



# CRIMES AGAINST HUMANITY IN THE JURISPRUDENCE OF THE AD HOC TRIBUNALS

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Crimes against humanity is a new terminology<sup>1</sup>. It was used for the first time by Russia , France and Great Britain in 1915 denouncing the massacres of the Armenians population by 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 statue 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>2</sup>. Now it is a settled rule of customary law that the crimes against humanity are an international crimes<sup>3</sup>, and their perpetrators incur individual responsibility<sup>4</sup>.

The concept of crimes with the concept against humanity is frequently confused of genocide and war crimes . So the experience of the international criminal tribunal of ex – Yugoslavia ( hereinafter ICTY ) and the international criminal tribunal for Rwanda (hereinafter ICTR ) represented a golden opportunity to enrich the concept of crimes against humanity<sup>5</sup>. This what happens . The trial chambers gave rise to interesting developments concerning : First , the relationship that should exist between crimes against humanity and an armed conflict . Then ,the definition of the context in which crimes against humanity are committed ; the massive and

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systematic attack and the civilian population . Finally , the requisite intent or mens rea.

#### **A / Nexus with an armed conflict**

Both status of international ad hoc tribunals requires that 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>6</sup>. The trial chambers stated that this expression requires the existence of an armed conflict at the time and the 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>7</sup> . Consequently there is no need to prove a nexus between the specific acts allegedly committed by the accused and the armed conflict <sup>8</sup> .As a result , Crimes against humanity can be committed in peacetime as well as in armed conflicts <sup>9</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 .

#### **B / 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>10</sup> . The trial chambers tried first to define the attack .A chamber held ‘ it is an unlawful act that may be violent or non – violent in nature , like apartheid or exerting pressure on the population to act in a particular manner <sup>11</sup>.‘it is also the event in which the enumerated crimes must form part , and there may be a combination of the enumerated crimes ( for instance murder , rape , ....etc ) within a single attack . It may happen in pursuant to or in furtherance of a state or organizational policy to commit such attack . It may happen pursuant to or in furtherance of a state or organizational policy to commit such attack<sup>12</sup> .

The attack may be an act or an omission . The trial chamber found that the accused Jean Kambanda was guilty of crimes against humanity for having omitted to fulfill his duty as 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>13</sup> .

The chambers noted that the crimes against humanity derives its specificity from the means implement to achieve it (massive ) and the context in which the acts are committed ( systematic ), and the quality of victims ( civilian population )<sup>14</sup> .

#### **(1) The massive and systematic attack**

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

- It is directed against a multiplicity of victims<sup>15</sup>.
- The cumulative effect of a serious of inhumane acts or the singular act effect of great magnitude<sup>16</sup> .

An attack is systematic when it is carried with out pursuant to a preconceived policy or plan which means with some kind of planning and organization<sup>17</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 crime of great magnitude was 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 Nuremberg tribunals 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>18</sup>. Consequently ,they may be committed in pursuance of a policy of either a state or a non – state actor. Such policy need not to be conceived at the highest level of the state organ, formalized, or expressed , or precisely announced . It can also be denied by the relevant authorities or apparatus of that policy<sup>19</sup>. It can be inferred from the manner in which the acts take 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 programme as evidenced in writings by 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 institution and its programme ; modifications 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 scope 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>20</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 acts 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>21</sup>.

As a conclusion an act could be qualified as crimes against humanity when it is related to a widespread or systematic attack . The act can be part of either one of them and need not be a part of both<sup>22</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>23</sup>.

## (2) 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>24</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 de 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 where a head of a family does not lose his civilian status when he is compelled to use arms to defend his family<sup>25</sup>. A trial chamber observes that there is no reason for

protecting only civilians but not combatants under the rules against crimes against humanity , particularly rules proscribing persecution<sup>26</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>27</sup> .

Moreover , the ' 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>28</sup> . Last but not least the word 'any ' before ' civilian population makes it clear that 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>29</sup> .

#### **B / The mental element**

Crimes against humanity like other crimes falling in the jurisdiction of the the ad hoc tribunals require a mental element . It 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 and pursuant to a policy or plan<sup>30</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>31</sup> . Otherwise he would have the mens rea for an ordinary crime .

Proving knowledge is an easier task because it is not necessary to prove that the accused must know exactly what will happen to the victims<sup>32</sup> . It is not also not necessary to prove that he knows the criminal policy or plan; it suffices that he deliberately takes a risk that the crime might be committed , even with the hope that the risk would not lead to any damage or harm<sup>33</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 crimes in

question , his responsibilities in the political or military hierarchy , the direct or indirect relationship between the military hierarchy and the political hierarchy , the widespreadness and seriousness of the acts committed, and the nature of the crimes committed as well as their notoriety<sup>34</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>35</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 mitigation 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 acts fits into the pattern of crimes against humanity as described above<sup>36</sup>.

### Conclusions

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

- Crimes against humanity can be committed in armed conflict as well as in peacetime.

- Crimes against humanity must be related to whether a widespread attack or a systematic attack but not both.

- Crimes against humanity must be directed against a civilian population . A civilian may be not only an ordinary person but a combatant who is hors de combat.

- Crimes against humanity need to be committed in pursuant of a policy of either a state or non – state actor such as political entities without international recognition , terrorist group or even criminal gangs

- Crimes against humanity does not require multiplicity of acts, perpetrators and victims. So one single act committed by a single perpetrator against a single victim or a limited number of victims must be

qualified as a crime against humanity.

- Crimes against humanity need the knowledge of the perpetrator that his act or acts is or are part of a widespread or systematic attack on a civilian population and pursuant to a policy or plan.

- Crimes against humanity offer more protection to human by qualifying and prosecuting mass violation of human rights by government or rebellions groups as crimes against humanity.

### References

<sup>1</sup> The expression ‘humanity ‘, ‘laws of humanity ‘ or ‘dictates of humanity‘ were used for the first time in the preamble of the 1907 of the Hague convention IV respecting the laws and the customs of war on land . Paragraph 2of 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 , that 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 the 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 siecle de droit international humanitaire , Bruxelles , Bruylant , 2001 . Kriangsak. Kittichaisareé, International Criminal Law , Oxford , Oxford university press , 2005 .

<sup>2</sup> Article 6 of the statue of the military tribunal of Nuremberg . Article 5 of the statue of the military tribunal of Tokyo enumerated the same acts as enumerated in Nuremberg statue except the omission of the religious grounds of persecution.

<sup>3</sup> United Nations General Assembly resolution95 of 11/12/1946 on the affirmation of the. principles of international law recognized by the charter of the Nuremberg tribunal .

<sup>4</sup> Principle VI of the principles of international law recognized by the charter of the Nuremberg tribunal .

<sup>5</sup> Article 5 of the ICTY statue stipulates that the ICTY shall have the power to prosecute persons responsible for the following crimes :murder , extermination , enslavement , deportation , 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 statue 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>6</sup> Prosecutor V Zoran Kupreskic and others , ICTY , IT 95 – 16 T , Trial chamber II , 14/01/2000 , Para 545 . Prosecutor V Tihomir Blaskic , ICTY , IT 95 – 14 T , Trial chamber I , 03/03/2000 , Para 71 .

<sup>7</sup> Prosecutor V Dusko Tadic , ICTY , IT94 – 1 A , Appeal chamber, 15/7/1999, Para 249.

<sup>8</sup> Prosecutor V Tadic , opcit , Para 272. Prosecutor V Blaskic , opcit , para 66.

<sup>9</sup> Prosecutor V Tadic , opcit , para 251. Prosecutor V kupreskic , opcit , Para 573.

<sup>10</sup> Prosecutor V Tadic , opcit , para 271 .

<sup>11</sup> Prosecutor V Jean Paul Akayesu , ICTR , IT96 – 4 T , Trial chamber, 02/09/1998, Para 581 .

<sup>12</sup> Prosecutor V Kayishema and Obed Ruzindana , ICTR , IT ..... , .....chamber, ..... , Para 122 . Prosecutor V George Rutaganda , ICTR , IT96 – 3 , Trial chamber I , 06/12/1999 , para 68 .

<sup>13</sup> Prosecutor V Jean Kambanda , ICTR , IT 97 – 23s , Trial chamber, 04/09/1998, Para 39 – 40 . .

<sup>14</sup> Prosecutor V Blaskic , opcit , Para 201 .

<sup>15</sup> Prosecutor V Kayishema and Ruzindana , opcit , para 123 . Prosecutor V Tadic , opcit , Para 648 .

<sup>16</sup> Prosecutor V Blaskic , opcit , Para 206 .

<sup>17</sup> Prosecutor V Blaskic , opcit , Para 207 .

<sup>18</sup> Prosecutor V Tadic , opcit , para 648 .

<sup>19</sup> Prosecutor V kupreskic , opcit , para 573 .

<sup>20</sup> Prosecutor V Blaskic , opcit , Para 206 .

<sup>21</sup> Prosecutor V Kayishema and Ruzindana , opcit , Para 124 .

<sup>22</sup> Prosecutor V Tadic , opcit , para 648. Prosecutor V Akayesu , opcit , Para 579.

<sup>23</sup> Prosecutor V Tadic , ibid , para 649 . Prosecutor V Blaskic , opcit , Para 206.

<sup>24</sup> Prosecutor V kupreskic , opcit , Para 586 .

<sup>25</sup> Prosecutor V Tadic , opcit , Para 636 - 643. Prosecutor V Akayesu , opcit , Para 574 – 582 . Prosecutor V Rutaganda , opcit , Para 70 . Prosecutor V Prosecutor V Blaskic , opcit , Para 208 .

<sup>26</sup> Prosecutor V kupreskic , opcit , Para 547 .

<sup>27</sup> Prosecutor V Blaskic , opcit , Para 214 .

<sup>28</sup> Prosecutor V Kayishema and Ruzindana , opcit , Para 128 . Prosecutor V Rutaganda , opcit , para 70 . Prosecutor V kupreskic , opcit , Para 549 . Prosecutor V Blaskic , opcit , Para 211 .

<sup>29</sup> Prosecutor V Tadic , ibid , Para 635 .

<sup>30</sup> Prosecutor V Kayishema and Ruzindana , opcit , Para 133 . Prosecutor V Rutaganda , opcit , Para 69 . Prosecutor V kupreskic , opcit , Para 556 .

<sup>31</sup> Prosecutor V Blaskic , opcit , Para 244 .

<sup>32</sup> Prosecutor V Tadic , opcit , Para 657 – 659 .

<sup>33</sup> Prosecutor V Blaskic , opcit , Para 251 .

<sup>34</sup> Prosecutor V Blaskic , opcit , Para 259 .

<sup>35</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 with 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 a general , 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>36</sup> Prosecutor V Tadic , ibid , para208.