



## PROSECUTING CRIME OF GENOCIDE AND CRIMES AGAINST HUMANITY BY THE AD HOC TRIBUNALS

تجربة المحاكم الجنائية الدولية في تجريم الإبادة والجرائم ضد الإنسانية

Salem Haoua

1.- Full affiliation University of Ghardaia , Email address,  
salem.haoua@gmail.com

Received:28/07/2020

Accepted: 26/06/2021

### Abstract:

The Creation Of International Criminal Law Is The Fruit Of A Historical Process In Which Real Experiences Such As; The International Ad-Hoc Criminal Tribunals Of Ex-Yugoslavia And Rwanda Have Facilitated The Establishment Of The International Criminal Court. This Research Paper Aims To Tackle The Matter Of Prosecuting The Heinous International Crimes: The Crimes Against Humanity And Crime Of Genocide By Defining Their Constituent Elements.

The International Criminal Tribunals Are An Evidence Of The Possibility Of Establishing An International Criminal Judiciary That Meets The Formal And Objective Specifications Of National Criminal Judiciary. Moreover It Is A Proof Of The Effective Role Of International Criminal Justice In Achieving Respect Of Human Rights By Fighting Impunity.

### Key Words:

International Criminal Law, International Ad-Hoc Criminal Tribunals, International Crimes, Crimes Against Humanity, Genocide.

## الملخص:

جاء إنشاء قانون دولي جنائي ثمره مسار تاريخي لعبت فيه التجارب الواقعية ممثلة في المحاكم الجنائية الدولية الخاصة بيوغسلافيا السابقة ورواندا دورا محوريا لإنشاء المحكمة الجنائية الدائمة، لكن بقي تفعيل عمل المحكمة يطرح تحد كبير خاصة فيما تعلق بمسألة المتابعة الجنائية للجرائم الدولية الداخلة في اختصاص المحكمة، تهدف هذه الورقة البحثية إلى معالجة الإشكالية السابقة عبر توضيح كيف أسهم عمل المحاكم الخاصة في توضيح أركان جريمة الإبادة والجرائم ضد الإنسانية

لقد حققت المحاكم الجنائية الدولية إضافة نوعية تمثلت؛ أولا التأسيس لاختصاص جنائي دولي يماثل القضاء الجنائي الوطني ويحقق المحاكمة المنصفة والسريعة، ثانيا تحقيق احترام لحقوق الإنسان عبر القضاء على ظاهرة الإفلات من العقاب.

**الكلمات الدالة:** القانون الدولي الجنائي، المحاكم الجنائية الدولية الخاصة، الجرائم الدولية، جريمة الإبادة، الجرائم ضد الإنسانية.

## 1. Introduction

The creation of the International Criminal Tribunals (hereinafter referred to as ICT) in the 1990 s by the United Nations Security Council sparked a heated debate both at the official level and among the doctrine. This debate has had the merit of shedding light on two key points: First, the legal foundations of this first one. Then, the need to adopt the conventional approach for the creation of the future International Criminal Court. The work of the Rome Diplomatic Conference resulted in the signature of the Rome statute.

Today, as the ad hoc tribunals has concluded their mandates. We believe that the experience of the courts has presented a golden opportunity for the development of international criminal law. This article is not intended to evaluate the work of the ICTY, far from it; it seeks to shed light on their contribution to the crime of genocide and crimes against humanity.

## **2.- The crime of Genocide**

Throughout its long history humanity suffer several times from mass destruction, which has inflicted great loses even in the twentieth century<sup>1</sup>. This crime remains unnamed until the prominent polish jurist “Raphael Lemkin” proposed the concept of genocide<sup>2</sup>. But this crime did not appear in the Nuremburg charter or judgments .The general assembly of the United Nations (hereinafter UNAG) played a key role in the evolution of the crime of the genocide. First, by adopting a resolution stating that genocide is an international crime<sup>3</sup>. Then, the preparation of an international convention, the convention of the prevention and punishment of the crime of the genocide (hereinafter convention of genocide), which was adopted in 12/9/1948<sup>4</sup>.

The establishment of the international criminal tribunal for ex – Yugoslavia (hereinafter ICTY) and the international criminal tribunal for Rwanda (hereinafter ICTR) in the 1990’s was a golden opportunity to develop the crime of genocide<sup>5</sup>, because it was the first time where the perpetrators of genocide will be prosecuted by an international criminal tribunal<sup>6</sup>. So this article will discuss the most important evolution brought by the jurisprudence of these tribunals concerning the crime of genocide.

### **2.1.- The accuracy of the elements of the crime of genocide**

Before the trial of Jean Paul Akayesu, there was no international jurisprudence concerning the crime of genocide. This jurisprudence participated in the clarification of the essential elements of this crime: (1) the notion of protected group, (2) the requisite mens rea and (3) the modalities of criminal involvement.

### **2.1.1.- The concept of protected group**

A criminal act cannot be considered as a crime of genocide unless the victim belongs to a national, an ethnical, a racial or a religious group. Consequently the identification of this group is one of the main concerns of the crime of the genocide.

The trial chamber I of the ICTR in Akayesu case tried to fill this gap by proposing a definition to the four protected groups. So the national group is “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties”<sup>7</sup>. This definition was inspired from the jurisprudence of the international court of justice (hereinafter ICJ) in the case of “Nottebohm” in 1955. An ethnical group is “a group whose members share a common language and culture”<sup>8</sup>. A racial group is distinguished from other racial groups by hereditary physical traits frequently identified with geographical areas, irrespective of linguistic, cultural, national or religious factors<sup>9</sup>. Finally a religious group is a group “whose members share the same religion, denomination or mode of worship or common beliefs”<sup>10</sup>.

Unfortunately this audacious jurisprudence has been criticized even by other trials chambers. The critics were based upon the following arguments: There are no clear definitions generally and internationally accepted on concepts such as nation, ethnicity, race and religion. Moreover these concepts must be defined in the lights of political, social, and cultural context. Thus the assessment has to be made on a case by case basis taking in the account the relevant evidence and the political and cultural context of the society concerned<sup>11</sup>. It is also possible to determine objectively the membership to a group through a number of objective indicators, for instance a trial chamber stated that the Tutsis population is an ethnic group with distinct identity, because every Rwandan required to carry an identity card showing his ethnic identity being either Hutu, Tutsi or Twa and the Rwandan constitution and laws in force at that time also identified Rwandans by reference to their group ethnic<sup>12</sup>. Furthermore the membership to a group is a subjective concept, the victim is perceived by the perpetrators of the genocide as belonging to a group slated for destruction and in some circumstances the victim may perceive himself as belonging to the sad group<sup>13</sup>.

So to determine whether the victim falls within one of the four enumerated group, we may adopt an objective or subjective approach: In the first one the perpetrator excludes individuals from the group of which he considers to have its own national, ethnic, racial or religious characteristics distinct from that of the group to which such individuals belong<sup>14</sup>. In the second the perpetrator distinguishes a group by reason of what he considers to be its national, ethnic, racial or religious characteristic pertaining to that group<sup>15</sup>.

As a conclusion the crime of the genocide is committed in all times<sup>16</sup>, from the moment where the perpetrator has the requisite intent to destroy in whole or part a protected group. This group can be determined objectively or even subjectively.

### **2.1.2.- The stability of the protected group**

The trial chamber I of the ICTR in the case of Akayesu held that “it is particularly important to respect the intention of the drafters of the genocide convention which is according to the travaux préparatoire, was patently to ensure the protection of any stable and permanent group”<sup>17</sup>. The victim of the crime of the genocide is the group itself and not the individual and the common criterion in the four types of groups protected by the convention of genocide is that “membership in such groups would seem to be normally not changeable by its members, who belong to it automatically by birth, in continuous and often irremediable manner”<sup>18</sup>. So the more “mobile” groups which one joins through individual voluntary commitment such as political or economic groups are excluded from this category of crime<sup>19</sup>.

The chambers’ interpretation should be flexible and progressive to meet evolving exigencies, so the chambers miss a golden opportunity to include political and cultural groups by omitting the necessity of stability and permanence of the group protected especially the UNGA adopted a resolution 96 / 1946 affirming that genocide was a crime under international law committed on religious, racial, political or any other grounds. Moreover the national group is not necessarily stable, we can acquire or even lose the nationality by choice, and this is also true for religious groups. Furthermore the drafter’s intention was not to make stability and permanence as necessary

conditions to each protected group, but their intention was to exclude all stable group not enumerated in the convention of the genocide<sup>20</sup>.

As a conclusion it is highly advisable to avoid considering stability and permanence as necessary criteria for the definition of a protected group.

### **2.1.3.- The mental element of the crime of genocide**

The crime of the genocide need not involve the actual extermination of a protected group. It is committed once any one of the enumerated acts above is committed with the requisite mens rea<sup>21</sup>. It is in fact the mens rea which give genocide its specialty and distinguish it from an ordinary crime and crimes against international humanitarian law. This specific intention (*dolus specialis*) is to destroy, at least in part a national, ethnic, racial or religious group as such, or psychological nexus between the physical result and the mental state of the perpetrator, or even that the accused had at least the clear knowledge (*conscience Claire*) that he was participating in the genocide<sup>22</sup>. But how to prove that specific intention especially it is a mental factor, so difficult if not impossible to identify with certainty.

#### **2.1.3.1- The appreciation of the mental element**

In absence of a confession from the accused, the specific intention may be referred from a number of facts such as words or deeds or pattern of purposeful action that deliberately, consistently, and systematically targets victims on account of their membership of a particular group while excluding the members of other groups. Circumstantial evidence that may be useful includes the general context of the commission of other criminal acts committed by the same offender or by others that were systematically directed against that same group or their property the use of derogatory language towards members of the group, the weapons used and the extent or bodily injury, the methodical way of planning, the systematic way of killing<sup>23</sup>. So the accused Akayesu was found that he had the requisite mens rea to commit genocide through the systematic rape of the Tutsi women, the sexual violence was a step toward the destruction of the group by destroying its spirit, will to live, or will to procreate<sup>24</sup>. The accused Ruggui – a Belgian national employed in the radio and television *libre des Mille colines* (RTLM) – was declared to have the requisite mens rea through broadcasting

messages inciting genocide against Tutsi. The trial chamber held that a person who incites another to commit genocide must himself have specific intent to commit genocide<sup>25</sup>.

Last but not least, the trial chambers of ICTY and ICTR concluded that due to the magnitude of genocide, it is virtually impossible to carry out it without a plan or organization, even with some or indirect involvement on the part of state<sup>26</sup>.

### **2.1.3.2 - The interpretation of the various modalities of criminal involvement in the genocide**

The five forms of participation in the crime of genocide set in the article II of the genocide convention which is: direct perpetrator, the conspiracy, public incitement, attempt and complicity. So if the drafters of the status of ad hoc tribunals have adopted this provision this will facilitate the work of judges. But unfortunately this was not the case because they have introduced two articles. The trial chambers defined the direct perpetrator of genocide and the accomplice.

The ICTR chambers of trial have affirmed that a person is convicted of genocide as a direct perpetrator if he is proved to have participated in the conspiracy or to attempt or to incite directly and publicly. The commission of the genocide is defined as committing the acts listed in the statute, with the specific intention to destroy at least in part a protected group<sup>27</sup>.

Conspiracy of genocide is defined as a resolution to act on which at least two people have agreed to commit genocide, it does not matter here the realization of the genocide. The conspiracy can be proved by objective criteria for instance, the prime minister of the Rwandan government in 1994 Jean Kambanda was declared guilty of conspiracy on the base of the meetings of his cabinet<sup>28</sup>.

The direct and public incitement is defined as provoking the perpetrator to commit the genocide, whether through speeches threats uttered in public places or meetings or through written or printed material sold, distributed or exhibited in public places or meetings, or by any other means of audiovisual communication<sup>29</sup>. The trial chamber held that incitement must be punished

severely because the inciter is animated with the specific intent, which is the destruction of a protected group. The genocide clearly falls within the category of crimes which is so serious that the direct and public incitement to commit genocide must be punished as such; even in cases the desired result is not reached<sup>30</sup>.

The trial chamber of the ICTR held that an accused is considered to be an accomplice if he knowingly and intentionally helped or assisted or even caused one or more persons to commit genocide. The chamber added that proving the specific intention to destroy a protected group in the case of the accomplice is not necessary<sup>31</sup>. So why do the chambers punish severely the accomplice even the specific intention is not proved and even no genocide is committed. The severity is due to the extreme dangerousness of the crime of the genocide.

### **3.- Crimes against humanity**

Crimes against humanity is a new terminology<sup>32</sup>. It was used for the first time by Russia, France and Great Britain in 1915 denouncing the massacres of the Armenian population by the Turkey as “a crime against humanity and civilization”. The first definition of the concept of crimes against humanity was contained in the London agreement on the statute of the Nuremberg military tribunal. The provision enumerated the following acts as crimes against humanity: murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, or prosecution on political, racial, or religious grounds in the execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated<sup>33</sup>. Nowadays it is a settled rule of customary law that the crimes against humanity are international crimes<sup>34</sup>, and their perpetrators incur individual responsibility<sup>35</sup>.

#### **3. 2.- Clarification of the concept of crimes against humanity**

The concept of crimes with the concept against humanity is frequently confused with the concept of genocide and war crimes. So the experience of the international criminal tribunal of ex-Yugoslavia (hereinafter ICTY) and



the international criminal tribunal of Rwanda (hereinafter ICTR) represented a golden opportunity to enrich the concept of crimes against humanity<sup>36</sup>. The trial chambers gave rise to interesting development concerning: (1) the relationship that should exist between crimes against humanity and an armed conflict. (2) The definition of the context in which crimes against humanity are committed; the massive and systematic attack and the civilian population. (3) The requisite intent or mens rea.

### **3.2.1.- The nexus with an armed conflict**

Both statutes of the hereinafter ICTY and ICTR requires that the crimes against humanity must be committed during an armed conflict. The type and nature of such conflict be it international or internal is not important<sup>37</sup>. The trial chambers stated that this expression requires the existence of an armed conflict at the time and place. So the armed conflict is a jurisdictional element that defines the *ratione materiae* of the ICTY, and not a legal ingredient of the subjective element of crimes against humanity<sup>38</sup>. Consequently there is no need to prove a nexus between the specific acts allegedly committed by the accused and the armed conflict<sup>39</sup>. As a result, crimes against humanity can be committed in peacetime as well as in armed conflict<sup>40</sup>. This progressive view point will be benefic to the protection of human rights by prosecuting massive violation of human rights committed by governments as crimes against humanity.

### **3.2.2.- Appreciation of the mental element**

Crimes against humanity like other crimes falling in the jurisdiction of the international ad hoc tribunals require a mental element which is the knowledge. The perpetrator must knowingly commit the crime in the sense that he must understand the overall or broader context in which his act occurs. He must have actual or constructive knowledge that his act or acts is or are part of a widespread or systematic attack on a civilian population pursuant to a policy or a plan<sup>41</sup>.

It must be proved that the perpetrator knew that his crimes were related to the attack on a civilian population in the sense of forming part of a context of mass crimes or fitting into such a pattern<sup>42</sup>. Otherwise he would have the mens rea for an ordinary crime.

The task of proving knowledge is an easier one because it is not necessary to prove that the accused must know exactly what will happen to the victim<sup>43</sup>. It is not also necessary to prove that the accused knows the criminal policy or plan, it suffices that he deliberately takes the risk that the crime might be committed, even with the hope that the risk would not lead to any damage or harm<sup>44</sup>. Knowledge can be examined on an objective level; it can also be inferred from circumstances. For instance, the historical or political circumstances in which the acts occur, the function of the accused at the time of the crime in question, his responsibilities in the political or the military hierarchy, the direct or indirect relationship between the military hierarchy and the political hierarchy, the widespreadness and seriousness of the act committed, and the nature of the crimes committed as well as their notoriety<sup>45</sup>. Therefore, a person who voluntarily assumes political or military functions and exercises his functions by collaborating periodically with the author of the plan, policy or organization and by participating would in all probability take place will be declared to have the requisite knowledge<sup>46</sup>.

It is not necessary to prove the accuser's motive because the motive is generally irrelevant in criminal law, except in the sentencing stage when it might be relevant to mitigating or aggravation of the sentence. But an accused who committed a crime with purely personal motives is not exonerated from being guilty of crimes against humanity if his act fits into the pattern of crimes against humanity as described above<sup>47</sup>.

### **3.2.3.- The material element of crimes against humanity**

Crimes against humanity must be related to widespread or systematic attacks, and not just a random act of violence, against a civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack<sup>48</sup>. The trial chambers tried first to define the attack. One trial chamber held that an attack “ it is an unlawful act that may be violent or non-violent in nature, like apartheid or existing pressure on the population to act in a particular manner” or “ it is the event in which the enumerated crimes (for instance murder, extermination, enslavement ... etc) within a single attack<sup>49</sup>. The attack may happen in pursuant to or furtherance of a state or organizational policy to commit such attack<sup>50</sup>.

The attack may be an act or an omission. The trial chambers found that the accused Jean Kambanda was guilty of crimes against humanity for having omitted to fulfill his duty as a prime minister of Rwanda to protect the children and the population from the massacres which eventually took place, especially after he had been personally asked to do so<sup>51</sup>. The trial chambers noted that the crimes against humanity derives its specificity from the means implemented to achieve it (massive), and the context in which the acts are committed (systematic), and the quality of victims (civilian population).

### **3.2.3.1- The massive and systematic attack**

According to the jurisprudence of the trial chambers of the ad hoc tribunals an attack can be described as massive or widespread if:

- It is directed against a multiplicity of victims<sup>52</sup>.
- The cumulative effect of a serious inhumane acts or the singular act effect of great magnitude<sup>53</sup>.

An attack is systematic when it is carried without pursuant to a preconceived policy or plan which means with some kind of planning and organization<sup>54</sup>. This can be stated in the following cases:

- The existence of a goal of political nature to weaken or to destroy a community.
- The commission of crimes of great magnitude against a group of civilians or the repeated commission of inhumane and continued acts with a link between them.
- The use and implementation of important public or private means.
- The involvement of political authorities or high level military authorities in the preparation of the plan.

It is important to note that the trial chambers of the ad hoc tribunals adopted the jurisprudence of the Nuremburg tribunal which stressed that crimes against humanity need to be committed as a part of the policy of terror in many cases organized and systematic<sup>55</sup>. Consequently, crimes

against humanity may be committed in pursuance of a policy of either a state or a non-state actor. Such policy need to be conceived at the highest level of the state organs: formalized, expressed and precisely pronounced<sup>56</sup>. The denial by the the relevant authorities or apparatus of that policy does not matter because the policy can be inferred from the manner in which the acts took place, the creation and implementation in the territory in question of autonomous political institutions of whatever level of power, the general tenor of a political program as evidence in writings by the its authors and their speeches, media propaganda, creation and implementation of autonomous military institutions, mobilization of armed forces, repeated and coordinated military offensives in the relevant time and case, connection between the military hierarchy and the political institutions and its program, modification of the ethnic composition of the populations, discriminatory measures, be they administrative or otherwise (such as banking restrictions and a requirement of a travel pass), and the scoop of the executions carried out, in particular, deaths and other forms of physical violence, thefts, arbitrary detentions, deportations and expulsions, or destruction of non-military property, especially religious edifices<sup>57</sup>.

It is so important to note that the requirement of the policy is intended to exclude the situation where an individual commits an inhumane act on his own initiative pursuant to his own criminal plan and without any encouragement or direction from either a government or a group or an organization<sup>58</sup>.

As a conclusion an act could be qualified as crimes against humanity when it is related to widespread or systematic attack. The act can be part of either one of them and need to be part of both<sup>59</sup>. Thus one single act against a single victim or a limited number of victims must be qualified as a crime against humanity as long as there is a link with the widespread and systematic attack against a civilian population, or where its effect is widespread in scope<sup>60</sup>.

### **3.2.3.2- The definition of the civil population**

Crimes against humanity must be committed as a part of an attack against any civilian population, so proving a nexus between the accused and the attack on civilian population is a necessary condition<sup>61</sup>. Before doing so, it is

vital to give the definition of the civilian population. A trial chamber held that “civilian must be given a broad definition in armed conflicts to cover not only the general population, but also members of the armed forces and resistance forces who are hors combat by sickness, wounds, detention, or any other cause. It is the situation faced by the victim at the time of the commission of the crime that must be taken into account to determine whether they have the civilian status or not. For example, a head of a family does not lose his civilian status when he is compelled to use arms to defend his family<sup>62</sup>. A trial chambers observes that there is no reason for protecting only civilians but not combatants under the rules against crimes against humanity, particularly rules proscribing prosecution<sup>63</sup>. Where there is no armed conflict or where there is a relative peace, the definition of civilian population includes all persons except those who have the duty to maintain public order and legitimate means to exercise force<sup>64</sup>.

Moreover, the term population does not mean that the entire population of a given state or territory must be targeted; it is intended to indicate the collective nature of crimes against humanity that exclude single or isolated acts punishable as war crimes. Even the targeted population must be predominantly civilian in nature although the presence of certain non-civilian in their midst does not change the character of that population<sup>65</sup>. Last but not least, the words “any” “before” civilian population make it clear that the crimes against humanity can be committed against stateless persons or civilians of the same nationality of the perpetrator as well as against foreign citizens<sup>66</sup>.

## **5.- Conclusion**

The experience of the international criminal ad hoc tribunals whether the ICTY or the ICTR was very fruitful, because not only they made international criminal prosecution for committing international crimes and violations of international humanitarian law possible and successful but also was have contributed significantly towards the clarification of the concept of the crime of genocide and crimes against humanity as well. We can sum up this valuable contribution in the following points.

- The clarification of the concept of a protected group and even developed a subjective test which will make the identification of the membership of a protected group easier.

- The easily inference of the specific intent to destroy a protected group from a set of facts which will certainly facilitate the task to the prosecutor.

- The ad hoc tribunals have given the example that prosecuting the genocide by an international criminal tribunal is not only possible but very fruitful as well.

- Crimes against humanity can be committed in armed conflict as well as in peacetime, but in both cases they must be related to whether a widespread attack or a systematic one directed against a civilian population. A civilian may be an ordinary person or even a combatant who is hors combat.

- Crimes against humanity may be committed in pursuance of a policy of either a state or a non-state actor such as political entities without international recognition, terrorist group or even criminal gangs. They need the knowledge of the perpetrator that his act or acts is or are a part of a widespread or a systematic attack directed against a civilian population pursuant to a policy or plan.

- Qualifying mass violation of human rights by government and rebellions groups as crimes of genocide and crimes against humanity and prosecuting them by international tribunals offer more protection to human.

## **6.- References**

<sup>1</sup> - The killing of Armenians by the ottoman in the first world war, the killing of millions by Nazi in the second world war. The killing of millions of Cambodian by the Khmer rouge regime in the 1970's. The killing of a million of Tutsis by Hutus in Rwanda in the 1990's.

<sup>2</sup> - The word genocide is a combination of the Greek word 'genos (race or tribe ) and the Latin word 'cide ' (killing ) .see also : Herve . Ascencio, Alain . Pellet , Emanuel . Decaux , Droit International Pénal ,Paris , Pedon , 2003 . Paul . Tavernier , un siecle de droit international humanitaire , Bruxelles , Bruylant , 2001 . Kriangsak . Kittichaisareé , International Criminal Law , Oxford , Oxford university press , 2005 .

<sup>3</sup> - United Nation General Assembly, UNGA. Res 96 (1) of 11 Dec 1946 .

<sup>4</sup> - William Shabas, Le génocide in Droit International pénale ,sous la direction de H . Ascension, A. Pellet, E. Decaux, Paris, Phédon, 2003, p 319.

<sup>5</sup> - The ICTY in article 4 and TPIR in article 2 replicated the provision given in article II of the genocide convention : ' any of the following acts committed with intent to destroy , in whole or in part , a national , ethnical , racial or religious group , as such :

- Killing members of the group.
- Causing serious bodily or mental harm to members of the group.
- Deliberately infecting on the group conditions of life calculated to bring about its physical destruction in whole or part ;
- Imposing measures intended to prevent births within the group ;
- Forcibly transferring children of the group to another group.

<sup>6</sup> - The crime of genocide appeared in the indictments of the judgments of Nuremberg but genocide was prosecuted under the heading of crimes against humanity.

<sup>7</sup> - Procutor V Akayesu , TPIR , 94-4 , judgement , trial chambre I , 12/9/1998 , para 571 .

<sup>8</sup> - Prosecutor V Akayesu , ibid. , para 513 .

<sup>9</sup> - Prosecutor V Akayesu , ibid. , para 514 . Prosecutor V Clément Kayishema and Obed Ruzindana , ICTR , 95- 1, judgment , trial chambre II , 21 /5/1998, para 98 .

<sup>10</sup> - Prosecutor V Akayesu , ibid. , para 515 . Prosecutor V Kayishema and Ruzindana , ibid , para 98 .

<sup>11</sup> - Prosecutor V Rutaganda, ICTR , 96-3, judgment , Trial chambre I , 6/12/1999, para 57 .

<sup>12</sup> - Prosecutor V, Rutaganda op.cit. , para 57 .

<sup>13</sup> - Prosecutor V, Rutaganda, ibid. , para 54.

<sup>14</sup> - Prosecutor V Akayesu ,op.cit. , paras 702 – 703.

<sup>15</sup> - K . Kittichaisareé , op.cit. , p 70 – 71.

<sup>16</sup> - Case concerning application of the convention of the genocide (Bosnia – Herzegovina V Yugoslavia), ICJ judgment, 11/5/1996, para 31 .

<sup>17</sup> - Prosecutor V Goran Jelesic, ICTY , 95 - 10, judgement , Trial chambre I , 19/10/1999, para 60 .

<sup>18</sup> - Prosecutor V Akayesu , *ibid.*, para 511 .

<sup>19</sup> - Prosecutor V Akayesu , *ibid.* , paras 511 – 521 . Prosecutor V Kayishema and Ruzindana, *opcit.* , para 118.

<sup>20</sup> - The most obvious stable group is the cultural group such as indigenous people and minorities with permanent membership brought automatically by birth and which can be subject to cultural genocide which is more dangerous than physical genocide .

<sup>21</sup> - Prosecutor V Akayesu , *opcit.*, para 497 . Prosecutor V Jelusic ,*opcit.* , para 62.

<sup>22</sup> - Prosecutor V Akayesu , *ibid.*, para 497 . Prosecutor V Jelusic, *ibid.* , para 62 .

<sup>23</sup> - K . Kittichaisareé , *opcit.* , p 74.

<sup>24</sup> - Prosecutor V Akayesu , *ibid.*, para 732.

<sup>25</sup> - Prosecutor V Ruggui, ICTR , 97 - 32, judgement , Trial chambre I , 1/06/2000, para14 .

<sup>26</sup> - Prosecutor V Kayishema and Ruzindana , *opcit.* , para 94 .

<sup>27</sup> - See article 2 paragraph 6 of the statue of the ICTR .

<sup>28</sup> - Prosecutor V Akayesu , *opcit.*, para 73.

<sup>29</sup> - Prosecutor V Musema , *opcit.* , para 191 – 193 .

<sup>30</sup> - Prosecutor V Kambanda , ICTR , 93 – 23 S , Trial chamber , 4/9/1998 , para 40

<sup>31</sup> - Prosecutor V Akayesu , *ibid.*, para 559 – 560 .

<sup>32</sup> - The expression “ humanity ”, “ laws of humanity ” or “dictates of humanity” were used for the first time in the preamble of 1907 of the Hague convention IV respecting the laws and customs of war on land. Paragraph 2 of the preamble states that the contracting parties desire to serve even in the case of war the interest of humanity and the ever – progressive needs of civilization. Paragraph 8 of the preamble provides that they declare among other things, the inhabitants and belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from laws of humanity, and from the dictates of the public conscience. see also : Herve . Ascencio, Alain . Pellet , Emanuel . Decaux, *Droit International Pénal* ,Paris , Pedon , 2003 . Paul . Tavernier, *un siècle de droit international humanitaire* , Bruxelles , Bruylant ,



2001 . Kriangsak. Kittichaisareé , International Criminal Law , Oxford , Oxford university press , 2005 .

<sup>33</sup> - Article 6 of the statute of the military tribunal of Nuremberg. Article 5 of the military tribunal of Tokyo enumerated the same acts as enumerated in Nuremberg statute except the omission of religious grounds for persecution.

<sup>34</sup> - United nations general assembly resolution 95 of 11 / 12 / 1946 on the affirmation of the principles of international law recognized by the charter of the Nuremberg tribunal.

<sup>35</sup> - Principle VI of the principles of international law recognized by the charter of the Nuremberg tribunal.

<sup>36</sup> - Article 5 of the ICTY statute stipulates that the ICTY have the power to prosecute persons responsible for the following crimes: murder, extermination, enslavement, imprisonment, torture, rape, prosecution on political, racial and religious grounds, other inhumane acts when these acts are committed in armed conflict, whether international or internal in character, and directed against any civilian population. Article 3 of ICTR statute enumerates the same crimes but when committed as a part of a widespread or systematic attack against civilian population on national, political, ethnic, racial or religious grounds.

<sup>37</sup> - Prosecutor V Kupreskic and others, ICTY, IT 95 – 16 T, Trial chamber II, 14 / 01 / 2000, para 545.

<sup>38</sup> - Prosecutor V T

adic , ICTY ,IT 94 – 1 A, Appeal chamber , 15 / 7 / 1999 , para 249 .

<sup>39</sup> - Prosecutor V Tadic , ibid. , para 272.

<sup>40</sup> - Prosecutor V Tadic , ibid. , para 251.

<sup>41</sup> - Prosecutor V Tadic , ibid. , para 635.

<sup>42</sup> - Prosecutor V Kupreskic , op.cit. , para 556.

<sup>43</sup> - Prosecutor V Blaskic , op.cit. , para 244.

<sup>44</sup> - Prosecutor V Tadic , op.cit. , paras 657 - 659.

<sup>45</sup> - Prosecutor V Blaskic , ibid. , para 251.

<sup>46</sup> - Prosecutor V Blaskic, ibid. , para 259.

<sup>47</sup> - The accused Blaskic was found to be part of a design whose purpose was the prosecution of the Muslim population because of his political will to get involved in the Croat defense council known as the HVO which had military and civilian structures. The HVO took decisions on the organization of life in the town, and as such, the accused, who was deemed to be perfectly aware that the scope of his activities was not and could not be a strictly military one, and to be aware of the policy of discrimination against Muslims to systematically exclude them from the organs of political life.

<sup>48</sup> - Prosecutor V Tadic , ibid. , para 271.

- <sup>49</sup> - Prosecutor V Akayesu, ICTR, IT 96 – 4, Trial chamber, 02 / 09 / 1998, para 581.
- <sup>50</sup> - Prosecutor V Rutaganda, ICTR, IT 96 – 3, Trial chamber, 06 / 12 / 1999, para 68.
- <sup>51</sup> - Prosecutor V Kambanda, ICTR, IT 97 – 23, Trial chamber, 24 / 09 / 1998, paras 39 - 40.
- <sup>52</sup> - Prosecutor V Blaskic , ICTY ,IT 95 –14 T, Trial chamber , 03 / 03/ 2000 , para 71 .
- <sup>53</sup> - Prosecutor V Tadic , ibid. , para 648.
- <sup>54</sup> - Prosecutor V Blaskic , op.cit. , para 206.
- <sup>55</sup> - Prosecutor V Blaskic , ibid. , para 207.
- <sup>56</sup> - Prosecutor V Tadic , op.cit. , para 648.
- <sup>57</sup> - Prosecutor V Kupreskic, op.cit. , para 573.
- <sup>58</sup> - Prosecutor V Blaskic, ibid. para 206.
- <sup>59</sup> - Prosecutor V Rutaganda, op.cit. , para 124.
- <sup>60</sup> - Prosecutor V Tadic , op.cit. , para 648. Prosecutor V Akayesu, op.cit. , para 579.
- <sup>61</sup> - Prosecutor V Blaskic, op.cit. , para 206.
- <sup>62</sup> - Prosecutor V Kupreskic, op.cit. , para 586.
- <sup>63</sup> - Prosecutor V Tadic , ibid. , paras 636 - 643.
- <sup>64</sup> - Prosecutor V Kupreskic, ibid. , para 547.
- <sup>65</sup> - Prosecutor V Blaskic, ibid. , para 214.
- <sup>66</sup> - Prosecutor V Rutaganda, op.cit. , para 70.