, this expression was always used to evoke the behavior by which the acts fall outside military logic or to designate new reproved forms of war. Thus the genealogy of "Humanity," in the field of law, reveals a peculiar legal logic: lawyers used it to punish violation of laws and customs of war.

The notions of laws of humanity and the crime against humanity suggest a realm beyond war and inscribed in the series of conventions pertaining to the law of war. The crimes of war are understood as violations of the laws and customs of war, the Conventions of The Hague of 29 July 1899 and of 18 October 1907, and the Geneva Conventions of 1906. In the nineteenth century efforts to humanize war (The Hague Conventions, but also the Lieber Code of 24 April 1863), one witnesses a criminalization of the violations of the laws and customs of war, as the preamble of The Hague Convention of 18 October 1907 clearly expresses the laws and customs of war on land:

> these provisions, the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

This was thus the behavior in the war that led not only to an extension of the regulation of armed conflicts, but also to an offense designating those acts that were progressively removed from the category of war crimes after the outlawing of war in 1928. This enabled the doctrine to affirm that the crime against humanity evolved from the war and from the idea of protecting the human person in times of peace. In effect, if the war crimes corresponded to an offense of classic international public law, the crime against humanity, qualified as an offense "prior to the formation of a collective system of security,"[29] was dissociated from the war crime in 1945, even if "no impenetrable partition"[30] appeared. To use Aronéanu's famous formula: "the crimes against humanity travelled under the cloak of war crimes"[31] until the Second World War. The crime against humanity did not acquire its own "autonomy" until after the postwar judgments. The International Military Tribunals decided to apply the qualification of crime against humanity only when a connection with war crimes or crimes against peace was established. They also considered that, for the events prior to the start of the war, this connection did not exist. For acts committed during the war, however, the Tribunals reunited under the same category the crimes against humanity and war crimes, thus avoiding the distinction between these two offenses.[32] This is because the majority of the doctrine denounces the IMT's timidity with respect to the qualification of crime

[29] Donnedieu de Vabres 1947, p. 506.

[30] Ibid., p. 505.

[31] Aronéanu 1948, p. 193.

[32] Without researching whether or not the facts were qualified, the Tribunals certified that the statute incriminated them as soon as they presented a connection with the crimes against peace and war crimes (other offenses laid out by the statute).

against humanity; it was retained only in terms of its connection with war crimes against peace.[33] Crime against humanity was "vanished."[34]

The other difficulty confronting jurists in 1945 was justifying the application of a new crime, that is to say, proscribing acts that were not defined at the moment of their commission. In other words, how does one legally justify the prosecution without violating the fundamental principle of criminal law: non-retroactivity?[35] In order to justify the application of this new offense, the doctrine and the jurisprudence situated the origin of the crime against humanity in substantive law via the laws of humanity. If the laws of humanity have been considered as the "fruit" of the law of nations since 1918, it was only after the Second World War that jurists would clearly affirm the genealogy of this notion. The legal doctrine consequently established a "direct filiation" between the crime created by the London Agreement, the laws of humanity, and, more generally, the law of nations, invoked at the Nuremberg Trial. In effect, if the law of nations *stricto sensu* concerns inter-state relations, it is "founded on universal principles of justice of which 'humanity' should be both the object and the beneficiary."[36] The legitimacy of the new Article 6c of the London Agreement answered already to requirements expressed by the law of nations. The promoters of the Nuremberg trial appealed to the theories developed by Thomas Aquinas, Suarez, Gentili, Vattel, and Vitoria. Grotius was mentioned several times during the Nuremberg Trial:

> the sovereign and the holders of sovereign power have the right to apply punishments not only for offenses of which they or their subjects were victims, but also for the flagrant violations of natural law and of the law of nations committed to the detriment of other states and of their subjects.[37]

The references to theoreticians of the just war allowed the justification of the war:

> In our civilization, the preoccupation of [the] 'international' characteristic of human rights harkens to the doctrinaires of the just war that grants the prince leading a just war the right to punish the authors of murders inutile to the war.[38]

Thus, the introduction of the law of nations, which imposes itself on everyone, saw the assurance of its violation by the "just war." The consequence of this law of

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[33] After the Nuremberg and Tokyo Trials, the United Nations Assembly adopted a resolution confirming the Principles of International Law recognized by the "Nuremberg Charter" of 11 December 1946 and the Commission of International Law decided to eliminate the connection between this crime and the situation of war (aggression) and war crimes. The war crimes and crimes against humanity would no longer be linked by a relationship (notably in the statutes of the International Criminal Tribunals and the International Criminal Court).

[34] Donnedieu de Vabres 1947, p. 527.

[35] As an example, it is interesting to note that this question has been resolved not only at Nuremberg, but also in the first decisions of the international criminal tribunals and by the International Criminal Court of Yugoslavia; see the *Tadic* case where the ICCY spent very large developments relative to its competence.

[36] Graven 1950, p. 438.

[37] Cited by ibid., p. 441.

[38] Aronéanu 1947, p. 193.

nations was indeed "the war of law."[39] Representing France at the Nuremberg Trial, Henri Donnedieu de Vabres thus affirmed that "the crime against humanity wronging interests common to the entire humanity [is an] abstraction made of the state form, [and] the crime against humanity is an offense against the law of nations."[40] This filiation is picked up within the Convention for the prevention and the repression of the crime of genocide of 9 December 1948, which inscribes this reference in its first article: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

The law of nations allows a discourse of legitimation of the new offense applied by the first *ad hoc* international jurisdictions. The genealogy of the introduction of the notion of humanity in law reveals a patina of legitimacy from the moral point of view that would justify the legal use. This discourse reveals the porosity of the boundary between natural and positive law, pertaining to the cleavage between the foundations and the technique of the law.[41]

Moreover, the elaboration of the rules aims decreasingly at the right to war that "contains" behaviors during the war. To put it differently, comportments during conflicts distinct from the military objective provide the opportunity to extend a regulation that seeks to adapt itself to the forms of wartime violence to contain them. The reference to humanity indicates that the *jus in bello*, behavior into the war, was henceforth as significant as the *jus ad bellum,* the right to do the war. This is why Donnedieu de Vabres could say that war crimes are only a species while crimes against humanity constitute a genus. According to this legal logic, this notion provides a foundation for the repression, in "containing" the wartime comportment, that is to say, to effect passage of a law to do the war to a law into the war. More a category of repression than of analysis, Humanity provides the legitimation to establish new judiciary institutions. Even so, must one consider still the crime against humanity as an act beyond the war committed within a conflict of which one must determine the temporal, geographic, and conceptual boundaries?

3.2 Humanity: The Nomination of Shattered Representations

What does the term "Humanity" mean? What are the contemporary legal debates about it? Does the established institution have uncontested legitimacy… what has become of this legal category at the implications of its use (contrary to the criminal policies that it can implement)?

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[39] Graven 1950, p. 439.

[40] Donnedieu de Vabres, 522.

[41] In this sense, see Legendre 1999.

3.2.1 Law and Grammar of the Crime

In the name of Humanity, which establishes the legitimacy of saying the law and, better, protects it, the legal taxonomy calls a definition of this referent. In effect, if humanity becomes the referent of an exaggerated crime, the appellation of the crime requires a definition of that from which the crime detracts.

Analysis of the doctrine and of contemporary jurisprudence reveals that the discussions relative to "humanity" are firstly concentrated on the definition. The question of knowing what is designated by "Humanity" has driven debates on the pertinence of elaborating a definition of this notion and will drive judges to determine who is "the victim" of these attacks. In effect, the polysemy of the referent "Humanity" required to determine if the offense is an attack on Humanity as a category that should be defined or if it is a particular attack on the body of the victim because of the negation of his/her membership in the human species? What is the specificity of the attack that the law decides to stigmatize: an abstract entity or specific individual(s)? In other terms, is this exclusion from humanity as an individual or of a member of a community; if the latter, which human community?

For the majority of the scholars after the Second World War, acceptance of the term of crime against humanity must be understood as the negation of the dignity of the victim and the rupture with the humankind. Others were partisan to a wider definition of the crime against humanity:

> The crime against humanity has no other object than the human person…. We do not believe in 'the crime against the very essence of the human genre' in so far that it is formed of different races, nationalities, and religions. And yet, racial hatred was the motive for the Israelite's inhuman treatment as he was rifle butted into a gas chamber, his person and right to life attacked and not his race.[42]

This question was posed in the national trials for crimes against humanity. In France, during the Barbie Affair, the judges asked themselves about this notion to understand if the crime against humanity was a crime against the essence of humanity, i.e., a quality intrinsic to each human being. The notion retained was that of a crime committed against the humankind, the man is

> attacked in his body, his life (he is assassinated, exterminated) or his liberty (he is deported, reduced to slavery), but also in his human dignity which makes him similar to other men.[43]

From this perspective, in 1994, Delmas-Marty wrote of the urgency to define this "implacable human."[44] She defended this idea with a definition of the crime against humanity because

> the refusal of all general definition permits, aimlessly of subjective appreciations of one another, to make of the crime against humanity an indefinitely extensible notion and not the strong core and constitutive intangible of the supreme forbidden.[45]

[42] Dautricourt 1947, p. 298.

[43] Truche 1992, pp. 67–68.

[44] Delmas-Marty 1994, p. 489.

[45] Ibid., p. 490.

This debate was re-launched among the international judges during the first decisions of the new *ad hoc* international tribunals. Although the attack on humanity serves as the basis for the competence of these jurisdictions, the tribunals agreed that this crime is international because of its nature: it challenges the "essential values on which lay international society."[46]

It is ultimately the "humankind" that is targeted by the reference to attacks on humanity. The international criminal courts' jurisprudence noted that the specificity of the crime lay in an attack that strikes more than the physical integrity of the victim and affirms "that there is no total equivalence between the life of the accused and that of the victim."[47] Echoed in the first decisions of the ICTR,[48] the ICTY stated, in its first case, that:

> Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity.[49]

Faced with these difficulties, the jurists have recourse to the notion of dignity, almost like a substitute for the notion of humanity. Although not new, this concept found its legal translation in 1945[50] in the endeavor to elaborate a legal protection from crimes against the "human family." The concept of dignity thus makes its appearance in the field of law that attempts to detail the acceptance of the term humanity. Today, the notion of "dignity" is considered a principle of international law, recognized by the international criminal jurisprudence.[51] The attack on dignity appears to be the common denominator of all the crimes against humanity, and a number of the ICTY's indictments make reference to it[52]: the "rules prohibiting crimes against humanity … have the goal of protecting fundamental human values in banishing the affronts to human dignity."[53] Humankind and the human abuses are both contained in this notion of dignity. If the utilization of the notion of dignity in matters of crimes against humanity could permit the recovering of the two principal acceptances of humanity, its

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[46] Francillon 1999, p. 400.

[47] Chambre de première instance I, *Erdemovic* IT-96-22 *"Ferme de Pilica*," 29 novembre 1996, §19.

[48] Chambre de première instance I, *Kambanda* ICTR-97-23-S, 4 septembre 1998.

[49] Chambre de première instance I, *Erdemovic* IT-96-22, *"Ferme de Pilica*," 29 novembre 1996, §28.

[50] The notion of "dignity" makes its entry in the United Nations Charter signed in San Francisco on 26 June, 1945.

[51] See, for example, the *Furundzija* affair judged by the ICTY.

[52] See the indictments in the *Kordic*, *Sikirica*, and *Nikolic* cases.

[53] Chambre de première instance II, *Kupreskic et consorts*, IT-95-16 "*Vallée de la Lasva*," 14 janvier 2000, §547.

definition would not be any easier. This "positive" version of crimes against humanity displaces more than clarifies the referent measure, revealing a rationality of statement founded on an inversion. In the same manner in which the definition of the term "humanity" is susceptible of receiving a contrary definition, the term "dignity" constitutes, too, the reference to the name by which eugenic practices were justified.

From the moment that the offense was named as an attack on humanity, the crime could only be formalized in terms of violation of this reference. This nomination process led to the multiplication of the definition of prohibited acts, regardless of jurisprudence (the ICTY having largely developed the notion of the crime against humanity) or in lengthening in the text the list of proscribed acts (Article 7 of the International Criminal Court's Statute is eloquent in this respect). The discursive logics of law drove the creation of offenses by *a contrario* nomination. The incriminations of crimes against humanity (and then of genocide) were conceived from the specificity of the crime to which the constitutive elements of the offense must respond. The definition by the statutes of international jurisdictions and the legal qualification operated by the jurisprudence attest to a formulation of the crime made from the discourse of the call to murder, certain practices of cruelty, and the traces of crime. The jurisprudence establishes a definition of the crime which takes, point by point, the prohibited acts and classifies and systematizes them.

The legal logic inherent in the genealogy of the notion of Humanity in the field of law led first to the definition of genocide by the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 and then took up, one by one, the terms utilized by the murderous organization and the discourse of the call to murder; the international criminal tribunals, as well as the International Criminal Court, reiterated the terms "race" and "ethnicity" in the incrimination of genocide from which the jurisprudence defined these terms.

The international judges released, in a tautological manner, a definition of the attempts on humanity as a series of inhuman acts. In revisiting the *a contrario* acts, the law did not oppose an inversion. More than that, the law, or more exactly the jurists, compelled themselves to engage to the core of crime. Thus, it was not a construction of an analytical category, but the classification of acts within a generic category of which the newness just signified "no."

Humanity, as a legal category, shows that the law, faced with the crime against humanity, relies on the same principles and the same vision as the murderous logic, thus questioning the legal rationality. This view is impervious to the prohibition of murder. In effect, the same notions are advanced but in an opposite interpretation; an inverse meaning is attributed to a similar sense. Still, the notion of dignity such as it was established by the genocidal logic redefines its beneficiaries; the law has just reestablished the attribution of this affiliation and reaffirmed its indivisibility thanks to the same notion. Law has just responded, term by term, to the established murderous logic, the inhuman attacks, the attempt on humanity that the genocidal logic redefined, such as the notion of responsibility.

This nomination, based on the effects of the crime, allows a "reversibility" of principles to appear, such as responsibility, which also belongs to the legal universe. If responsibility is fundamental to modern criminal law, it also constitutes the fulcrum for the realization of crimes against humanity and, more generally, collective murder. Ordering murder relies on the action of perpetrators in implementing the disappearance of the moral responsibility to the profit of technical responsibility, that is to say, the dissociation of moral and legal responsibility by a "transfer" of the meaning of the act emptied of its symbolic substance. In this capacity, the rhetorical arguments of the perpetrators and of the law respond to each other; rhetoric of the legitimate defense or of the constraint as a legitimate form of submission to authority.[54] These sales points pertain to the same categories and they respond to the constructed language as extenuating circumstances. Our "surprise" at the discourses of justification or of absolving the authors of crimes against humanity reveals more the cultural deep-rootedness of the notion of responsibility and the difficulties of its utilization for crimes against humanity. In effect, if "being responsible" today is associated with the responsibility—including the criminal sense and those of guilt and accountability—the register of the offense does not appear until the moment where this term is transported into the discourse of Christian morality; the act at fault becomes the cause of the form of a responsibility before God's judgment.[55] In other terms, this rationality permits the formulation of the refusal of the crime, but also in reconstructing the shaken representations of "the human." This "mirror effect" of the arguments shows that, in successive temporalities, the same principles serve societal projects founded on its exact antinomy, the reproduction of life in the face of its extermination. A reading of the law that establishes a list of proscribed acts shows that the effort of classification touches what is visible of the crime, to know its materialization.[56] Thus, the construction of this murderous normativity reveals the limits of our categories and of the law.

3.2.2 Law's Unspoken Elements

Through the notion of Humanity, the construction of the legal narrative of a crime makes evident the law's spoken and unspoken elements vis-à-vis the crime. If today the look is less turned away from perpetrated collective crimes,[57] the proof

[54] See Liwerant 2006.

[55] The term "responsible" is recent, dating to the end of the eighteenth century; its original meaning was "to hold accountable for" [*se tenir garant*], that is, it designated a debtor on which weighed an obligation and not an offense. See Villey 1977.

[56] In this sense, our propos consists in affirming that there exists a "murderous normativity." See Liwerant 2010. And, in considering these acts in relation to this murderous normativity, international criminal law cannot attain the construction of its legitimacy and of its authority.

[57] See Liwerant 2007.

is in the development of a new field of research dedicated to this scientific object.[58] The legal category has led the social sciences to free themselves of this nomination of crime against humanity (and genocide) in order to understand the crime. In effect, for some time the legal terminology has formalized the framework of this research. The state of scholarship dedicated to genocides and crimes against humanity shows the force of the legal categorization of these notions, necessitating an empowerment by the other scientific disciplines in order to free themselves from the legal taxonomy and to be overcome with other interpretations of the realization of the crime and its treatment. This "closure effect" reveals the limits of both human perception and of legal rationality before this collective crime.

Humanity seems to be the single reference that accounts for this irrepresentability. The recourse to this reference leads inexorably to the following paradox: the law must define a representation. Besides, the choice of the term "humanity"—the reference conveying a number of representations—signals the vague desire to reconstruct a representation that puts into check the crime.

Faced with this crime, the legal discourse reconstructs the shattered representations in evading all materiality of the crime to emphasize the abstraction of their reference. The legal montage always attempts to preserve this image of the human. It dodges the fracture opened by the crime in order to better restore this indestructible representation of humanity, that of a dread before the posed acts. The crime contains an inexpressible dimension but it does not at all concern the crime; in fact, it signals the collapse of our representations. It is more about considering the representations that founded our system and today put into cause the perception of the human, and also about the implications of the mode of legal nomination. It is not about attempting to reconstruct a representation of the humanity that the murderous logic has largely damaged. The crime shows the collapse of the human representation; its sequential analysis requires the freeing of oneself of all reconstruction and not prolonging the unthinkable discourses on the mass crimes that one attempts to keep at a distance like a reality external to the thought. Or like the acts broken by a force that cannot be human. The difficulties of thinking about the genocide and crimes against humanity signal a perception and a classification of the world. The crime has, in some fashion, lightened the flaw of a rationality from which the law does not escape. In this sense, the law functions like a revelation of the "state of our categories of thought." In effect, the unrepresentability of the mass crimes breaks the classic modes of nomination and our representations.

Several signs illustrate the legal difficulties in taking into consideration the collective dimension of the crime.

On the one hand, Humanity used as an "absolute" reference contrasts with the application of principles of common law by the international criminal jurisdictions. This gap is particularly visible in what concerns the sanction, the object of numerous critiques of international criminal jurisdictions. If the critique is near the one relative to punishments pronounced in common law, then the contradiction

[58] See Liwerant 2012.

between the designation of "crime of crimes" and the applied principles clouds the readability of a crime for a common law offense and for crimes against humanity.

According to the texts, the punishment is principally determined as a function of the gravity of the crime and the personal situation of the defendant.[59] The "fair" punishment reflects the personality of the alleged criminal and must be proportional to the gravity of the act. Based on steadfast jurisprudence, the ICTR[60] and ICTY[61] believed that the gravity of the offense constituted the principal factor of determining punishments. The jurisdictions have freed several elements characterizing the gravity of the crime: those pertaining to the nature of the crime, the victims, and the criminal behavior during the commission of the offense. Thus, the scale of the crime committed, its organization, and the rapidity of its execution characterize the gravity of the crime.

> The odious characteristic of the crime of genocide and its absolute proscription confer a character properly aggravating to its commission. The magnitude of the crimes involving the massacre of approximately 500,000 civilians in Rwanda in the space of 100 days constitutes an aggravating circumstance.[62]

The international criminal tribunals have considered that the gravity of the crime rises in regard to the number of victims and the amount of suffering[63] inflicted by the defendant[64] and the consequences of the offense and its gravity.[65] The ICTY considered that the gravity of the crimes committed by Krstić[66] was characterized by their magnitude, organization, and the "rhythm to which they [the crimes] followed one another in the space of ten days."[67] A "subjective" criterion is added to this "objective" criterion: the behavior of the defendant in view of

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[59] The principle is inscribed, respectively, in Articles 23 and 24 of the statutes of the International Criminal Tribunals of Rwanda and Yugoslavia.

[60] This principle is recalled in "the general principles governing the determination of the punishment," the rubric preceding the in-depth examination. Furthermore, judging the criminal responsibility for the crime of genocide, the "crime of crimes," the ICTR straightaway characterized the gravity of the offense.

[61] Mucic: "The gravity of the offense is far from being the most important, determinant criterion for meting out a just punishment. It is advisable to recall here that the Tribunal was competent for judging, the grave violation of international humans right law committed on the soil of the ex-Yugoslavia since 1991."

[62] Chambre de première instance I, *Kambanda…,* 4 septembre 1998, §42.

[63] Jugement portant condamnation d'*Erdemovic* du 29 novembre 1996. The court recognized that the victims' suffering was an element to take into account in the sentencing.

[64] The *Tadic* judgment concerning sentence: precisely the harm that the defendant had caused the victims.

[65] Chambre de première instance I *Kvocka…*, 2 novembre 2001, §701; see, too, Chambre de première instance II *Mucic …* "*Camp de Celebici*," §1256.

[66] Radislav Krstić (b. 15 February 1948) commanded the Bosnian Serb unit responsible for the Srebrenica massacre of approximately 7,800 Bosniaks in 1995. He was indicted for war crimes by the ICTY in 1998 and convicted on 2 August 2001 and sentenced to forty-six years of prison. -NdT.

[67] Chambre de première instance I *Krstic* …, 2 août 2001, §720.

the circumstances and his/her behavior. To appreciate the latter, the jurisprudence isolated three factors considered as aggravating circumstances: the degree of participation, the premeditation, and the motives.[68] To an exceptional crime, a "common" punishment is inflicted, clearing recognition of the crime's specificity. An attack on humanity, the jurisprudence and the doctrine consider, in application of the texts, that the attack on humanity permits the stigmatization of the gravity of the act committed. The crime is named by an attack on a non-consensual, if not "inexpressible," notion, of which one no longer knows very well who is the victim of what. Thus, the reference to humanity passes, little by little, a definition of the victim of a stigmatization of the offender. In effect, if the reference to humanity allows making the connection, at least in principle, between the collective and the singular victim, it also participates in the confusion of genres, between those which belong to the intimate and to the social. The designation "fusions" the diverse faces of the victim: victim of the movement to the act, target of the institutionalization of the murder, or even intangible disappeared figure. Three dimensions are present: the transgression, the murderous project, and the effects on the representation of the human. One observes thus a shift in the use of the notion: from an attack against Humanity and the definition of the "victim," it is the gravity and is today still stigmatized by the international judges through the charge that reflects on the author. Thus, the notion of "humanity" allows the quantification of the directed attack and becomes a grave criterion of the crime and of fixation of the punishment inflicted on the author of the crime against humanity.[69] Even so, it would not be necessary that, by the designation of attack on humanity, the author of these attacks would be implicitly considered as being "outside of humanity" and which would return to feed the all-powerful imaginary.

On the other hand, the application of these common law principles reveals the law's difficulties in grasping the collective and political nature of the crime. The criminal policy of the international criminal tribunals has always privileged the judgment of the rulers and upper hierarchies to the detriment of the perpetrators, although the nomination of the crime constitutes a political and social issue for the populations within which the crime has been perpetrated only for the governments of these countries. The choice appears as the only translation of the recognition of the political dimension of the crime. In effect, understanding the "post-conflict" in terms of responsibility, on the one hand, leads to the conceptual difficulties and practices of "judging a nation" and, on the other hand, underlies a hierarchization of the responsibilities superimposing themselves implicitly on a scale of gravity of the exactions. As an example, whether it is "Humanity" or "dignity," neither of these notions responds to the question of knowing how the law can take hold of the collective and how it designates the transgression. This adaptation of the law to the collective violence puts into question the differentiation between common and

[68] Ibid., §705.

[69] This same criterion is used to determine the punishment pronounced towards the authors of genocide, which poses the question of the existence of an implicit hierarchy between these two offenses.

"exceptional" law. There, too, international criminal law does not make readable the murderous logic at work; the question of the sanction renders salient the tension between individual and collective.

The will to put an end to impunity pass by the identification of the author and the declaration of the criminal responsibility for the acts committed. Modern criminal law is constructed like an instrument of protection of individuals against the state (through the philosophy of independent judges) and is developed through the monopoly of legitimate violence, including the repressive law. But the crimes against humanity (along with genocide) require a political organization that can be the state itself. International law did not cease to affirm, since the Second World War, the criminal responsibility of individuals, but not of states. The model of criminal responsibility is inherited from classic criminal law which considers responsibility a consequence of individual free will (*libre arbitre*). The demand for international repression has led to an increase in categories of physical people susceptible of being declared criminally responsible for a crime that became international. The mobilization of this principle permitted the neutralization of the earlier principles protecting the members behaving in accordance with their hierarchy, of which the functioning is based on the principle of obedience. One then sees that criminal law became international. The mobilization of this principle permitted the neutralization of the earlier principles protecting the members conforming to their hierarchy, of which the functioning is based on the principle of obedience. One sees when the criminal law, here borrowed by international law, is diminished before the political and collective nature of the crime. In this perspective, the articulation between the national and international jurisdictions takes its significance as well as its necessity to fully consider the endogenous vision of the justice, of the law, and of its forms and forums.

Recently, and more particularly since the activity of the International Criminal Court (ICC), one can observe that the term "Humanity" is less commonly used. In the general declarations, it is not so much humanity that demands repression, but the international community. In effect, this crime concerning all of humanity comes back to the international community to judge it: "In consecrating the concept of humanity, international law effectively refers to the interests common to all men, to the common universal good."[70] If yesterday's "outraged world conscience"[71] or if the international crimes always arouse "indignation,"[72] qualifiers and not subjects are associated with the term "humanity." Today, the latter confers a certain legitimacy to the name by which international criminal justice is rendered; as an example, the ICC's preamble uses the terminology of "human conscience"; today, one can observe that the indictments and the warrants delivered

[70] Carrillo-Salcedo 1999, pp. 23–24.

[71] The lead American prosecutor J. Jackson's initial indictment before Tribunal at Nuremberg, cited by Graven 1964, p. 15.

[72] Donnedieu de Vabres 1947, p. 518. The term indignation is also taken up by the contemporary doctrine. Bettati presents the crime against humanity as a legally vague notion that makes more of a reference to "indignation."

by the ICC are more re-focused on the actors pursued for international offenses in the name of the international community than in the name of humanity. This recent evolution of the vocabulary reveals an accent on the gravity of the crimes, whatever the location or nationality of the presumed perpetrators. One can question the semantic shift. Perhaps this is the enactment of a discourse of truth founded on humanity in the sense where the international scale prevails over the reference that founded the repression. The necessity of establishing a system of international criminal justice is less crucial where the work consists more of finding the legal and political instruments to make it function.

This change of terms is in keeping with the complementary competence of the ICC (contrarily to the two *ad hoc*[73] international criminal tribunals) and this jurisdiction has no vocation to treat all of the cases. The ICC must then elaborate, implicitly or explicitly, a penal policy or at least a "choice" of the cases. The legal proceedings appear as a manifestation of the international community's disapproval and the proposed repartition remains a repartition between those responsible (judged by the ICC) and the perpetrators (judged by the national jurisdictions). In this example, via the question of a de-territorialized justice or not, it is the penal policy that is particularly disparaged on the African continent which remains the principal "purveyor" of presumed suspects. In effect, one observes, a willingness of certain African states to take charge on their own territory, the judgment of individuals suspected of offenses. It is perhaps an affirmation of a sovereign domain and/or of modified power games, notably the geo-strategic and economic equilibriums. However, this position does not contradict the idea of the usage of the notion of Humanity, which, taken by the word, can implicate the consideration of national sovereignties.

The function of the notion of humanity in law thus takes into account the crime by its outrageousness. "Humanity" becomes a means of measurement, rather than an analytical category. Even so, the law does not have for vocation the production of analytical categories, but categories of nomination. Besides naming the crime based on notions that were put into question by the realization of the crime, and in the name of an abstract reference purporting transcendence, the law divides the collective while seeking to name it. The law aspires to be a pacifying instrument when, in fact, it is bellicose: the law attempts to reconcile by invoking the core of the conflict. A justice that divides the "war" or the "conflict" by judging the acts of a few actors and in imposing on them a sanction is governed by principles of common law. The law sanctions violations of acts of war, but from a war no one recognizes. Thus, the opening in the legal taxonomy comes to define an undefinable notion. The nomination is that which passes by reconstruction of a collapsed representation. The introduction of the term into law must define it or, failing that, classify it. If law's function is to name, it is necessary to ponder that which it must

[73] Article 9.2 the Statute of ICTY (similar to Article 8 of the ICTR) states: "The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer the competence of the International Tribunal in accordance with the present Statute and [its] Rules of Procedure and Evidence."

name so as not to "invert the inversion" and the modes of nomination. The choice of this notion operates to signify the refusal of the collapse of a human representation in reconstructing the idea of humanity as the supreme value to protect. The law puts into place a classification to designate what to protect, but in naming the attack on this vital issue and not the issue itself.[74] The work of legal qualification is also the imposition of a symbolic order. The force of this single ordering allows the illusion of resolution and it suffices to produce an effect of truth that becomes the sole alternative treatment. Far from being immutable, our categories can be re-examined. The international criminal justice system is more similar to a model of distribution of responses than to a model in crisis. In this sense, one can ponder this circulation of a model more or, more precisely, on the circulation of the conceptual crisis.

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[74] The creation of the offenses corresponds to a known phenomenon: knowing how to proclaim rights or a prohibition at a moment where the transgression was so devastating that the prohibition lost all its evidence; this is the case of the Declaration of 1948 and the offenses of Nuremburg.

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