Hakemli Makale

THE ORIGINS OF CRIMES AGAINST HUMANITY: FROM NUREMBERG TO ROME*

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ABSTRACT

Although crimes against humanity is as old as the history of humanity, it was not until the adoption of the Nuremberg Charter of 1945 that the acts considered as a crime against humanity were formally included in the category of international crimes and were defined in order to enable prosecutions and convictions. The world has witnessed bloody attacks directed not only to armed forces of the parties of armed conflicts, but also civilians particularly during World Wars I and II. Despite the fact that the Second World War broke out shortly afterwards of the First World War considered as "the war to end all wars", international community promised: 'never again', and has taken action to prosecute and try the perpetrators of international crimes.

In this study, the pre- Nuremberg foundations of definitions of crimes against humanity, the Charters of the Nuremberg and Tokyo International Military Tribunal, the Statutes of the International Criminal Tribunal for the former Yugoslavia, Rwanda and Rome setting a ground for the establishment of tribunals to prosecute the perpetrators of international crimes, and the work of International Law Commission will be examined to reveal the evolution of crimes against humanity in international law.

Keywords: Crimes Against Humanity, International Crimes, Rome Statute, International Law Commission.

ÖZET

İnsanlığa karşı suçların işlenmesi neredeyse insanlık tarihi kadar eskiye dayansa da, bu kategoriye giren eylemlerin uluslararası suçlar arasına dahil edilmesi Nürnberg Statüsü'ne kadar mümkün olmamıştır. İnsanlık, bilhassa Birinci ve İkinci Dünya Savaşları boyunca kan donduran vahşetlere, insan hakları ve insancıl hukuk ihlallerine şahitlik etmiştir. "Bütün savaşları bitirecek olan savaş" olarak görülen Birinci Dünya Savaşı'ndan kısa bir süre sonra daha büyük ölçekli bir savaşın meydana gelmesi bu iyimser kanının gerçeklikle bağdaşır bir yanının olmadığının en göze çarpan göstergelerinden biri olarak karşımızda dursa da, uluslararası toplum "Bir Daha Asla" sloganıyla, suç işleyenlerin yargılanması amacıyla harekete geçmiştir.

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Bu çalışmada, insanlığa karşı suçların tanımlandığı ilk uluslararası metinler, bu suç kategorisine giren eylemleri gerçekleştirenlerin yargılanması maksadıyla mahkemeler kurulmasına zemin hazırlayan Nürnberg, Tokyo, Eski Yugoslavya, Ruanda ve Roma Statüleri ile Uluslararası Hukuk Komisyonu'nun çalışmaları incelenerek insanlığa karşı suçların uluslararası hukuktaki gelişim serüveni ortaya konulmaya çalışılacaktır.

Anahtar Kelimeler: İnsanlığa Karşı Suçlar, Uluslararası Suçlar, Roma Statüsü, Uluslararası Hukuk Komisyonu.

INTRODUCTION

The world has witnessed horrific human rights and humanitarian law violations, particularly during World Wars I and II. Although it was thought that the First World War was "the war to end all wars",[1] another war of even greater proportions broke out shortly afterwards. Therefore, the international community promised: 'never again'. The maintenance of global peace and security has been the principal aim of the world community after World Wars. In this regard, In this regard, alongside international organisations dedicated to maintain international peace and security, such as the United Nations (UN)[2] and the World Peace Council,[3] and international instruments adopted to prevent and punish the commission of serious crimes like the 1948 Convention for the Prevention and Punishment of the Crime of Genocide,[4] international tribunals have been set up to bring persons responsible for the atrocities to justice to account for the commission of such crimes.

The first attempt to prosecute the perpetrators of international crimes has been the establishment of the Nuremberg International Military Tribunal (Nuremberg IMT)[5] and the International Military Tribunal for the Far East (Tokyo IMT) both invested with power to try and punish war criminals responsible for the commission of crimes against peace, war crimes and crimes against humanity.[6] These tribunals were criticised to apply retroactive law as what constituted a crime against humanity or a crime against peace was unknown at the time of the commission of many of the crimes until the adoption of the Charter of the International Military Tribunal where these concepts were defined in a technical sense for the first time. However, a link between the war (World War II) and crimes against humanity was required by both of the IMT Charters. Following the recognition of 'crimes against humanity' as a category of international crime, the International Law Commission (ILC) adopted three draft codes in 1954, 1991 and 1996, which made significant contributions to the evolution of the definition of crimes against humanity. These developments include the elimination of a connection with an armed conflict, the introduction of the requirement of the commission of the crime in a systematic manner or on a large scale, and the expansion of the list of acts constituting crimes against humanity.

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1 Bassiouni, M. C., 2003. *The Permanent International Criminal Court*. In: Lattimer, M., Sands, P., eds., *Justice for Crimes against Humanity.* Oxford: Hart Publishing, 2003, p. 173

2 United Nations, 1945

3 World Peace Council, 1950

4 Convention of the Prevention and Punishment of the Crime of Genocide, 1948

5 International Military Tribunal, 1945

6 International Military Tribunal for the Far East, 1946

Nevertheless, "the hope of 'never again' became the reality of again and again".[7] In the 1990s, the occurrence of inter-ethnic Yugoslav wars where thousands of civilians were killed resulted in the breakup of Socialist Federal Republic of Yugoslavia and the emergence of lots of people whose rights were violated.[8] In order to prosecute war crimes that took place during the Yugoslav wars which fought from 1991 to 1999 and to try their perpetrators, the International Criminal Tribunal for the former Yugoslavia (ICTY) was created by the UN in 1993. In 1994, it was Rwanda struggling with human rights violations, and therefore, the UN Security Council (UNSC) took action this time for Rwanda pursuant to Chapter VII of the UN Charter and set up the International Criminal Tribunal for Rwanda (ICTR). Following the establishment of the two *ad hoc* tribunals, the UN created the Special Panels for East Timor and assisted the creation of the Extraordinary Chambers in[9] the Courts of Cambodia[10] and the Special Court for Sierra Leone (SCSL)[11] upon the request of the Governments of Cambodia and Sierra Leone.

Finally, in 2002, the International Criminal Court (ICC), which is the world's first permanent criminal court for the prosecution of individuals, came into existence to prosecute and try the perpetrators of the most serious international crimes, including crimes against humanity. It was established pursuant to the Rome Statute[12] adopted in the Rome Conference on 17 July 1998. The Statute provides more elaborate definitions for the crimes within the jurisdiction of the Court than the previous instruments. Particularly, in terms of crimes against humanity, the Statute not only does represent a codification but also reflects the progressive evolution of this crime in international law under Article 7. The express elimination of the nexus requirement and the inclusion of *mens rea* of crimes against humanity in the provision are some features of the Statute.

This article addresses the evolution of the specific international crime of crimes against humanity, as it has emerged from over-arching humanitarian principles, the efforts of the international community to define such crimes and the developments in the area of this category of crime throughout the 20th century. It will do so by considering the origins and the definition of crimes against humanity. In this context, the international instruments, in particular, crimes

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7 Chesterman. S., Never Again… and Again: Law, Order and the gender of War Crimes in Bosnia and Beyond. *Yale Journal of International Law,* 22, 1997, p. 316

8 Pupavac, V., *Disputes over War Casualties in former Yugoslavia*. [Online]. (s.l.): Radical Statistics. Available at: **http://www.radstats.org.uk/no069/article3.htm**. [Accessed: 31.08.2014], n.d., p. 1

9 Special Panels for East Timor, 2000

10 Extraordinary Chambers in the Courts of Cambodia, 1997

11 Special Court for Sierra Leone, 2002

12 The Rome Statute of the International Criminal Court, 1998

against humanity provisions, which have been developed to deal with the term 'crimes against humanity', and which have helped to develop this crime as a core concept within the category of international crimes, will be examined.

1.1. The Pre- Nuremberg Foundations of Definitions of Crimes against Humanity

The idea of prosecuting crimes against humanity is not an invention of the post-World War II Nuremberg and Tokyo Charters. Indeed, the legality of war itself and the way in which wars were fought had been debated by well-known scholars such as Plato and Grotius since ancient days.[13] Despite the fact that crimes against humanity have been committed against civilians since the dawn of time, the legal notion underlying their criminalisation has evolved only recently.[14] Undoubtedly, efforts, such as the trial, conviction and execution of Conradin von Hohenstaufen for initiating an unjust war in Naples in 1268 and the conviction of Peter von Hagenbach for committing crimes against 'the Laws of God and man' by an international tribunal in 1974, provide good historical precedents for calling persons to account for violations of natural human rights long before the Nuremberg and Tokyo IMTs.[15] However, the first international attempt to introduce laws against inhumane acts was made via the 1899 Hague Convention II[16] and the similar 1907 Hague Convention IV[17], both Respecting the Laws and Customs of War on Land at the beginning of the 20th century.[18] The Preamble of both instruments contained the 'Martens Clause'. Hague Convention phrases as follows: "…the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".[19] Nevertheless, no

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13 Ferencz, B.,, *From Nuremberg to Rome: A Personal Account*. In: Lattimer, M., Sands, P., eds., *Justice for Crimes against Humanity*. Oxford: Hart Publishing, 2003, p. 31

14 Cerone, J., The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes against Humanity- The Evolution of the Nexus Requirement, *New England Journal of International Law Comparative Law*, 14 (2), 2008, p. 191

15 Bantekas. I., Nash. S. and Mackarel. M., *International Criminal Law*. New York: Cavendish, 2001, p. 69

16 Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1899

17 Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1907

18 Than, C. and Shorts, E., *International Criminal and Human Rights*. London: Sweet and Maxwell, 2003, p. 87

19 Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1907, para.8

intention was yet indicated to establish norms creating a separate crime from war crimes, which latter were prosecuted domestically in any event.

The term 'crimes against humanity' was first propounded, albeit in a non-technical sense, in the 1915 Joint Declaration of the Governments of France, Great Britain and Russia[20] describing as "crimes against humanity and civilization" and the alleged massacres of the Armenian people by the Ottoman Empire.[21] After World War I, there was little in the way of 'international crime' in existence, yet it was hoped that the scope of international crime could be developed so as to encompass inhumane treatment against civilians and a tribunal to prosecute such crimes was recommended.[22] In this regard, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, established by the victorious Allied governments at the Preliminary Peace Conference of Paris in 1919 to examine the attribution of responsibility for the First World War, produced a report in which it was stated that "[a]ll persons belonging to 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".[23] The majority conclusion of the Commission was that the Central powers had carried on the war by illegitimate means in violation of "the elementary laws of humanity"[24] as well as in violation of the established laws and customs of war. Nevertheless, the Commission majority had to revise in their final sessions their recommendations, which envisaged individual prosecutions for violations committed against *civilian populations,* upon the objection of the American representatives. The US delegation objected to the addition of the phrase 'the laws of humanity' to the jurisdiction of the envisaged *ad hoc* tribunal on grounds that the law to be applied was uncertain, and that there was no universal standard of humanity.[25] Therefore, the 1919 Versailles Treaty stipulated criminal prosecution only for persons accused of having committed acts contrary to the laws and customs of war.[26]

As can be seen, developing offences against the laws of war remained the primary concern of the international community rather than dealing with new

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20 Joint Declaration of the Governments of France, Great Britain and Russia, 1915

21 Kittichaisaree, K., *International Criminal Law*. Oxford: Oxford University Press, 2001, p. 85

22 Than, C. and Shorts, E., *International Criminal and Human Rights*. London: Sweet and Maxwell, 2003, p. 88

23 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties Annex II: Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, *The American Journal of International Law*, 14 (1/2), 1920, p. 117 (emphasis added),

24 Ibid, p. 115

25 Ibid, pp. 127-151

26 The Treaty of Versailles, 1919, Art. 228

crimes until the Second World War. Moreover, it was not until 1945 that offences against the laws of war and those against inhumane acts against civilians would be prosecuted as separate types of crime. [27]

1.2. Formulation of International Crimes against Humanity in International Instruments

1.2.1. The Charters of the Nuremberg and Far East International Military Tribunals

After acknowledging the commission of atrocious acts during World War II, the need to make a distinction between violations of war and inhumane acts against civilians (particularly the nationals of the fascist forces and of the lands they had conquered) was clear. The international prohibition of crimes against humanity was introduced and the legal definition of this crime was authoritatively articulated for the first time by the adoption of the Charter of the IMT (Nuremberg Charter) annexed to the London Agreement in 1945.[28] Thus, the Nuremberg IMT was the first international tribunal vested with power to prosecute crimes against humanity. However, crimes against humanity in general have since been elaborated and developed outside the treaty process as a product of customary international law.[29] In contrast, the 1948 Genocide Convention arguably constitutes the most important treaty in international criminal law to address massive human rights violations today.[30] 'Genocide' was accepted after World War II as a new and specific type of crime against humanity in which category it was included in the Nuremberg Principles by the ILC.[31] Therefore, unlike the adoption of the 1948 Genocide Convention, or codification of 'grave breaches' in the four 1949 Geneva Conventions and war crimes in their Additional Protocols of 1977,[32] the international community has not adopted a comprehensive and stand- alone treaty devoted to preventing and punishing crimes against humanity. On the one hand, this may be viewed as disappointing, as it has made the prosecution of crimes against humanity more

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27 Than, C. and Shorts, E., *International Criminal and Human Rights*. London: Sweet and Maxwell, 2003, p. 88

28 Cerone, 2008, p. 191

29 Badar, M. E., 2004. From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes against Humanity, *San Diego International Law Journal*, 5, 2004, p. 75

30 Convention of the Prevention and Punishment of the Crime of Genocide, 1948

31 Principles of International Law Recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 1950; Ratner, S. N., 1998. The Genocide Convention after fifty Years: Contemporary Strategies for Combating a Crime against Humanity. *ASIL Proceedings*, 92, 1998, p. 2

32 Additional Protocols I, II to the 12 August 1949 Geneva Conventions, 1979

difficult in both domestic and international courts,[33] yet on the other hand, it could equally be argued that crimes against humanity are more flexible as a result. Furthermore, as Jalloh correctly points out, the absence of an international instrument addressing crimes against humanity directly has led to the emergence of various definitions and elements for such crimes in different domestic and international contexts.[34]

Following their victory in World War II, the four major Allied powers, the United States, Great Britain, France and the Soviet Union, decided to establish IMTs in Nuremberg and Tokyo to prosecute and try enemy war criminals, including a number of high-ranking civilian officials, alongside high-ranking military personnel.[35] Specifically for the Nuremberg IMT, they ratified the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, known as London Agreement, on 8 August 1945.[36] The Charter for the Far East was similar.[37]

One of the most remarkable aspects of the Nuremberg Charter was the inclusion of the category of crimes against humanity within the jurisdiction of the Tribunal. This was the first time that such crimes had appeared in positive international law, which made an enormous contribution to the future development of international criminal law in that the new type of crime was defined, its elements were enumerated, and its perpetration entailed rules for individual criminal responsibility.[38] Although the 1899 Hague Convention II[39] and the 1907 Hague Convention IV,[40] which had codified certain laws of war, were drafted to provide inhabitants of militarily occupied states with some protection against the hostilities, atrocities perpetrated against a state's own nationals or its allies were not taken into account in these instruments – a point largely attributable to the inviolability of state sovereignty. The absence of an international rule protecting inhabitants [a category broader than 'citizens' or 'nationals'] of a state from its actions led to inhumane acts committed against

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33 Sadat, L. N., Crimes against Humanity in the Modern Age, *The American Journal of International Law*, 107, 2013, p. 338,

34 Jalloh, C. C., What Makes a Crime against Humanity a Crime against Humanity? *American University International Law Review*, 28 (2), 2013, p.383

35 Bantekas, Nash and Mackarel, 2001, p. 69

36 Badar, 2004, p. 80

37 Charter of the International Military Tribunal for the Far East, 1946

38 Bantekas, Nash and Mackarel, 2001, p. 71

39 Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1899

40 Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 1907

them, such as the Holocaust of the Jews. Bassiouni views the inclusion of crimes against humanity in the Nuremberg Charter as a "jurisdictional extension" of the prohibition of war crimes.[41] According to Guzman, the inclusion of crimes against humanity in the Nuremberg Charter was a revolutionary act as it eroded the time-honoured principle of non-intervention in a civilised state's internal affairs.[42]

Article 6 of the Nuremberg Charter, entitled "Jurisdiction and General Principles", provided the Nuremberg IMT with the power to try and punish persons who committed crimes against peace, war crimes and crimes against humanity, "acting in the interests of the European Axis countries, whether as individuals or as members of organizations".[43] The crimes against humanity over which the Nuremberg IMT had jurisdiction were defined in Article 6(c) as follows:

[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[44]

Before the Nuremberg IMT, however, the legal basis for these crimes against humanity had never been made precise. This led to accusations of *ex post facto*, or 'instant' law.

Two categories of crimes against humanity were contained in Article 6 (c), as noted by the ILC:[45] inhumane acts called "murder type" and persecution on political, religious or racial grounds. Hwang propounded that "this categorization makes it clear that the ILC viewed the phrase 'on political, racial or religious grounds' as clarifying the bases of persecution, rather than imposing a requirement of a discriminatory motive for inhuman acts."[46] Nevertheless, it is worth noting that neither the content nor the scope of crimes against humanity, particularly the nexus between either war crimes or ordinary municipal crimes

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41 Bassiouni, M. C., "Crimes against Humanity": The Need for a Specialized Convention, *Colombia Journal of Transnational Law*, 31, 1994, p. 465

42 Guzman, M. M., The Road from Rome: Developing Law of Crimes against Humanity, *Human Rights Quarterly*, 22, 2000, p. 345

43 Charter of the International Military Tribunal, 1945, Art. 6

44 *Ibid.,* Art. 6 (c)

45 Report of the International Law Commission, UN GAOR, 5th Sess. at para. 120, U.N. Doc. A/1316, 1950

46 Hwang, P., 1998. Defining Crimes against Humanity in the Rome Statute of the International Criminal Court, *Fordham International Law Journal*, 22, 1998, p.463

such as murder, torture, or rape and this crime or some key phrases such as "humanity" and "any civilian population", were clarified by the Nuremberg IMT, which caused criticism.[47] Indeed, it seems obvious that the nexus requirement restricted the prosecution of crimes against humanity at Nuremberg IMT to the crimes committed in the course of World War II. Therefore, the offences committed outside of an armed conflict were excluded from the jurisdiction of the Nuremberg IMT. Wexler also criticised the legacies of the IMT Judgment for construing the term "civilian population" and asked whether the members of an armed local resistance were excluded or not.[48] Another point of criticism is the issue of the conformity of Nuremberg Charter Article 6 (c) with the principle of *nullum crimen sine lege.* Most scholars agree that there was a consensus among the Allied states that crimes against humanity were rooted in general principles of law as well as of morality and thus did not give rise to an egregious breach of the legality principle.[49] Therefore, the Nuremberg Charter's jurisdiction is accepted as a significant substantive development in international law, albeit procedurally, this is perhaps more difficult to argue.

The Tokyo IMT established by the Charter of the IMT for the Far East (Tokyo Charter) did not bring any significant innovation regarding crimes against humanity, except the omission of religious grounds of persecution. Indeed, the Tokyo Charter under Article 5 (c) adopted almost the same definition of 'crimes against humanity' as the one enshrined in the Nuremberg Charter. Moreover, both the Nuremberg and Tokyo Charters included the requirement of a link between the offences enumerated respectively in Article 6 (c) and Article 5 (c) and either war crimes or crimes against peace, i.e., there had to be linkage to a war.[50] This connection with an armed conflict in international law was gradually dropped. First, the Statute of ICTR does not contain a nexus requirement. Subsequently, the Rome Statute eliminates the linkage.

Subsequent to the Nuremberg and Tokyo IMTs, the prosecution of crimes against humanity in the European Allies' respective zones of enemy occupation was taken a step further by Allied Control Council Law No. 10.[51] Article 2 (c) of Control Council Law No. 10 removed the requirement for a

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47 *Ibid.,* p. 460

48 Wexler, L. S., The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, *Colombia Journal of Transnational Law*, 32, 1994, p. 310

49 Bassiouni, 1994, pp. 468-469

50 *Ibid.,* p. 463; Charter of the International Military Tribunal, 1945, Art. 6 (c); Charter of the International Military Tribunal for the Far East, 1946, Art. 5 (c)

51 Control Council Law No. 10: Nuremberg Trials Final Report Appendix D: Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, 1945, Art. II (c)

linkage between war crimes and crimes against peace, by omitting the phrase 'in execution of or in connection with any crime within the jurisdiction of the Tribunal'. Crimes against humanity were also extended, by adding imprisonment, torture and rape to the list. Thus, crimes against humanity under Control Council Law No. 10 became a separate international crime category unrelated to the commission of war crimes or the commencement and conduct of war. This formulation was later utilised by the ILC in the 1950 "Nuremberg Principles".[52] However, the linkage between crimes against humanity and an armed conflict continued to be considered necessary by the international community until the adoption of the ICTR Statute in 1994[53] and the Rome Statute in 1998. Whether the linkage is considered to have been completely abandoned is yet to be definitively verified however.

1.2.2. Codification by the International Law Commission

A number of international instruments exist which clarify the definition of crimes against humanity, and which expand upon the Nuremberg legacy, such as the 1946 UN General Assembly (UNGA) Resolution 'Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg' IMT,[54] the 1948 Genocide Convention defining genocide as an international crime separate from the category of crimes against humanity,[55] the four Geneva Conventions of 1949 and their Additional Protocols of 1977,[56] the 1950 Codification of the Nuremberg Principles of the ILC, the 1973 Apartheid Convention,[57] and the 1984 Convention Against Torture.[58] All these instruments have been adopted since the 1945- 46 Nuremberg IMT and its Judgment. Among these instruments, the adoption of the Genocide Convention, as noted above, is perhaps the most important development as it differentiates genocide from the category of crimes against humanity by envisaging the requirement of the commission of the crimes enumerated in Article 2 of the Convention, such as killing members of the group or imposing measures intended to prevent births within a group, with the "*intent* to destroy, in whole or in part, a national,

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52 Bassiouni, 1994, p. 464

53 The Statute of the International Criminal Tribunal for Rwanda, 1994

54 UNGA Res. 95 (I), Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal, U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236, 1946

55 Convention of the Prevention and Punishment of the Crime of Genocide, 1948

56 Additional Protocols I, II to the 12 August 1949 Geneva Conventions, 1979

57 UNGA Res. 3068 (XXVIII)), International Convention on the Suppression and Punishment of the Crime of Apartheid, 1974

58 UNGA Res. 39/46, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

ethnical, racial or religious group."[59] Conversely, the widespread or systematic commission of the offence *with knowledge of the attack* is sufficient for the acceptance of the commission a crime against humanity.

Another remarkable post-Nuremberg development has been the creation of the ILC and its work.[60] The ILC[61], established by the UNGA as a permanent body for "the promotion of the progressive development of international law and its codification"[62] in 1947, drafted the 1954 Code of Offenses against the Peace and Security of Mankind[63] which was renamed in 1987 upon the request of the General Assembly[64] and the 1991 and 1996 Draft Codes of Crimes against the Peace and Security of Mankind.[65] Despite the non-binding nature of these documents in international law, the ILC has been shown to be an authoritative reference source by various tribunals[66] and UN negotiations.[67]

On the same day of the ILC's creation, the UNGA by resolution also entrusted the codification of the legal principles of international law recognised by the Nuremberg IMT Charter and Judgment to the ILC with another resolution.[68]**.** The ILC completed its work on the Nuremberg Principles in 1950. Crimes against humanity are formulated in Principle VI (c) as follows:

Murder, extermination, enslavement, deportation and other inhumane acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.[69]

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59 Guzman, 2000, p. 348; The Convention on the Prevention and Punishment of the Crime of Genocide, 1948, Art. 2 (emphasis added)

60 *Ibid.,* p. 349

61 UNGA Res. A/RES/174(II), Establishment of an International Law Commission, 1947

62 Statute of the International Law Commission, 1947, Art. 1

63 U.N. GAOR, Draft Code of Offences against the Peace and Security of Mankind, 9th Sess., Supp. No. 9, at 11, U.N. Doc. A/2693, 1954

64 UNGA Res. A/RES/42/151 Draft Code of Crimes against the Peace and Security of Mankind, 1987

65 U.N. GAOR*, Draft Code of Crimes against the Peace and Security of Mankind, in Report of the International Law Commission on the Work of Its Forty-Third Session,,* 46th Sess., Supp. No. 10, at 265, U.N. Doc. A/46/10, 1991; U.N. GAOR, Draft Code of Crimes against the Peace and Security of Mankind, 48th Sess., at 6-7, U.N. Doc. A/CN.4/L.532, 1996

66 *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, para. 655 (7 May 1997)

67 Guzman, 2000, p. 350

68 Formulation of the Principles Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, G.A. Res. 177 (II), U.N. GAOR, 2nd Sess., 123rd plen. mtg., at 111, U.N. Doc A/519 (1947)

69 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, 1950, Principle VI (c)

In contrast, the Nuremberg Charter under Article 6 (c) had included the phrase "before or during war" but this was omitted by the ILC due to the particular relevance of the Nuremberg phrasing to World War II. [70]

The 1954 Draft Code defined crimes against humanity in Article 2 section 11, and merged two types of crimes against humanity, inhumane acts and persecution, under the single category of "inhumane acts".[71] In addition, the discriminatory grounds indicated previously for 'persecution' were enlarged to encompass all other inhumane acts. Johnson criticised the Draft Code for mainly two reasons. He stated that the introduction of the discriminatory grounds for all inhumane acts enumerated in Article 2 necessitated to be shown that any of the acts were committed on "social, political, racial, religious or cultural grounds".[72] As he correctly pointed out, persecution was the only offence requiring such a connection before this amended version of VI (c) of the Nuremberg Principles.[73] Furthermore, the requirement of "acting at the instigation or with the toleration of such authorities"[74] complicated individual criminal responsibility as the existence of a policy connection became necessary in order for a person to be held criminally responsible for crimes against humanity.[75]

It was not until 1981 that the UNGA took action on the Draft Code and requested the ILC to resume its work.[76] In 1991, the ILC adopted another Draft Code which did not include crimes against humanity under a specific article. Instead, crimes against humanity were included in Draft Code Article 21, "Systematic or Mass Violation of Human Rights".[77] Bassiouni criticises the 1991 Draft Code due to its insufficient legal precision and definition of 'crimes against humanity', and its failure to cure the shortcomings of Article 6 (c) of the Nuremberg Charter, and to combine instruments developed since World War II

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70 Report of the International Law Commission, U.N. GAOR, 5th Sess., Supp. No. 12, at para. 123, U.N. Doc. A/1316, 1950

71 Draft Code of Offences against the Peace and Security of Mankind, U.N. GAOR, 9th Sess., Supp. No. 9, at 11, U.N. Doc. A/2693, 1954, Art. 2, sec. 11

72 *Ibid.,* Art. 2, sec. 11

73 Johnson, D. H. N., The Draft Code of Offences Against the Peace and Security of Mankind. *International & Comparative Law Quarterly*, 1955, p. 445

74 Draft Code of Offences against the Peace and Security of Mankind, U.N. GAOR, 9th Sess., Supp. No. 9, at 11, U.N. Doc. A/2693, 1954, Art. 2, sec. 11

75 Johnson, 1955, p. 465

76 Allain, J. and Jones, J. R. W. D., A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind. *European Journal of International Law*, 8, 1997, p. 100

77 Report of the International Law Commission, U.N. GAOR, 46th Sess., at 238, U.N. Doc. A/46/10, 1991

which touch upon crimes against humanity into a codification dedicated to all types of crimes against humanity.[78]

With regard to the 1996 Draft Code, although a shorter list of crimes was enumerated, crimes against humanity were separately dealt under Article 18.[79] Article 18 envisages two "general conditions" for an offence to reach the level of a crime against humanity which were not only new but also ambiguous.[80] The first condition was that the enumerated acts must be committed in a "systematic manner or on a large scale".[81] As for the second condition, crimes against humanity must be "instigated or directed by a Government or by any organization or group".[82] Although the 1954 Draft Code also required state instigation or tolerance of such authorities for the purpose of imputing individual criminal responsibility, a more active involvement of the relevant authorities was required by the 1996 Draft Code.[83] Moreover, apart from state authorities, crimes against humanity could now be instigated or directed by "any organisation or group".[84] Nevertheless, what would constitute such an 'organisation' or 'group' was not clarified.[85] The ILC confirmed that Article 18 did not require a connection with armed conflict, referencing the Genocide Convention, Control Council Law No.10, the Statutes of the ICTY and ICTR and the case law of the ICTY as authority.[86] However, it is worth noting that Article 18 of the 1996 Draft Code makes no reference to 'any civilian population' nor does the Commentary to the Draft Code offer an explanation as to why the phrase is not featured as an element of crimes against humanity.[87] According to Allain and Jones, recent jurisprudence may have justified the removal of the phrase.[88] In the *Vukovar* case,[89] the Trial Chamber referred to the

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78 Bassiouni, 1994, p. 484-486

79 Draft Code of Crimes against the Peace and Security of Mankind, U.N. GAOR. 48th Sess., at 6-7, U.N. Doc. A/CN.4/L.532, 1996, Art. 18

80 Allain and Jones, 1997, p. 113; Hwang, 1998, pp. 466-467; Badar, 2004, pp. 86-87

81 Report of the International Law Commission on the Work of Its 48th Session, Draft Code of Offences against the Peace and Security of Mankind with Commentaries. *Yearbook of the International Law Commission,* 2, 1996, pp. 47-50

82 *Ibid.,* pp. 47-50

83 Hwang, 1998, p. 467

84 Draft Code of Crimes against the Peace and Security of Mankind, U.N. GAOR. 48th Sess., at 6-7, U.N. Doc. A/CN.4/L.532, 1996, Art. 18

85 Allain and Jones, 1997, p. 113

86 Report of the International Law Commission on the Work of Its 48th Session, 1996, pp. 47-50

87 Hwang, 1998, p. 468

88 Allain and Jones, 1997, pp. 112-113

89 Prosecutor v. Mile Mrksic, Miroslav Radic, and Veselin SIjivancanin, Case No. IT-95-13-R61, para. 29 (3 April 1996)

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 stating that "it seems obvious that [ICTY] Article 5 [crimes against humanity] applies first and foremost to civilians, meaning people who are not combatants".[90]

1.2.3. The Statutes of the International Criminal Tribunal for the former Yugoslavia, and for Rwanda

Following the Nuremberg and Tokyo IMTs, persons accused of serious violations of international humanitarian law were prosecuted in several countries by in pursuing domestic prosecutions. To illustrate, thousands of investigations and prosecutions had been undertaken by Germany following the work of the Nuremberg IMT. By extension, war crimes investigations concerning Nazi collaborators emigrating to other countries like the United States of America, Canada, Australia, England and Scotland in the aftermath of World War II were conducted during the 1980s and 1990s.[91]

Apart from the above mentioned domestic prosecutions in pursuit of war criminals, the creation of the ICTY[92], and ICTR[93] by the UNSC acting under Chapter VII constitutes perhaps the most notable and important development to end impunity for such egregious crimes. Article 5 of the ICTY Statute defining crimes against humanity stipulates that:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.[94]

It can be observed that Article 5 of the ICTY Statute departs, in some respects, from customary international law. First of all, although the Statute continues to require a nexus with an armed conflict, it extends the scope of the phrase 'armed conflict' by adding the expression 'whether international or

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[90] UNSC Final Report of the Commission of Experts Established pursuant to UNSC Resolution 780, S/1994/674, 1994, para. 78

[91] Blewit, G., *The International Criminal Tribunals for the Former Yugoslavia and Rwanda.* In: Lattimer, M., Sands, P., eds., *Justice for Crimes against Humanity*. Oxford: Hart Publishing, 2003, p. 145

[92] UNSC Resolution 827 on Establishing an International Tribunal for the former Yugoslavia, S/RES/827,1993

[93] UNSC Resolution 955 on Establishment of an International Tribunal and Adoption of the Statute of the Tribunal, 1994

[94] The Statute of the International Criminal Tribunal for the former Yugoslavia, 1993, Art. 5

internal in character' to the provision. In *Prosecutor v Tadic* case, where Dusko Tadic, who was accused of committing various atrocities against Bosnian Muslims on the territory of Bosnia and Herzegovina in 1992, was convicted of crimes against humanity, grave breaches of the Geneva Conventions and breaches of the customs of war by the ICTY Appeals Chamber, which stated that Article 5 of the Statute requires the existence of an armed conflict. Therefore, the Chamber agreed with the Prosecution on that the requirement of an armed conflict is not a substantive element of crimes against humanity; rather it is a jurisdictional element.[95] The interpretation of the Appeals Chamber was reiterated in the *Krnolejac* case. Secondly, the Statute of the ICTY only envisages 'any civilian population' as relevant victims of crimes against humanity, which omits combatants. Finally, Article 5 does not explicitly require that crimes against humanity be committed as 'part of a widespread or systematic attack' despite the Report of the United Nations Secretary- General to the Security Council[96] envisaging this requirement.[97]

The ICTR, the first international court of law created to prosecute high-ranking individuals allegedly responsible for the Rwandan Genocide,[98] has made revolutionary changes in the jurisprudential progress of international criminal law. Among these, the evolution of the concept of crimes against humanity and the complete omission of a required nexus with an armed conflict have been its most important contributions.[99] The establishment of the ICTR was similarly revolutionary. The UNSC created a tribunal in response to atrocities committed in an *internal* conflict for the first time. In fact, the UNSC had created the ICTY a year earlier, but some of the constituent Republics of the former Yugoslavia had become independent by that time, rendering the conflict international.[100] Article 3 of the ICTR Statute is as follows:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h)

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95 *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 249 (15 July 1999)

96 UNSC Provisional Verbatim Record of the 3217th Meetings, S/PV.3217, 1993, p. 16

97 Cassese, A., *Crimes against Humanity*. In: Cassese, A., Gaeta, P. and Jones, J. R. W. D., eds., *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, Oxford: Oxford University Press, 2002, p. 365

98 Scharf, M. P., Statute of the International Criminal Tribunal for Rwanda. *United Nations Audio-visual Library of International Law,* 2008, p. 1,

99 Cerone, 2008, p. 191

100 *Ibid.,* p. 195

persecutions on political, racial and religious grounds; (i) other inhumane acts.[101]

As can be seen, Article 3 of the ICTR Statute is similar to Article 5 of the ICTY Statute. First of all, the list of acts is identical, and is much longer than those provided for previously in Control Council Law No.10 or in international treaty rules; which contain identical list, is enumerated by both of the Statutes. Another point that both Statutes have in common is that they envisage "any civilian population" as victims of crimes this crime. Finally, they each deviate somewhat from customary international law, while their main difference with each other concerns the linkage to an armed conflict.[102] Although ICTR Article 3 contains the same crimes against humanity as those enshrined in ICTY Article 5, Article 3 does not mention the traditional requirement of a connection with an armed conflict in its text; thus, developing beyond existing customary international law. Moreover, Article 3 incorporates the requirement that the enumerated crimes are "*as part of a widespread or systematic attack* against any civilian population".[103] Furthermore, ICTR Article 3, unlike ICTY Article 5, requires a discriminatory intention for each of the acts enumerated in Article 3 on '*national*, political, *ethnic*, racial or religious grounds'; in contrast, the discriminatory intent required by the ICTY Statute and customary international law is on the basis of 'political, racial and religious grounds' only for the crime of persecution.[104]

Taking everything into account, it is beyond any shadow of doubt that the two *ad hoc* tribunals established in the former Yugoslavia and Rwanda have met a significant need to bring mass rapists and perpetrators of genocide to justice.[105] However, it is also a reality that the UNSC does not exercise the authority given by the Charter of the UN under Chapter VII in every necessary case. To be more precise, the Chapter VII enforcement power is utilised politically, which fact often entails politics serving the interests of powerful states. For instance**,** a draft resolution[106] calling for the 'situation' in Syria to be referred to the ICC has been vetoed by Russia and China recently despite the support given for the resolution by the other three permanent members of the UNSC and 65 other countries.[107] As seen, the Security Council veto provided by

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[101] The Statute of the International Criminal Tribunal for Rwanda, 1994, Art. 3

[102] Cassese, 2002, p. 365

[103] The Statute of the International Criminal Tribunal for Rwanda, 1994, Art. 3 (emphasis added)

[104] Cassese, 2002, pp. 365-366

[105] Ferencz, 2003, p. 42

[106] UNSC Draft Resolution on the Situation in the Middle East (Syria), S/2014/348, 2014

[107] Black, 2014, p. 1

the UN Charter to the five permanent members of the Security Council enables an unequal approach to be taken in regard to equivalent events in the UN.

1.2.4. The Rome Statute of the International Criminal Court

A crucial step was taken in the area of international criminal justice with the creation of the ICC, which is the only permanent international criminal judicial body in the world having jurisdiction to prosecute individuals. Despite the failure of the international community in either to address properly or in a timely manner numerous situations in which international crimes have been committed or to respond to the commission of such crimes by creating *ad hoc* tribunals, the fact that *ad hoc* responses raise legitimacy concerns cannot be denied.[108]

The Rome Statute of the ICC constitutes the most recent and comprehensive international instrument in the context of the prosecution and punishment of "the most serious crimes of concern to the international community as a whole".[109] 'Crimes against humanity', initially enumerated in Article 5 of the Rome Statute as one of the four crimes within the jurisdiction of the ICC, is dealt with comprehensively under Article 7 of the Statute which, as Ambos correctly expressed, "… represents both a 'codification' and a 'progressive development' of international law.[110] The Statute not only does enumerate individual offences which constitute crimes against humanity but also it clarifies the general requirements of the crime category. Rome Statute Article 7 provides as follows:

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other

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[108] Horovitz, S., Noam, G. and Shany Y., *The International Criminal Court.* In: Shany, Y., *Assessing the Effectiveness of International Courts.* New York: Oxford University Press, 2011, p. 223

[109] The Rome Statute of the International Criminal Court, 1998, Art. 5

[110] Ambos, K., *Crimes against Humanity and the International Criminal Court*. In: Sadat, L. N., ed., *Forging a Convention for Crimes against Humanity*. New York: Cambridge University Press, 2011, p. 280

grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[111]

It can be observed that Article 7 consists of two main parts: the acts that constitute crimes against humanity and pertinent aspects of these acts. The phrase 'a widespread or systematic attack directed against any civilian population, with knowledge of the attack' is the jurisdictional element which places this crime category within international crimes. The specific crimes listed in Article 7 (a) - (k) are widely accepted as crimes against humanity when they satisfy their own pertinent aspects.

As is seen, in order to be accused of a crime against humanity, the perpetrator must be part of a widespread or systematic attack and this attack must be directed against a civilian population. According to the interpretations of the international tribunals made in various cases, such as the *Tadic* and the *Kunarac* cases, this requirement encompasses the following five elements, also adopted by the Rome Statute under Article 7.[112]

"1- There must be an attack.

2- The acts of the perpetrator must be part of the attack.

3- The attack must be directed against any civilian population.

4- The attack must be widespread or systematic.

5- The perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern."[113]

The 1998 Rome Statute differs from its *ad hoc* predecessors in terms of providing in its text an explanation for most concepts, namely, those of 'attack directed against any civilian population', 'extermination', 'enslavement', 'deportation or forcible transfer of population', 'torture', 'forced pregnancy', 'persecution', 'the crime of apartheid' and 'enforced disappearance of persons'.[114] Most importantly, the Rome Statute expressly eliminates the linkage

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[111] The Rome Statute of the International Criminal Court, 1998, Art. 7 (1)

[112] *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment (15 July 1999)**;** *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment, (12 June 2002)

[113] *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgment, para. 85 (12 June 2002)

[114] *Ibid.,* Art. 7 (2)

between crimes against humanity and armed conflict. Instead of a nexus with an armed conflict, it requires the commission of the offences "as part of a widespread or systematic attack directed against any civilian population, *with knowledge of the attack*".[115]

CONCLUSION

Although the concept of crimes against humanity is not new, the legal meaning of this crime category has evolved only recently. At the beginning of the 20th century, the term was used to condemn the Ottoman Empire, allegedly responsible for the massacres of the Armenian people, but it was deprived of legal content. The term was first defined in a legal context by the Nuremberg Charter which was subsequently followed by the Tokyo Charter, the ILC, the ICTY, ICTR and Rome Statutes. On the path to evolution, the elimination of the nexus with armed conflict paved the way for progress. While the Nuremberg and Tokyo Charters, and the ICTY Statute contain a link between crimes against humanity and an armed conflict, it has been observed that the traditional connection has gradually been broken. Despite the fact that the ICTY Statute requires this linkage, *internal* armed conflicts have been included, and therefore, the scope of armed conflict has been expanded. Subsequently, the nexus requirement was found 'obsolescent' by the ICTY and the view that "…there is no logical or legal basis for this requirement…" was promoted.[116] The linkage was broken by the ICTR and Rome Statutes.

When comparing the previous instruments, it can be observed that much progress has been made in the context of crimes against humanity by the Rome Statute which reflects the existing developments in international criminal law. Among these, the elimination of nexus with an armed conflict, the adoption of the knowledge standard to demonstrate the mental element, and the enlargement of the list of acts constituting crimes against humanity and of the discriminatory grounds required for persecution are some of the remarkable indicators of this progress.

This study has attempted to demonstrate the progressive evolution of crimes against humanity during the 20th century, the efforts of the world community to prosecute, try and punish the perpetrators, and the achievements and deficiencies of the international instruments defining this category of international crime.

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[115] *Ibid.,* Art. 7 (1) (emphasis added)

[116] *Prosecutor v. Tadic aka "Dule"*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (2 October 1995)

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