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Historical and Legal Overview of Crimes Against Humanity
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Thank you, Professor Chiara Giorgetti, and thank you to the attendees. My colleagues have been given the difficult task of discussing the present and the future of crimes against humanity. I have been given the much easier one of discussing the history behind that concept. The relevance of history persists not only in the legal field, but in every field. It is the past that helps us to understand the present. Therefore, I will attempt to draw upon the past to address Professor Giorgetti's question about why the notion of crimes against humanity exists in international law and what is its relevance today in the context of combating impunity. According to my account, the history of crimes against humanity dates back about 250 years. I will not take you through every detail of that history, but I will highlight some of the most important aspects. The first references to that notion, which I was able to find, originate from the 18th and early 19th century. In 1807 already, an author was referring to crimes against humanity committed by Napoleon Bonaparte against Toussaint Louverture, a Haitian freedom fighter. More interestingly, by the mid-19th century, in 1861, a Swiss lawyer named Johann Kaspar Bluntschli made perhaps the first juridical use of the concept of crimes against humanity.

He did so in a work published in German, to describe the phenomenon of slave trade and what he thought crimes against humanity reflected. By his own account, he characterised slave trade as a crime against humanity. That was Swiss scholarship at its best, about 200 years ago.

By the turn of the 19th century, the concept was also starting to take on another juridical meaning, which is interesting because it remains pertinent to this day. Specifically, it evolved as an exception to the principle of non-intervention. I will not bore you with reading an article from 1908 by Frederick Charles Hicks titled *The Equality of States and the Hague Conferences*.[1] Therein, the author, writing more than 100 years ago, stated that the then-present tendency among publicists had been certainly towards accepting the principle of non-intervention as an integral rule of international law and its practice. They also accounted for

[1] Hicks, F. C., *The Equality of States and the Hague Conferences*, The American Journal of International Law, Vol. 2, No. 3 (July 1908), pp. 530-561. Available here.

the possibility of interventions as a legitimate exercise of sovereign power in extreme or exceptional cases on high moral or political grounds rather than purely legal ones, as in the case of grievous crimes against humanity. In that piece, one can find a parenthesis referring to Greece, Armenia, and Cuba. Already at that time, at the beginning of the past century, the idea that crimes against humanity were an important norm that could constitute an exception to fundamental principles of international law was already in the pipeline.

But by that stage, the concept of crimes against humanity was still very much at the margins of international law. What brought this concept from the margins to the centre of international law are the two world wars. During the First World War, there was a noticeable rise in the use of the term 'crimes against humanity'. At that point in time, references to crimes against humanity started to arise in many joint declarations issued by States. I am now referring as an illustration to an excerpt from one such joint declaration dating 28th of May 1915, signed by France, the United Kingdom, and Russia. Therein, these States condemned the mass killing of Armenians as a crime against humanity. At the same time, during and in the immediate aftermath of the First World War, States started to consider the possibility of prosecuting some of these crimes. For that purpose, they examined international law and quickly identified some of the shortcomings of international law pertaining to the prosecution of these crimes. However, the First World War was in, this regard, a normative disappointment, as while the idea of crimes against humanity was slowly gaining common acceptance, its enforcement as a crime remained largely theoretical. The tangible shift in the law of crimes against humanity coincided with the outbreak of the Second World War. That is where I hope to answer Professor Giorgetti's questions about what that concept encompasses.

Once the Allies started looking at ways to prosecute the criminality attributed to the Nazi regime and the Allies, it quickly became quite clear that there were very significant shortcomings in the arsenal of international law that was at the disposal of the Allies to prosecute these crimes. The concept of war crimes was already recognised at the time, but that legal framework proved inadequate and insufficient to address the scale and nature of criminality witnessed during the Second World War. Therefore, several new legal concepts were invented. One of them has been the crime of aggression, the concept some of the speakers discussed this morning. The second one has been the concept of crime against humanity.

A need for a concept of crimes against humanity, notwithstanding the framework of war crimes, was threefold. The first point is that a significant portion of the crimes investigated by the Allies was unrelated to an armed conflict or insufficiently connected to one. A significant portion of the crimes committed by the Nazis occurred during the armed hostilities but had

very little connection with the actual conflict; some of their crimes commenced before the war. To prosecute that form of criminality, a new concept was needed. This led to the concept of crimes against humanity. One of its core elements is the absence of a link in the definition of that crime to an armed conflict. Thus, offenders could be prosecuted for such crimes committed before, throughout, after, inside, or outside of an armed conflict. That was one of the reasons driving the adoption of that concept at the time.

The second point is that the law of war crimes, at least as it was interpreted back in the 1940s, was essentially understood to apply only to crimes committed against nationals of the enemy State. That meant that the crimes committed by Nazi Germany directed either against its own citizens, homosexuals, gypsies, Jews, and so on, would have fallen outside of the scope of the notion of war crimes as interpreted back in the day. Again, the concept of crimes against humanity was intended to circumvent that limitation enabling the prosecution of crimes committed by one state against its own nationals.

The last reason that has shaped the modern definition of crimes against humanity are two core aspects of that crime. The first is the discriminatory nature of most crimes against humanity, which led to the adoption of the concept, for instance, of persecution. The second is the collective nature of this criminality, which is challenging to fully encompass within the traditional concept of war crimes.

Crimes against humanity, as you likely know, include several sub-offences, such as extermination, that allow for the prosecution of large-scale atrocities. Instead of prosecuting separately a thousand instances of murder, one can prosecute one act of extermination in that way. Another way in which the notion of crimes against humanity addresses collective criminality is through what is often referred to, using a French term again, as the *chapeau* or contextual element. This requires proof of a widespread or systematic attack against a civilian population. Again, the narrative function, so to say, of crimes against humanity was crucial at the time and remains important to this day when it comes to describing and prosecuting collective criminality.
From these considerations arose Article 6, letters A, B, and C of the Charter of the International Military Tribunal of Nuremberg, which recognised these categories of crimes, crimes against peace or aggression, war crimes, and crimes against humanity. This provision is the primary normative framework from which modern international criminal law has evolved. Now, I will skip over the subsequent historical stage of the development of that concept as Professor Murphy will deal with it, the International Law Commission. I will go directly to the contribution

that modern international criminal tribunals have made to that notion. There are essentially three features that must be underlined here.

First, the jurisprudence and the practice of international criminal courts and tribunals have quite convincingly demonstrated that the notion of crimes against humanity, which were already recognised at Nuremberg, exists not only under the Nuremberg Charter, but also as part of customary international law. That jurisprudence and practice have also attributed *ius cogens* standing to this notion, thus a normative provision of a particular standing to which no exceptions are permissible. This is what has been established by these international criminal courts and tribunals. Another thing that they have succeeded at, which has proven useful, is clarifying the law. If you are interested in the details, not necessarily academic ones, but legal specificities of the law of crimes against humanity, the best source to explore is the jurisprudence of international criminal courts and tribunals. They have established that, for instance, both civilians and members of the military can be considered victims of crimes against humanity. They have also established that the presence of military personnel within a civilian population does not alter the civilian nature of that population. Further, according to their practice and jurisprudence, crimes against humanity must be committed in the context of a systematic or widespread attack against a civilian population, and so on. The third thing I will highlight here is that the value of the practice and jurisprudence of these international criminal courts and tribunals lies in their identification of the facts or evidence that are pertinent to proving crimes against humanity. We might all have a general understanding of what crimes against humanity are in theory, but if you are, like our German colleague or I, practicing law in a courtroom, you must also have an understanding of what facts or pieces of evidence go into proving the crimes that are alleged. That is another aspect where these international criminal courts and tribunals, in tandem with domestic courts, have made a significant contribution.

Moving to your question, Professor Giorgetti, I will try to answer it in this way: crimes against humanity should not be conceived in isolation, but rather as part of the wider arsenal of tools that prosecutors and law enforcement institutions have at their disposal in combating international crimes.

There are essentially three main normative tools in that toolbox: war crimes, crimes against humanity, and genocide. There is a fourth box that is in the process of being created, the crime of aggression. Thus, for the time being, the three main boxes are war crimes, crimes against humanity, and genocide. In this toolbox for prosecutors and law enforcement authorities, crimes against humanity play a particularly important role. Because, as I said, if you look at crimes against humanity, these notions cover criminality that is not directly or sufficiently

connected to an armed conflict. It covers a much broader range of crimes and a wider array of protected interests.

The concept of crimes against humanity addresses criminality that stems from a collective act, rather than solely from an individual one. It covers criminality that is discriminatory or organised in nature, for example, apartheid or persecution. It also covers the crime of other inhumane acts, which are considered a residual category of crimes against humanity and are extremely useful for prosecutors. When compared to the crime of genocide, crimes against humanity also have several other advantages. First, and most central is an evidential one. Everyone knows that the crime of genocide is extremely difficult to establish in practice because it requires proof of a special intent, namely, proof of an intent to destroy in whole or in part a protected group as such. If you examine the definition of crimes against humanity, there is no such requirement. That absence lessens the burden of proof and therefore eases the prosecution of such crimes in practice. Also, crimes against humanity, unlike genocide, protect individuals as such and not necessarily as members of a particular group. Although, of course, there is a great deal of overlap between the two categories. Finally, the definition of crimes against humanity covers a much broader scope of prohibited acts, ranging from murder, extermination, enslavement, deportation, apartheid, persecution, and so on.

Genocide is a much narrower concept when it comes to prosecution. The value of crimes against humanity lies in the breadth and depth of criminality that the concept is capable of capturing, which goes way beyond what genocide and war crimes encompass. Therein lies the importance of this notion and, by extension, of the possible convention addressing it. I will not discuss the topics which my colleagues around the table will address. They are going to discuss these angles. I would like to emphasise, nonetheless, that every state intending to investigate and prosecute international criminality must have the necessary legal basis to enforce crimes against humanity. I have kept to my 20 minutes. Thank you.