The Concept of Humanity in International Criminal Law*

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Abstract

It is difficult to find a more ambiguous and multifaceted category than the concept of humanity. This is all the more striking considering its widespread appearance and countless invocations in legal, political, ethical, social and cultural spheres, expressly or otherwise. Among the words several different connotations are mankind, humaneness, human dignity and human nature. But there is no explicit or accepted definition of the term "humanity" in international legal documents or in relevant case law. Often used in the legal literature, first of all with reference to the famous Martens' Clause, the concept of "humanity" does not yet have a comprehensive formulation in international criminal law or in other relevant branches of law, for that matter. To tackle the issue, the present article argues that in order to properly assess the role of such a multifaceted but subjective notion in the law dealing with international crimes, it first needs to be considered from a wider perspective, i.e., from the point of view of international law, so as to facilitate its analysis from a more focused perspective, namely, with a view to better understanding a particular category of crimes under international law. After a very brief study, several conclusions are offered. One of them is that the notion of humanity found itself constantly reinstated in different civilizations and societies under various formulations and sometimes containing starkly differing elements but always embodying the same fundamental and basic values, or humanitarian sentiments. Another conclusion concerns the legal aspects of the concept: neither humanity nor its related notions ("principle of humanity", "laws of humanity") carry a strictly legal nature – in the sense of understanding a legal norm, rule or principle. But the so-called elementary considerations of humanity belong to certain general and well-recognized principles, which are exacting both in peacetime and war and upon which the state obligations are to be based. Finally, no other category of crimes is so closely related to the idea of humanity as the category of crimes against humanity. They are harmful to human beings' most fundamental interests. Therefore, to describe them as the umbrella concept encompassing all those interests has to be fundamental and comprehensive, too. The article offers such a concept: "humanity" under the context of international criminal law and the law of crimes against humanity should be understood as "humanness", or the status/quality of being human. Crimes against humanity

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attack humanity as such; hence, their title is justified and needs no replacement. Moreover, this interpretation not only encompasses all sub-elements of humanness but, furthermore, makes it possible to develop a holistic theory of crimes against humanity that reflects and explains these crimes' unclear protective scope. That theory preliminarily labelled "the theory of humanness" (and laid out by the author in more detail elsewhere) enables us to answer not only the conceptual question of "what is humanity?" but also the normative one, i.e., why crimes against humanity must be criminalized and prosecuted.

Keywords: humanity, laws of humanity, principle of humanity, crimes against humanity, humanness, international law, international criminal law, Roman law, natural law.

1 Introduction

It is hard to imagine a more compelling and global idea of appeal in the modern public discourse worldwide than the idea of humanity. A broad range of circumstances and situations where humanity may be invoked demonstrates the category's universal and fundamental nature. It permeates each and every societal culture. Thinking and discussions involving some sort of implied notion of humanity can be traced back to ancient times. And yet it is also difficult to find a more ambiguous and multifaceted category than the concept of humanity. This is all the more striking in light of its widespread appearance in legal, political, ethical, social and cultural spheres, expressly or otherwise. A study throughout history shows that there has not been a systematic analysis of the concept applied universally, with a view to suggesting an integral comprehensive interpretation. There are simply too many diverse understandings of humanity.[1]

There are several contemporary definitions of the word in common knowledge. The first, and apparently the most widespread, understanding of it is humanity as "humankind", i.e., the aggregation of all human beings as a collectivity. The second definition encompasses the quality of being human, or "humanness", or the very human condition itself. These first two figure prominently in various legal scholarly works dealing with international criminal law.[2] The third definition foresees the set of strengths focused on tending others, or humanity as a virtue (benevolence). Yet another meaning represents a combination of natural human characteristics (such as ways of thinking, feeling and acting), or humanity as "human nature".

While this was not the case with the generally used common term of "humanity", which has several notions embedded under the one umbrella term, no explicit and accepted definition of the word "humanity" currently exists in international legal documents or in international or domestic case law. It appears

1 Feldman and Ticktin 2010, pp. 1-2.

2 See, e.g., Luban 2004; Bassiouni 2011; May 2005; Cassese 2003; Jessberger and Werle 2014.

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that since the beginning of the formation of international law, the precise intrinsic meaning of humanity has been left to an intuitive understanding conditioned significantly by political, social, cultural, or possibly some other important factors.

Perhaps in some cases an abstract definition is not needed; but, logically, it is not entirely satisfying to accept the idea that "humanity" cannot be defined using, first of all, legal analytical approaches. In my opinion, to study a concept in detail does not mean to reject the legal constructions of which the concept forms a part. The question of clear conceptual definitions becomes critical when one tries to analyse what exact role those concepts played in the formation of legal categories, including in international law. Without a full understanding of this basic underlying concept many important questions will continue to arise on the precise nature of the key relevant legal categories. In the case of international criminal law, such a category would be crimes against humanity.

There can hardly be an area more topical in the conceptual realm of "humanity" than the question of its role and influence on legal theories of crimes against humanity. There the matter departs from a purely theoretical dimension and acquires a more practical significance. It concerns, first of all, these crimes' legal nature and the main interest they purport to protect. It is precisely this practical aspect that justifies the undertaking of a corresponding legal study.

Before proceeding to the consideration of "humanity" to clarify the protective scope of crimes against humanity, it is important to examine the concept from a broader perspective, i.e., from the point of view of international law. The overlying reason is that it would be difficult to try to explain the protective scope of such a complicated legal construct as crimes against humanity without a better understanding of the nature and content of the central value that unites all the divergent acts that constitute these crimes, that is, humanity.

A suitable approach would be to focus on how the idea of humanity has become established in *international law*.[3] Crimes against humanity form an important material part of international criminal law and thus, by extension, international law. It was even suggested that the concepts of humanity and international law, "go hand in hand as universal necessities for human existence".[4] It is therefore relevant to consider the possible links between the two phenomena, try to clarify what influence the former exerted on the latter and what role "humanity" played and continues to play in the development of pertinent aspects of international law. Within the Yearbook's format constraints, the analysis will be laid out very concisely and selectively.

The ensuing conclusions of the wider review will allow us to deal with the more specific task of how the concept of humanity contributes to the clarification of the substantive part of international criminal law, i.e., the law of crimes against humanity, and, accordingly, what role it plays in this dynamic but also functional branch of international law. It will be carried out by introducing a

3 Manske 2003, pp. 220-221.
4 Coupland 2001, p. 989.

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comprehensive theory describing crimes against humanity's protective scope (that is, interests/values they aim at protecting). This theory, tentatively called "theory of humanness", is based on an inclusive view of "humanity" as "human status" or "quality of being human". Its constituent elements will also be briefly described. Finally, the two main purposes (functions) of the theory – conceptual as well as normative – will be explained. While the first one will be to provide the answer to the question "what exactly is humanity?", the second is to justify the criminalization and prosecution of crimes against humanity in law.

2 The Development of the Concept of Humanity in International Law and Its Role

Several important considerations justify undertaking a brief historical/contextual review of the understandings of the notion of humanity in international law and the way it influenced the latter.

First, it is necessary to clarify the exact legal nature of "humanity". Since the adoption of the 1899 and 1907 Hague Peace Conventions, many modern writers have tried to clarify that nature – especially after the Second World War, embedding it with various connotations. If some recognize "humanity" expressed through the famous resonating "laws of humanity" as a source of international law,[5] others deny it the important role it plays in international law, for example, in international humanitarian law via its principle of humanity.[6] It is also unclear whether the "considerations of humanity" belong to the set of principles of general law, or, rather, they represent a rule of interpretation which comes into play whenever difficulties or ambiguities in the standard legal review must be solved.[7] Therefore, it is important to try to clarify whether "humanity" could be defined as a legal concept.

Second, besides the questions about the nature of the concept, its overall content remains equally unclear. Even if one assumes that the concept of humanity has acquired an increasingly significant meaning and has eventually become a recognized legal concept, in particular through the international prosecutions of war crimes after World War II, the substantive elements of the concept still remain largely unexplained or divergent at best. The question becomes especially relevant in the field of legal propositions, which are supposed to apply universally. By briefly looking at relevant conceptual developments in some human civilizations, we therefore attempt to determine what exact content was ascribed to the meaning of humanity as understood in those cultures.[8]

5 Ibid., pp. 969-970.
6 Cooper et al. 2013, p. 73.
7 Manske 2003, pp. 220-221.
8 The overview does not purport to be fully comprehensive geographically; some of the regions where distinct ancient cultures have evolved (e.g., Africa) are not included, simply owing to the extent of the influence exerted by the prevailing ideas in the reviewed cultures on the rest of the world.

Third, it is important to take into account the related *legal developments* in the analysed different human societies as it appears that such a comprehensive concept as humanity has exerted at times a considerable influence on various segments of the law regulating those societies (i.e., "law" as perceived at that times). Two examples of those developments are criminal law and the famous but controversial theory of natural law.

2.1 The Ancient World

2.1.1 Humanitas

Despite the abundance of humanist ideas in the Ancient Greek society (philantropia, unity of mankind, human nature and reason advanced by Socrates and the Stoics), it was in Ancient Rome that the first, most relevant and influential notion of humanity developed. It not only impacted the development of international law and Roman law itself but also greatly affected the intellectual movement of humanism for many centuries to come and helped shape the concept of humanity as understood nowadays. That idea is named *Humanitas Romana*.[9]

The following working definition appears best suited to the present discussion since it is rather concise but, at the same time, comprehensive and includes all its key constituent components: the primary connotation of *Humanitas* is "the quality of civilized and cultural behaviour that is inculcated in people by education and training".[10] Although not the original "inventor", it was Marcus Tullius Cicero, a prominent Roman thinker and lawyer, who – following, among others, the Stoics' views on mankind's unity and philantropia – attached to the concept its universal importance.

The effect of the conception of humanity (*Humanitas*) on the Roman law and Rome's legal life, in general, was profound. The affected areas included family law, *ius civile*, criminal law and procedure and, most importantly, *ius gentium*. *Humanitas* set serious restrictions on the application of capital punishment (which was mostly used only for cases of murder and treason). Furthermore, the principle that the guilty alone shall be punished appears to have been affected by the Roman *Humanitas*, demanding that the sins of the fathers must never be visited on their children.[11] As concerns the criminal procedural aspects, *Humanitas* required the protection of the accused as against the all-powerful state by securing his defence, which was accorded considerable latitude in their legal action and could even consist of several defence counsel.[12] Many procedural assurances that *Humanitas* demanded to be adhered to (e.g., fair opportunity for the defence of the accused, sufficient time for oral defence speech, impartial taking of evidence, etc.), are reminiscent of the fair trial guarantees that are well known in the modern legal systems.

9 See Büchner 1957.
10 Bauman 2000, p. 2.
11 Schulz 1956, p. 203.
12 Ibid., p. 205.

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In *ius gentium*, considerations of *Humanitas* found their firm way in Romans' treatment of foreigners, especially during the Late Republic. For instance, it prohibited the ill-treatment of the prisoners of war, going as far as entitling the tribunes to legally charge the guilty Romans with a capital crime (!) of "befouling the image of Rome".[13] Another sphere was to curb the money extortions from non-Romans, which had apparently been a rather topical and problematic question at the time. This behaviour, according to Bauman, inspired laws punishing the culprits and restoring to those suffered what had been taken.[14]

As it turns out, *Humanitas* and its constituent elements, such as *paidea* (education), *philantropia* (benevolence) and *clementia* (clemency),[15] largely influenced many aspects of life of ancient Romans and their contemporaries. Its appeals to moral values and civilized attitude towards all people surely rendered the Roman law and related legal practices more "humane" or "humanistic" which is apparent judging by the relevant texts and scholarly sources.[16]

Despite the difficulties in interpreting the idea of humanity as a legal concept,[17] some scholars did attempt to cast light on it from a legal perspective – in its form as the idea of *Humanitas* – and tried to make a convincing connection between the latter and crimes against humanity. The most notable effort was carried out by Gustav Radbruch, famous German lawyer and philosopher. He studied the concept of *Humanitas* as it was understood by Cicero and saw in it an equivalent of the modern term "Humanität". For him, it meant the following:

> Humanitas is what renders people truly human; it means education, it raises them above animal brutality and becomes a fertile soil for hearty kindness and love for people. It is the idea of the civilized mankind that connects all the people, so that the people are to be worthy, regardless of their status or nation.[18]

In Radbruch's description, the concept had three constitutive elements: education (German *Bildung*, equivalent to the Greek *paidea*), philanthropy (*Menschenfreundlichkeit*, or "philantropia") and human dignity (*Menschenwürde*).[19] With humanity seen in such a threefold sense and based on the claim that the National Socialistic regime has committed continual crimes against humanity in all these meanings, Radbruch offers the following interpretation: crimes against humanity include within their purview (1) destruction of human culture, (2) cruelty to human existence and (3) dishonouring of human dignity. Thus understood, crimes against humanity attack all of these elements and,

13 See Bauman 2000, p. 52.
14 Ibid., p. 51.
15 See Schultz 1956; Bauman 1996; 2000.
16 See Dyck 1999.
17 For a succinct yet impressive account of those difficulties see Manske 2003, pp. 220-221.
18 Radbruch 1947, col. 131.
19 Ibid.

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correspondingly, are to be legally perceived as attacking the whole of humanity – as mankind (*Menschheit*).[20]

With due regard to this and other similar impressive works, neither one examined the central concept of humanity as an exact protected interest of the criminalization of crimes against humanity. The existing criminal legal theories and evaluation criteria those purport to provide could have well been used in such scrutiny. Even with the ambiguity of "humanity" as to its legal character, this would help further clarify the precise meaning and definition of crimes against humanity, filling another wide gap in international criminal law.

Still, German scholars have taken into account the existing uncertainties in terms of the legal value of the concept as well as the abundance of historical, ethical and philosophical ideas and sub-concepts all inherent in the "successor" of *Humanitas*. Their conclusions are appealing. It demonstrates that contemporary lawyers do see the necessity to refer to such an ambiguous but crucially important concept and to analyse it in order to clarify one of the most gruesome types of international crimes.

2.1.2 Ren

Another major idea that has also profoundly influenced its society comes from a non-Western civilization: Ancient China.[21] Its regulation of international relations and exchanges, treaty making, diplomatic practice and the formation of various leagues of Chinese states as well as the legal system, in general, experienced a profound influence of Confucianism. The latter stands out as being central to the thinking and feeling of the Chinese at all levels of society for more than 2,500 years. Confucianism has sometimes been referred to under a term "*Li*",[22] a set of culturally and socially valued norms that provide guidance to proper behaviours that would ultimately lead to a harmonious society.

And it is within the framework of *Li* that Confucius' concept of humanity, or *Ren* (sometimes referred to as *Jen*), was understood. The word is also seen as a dominant Chinese conception of humanism. It has been translated in many ways, including as "benevolence", "goodness", "perfect virtue" and "humanness", but the most appropriate and inclusive interpretation seems to be humanity as "humaneness".[23] What *Ren* denoted was the good feeling a virtuous human experiences when being altruistic; similar to *Humanitas*, *Ren* is not an inherent virtue in every man (although everyone has the "root" of *Ren*)[24] but rather a cultivated disposition that can be attained by training and constant reflection. According to Confucianism, only by fully achieving this quality does a man becomes a true person.

20 Ibid., col. 132. Another helpful legal analysis based on Radbruch's interpretation is offered by Manske. See Manske 2003, pp. 219-221.

21 On considerations of space and relevance, the review here is limited to Ancient Rome and China alone.

22 Pan 2011, p. 234.

23 Horowitz 2005, p. 1024.

24 Ibid., p. 1025.

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Despite its unique character and influence, the concept of *Ren*, unfortunately, stayed confined to the territory of the Chinese states. Unlike its Mediterranean counterpart, the idea of the Confucian human benevolence did not affect the later international, legal, humanistic and educational thinking of the rest of the world – as much as it plays an important role today for some of those spheres in modern China. Allegedly, this was conditioned largely by the nature of international relations that China has sustained with other states and cultures throughout its unique history.

As maintained by Neff, the stubborn and continued denial by ancient China's rulers and people, in general, of *de facto* equal status of the other major states in the region – China's neighbours, established a sort of firm conceptual barrier against the development of an image of a world of independent states carrying the same legal status – that is, against the idea that would later form the core of international legal theory.[25] Those ideas of equality and independence of states would eventually arrive, as history shows. But not from the ancient Chinese people.[26]

Correspondingly, unlike the case of analytical and conceptual treatment of *Humanitas* by German jurists, *Ren* has not received any particular attention in that sense, not at least in terms of explaining the relevant legal categories. However, the discussion of *Ren* is important to be noted here since it lucidly demonstrates how the same humanistic sentiments and considerations were present in two different ideas separated in space and time, expressed in different terms and exerting the differing degrees of influence inside and outside of their respective contexts.

2.2 Natural Law

Few concepts have caused as much controversy in the debates related to the development of international law as the notion of natural law. Also, perhaps, no other idea raised so much opposition against its basic postulates, especially coming from the proponents of the school of legal positivism. Despite natural law's inherent controversial characteristics, its significance for the origins and evolution of international law as we know it, is generally well recognized. In fact, the tensions between natural law and positive law have played their key role in the crystallization of international law.

But what would be the common links between such different phenomena as natural law, *ius gentium* (in its hypostasis of the "predecessor" of international law) and the concept of humanity?

In order to respond to this question, it first makes sense to briefly define what natural law means. There exist a number of descriptions.[27] One of them, despite its age, appears to be quite comprehensive, grasping the phenomenon's essential characteristics:

25 Neff 2014, p. 41.
26 Ibid.
27 See Wolfe 2003, p. 3.

> The traditional view of natural law is that it is a body of immutable rules superior to positive law. It is an ideal law since it consists of the highest principles of morality towards which humanity [mankind] is striving. It is also an absolute law since it is not the result of any convention, but is discoverable by the exercise of human reason.[28]

Viewed this way, the category is more easily distinguished from other types of law such as positive law, scientific law or even divine law.[29] In its rationalistic and secularized sense offered by St. Thomas Aquinas, natural law provided the basis of the *ius gentium* and, as such, formed the grounds of international law.[30]

It makes sense to very briefly recall the inherent essential characteristics of natural law, its main agreed features and principles – in other words, its *content* – and look for common elements that linked the concept with humanity considerations. There are several of those.

Although the uses and perceptions of natural law varied greatly throughout the Middle Ages, its four fundamental features persisted. The first principle, universality, parallels the contemporary idea of the global unified mankind. Another feature of natural law's substance linking it with humanity as an idea was its focus on human nature, through the element of reason. The third element consists in the individualistic character of natural law. Since its inception, it has always been seen as a basic set of rules regulating interpersonal relations as opposed to interstate relations, which was to become the realm of *ius gentium*. The last feature is, perhaps, the one most closely related to the various ideas that affected ancient civilizations considered earlier. It deals directly with the content of natural law and flows out of the character of the rules contained therein.[31]

Of course, it would be contrary to logic to state that the two concepts differing from each other in so many respects, had exactly the same nature. There are many theories of natural law and no legally established concept of humanity. Their respective roles in the formation of other concepts, legal or otherwise, were rather varied. But perhaps there is no mistake in maintaining that in the absence of one unified concept of humanity during the Middle Ages and considering the elements noted previously that were shared by natural law doctrine and a modern interpretation of humanity, the former provided a sort of substitute for the latter's strong global appeal – if only an ethical one that nevertheless did play a significant role for legal developments, first of all, for the evolution of international law.

The two concepts, it appears, were definitely closely related. The American delegates – members of the 1919 Commission on the Responsibilities of the Authors of War, at the beginning of the twentieth century, apparently did not err in pointing to the absence of universal standards of humanity and its strong

28 Chloros 1958, p. 609.

29 Johnson 1987, p. 217.

30 Chloros 1958, p. 609; see also in general Neff 2014.

31 Those principles and rules were comprehensively drafted in the two of Grotius' most important works: the famous treatise "On the Law of War and Peace" and the less known "On the Law of Prize and Booty". Grotius 2006, p. 500; Grotius 2005, pp. 737-738, 749-750.

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connection with natural law[32] even if their voices, regrettably, delayed a speedier evolution of the law of crimes against humanity. But if the various conceptions of humanity significantly influenced the legal categories (Roman law, natural law), then what would their exact legal character be? Did they represent only a sort of moral idea or did they play a more important role as a principle of law? In order to respond to these questions, it would be useful to briefly look at the principle of humanity, a pivotal principle for the whole development of international humanitarian law. Its legal nature has already been considered by some scholars, which would cast a helpful light on the matter here.

2.3 The Principle of Humanity in International Humanitarian Law

The principle of humanity has considerably influenced international humanitarian law – a set of rules that seek humanitarian reasons to limit the effects of armed conflict, also known as the law of war or the law of armed conflict,[33] which itself serves as the basis for the law of war crimes. As I argue elsewhere, the concept of humaneness lies at the core of the so-called humanitarian considerations informing the key principles of humanitarian law, first of all, its principle of humanity, which in turn provides the balancing basis for the other key principles of the law of armed conflict: principles of distinction, military necessity, proportionality and prohibition of unnecessary suffering. The concept of humaneness is best understood as a sentiment of active goodwill towards mankind, as offered by Jean Pictet.[34] But as is the case with the laws of humanity, the principle of humanity has also not been explicitly defined in law. So how best can we define it for our working purposes?

I offer the following definition: "The requirement that each and every individual must be treated humanely and with respect under all circumstances, out of humanitarian considerations and fundamental standards of humanity".[35] This definition relies on the concept of humaneness seen in accordance with Pictet's proposal.

The phenomenon of war has accompanied human societies since prehistoric times[36] and is as old as mankind itself – as are rules on how to behave in war. For reasons of space and purpose, we will not dwell on how considerations of humanity (humaneness, mercy, etc.) have shaped the evolution of the law of armed conflict. It suffices to say that humanitarian considerations have influenced those rules since ancient history, with the result that some significant restraints must be observed even under the extreme conditions of armed conflicts.[37] Thus, the very occurrences of inhumanity and brutality in war have

32 In their dissenting position the Commission's US and Japanese members maintained that the content of "the laws of humanity" could not be defined because it was based on natural law, which was not part of international law. See Bassiouni 2011, p. 89; Mettraux 2008, pp. 123-124.

33 For a useful working definition of humanitarian law see ICRC Manual 2013, p. 13.

34 Pictet 1979, p. 143.

35 The project of "fundamental standards of humanity" and the so-called Turku Declaration of 1991 on Minimum Humanitarian Standards are well described in Oberleitner 2015, pp. 64-68.

36 Sayapin 2014, p. 4.

37 Cooper et al. 2013, p. 3.

prompted the basic humanistic values to rise and impose limitations on the use of force and violence against civilians.

Compared with the later crystallization of other principles of the law of armed conflict, the principle of humanity carries a rather vague nature. While the process of development of the humanistic elements in the law of armed conflict can definitely be positively characterized as "humanization" of international law, the question is, can the idea of humanity be said to be firmly established as a *legal* principle in humanitarian law, and does it have a similar *legal* impact as its other main principles? When references are made to general principles – such as the principles of distinction, the principle of proportionality and the principle of unnecessary suffering, the use of the term "principle" implies a particular legal impact. Then, is "humanity" a principle at all or rather a form of important but non-binding consideration, as it proved to be in some historical developments unrelated to the context of war?

Some scholars suggest that the answers depend on how the term "principle" is understood: if it implies a legally binding norm, written in positive law, there is no established principle of humanity as such, and it could hardly be said that it is currently emerging; on the other hand, if by principle one refers to a wider understanding of the word, with extra-legal considerations, then such a principle could be argued to exist today.[38] In the second case, they propose that it would be more appropriate to speak of "humanitarian considerations" rather than a principle of humanity.

Moreover, they even doubt whether there is a need for such a principle (or legal norm) as the other principles of humanitarian law already ensure protection to both combatants and civilians.[39] However, to reach a conclusion as radical as that bears a potential risk of loosening the overall protection as well as the strong humanitarian and emotional appeal provided by "humanity". The principle of humanity serves as a cornerstone for the rest of the basic principles of humanitarian law; viewed even in a broader sense, it has affected the developments going beyond the purely humanitarian law sphere and has played a huge role in shaping the law of crimes against humanity at the international level. References to it are found in important international legal treaties and legal documents on the national level (the most famous examples being the Lieber Code and Martens Clause); its implications have been discussed in a great many works of legal scholars, and it seems too hasty and illogical to discard it completely only because of the conceptual vagueness.

Furthermore, on the basis of comparing the key principles of humanitarian law (principles of humanity, military necessity, distinction, unnecessary suffering and proportionality), Dinstein argues that the principle of humanity should not be equated with its other "counterpart" principles. In his view, it must not be considered as a legal norm but rather as an "extra-legal consideration", invoking also the wordings of the *Corfu Channel Case* and the St. Petersburg Declaration.[40]

38 Ibid., p. 355.
39 Ibid.
40 Ibid., p. 73.

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It is difficult to disagree with the proposition that unlike the other principles, the principle of humanity does not constitute a set of obligations *per se* in written humanitarian law; there is no explicitly overarching and binding norm of humanity telling what one ought to do or not to do during war. Larsen and Cooper's opinion in many ways echoes the words of Dinstein: that considerations of humanity are inspiring and instrumental, yet they are no more than considerations.[41] But the obvious question is, how can the remaining principles of the law of armed conflict continue protecting the civilians and other persons *hors de combat* if the very humanitarian considerations informing them are not derived from the general principle of humanity?

According to Pictet, the term "humanitarian" characterizes any action beneficent to man,[42] while according to the Oxford Dictionary the word denotes "concerned with or seeking to promote human welfare".[43] Both are in full accord with Pictet's earlier definition of humanity (even if it was not defined in the context of a legal principle) as a sentiment of active goodwill towards mankind. For both terms the ultimate object is the human being. "Humanitarian" is most often associated with a morale of kindness, benevolence and sympathy that extend to all human beings, without any distinction. But isn't this a clear sign of its strong connection to different historical perceptions and understandings of the idea of "humanity" going beyond the times of war?

The various forms of those perceptions, be it *Humanitas* or *Ren*, or even the concept of natural law, all expose to varying degrees the common inclination towards this philanthropic sentiment of benevolence for other human beings. The scholars referred to previously all recognize that humanitarian considerations did play a significant role in international humanitarian law (to argue against that would simply be irrational and contrary to the facts). Similarly, they also seem to agree with Meron, who holds that in the less regulated cases of non-international armed conflict "the central source for the rules will be the principles of humanity".[44]

Thus, it can be said that at the current stage of the development of humanitarian law the principle of humanity has not yet acquired a fully independent and autonomous status as such. It has not been recognized as a full-fledged legal principle of international law, nor does it set up any list of positive obligations written in black and white in a binding legal instrument. Even the proposition that it might carry a significant independent normative force beyond functioning as a reminder of other existing norms is rather doubtful.

However, its role and value remain crucially important – as a guiding interpretative tool, via Martens Clause's provisional construction, ensuring a

41 Ibid.

42 Pictet 1979, p. 143.

43 See the modern English definition at "Oxford Dictionaries Online" (UK English), http://www.oxforddictionaries.com/definition/english/humanitarian (last visited 17 February 2022).

44 Brus et al. 2013, p. 69. In addition, the International Law Commission confirmed that the most important meaning of the Martens Clause is its application to situations that are otherwise not regulated by international law. See Ibid., p. 70; Commission Report 1994, p. 317.

proper interpretation of legal rules in otherwise unclear cases in accordance with the principle of humanity, for example, in "grey" non-regulated areas of law (e.g., in non-international armed conflicts). Moreover, the combined progress and increasing interaction of international humanitarian law, human rights law, international criminal law and the law of state responsibility provide evidence of the increasing importance of the principle of humanity,[45] whose content is informed by humaneness and humanitarian considerations.

2.4 Later Developments

The development of the concept of humanity in international law during more recent periods, i.e., after the rising times of the theory of natural law, is closely linked to the evolution of the law of crimes against humanity. What follows is a very brief account of the most notable milestones in that evolution and a brief assessment of the influence "humanity" played in them.

The genesis of the term ("crimes against humanity") is derived from the so-called "laws of humanity" included by Fyodor Martens into his famous "Martens Clause", which was incorporated into the Preambles of the Second Hague Convention of 1899 and the Fourth Hague Convention of 1907 on the Laws and Customs of War on Land.[46]

Thus, crimes against humanity are rooted in humanitarian law. The very birth of this legal category itself, however, came as a result of tragic events characterizing an oppression policy of a government against its own citizens, not the enemy combatants. These events, collectively termed here as "Armenian Massacres", are often referred to as "Armenian Genocide". During World War I, the Young Turk government was carrying out its own radical plan, the "Turkification of the Ottoman Empire", by way of mass deportations and systematic killings of the Armenian population in Turkey.

It is because of the Armenian Massacres that crimes against humanity appeared for the first time as a conceptual denomination in an official international document. Already during the massacres' early phase, the Allies, France, Great Britain and Russia, reacted to them with a stern warning by issuing a Joint Declaration where it read:

> In view of those new *crimes* of Turkey *against humanity and civilization*, the Allied governments announce publicly to the Sublime-Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres. [emphasis added].[47]

This condemnation of the Turkish government's actions turned out to be political in nature and, as history showed, it has also not entailed any practical follow-up. But from the point of view of international criminal law, the Declaration is

45 As noted in Brus et al. 2013, p. 90.
46 Schindler and Toman 1996.
47 US Foreign Relations Papers 1928, p. 981.

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important for three reasons. First, it came as the first "official" appearance of the concept of crimes against humanity at the international level. Second, the new concept represented an "incrimination without infraction"; in other words, it was the recognition of a crime that had yet to be codified. And third, even if the subsequent practical follow-up of the Declaration failed, it is clear that what the three complaining states had in mind was the imposition of individual criminal responsibility for those responsible.

The Commission on the Responsibility of the Authors of the War and On Enforcement of Penalties was set up in January 1919 by the Paris Preliminary Peace Conference to inquire into responsibilities relating to the First World War. The majority of its members concluded that the First World War was conducted by Germany, Turkey and Bulgaria using barbarous or illegitimate methods in breach of the established laws and customs of war as well as the *elementary laws of humanity*. Its Final Report further determined that "all persons belonging to the enemy countries … who have been guilty of offences against the laws and customs of war or the *laws of humanity* are liable to criminal prosecution" [emphasis added].[48]

Unfortunately, as was the case with the Joint Declaration before, the practical follow-up of the Report's conclusions on the violations of the laws of humanity was again doomed to failure. The reason was the position of the United States' delegates who objected to the invocation of the "laws and principles of humanity" in the Final Report on the grounds that, as opposed to the laws and customs of war, "the laws and principles of humanity" are not "a standard certain" to be found in books of authority and in the practice of nations but they, instead, "vary with the individual" which factor "…should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law".[49]

As a result of this strong difference in the Commission's opinions, the expressions "laws of humanity", "violations of the laws of humanity" and alike were not eventually included in the texts of the subsequent treaties (Treaty of Versailles and Treaty of Lausanne), or, even when included, the treaty would not be ratified and enforced (such as the Treaty of Sèvres).

Even if the Commission nowhere in the text of its Report has tried to expressly clarify what exactly it implied by referring to the strong wording of "elementary laws of humanity", one should not underestimate the role played by its work in later developments. Considering that at the time there was no formulation to be found either in humanitarian law or elsewhere, the Commission's work, all its deficiencies notwithstanding, should be considered a rather progressive development. Furthermore, the influence of the list of acts drawn up in the Final Report would prove to be important in the process of elaborating the legal definitions during the preparatory work of the Nuremberg Charter in the aftermath of the Second World War.

48 Commission Report 1920, pp. 115, 117.
49 Commission Report 1920, Annex II, pp. 127-151, 134.

The first true international legal codification of crimes against humanity came with the adoption of the Charter of the Nuremberg International Military Tribunal. Article 6(c) of the Nuremberg Charter defined crimes against humanity as a constellation of prohibited acts committed against civilian populations.[50] This category of crimes was added to the Charter in order to guarantee that many of the Nazis' defining acts would not go unpunished, in particular, to cover acts committed by Germans against other Germans that did not fall into the category of war crimes. Strikingly enough, no precise record exists of how the term "crimes against humanity" was chosen by the drafters of the Nuremberg Charter. It is known that the term was selected by the Chief US Prosecutor at IMT, Robert Jackson, who consulted, at least over that matter, with Sir Hersch Lauterpacht, but their deliberations and discussions were left unrecorded.

A more or less similar definition of "crimes against humanity" was included at the time in the Charter of the International Military Tribunal for the Far East (IMTFE Charter)[51] and the Allied Control Council Law No.10.[52] Few national cases involving crimes against humanity were considered as well as few international instruments dealing with some acts pertaining to crimes against humanity were adopted in the period between Law No.10 and the work-out of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993.[53] The notable domestic cases include the trials of *Eichmann* (Israel), *Barbie* (France) and *Finta* (Canada).[54] The latest definitions of these crimes were included in the Statute of the International Criminal Tribunal for Rwanda (ICTR)[55] and the Rome Statute of the International Criminal Court (ICC).[56] Currently, there is also no specific international treaty on crimes against humanity, unlike the situation with, for example, the crime of genocide.[57]

Regrettably, in none of these legal developments has a comprehensive effort been undertaken to explain and define what the concept of humanity means for each one of those developments (i.e., for the purposes of the law of crimes against humanity), as is demonstrated by the available research and reporting materials. What appears clear, however, is that the *spirit* rather than the *concept* of humanity has been guiding those who were behind each milestone described

50 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex, 59 Stat. 1544, 82 UNTS 279 (8 August 1945), reprinted in American Journal of International Law, 39, Supp. (1945), Art. 6.

51 Tokyo Charter, in Cryer and Boister 2008, p. 7 et seq.

52 Allied Control Council Law No. 10, in Ferencz 1980, p. 488.

53 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia since 1991, UN SCOR, Annex, UN Doc. S/25704 (1993), reprinted in International Legal Materials 32, 1994, 1159, 1192, Art. 5.

54 See also Jessberger and Werle 2014, pp. 13-14, 130-134, paras 43, 348-353.

55 Statute of the International Criminal Tribunal for Rwanda, S.C.Res. 955, U.N. Doc. S/RES/955 (8 November 1994), Art. 3.

56 Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 90, Art. 7.

57 Currently, the academic community is making efforts to promote the adoption of such an international legal instrument. See Sadat 2011.

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previously.[58] That spirit, being a common sentiment, has nevertheless had a very compelling appeal, with the result that after the adoption of the Nuremberg Charter the inclusion of the responsibility for the gravest attacks on "humanity" in the founding documents of international and regional judicial bodies had to be a decided matter. Even if one cannot say that a legally determined unambiguous notion set the relevant positive legal evolutions in action, that notion's role could be clearly felt and observed.

2.5 Review Conclusions

Several important conclusions may be made on the basis of the foregoing short overview. First, there has been no comprehensive formulation for the concept of humanity, in international law or beyond. It appears sometimes so multifaceted as to make the task of setting a satisfactory definition for the purposes of international law or the law of crimes against humanity, in particular, very difficult. That is so especially given the subjective nature of the concept. Martens' "laws of humanity" have never been defined in any declarative or binding instrument; instead, it appears that the exercise of their clarification was purposefully avoided, as the history of drafting the Nuremberg Charter reveals.

Second, the notion of humanity found itself constantly reinstated in different civilizations and societies, under various formulations and containing sometimes starkly differing elements but always carrying the same fundamental and basic values, or humanitarian sentiments. Thus viewed, it includes within its purview all the phenomena considered in this section, i.e., the ancient ideas of *Humanitas* and *Ren*, "moral" elements of the natural law doctrine, Kantian philosophy and humanitarian considerations pertinent to the law of armed conflict. All these principles, doctrines and considerations have developed over several millennia, spanning across continents, covering human conduct both during peace and wartime; they evolved in one same direction.

Third, with respect to the legal nature of the idea of humanity, it turns out that the concept of humanity did not and does not represent the appearance of an autonomous source of international law, distinct from the customary process. The "laws of humanity" have not been recognized as a new and independent legal rule. It would be difficult to refer to "humanity" either as a general principle of law or as a general principle of international law. Instead, "elementary considerations of humanity" have been carefully viewed as belonging to certain

58 One notable exception is a separate decision made by the ICTY judges in the case of Dražen Erdemović, where it is argued that "… Because of their heinousness and magnitude they [crimes against humanity] constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind …". *Prosecutor v. Dražen Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah (Appeals Chamber), 7 October 1997, para. 21. However, the Tribunal's laudable view lacks in comprehensiveness: it would have been more compelling if it addressed humanity in its truly universal character.

general and well-recognized principles, which are even more exacting in peace than in war, and on which state obligations are to be based.[59]

In any case, one should not underestimate the significance of "humanity" for the development of international law. It served (and continues to serve, as is demonstrated by the inclusion of a modified version of the Martens' Clause in the draft Convention on crimes against humanity) as a strong rhetorical code language that, by and in itself, has clearly exerted a strong pull towards normativity. And, importantly, the concept of the "laws of humanity" provided a convenient starting point for the thinking behind crimes against humanity and corresponding initiatives during the twentieth century, thus positively influencing the dynamic evolution of international criminal law.

Moreover, the combined progress and increasing interaction of international humanitarian law, human rights law, international criminal law and the law of state responsibility provides evidence of the increasing importance of the principle of humanity informed in its content by "humanitarian considerations". To discard or downgrade them to mere "background thinking" would undermine the significance of protecting the civilian population, be it in peace or war.

3 "Humanity" in International Criminal Law

The concept of humanity plays a critical role in the substantive international criminal law, even if it has not yet been positively defined. The category of crimes against humanity forms an integral part of material international criminal law, where "humanity" represents the category's central object, in the sense that it constitutes the main protected interest of these crimes. However, the doctrinal treatment of this central element is very uneven, with humanity being interpreted in many different ways in various legal or even interdisciplinary theories purporting to explain crimes against humanity.

According to Renzo,[60] any account of crimes against humanity has to provide an answer to the two main questions: (1) a *conceptual question* of how one should understand the notion of crimes against humanity and (2) a *normative question* of what exactly justifies the international prosecution of those who commit the crimes.[61] In other words, the first question deals with the nature of crimes against humanity and its attacked object (i.e., "what do we mean when we label certain crimes as 'against humanity'"). And the second tries to explain the basis on which the international community has the right to prosecute and punish crimes against humanity.[62]

Indeed, any comprehensive theory of crimes against humanity must be able to provide an adequate answer to both of these fundamental questions. These crimes are harmful to human beings' most fundamental interests. Moreover, the

59 *Corfu Channel Case* (UK vs. Albania), Merits, ICJ Reports 4 (1949), para. 22; see also Brownlie 2008, p. 27.
60 Renzo 2012, p. 448.
61 Ibid.
62 Ibid.

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element of humanity itself is a fundamental concept. Therefore, to properly describe crimes against humanity the umbrella concept encompassing all their protected interests has to be fundamental and comprehensive too. A theory based on such holistic conceptual reading can better provide satisfactory answers to the question of how exactly we should understand the notion of crimes against humanity, i.e., what do we mean when we label certain crimes as "against humanity" as well as to the question of what justifies the international *and* domestic criminalization, prosecution and punishment of these crimes.

4 The Theory of Humanness

4.1 Conceptual Part: Content and Elements

This theory builds on the reach and strong content of "humanity" seen as "humanness". That content consists of several important elements, some of which were revealed in the preceding section. Without taking into account all of them it is difficult to perceive humanness in its entirety, to see it as a whole. This "whole" comes up as a comprehensive multi-elemented concept that can best describe what comes under threat by the commission of crimes against humanity. To explain how, all the elements need to be systematically considered and then taken as one coherent notion.

A logical deconstruction allows us to see that there are mainly five of them, each incorporating in itself a sister sub-concept, or sub-concepts. I am in no way offering new or alternative definitions for the elements. Each one of them has been countlessly described elsewhere. What follows is a brief description of each constituent element of humanity (humanness), highlighting the main points that made them relevant to the discussion of the protected interest of crimes against humanity.

1. Freedom. Freedom is indispensable for the (inherent) notion of humanity as understood by Kant and defined as follows: "Freedom is the only one and original right of every man inherent in him by virtue of his humanity, provided it can coexist with the freedom of others, in accordance with one universal law."[63]

2. Human dignity. The notion of human dignity is fundamental for the whole classical understanding of human rights: "Firstly, human dignity is the value that explains why all human beings can be said to have human rights: it is in virtue of their intrinsic dignity, however we understand the notion, that human beings are in possession of these rights. Secondly, human dignity constitutes the ultimate value that human rights are supposed to protect. These rights protect human dignity by placing limits on how human beings can be treated."[64]

3. Civilized attitude. This element can be defined as "the quality of civilized and cultural behaviour that is inculcated in people by education and training".[65] It incorporates in itself the following notions: culture, civilization and education. It

63 Translated from the German by the author and taken from Gierhake 2005, p. 273.

64 Renzo 2012, p. 450.

65 Bauman 2000, p. 2; see also Bauman 1996, p. 14.

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can also be said that through this civilized and universally uniting element a connection to common mankind is present.

4. Humaneness. Humaneness is best understood as a sentiment of active good will towards mankind.[66] The concept of humaneness lies at the core of so-called humanitarian considerations that greatly influenced the development of international humanitarian law and its main principles, chiefly, its "principle of humanity". It includes within its purview the following synonymous notions: compassion, empathy, mercy, benevolence, philantropia and chivalry.

5. Reason. Out of all the elements, reason is perhaps most closely connected to human nature – as the fundamental feature that distinguishes us from other, non-human beings. Unlike emotions or feelings, this particular characteristic is the one that allows human beings to live by and employ their comprehensive humanity, which is void without reason. All the constituent elements of humanity – even humaneness, which is often associated with benevolent feelings rather than mind – are based on reason.

Now, the answer to the conceptual question, i.e., what do we mean when we label certain crimes as "against humanity", would thus be the following.

The protected interest of crimes against humanity is humanity as humanness. Humanness is a human status or condition or quality of being human. It is what makes us human. Crimes against humanity are inhuman acts that attack each and every element of humanity. The inhuman acts include inhumane acts as the former are more serious in their degree of gravity than the latter. The commission of these acts eventually aims at rendering their victims "inhuman", in the sense of depriving them of that very status. All parts of this status come under attack:

1 the victims' individual freedom is denied;
2 they are deprived of their human dignity;
3 the civilized attitude is negated, removing the link between the victims and mankind;
4 the sentiment of active good will, or humaneness, ceases to exist by the commission of inhumane acts, and
5 the victims' human nature in the form of reason is denied as well since those acts do not allow them the status of reasonable creatures any more.

This conceptual definition clarifies the exact objects that are under threat when these international crimes are committed. Some elements represent the values that are fundamental for human beings as such (freedom, human dignity). Others represent the foundations for these or other values (humaneness, civilized attitude, reason). While some crimes – either international or domestic – may be said to be encroaching on one or more of these elements, I maintain that crimes against humanity breach all of them. This breach is inflicted on the whole of humanity – as humanness, or the human condition. That is why they are crimes against, precisely, humanity as such.

66 Pictet 1979, p. 143.

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4.2 Normative Part: Protection of a Valid Legal Interest

When it comes to the analysis of concepts relevant to a particular branch of law, it is important that such analysis remain consistent with the relevant principles of that branch. The concept of crimes against humanity is, first of all, a criminal legal concept. It belongs to the category of crimes against international law and forms a significant part of the material content of international criminal law. Therefore, it is only logical to apply in the study of this category the fundamental principles of criminal law dealing with justification for crime and punishment.

Now, in order to deal with the normative part of the theory of humanness, an important criminal law theory is instrumental. Why use a criminal law doctrine? The answer appears to be quite obvious: the category of crimes against humanity lies as much in the sphere of criminal law as it does in the area of international law.

The theory under the question represents a fundamental principle of criminal law in the continental legal system that has not yet been much invoked in order to try to justify the penalization of international crimes. It is called the *Rechtsgutstheorie*, or the theory of protected legal interest (otherwise known as protected legal good). It is one of the foundational concepts underpinning the German criminal law system and lying at the core of the German theory of crime.[67] According to the classical description, the sole function of criminal law is the protection of legal goods and nothing else; thus, anything that does not qualify as a legal good falls outside the scope of criminal law and cannot be criminalized. In other words, a criminal statute that does not seek to protect a legal good (i.e., interest) is *prima facie* illegitimate.[68]

To be able to apply the doctrine to crimes against humanity's protected interest, one needs to determine whether or not humanity (a.k.a. humanness) represents a fully valid legal interest, i.e., *Rechtsgut* as such. This requires that we first define *Rechtsgut*. The classical progressive description of legal good is proposed by Claus Roxin. The reasons for choosing this particular view over the others are, very briefly, its comprehensiveness, normative and progressive nature, value-based foundation, preciseness and clarity. Here is Roxin's definition:

> the legal goods are to be understood as all the conditions or purposes necessary for the free development of the individual, the realization of his/her fundamental rights and the functioning of a state system based on these objectives.[69]

The following constituent elements are discerned from this definition: the legal goods are (1) conditions or (2) purposes (3) that are necessary for (4) the free development of the individual(-s), (5) the realization of his/her fundamental rights, as well as (6) the functioning of a state system based on these objectives.

67 Dubber 2005, p. 683.
68 Ibid., p. 684.
69 Roxin 2006, p. 16.

Following the logic of legal analytical argumentation, we now have to establish whether and how "humanity", in its conceptual understanding of "humanness", satisfies all, or at least some, of these elements.

Humanity as a Condition (element 1). Can we claim that humanity as humanness serves as a condition that must ensure (and so is necessary) that either the individuals freely develop, or the individuals' basic rights are realized and/or the state system, which aims at such development and realization, functions properly? To answer this, we need to look at the specific aims separately.

Free development of the individual (element 4). The answer to the question of how humanity (humanness) is a condition necessary for the free development of individuals can be deduced from two central notions: the free (and full) development of individuals may not be possible without the component of freedom – the fundamental and original, albeit not absolute, component. But the freedom itself is inherently present in people because of the element of humanness ("by virtue of his/her humanity"). Freedom represents an indispensable (sub-)element of humanity, while without the inherent notion of humanity there can be no truly ensured freedom. Thus, if freedom is necessary for the actual development of one's personality, so is – in a more global sense – humanness. And if the latter is necessary for each individual member of society in order to develop freely, then it does constitute a condition.

Humanity as a Purpose (element 2). In order to prove that humanness is a necessary legal good, i.e., interest, needed to ensure one of these particular aims, we now have to look at this element from another perspective, i.e., not from the condition-based point of view, as for element 4, but from the purpose-based, or teleological, perspective.

The realization of the individual's fundamental rights (element 5). The second element is another objective for the achievement of which the legal interest is necessary in *Rechtsstaat* (or "state of law"). To prove the reverse relationship as well, namely, that to realize basic rights would mean to ensure humanness, we need to consider another subcomponent of the latter: human dignity. This is because in order to analyse issues such as the objectives developed by Roxin, one has to apply the human rights law rationale: the realization of fundamental rights is based on and is aimed at ensuring dignity.[70]

A useful description of human dignity has been offered by a legal philosopher who used it as part of his own explanation of crimes against humanity:

> Firstly, human dignity is the value that explains why all human beings can be said to have human rights: it is in virtue of their intrinsic dignity, however we understand the notion, that human beings are in possession of these rights. Secondly, human dignity constitutes the ultimate value that human rights are supposed to protect. These rights protect human dignity by placing limits on how human beings can be treated.[71]

70 See in general Braarvig et al. 2014.
71 Renzo 2012, p. 450.

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If human rights aim at protecting dignity as a value (and, in fact, are based on the need to ensure human dignity), then, by extension, their proper observation, implementation and realization do too. What is the point of discussing the foundations of human rights if no corresponding realization of those rights is implied?

Now, the concept of *Menschenwürde* is closely connected to the more general notion of humanness. It would be wrong to separate these two, as it would be wrong to separate humanness from its other elements such as freedom and civilized attitude. The conceptual part of the theory of humanness holds that humanity must be viewed as one comprehensive ("umbrella") concept since crimes against humanity attack each and every element of humanity. If so, human dignity is an inseparable component of humanness and is as fundamental for humanity and human beings as is freedom.

Then, if we agree that the realization of human rights has as its eventual purpose the upholding of human dignity indispensable for those rights (and this is what the leading human rights law instruments say), it does the same with respect to humanity as humanness, which incorporates the daughter concept of human dignity. Therefore, humanity represents a "purpose" as a particular *Rechtsgut*, providing justification for the second objective of Roxin's definition.

Humanity as Both a Condition and a Purpose (elements 1 and 2). While the first two objectives for the achievement of which a legal good is considered necessary in Roxin's description represent the individual dimension of the theory, the last one, i.e., the functioning of a state system based on these objectives, adds a collective dimension to the *Rechtsgut*'s definition. It is essential and based on Roxin's liberal understanding of the social contract theory.

The functioning of a state system based on the individuals' free development and realization of their rights (element 6). According to Roxin, the main object of criminal law is to enable individual (citizens) to live together, or cohabit in peace and freedom while all constitutionally guaranteed rights are assured.[72] With its role thus understood, the criminal law fits well within Roxin's overall view of the social contract model, which he describes as follows:

> One therefore acts on the hypothetical assumption that all the inhabitants of a certain territory enter into an agreement in which they consign to certain institutions the role of safeguarding their cohabitation. They create an organization – the State – and assign the right to safeguard the citizens by enacting criminal laws and other regulations to it. But since a criminal law restricts the individual in his or her liberty of action, nothing that is not necessary to achieve a peaceful and liberal co-existence may be prohibited.[73]

In order to safeguard the peaceful and liberal cohabitation of its individual subjects, via its available means and system resources (including criminal law), the sovereign, i.e., the state, must clearly realize the purposes, or objectives, that

72 Roxin 2006, p. 16; Lauterwein 2010, p. 9.
73 Lauterwein 2010, p. 9.

are needed for such cohabitation. Roxin identifies those objectives in line with the logic of the social contract theory (at least the liberal contractual reading of it) as well as the concept of *Rechtsstaat* where the citizens share legally based civil liberties: those objectives include the free development of the individuals of that state and the full realization of their fundamental rights.

What remains is the application of pure logical reasoning. If we accept the first two premises, then for the last element of the definition – which is necessarily based on the first two – both rationales hold no less true. Humanity (humanness) is necessary as a condition, and it is necessary as a valid purpose for the state in its pursuit of the two main objectives. Those are in turn needed to fulfil its main task assigned to it by the individuals who entered into a social agreement with that state: to safeguard their peaceful and liberal cohabitation and provide for their essential human rights.

Furthermore, the concept of humanity as a valid *Rechtsgut* satisfies both the critical (limiting) function as well as the methodological function of the doctrine. It does so because, first, it represents a legitimate legal interest that needs to be protected by criminal law, whose main task is to ensure a peaceful coexistence of members of society, and without humanity such coexistence does not seem plausible. Second, it may not be considered merely as an abstract object of protection but rather as a more global value, as are international peace and human rights, of international criminal law and law of crimes against humanity; thinking otherwise would compromise the whole value-based foundation of international criminal law.

Hence, humanity (humanness) does constitute a fully valid and legitimate *Rechtsgut* in its own right, and it must be included under the protection of criminal law. But if it is so, then such protection will be foreseen to ensure that the grave transgressions on humanity such as crimes against humanity are criminalized, prohibited and – if need be – prosecuted and correspondingly punished.

5 Conclusion

One thing is to be remembered when dealing with research issues similar to the present one: the history of the idea is not the history of the word. Many significant factors have contributed to the development of the considerations of humanity pertinent to the evolution of legal theories. Those factors go beyond purely conceptual definitions and include realities of life and politics in any given society, in addition to legal developments; individual influences including philosophical contributions; social factors; globalization and international developments. This contextual aspect must always be borne in mind when the nature of the concept of humanity is sought to be understood.

The foregoing overview and analysis suggested several important conclusions regarding the phenomenon called “humanity”. First, the concept of humanity has not been comprehensively formulated, in international law or beyond. Second, the notion of humanity found itself constantly reinstated in different

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civilizations and societies, under various formulations and containing sometimes starkly differing elements but always carrying with it the same fundamental values, or humanitarian sentiments. Third, with respect to the legal nature of humanity, it has not been recognized as an independent legal rule, principle of law or as a general principle of international law.

Yet it served, and continues to serve, as a strong ethical code language that has exerted a strong pull towards normativity. Importantly, the concept of the "laws of humanity" provided a convenient starting point for the thinking behind crimes against humanity and corresponding initiatives during the twentieth century, hence positively affecting the dynamic evolution of international criminal law and thus, by extension, international law. The role and influence of the concept of humanity, all its ambiguity and subjectivity notwithstanding, may not be exaggerated.

As reflected by the second part of the article, a comprehensive view of "humanity" is key when one tries to better understand the critical but still unclarified categories in law, such as crimes against humanity. The latter are harmful to human beings' most fundamental interests. Therefore, to describe them, the umbrella concept encompassing all those interests has to be fundamental and comprehensive too. Such a concept avails itself in the form of "humanity" understood as humanness. It makes it possible to reflect and explain all the elements characteristic of these crimes' protective scope as well as to unite all the doctrinal components in the authoritative theoretical efforts undertaken before by different outstanding scholars.

The title "crimes against humanity" is justified because they attack humanity as such, in its connotation as humanness (condition or quality of being human). All elements of humanness come under attack by the commission of these crimes: freedom, human dignity, civilized attitude, humaneness and reason. This breach is inflicted on the whole humanity as humanness; that is why they are crimes against, precisely, humanity as such.

Furthermore, the current interpretation of the "civilian population" element of crimes against humanity suggests that there is no pressing need to rename this group of core crimes as "crimes against civilian population" or rephrase it otherwise. The terms "crimes against humanity" already serves the purpose of denoting some of the worst and most serious criminal offences in international law.

Based on the foregoing reasoning, it can be concluded that the chief purpose of the theory of humanness consists in describing and conceptually clarifying the protective scope of crimes against humanity and thus contributing to a proper understanding of this category of core crimes under international law. It does so by answering the question "what is humanity?" with the word "humanness".

In responding to the second – normative – question, i.e., "why should crimes against humanity be criminalized and prosecuted?", the German criminal law doctrine of the protected legal interest is instrumental. The definition of *Rechtsgut* and the ensuing analysis concluded that humanity as humanness represents a fully valid *Rechtsgut* because it is necessary for all the specific objectives on which the social contract-based system is dependent. This legal

interest must be protected by criminal law. If it is the case, then such protection will have to be foreseen to ensure that the grave transgressions on humanity such as crimes against humanity are criminalized, prohibited and – if need be – prosecuted and correspondingly punished.

This has to be realized at both the international and domestic levels. Concerning the former, the criminalization should be present in the relevant legal instruments and be found in customary law. This is already the case with respect to the Rome Statute, but no legal instrument of the ICC contains any definition clarifying the concept of humanity as it pertains to crimes against humanity. Furthermore, no particular separate treaty specifically on crimes against humanity has so far been adopted. The international efforts led by the UN International Law Commission are under way but not yet concluded. Equally, no comprehensive legal definition of humanity, either as a protected interest in terms of criminal law or as a legal principle for the purposes of international law currently exists.

Securing the definition of humanity at the international treaty level would turn out instrumental for much-needed criminalizations at the domestic level as well, including in Central Asian countries. States and governments would be able to refer to such provisions in the process of implementation of the Rome Statute's substantive part, specifically as concerns crimes against humanity, and become positively affected in favour of opting for their national criminalization and prohibition. Moreover, using the rationale of humanness as a valid legal interest under the liberal view of *Rechtsgutstheorie* would contribute to the justification of the laws and codes that implement the dispositions of crimes against humanity. This would first of all be true for those countries whose legal systems are flexible enough to use the doctrine of *Rechtsgut*.

It was stated back in 1995 that it is "the spirit of humanity that gives international law its philosophical foundation".[74] No matter how broadly this spirit may be understood or described, it fully conforms to the undeniable processes that have characterized the evolution of international law during the last several decades in the history of mankind: the aptly termed process of humanization.[75] This is despite the fact that the positive influence of this phenomenon might seem somewhat diminished of late, owing to the global negative processes ongoing in the world and affecting, among others, the legal developments: the rise of nationalistic thinking, populistic ideas, religious extremism and increasing number of human rights violations.

The overarching concept of humanity is what has been driving the humanization processes. It has informed the development of human rights law and humanitarian principles, and it remains of no lesser significance for other branches of international law such as international criminal law, humanitarian law, law of treaties and law on the use of force and state responsibility. The value-based approaches in developing the doctrinal part of law are justified since they

74 Cited in Brus et al. 2013, p. 70.

75 See Meron 2006; also, Meron 2000, pp. 239-278.

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take into account the role of the concepts like humanity and humanitarian considerations in shaping the law.

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