CHAPTER THIRTY-TWO

CRIMES AGAINST HUMANITY
IN CONTEMPORARY INTERNATIONAL LAW

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I. THE EVOLUTION OF CRIMES AGAINST HUMANITY

Crimes against humanity are directed against any civilian population and are forbidden either in time of peace or of armed conflict.¹ Their legal definition has its origins in the Charter of the International Military Tribunal of Nuremberg. According to Article 6(c) of the Charter, as amended by the Protocol of 6 October 1945, crimes against humanity were

namely murder, 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.²

The subsequent evolution of international law implied a radical change in the definition of crimes against humanity, with the gradual disappearance of the requirement of the act being committed during the war or in connection with any crime against peace or war crime. Several international treaty recognized the autonomy of crimes against humanity. The 1948 Convention on the prevention and punishment of the crime of genocide deserves a special mention. Although the crime of genocide was until then considered as the second category of crimes against humanity, this Convention no longer requires it being committed during an armed conflict.

Nor the subsequent evolution of the definition on the first category of crimes against humanity contained any substantive link with other crimes relating to a state of war. The first step in this direction was taken by the Control Council established by the four victorious Powers in

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¹ Report of the Secretary-General on the Statute of the International Criminal Tribunal for the former Yugoslavia (S/25704), para. 47.

order to administer Germany after World War II. The Control Council passed Law No. 10 for the Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity. It defined “crimes against humanity” as an open list of “atrocities and offences … whether or not in violation of the domestic laws of the country where perpetrated”\(^3\). This trend was consolidated by the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and by national case-law, mainly the *Eichmann*, *Barbie* and *Touvier* cases.\(^4\)

This trend was consecrated at the international level by the case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Although the ICTY Statute\(^5\) keeps on declaring that this Tribunal has jurisdiction “to prosecute persons responsible for [crimes against humanity] when committed in armed conflict, whether international or internal in character …”, the ICTY Appeals Chamber has concluded that “customary international law no longer requires any nexus between crimes against humanity and armed conflict, while Article 5 was intended to reintroduce this nexus only for the purposes of this Tribunal”.\(^6\)

The last step forward was represented by Article 3 of the ICTR Statute.\(^7\) On this occasion, the Security Council not only dissociated crimes against humanity from crimes against peace or war crimes, it also replaced the requirement of these crimes being “committed in armed conflict, whether international or internal in character” with the exigency of these crimes being “committed as part of a widespread or systematic attack against any civilian population”.\(^8\) This provision has influenced

\(^3\) In the *Einsatzgruppen* Case, 8–9 February 1948, Judgment, the Military Tribunal held that: “The International Military Tribunal, operating under the [Nuremberg] Charter, declared that the Charter’s provisions limited the Tribunal to consider only those crimes against humanity which were committed in execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law”, pp. 113–114.

\(^4\) All relevant national and international instruments and judgments on crimes against humanity are available at www.icc-cpi.int/legaltools, 29 May 2009.

\(^5\) SC Res. 827 (1993), 25 May 1993, established the ICTY.

\(^6\) ICTY, Decision of 2 October 2005 on the Defence Motion for Interlocutory Appeal on Jurisdiction on the *Tadic* Case, paras. 78, 140–141.

\(^7\) SC Res. 955 (1994), 8 November 1994, established the ICTR.

\(^8\) It must be noted that this provision goes on saying “on national, political, ethnic, racial or religious grounds”. However, as the ICTR held in its *Kajelijeli* case, 1 December 2003, Trial Judgment, para. 877: “This provision is jurisdictional in nature, limiting the