
**ASPECT OF CRIMES AGAINST HUMANITY AND
THE INTERNATIONAL CRIMINAL COURT**

DEAN EMERITUS PETER T. BURNS, Q.C.

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**International Centre for Criminal Law Reform
and Criminal Justice Policy**

1822 East Mall, Vancouver, BC CANADA V6T 1Z1

Tel: +1.604.822.9875 Fax: +1.604.822.9317

icclr@law.ubc.ca

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Dean Emeritus Peter T. Burns, Q.C.
Chair
International Centre for Criminal Law Reform and
Criminal Justice Policy
Vancouver, BC, Canada

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Peter Burns¹

1. INTRODUCTION

The development of modern international criminal law must be seen against the backdrop of the various conflicts of the late 19th and the 20th Centuries. Some of these conflicts were relatively narrow whereas others were engaged in on a massive scale. As a result, various attempts were made, usually in the aftermath of such a conflict, to codify rules of engagement in armed conflict and to define a set of core crimes that reflect behaviour that can never be tolerated in any conflict at all.

The most influential publicist on the topic of crimes against humanity, Cherif Bassiouni, has pointed out that in the popular mind the term crimes against humanity means anything atrocious committed on a large scale.² As we shall see, this general description is useful as a conceptual starting point but the modern law reveals crimes against humanity to be fairly specific and sometimes elusive.

In 1945 the Nuremberg Charter was entered into by the four major allied governments following on from an agreement in London two years earlier to prosecute and punish the major war

¹ Dean Emeritus, University of British Columbia; Chair, International Centre for Criminal Law Reform and Criminal Justice Policy, Vancouver, Canada.

² Crimes Against Humanity, in Crimes of War – The Book <http://www.crimesofwar.org/the-book/crimes-against-humanity.html>. His monumental work, *Crimes Against Humanity in International Criminal Law* (2d rev. ed., 1997), remains the gold standard on this subject. See the extensive review of Bassiouni's book by Ambos, (2003) 14 *Criminal Law Forum* 225.

criminals of the European Axis at the successful conclusion of the Second World War.³ The major war criminals would be charged and prosecuted before the Nuremberg Tribunal for, *inter alia*, crimes against humanity as defined in the Charter itself. This was the first occasion of such prosecutions and it marked the most significant step forward in the development of both international criminal law and an international criminal tribunal.

Prior to this, there had been discrete and unconnected references to conduct that offended principles of common humanity or which was in conflict with the laws of humanity. The First Hague Convention of 1899 on the laws and customs of war, as well as the Fourth Hague Convention of 1907,⁴ and the Commission created by the Allies after the First World War in 1919⁵ which produced a Report of the Commission on the Responsibilities of the Authors for War and on Enforcement of Penalties for Violations of Laws and Customs of War, are pointed at as progenitors of the crimes against humanity concept. But none of these defined a crime against humanity, nor did they generate prosecutions against possible offenders. It was not until Nuremberg that any such prosecutions ensued.

The Nuremberg Charter defined crimes against humanity to include "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, 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". Subsequently, subject to minor change this definition was adopted by Executive Order setting up the International Military Tribunal for

³ 8 UNTS 279; reprinted in (1945) AJIL (Supp.). For the history of the Nuremberg Tribunal see Bassiouni, *ibid.*, *Crimes Against Humanity in International Criminal Law*, Ch. 1.

⁴ The 1899 Hague Convention is reprinted in (1907) 1 AJIL (Supp.); and the 1907 Convention is reprinted in (1908) AJIL (Supp.).

⁵ (1920) 14 AJIL 95 (Supp.).

the Far East in Tokyo⁶ to prosecute major Japanese war criminals as well as tribunals set up under Control Council Law #10⁷ to try war criminals who were not deemed to be major in those parts of Europe occupied by the Allies. In applying the law relating to crimes against humanity, the Nuremberg Tribunal was forced to turn to custom to determine the international law on the subject. Given that there was virtually no state practice that could be referred to, this inevitably devolved on the opinion of jurists and the few instances of objection by certain states to the conduct of others. The Treaty of Versailles⁸ and the Treaty of Sevres,⁹ which provided for the prosecution of the German Kaiser and Turkish major war criminals respectively were never implemented in this respect.

2. MODERN DEVELOPMENTS

For almost 40 years, from the time of Nuremberg, the development of international law concerning crimes against humanity is marked by stasis. This is a reflection of the debilitating effects of the Cold War rather than an absence of conduct that would fall within the concept of crimes against humanity. Then, with the collapse of the Soviet Empire and the disintegration of Yugoslavia, everything was changed. In 1993, the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹⁰ was created by the Security Council of the United Nations and a similar tribunal was created by the same body in 1994 to deal with the aftermath of the Rwanda genocide (ICTR).¹¹

⁶ 19th Jan., 1946, TIAS 1589.

⁷ Official Gazette of the Control Council for Germany, No. 3, 31st January, 1946.

⁸ The terms of this treaty may be found in Friedman, *The Law of War, A Documentary History*, at 417, (1972).

⁹ This was the original peace treaty between the Allied Powers and Turkey on 20th August 1920; see 15 AJIL 179 (1921) (Supp.); and was replaced by the Treaty of Lausanne on 24th July, 1923, which deleted the prosecution of war criminal provision: 18 AJIL 1 (1924) (Supp.).

¹⁰ Created by S.C. Res. 808; see Annex to UN Doc. S/RES/808 (1993).

¹¹ Created by S.C. Res. 955; see Annex to UN Doc. S/RES/955 (1994).

The Rome Statute of the International Criminal Court (ICC), 1998,¹² includes within the jurisdiction of that tribunal crimes against humanity. Whereas the ICTY and ICTR had jurisdiction over crimes against humanity that mirrored, for the most part, the jurisdiction exercised by the Nuremberg Tribunal, the ICC, pursuant to Article 7 of the Rome Statute, has a much more specific definition, but one that goes beyond that of the ICTY or ICTR.

Undoubtedly, the ICC will rely very heavily on the decisions in jurisprudence developed by the ICTY and the ICTR.¹³ The two earlier tribunals developed their understanding of customary international law relating to crimes against humanity and have systematised a very extensive functional juridical framework within which prosecutions for these crimes operate. Given the overlap between so much of the content of crimes against humanity in the Rome Statute and that in the statutes creating the ICTY and ICTR, the decisions of the latter will undoubtedly be compelling on the decisions of the ICC, particularly when the ICC is applying customary international law to a case.

Turning now to Article 7 of the Rome Statute. It states that "1. 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;

¹² The Rome Statute creating the ICC was adopted by a Meeting of Plenipotentiaries on 17th July 1998, and the ICC itself came into being on 1st July 2002, upon the 60th ratification by a signatory state: ICC Statute, Art. 126.

¹³ Probably the best resource in this respect is the article by Mettraux, "Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", (2002) 43 Harv. L. Jnl 237.

- (d) Deportation or forcible transfer of populations;
- (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 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.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

The first thing to be noted is that a crime against humanity must be part of a "widespread or systematic attack".¹⁴ The attack can be disjunctive in the sense that it can be widespread or systematic or widespread *and* systematic. In *Blaskic*¹⁵ the ICTY concluded that the term "widespread" refers to the scale of the attack and the number of victims. It could relate to the broad magnitude of the results of the series of acts or may even relate to one act of extremely wide effect. In the same case it was held that the term "systematic" relates to the organized nature of the conduct concerned which will very often be evidenced by planning or organization by the accused.

It is clear too, and it has been so found by the ICTY, that the attack on any civilian population need not be part of an armed conflict. In *Kunarac*¹⁶ the ICTY held that an attack upon members of a civilian population who were not participating in hostilities satisfies the requirements of an

¹⁴ An attack would include, but is not confined to, acts of violence: *Kunarac et al.* Case No.'s IT-96-23-T, and IT-96-23/1-T, 2001 (ICTY Trial Chamber 11).

¹⁵ 122 ILR 1 (ICTY) Trial Chamber I, 2000).

¹⁶ *Supra*, note 14.

"attack" for the purposes of Article 5 of the ICTY statute. As Mettraux has pointed out,¹⁷ "an attack need not, however, be very large in scale. In the *Tadic* case, for example, the geographic area under consideration was 20 km in diameter; in the *Kunarac* case it was three relatively small municipalities of Eastern Bosnia; in *Rutaganda*, it was two prefectures; and, in the *Musema* case, it was two communes in the Kibuye Prefecture. On the other hand, the fact that there are many victims does not itself constitute a sufficient indication that a population is being attacked". The attack, which must be either widespread or systematic or both, must be primarily¹⁸ directed against a civilian population. At the time of the commission of the acts by the accused that form part of the attack on a civilian population, the accused must have knowledge of the attack.¹⁹ This is the mental element that must be established by the prosecution in addition to the *mens rea* of the underlying crime supporting the charge of crime against humanity.

In *Kunarac* the term population was held to mean people possessing some distinctive features that marked them as targets of the attack.²⁰ As Mettraux puts it, "the population must form a self-contained group of individuals, either geographically or as a result of other common features. A group of individuals randomly or fortuitously assembled – such as a crowd at a football game – could not be regarded as a "population" under this definition".²¹

¹⁷ *Supra*, note 14, at 250.

¹⁸ *Kunarac*, *supra*, note 15.

¹⁹ *Tadic*, Case No. IT-94-1 (Appeals Chamber, 1999).

²⁰ *Supra*, note 14. They can also belong to the group that the offenders belong to.

²¹ *Supra*, note 13, at 255. This definition of "population" may be too narrow. What if the football stadium audience was predominantly of a particular ethnic source and the attack was aimed at them? What functional difference does it make if the stadium audience is of mixed ethnicity and the attack was aimed at everyone in order to terrorise the public or to blackmail the government? If a low-yield nuclear device was directed at a stadium audience that had no common features other than an enjoyment of football and thousands were killed, such a narrow definition of "population" would preclude prosecution for a crime against humanity. Surely the purposes of Art. 7 are more effectively met if the term population is taken to mean nothing more than those who inhabit, in the sense of being there, a particular space at a particular time, namely at the time of the attack?

3. FEATURES OF SOME OF THE UNDERLYING CRIMES

Article 7 of the Statute of the ICC sets out the underlying crimes that can constitute crimes against humanity if they are committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack. Some of these underlying crimes are defined. They are extermination, enslavement, deportation or forcible transfer of population, torture, forced pregnancy, persecution, apartheid, and enforced disappearance. As well, the term "attack" contained in the Preamble to Article 7 is also defined to mean a "course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance to a state or organizational policy to commit such attack"

This reference to "state or organizational policy" introduces an extremely cryptic element. Mettraux takes the view that beyond the ICC Statute, i.e., at customary international law including the practice of the ICTY and ICTR, the existence of a policy or plan is merely one of the factors which a tribunal can take into account to conclude that an attack was directed upon a civilian population rather than against one or several members of such population, and to find that the attack was indeed systematic.²² But the ICC Statute appears to be quite clear. For prosecution under its statute an attack must involve the multiple commission of acts of a widespread or systematic nature directed at civilian population pursuant to or in furtherance of a state or organizational policy to commit such an attack.

Such policy can be express or implied. The truly opaque feature of this definition of attack is with reference to the term "organizational". To what entities does this "organizational policy"

²² *Ibid.*, at 272, citing *Kordic*, Case No. IT-95-14/2 (Trial Chamber, 2001).

refer? It can undoubtedly include state organs and will extend to para-military units of a state, organized rebel groups within a state, or even unorganized rebel groups so long as there is a sufficient core that develops such a policy for the group. But what of non-military but highly organized and armed groups within a state? If the mafia was to develop a policy designed to terrorize key elements in a community and in furtherance of this policy exploded bombs in railway stations and in airports that were clearly intended to injure and kill large groups of the civilian population, would those participating in the attacks be guilty of crimes against humanity? Would narco-terrorists in Columbia and Hells Angels in Canada be liable to prosecution for this crime if the other requirements were met? Would Asian and Mexican organized crime groups fall within the definition?²³

The answer to these threshold instances probably turns upon the mental element of the crime. Although civilians are often caught in the crossfire, the Hells Angels, whose primary purpose is profit from drug trafficking, prostitution, and extortion, do not normally direct their violence at a civilian population. The individuals concerned may be guilty of murder or some other crime, but probably not of a crime against humanity. Narco-terrorists and rebels, on the other hand, who often resort to violence against a civilian population in order to terrorize the population and extort concessions from a government would in all probability be guilty of a crime against humanity if all the other conditions are met.

Torture is defined in Article 7(2)(e) in such a way that it is wider than the definition recognized at customary international law, particularly if the definition in the Convention Against Torture is

²³ Could those participating in the sarin gas attack on the Tokyo subway in 1995 be liable to prosecution for the deaths of their victims? They were members of Aum Shinrikyo, a cult that was apparently attempting to hasten an apocalypse.

taken to be the definition by custom. The ICC definition is not constrained by the purpose of the torturer, nor does it require the torturer to be acting in pursuance of state policy or in the capacity of an agent of the state. So long as the torturer is implementing "organizational policy" with the knowledge that he or she is doing so in the course of a widespread or systematic attack against a civilian population, such torturer commits a crime against humanity.

Article 7 includes a number of sexual and gender related offences,²⁴ apartheid, and persecution as underlying crimes that will support a prosecution for a crime against humanity. The main difference between persecution and genocide is that persecution does not require an intent to destroy the group being persecuted and such group is not confined to those based upon nationality, ethnicity, race, or religion.

The International Criminal Court has a very limited range of international crimes over which it has jurisdiction. Crimes against humanity, genocide, war crimes and aggression are the very worst in the international calendar of crimes. They are responsible for the worst suffering that the innocent victims of political repression and armed conflict endure. The ICC has swept aside the traditional devices that protected those who perpetrated these crimes. There will now be individual responsibility regardless of the status of the perpetrator or participant in such crimes.²⁵ The traditional immunities will not apply to protect them. As well, no statute of limitation will apply to protect offenders.²⁶ The framers of the Rome Statute recognized the erosion of

²⁴ For an account of the ICTY's experience with such crimes, see McHenry, "Justice for Foca: The International Criminal Tribunal for Yugoslavia's Prosecution of Rape and Enslavement on Crimes Against Humanity", (2002) *Tulsa Jnl. Of Comp. & Int. Law* 183.

²⁵ ICC Statute, Arts. 27 and 28.

²⁶ *Ibid.*, Art. 29.

traditional state sovereignty in creating the ICC and introduced the device of "complementarity"²⁷ to ensure that the erosion is constrained and functionally justifiable.

Given the doctrine of complementarity it will be rare cases that are actually prosecuted before the ICC. They will usually emerge from a situation of armed conflict and then probably during the course of the settlement of such conflict. Indeed, given the protections built into the ICC Statute, designed to ensure that the process leading up to and of the prosecution itself cannot be abused, national sovereignty would appear to be well protected.²⁸

The list of underlying crimes set out in Article 7 of the ICC Statute are crimes that all modern states recognize, or constitute conduct prohibited at international law.²⁹ Their range should prove no obstacle to a modern and progressive super power, such as China claims itself to be, from ratifying the Rome Statute.

²⁷ *Ibid.*, Art. 17. This is also reflected in Art. 17 whereby only those cases deemed to be of sufficient gravity are to be taken up by the ICC; see Murphy, "Gravity Issues and the International Criminal Court", (2006) 17 *Criminal Law Forum* 281; Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process", (2006) 17 *Criminal Law Forum* 255.

²⁸ *Ibid.*, Arts. 15, 16 and 17.

²⁹ The International Crime of Aggression has yet to be defined for adoption by the Assembly of States Parties to the Rome Statute at a Review Conference after 1st July, 2009: Art. 123 of the ICC statute.