

Review

Understanding the content of crimes against humanity: Tracing its historical evolution from the Nuremberg Charter to the Rome Statute

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The term 'crimes against humanity' has been widely used by different people to mean different things. The media has referred the term to include a variety of contemporary political events that they have reported on. The media practitioners and social workers have used the term loosely to refer to situations where the governments or any other people holding power, authority or influence have done any wrong. Politicians and political scientists deploy the term while referring to unacceptable and unfair activities in the political field. To International law scholars, the term has been used to refer to a specific crime under international criminal law, as distinguished from Genocide and War Crimes. This paper traces how crimes against humanity as a category of international crimes emerged and its essential requirements and how courts and institutions have developed and interpreted it, since the term crimes against humanity has acquired both a legal as well as socio-political perspective.

Key words: Crimes against humanity, political violence, *hostis humani generis*.

INTRODUCTION

There is a lot of misconception on the actual meaning of crimes against humanity as a category of crimes under international criminal law. The term has been used to mean different things by different groups of people around the world. The term has been used loosely by politicians to describe and demonise activities of political opponents. This is so for example when activities of revolutionary or nationalist movements result in deaths of people as acts of terrorism and crimes against humanity in the eyes of governments opposed or threatened by the revolutionary activities. Media practitioners use the term

to describe various events covered in the media where activities under publication have some elements of cruelty, suffering or intolerance of any kind, whether or not such events are systematic or widespread. The term clearly means something technically different to those studying or practicing international criminal law, in terms of both scope and content.

From an international criminal law perspective, a crime against humanity is a category of international crimes punishable under international criminal law. This therefore invites an analysis of the subject and object of the crime,

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that is to say;

- i. *Who is liable for prosecution?*
- ii. *As well as against whom the offence or the crime can be committed?*

This position is derived from the general legal framework classifying crimes in relation to either the subject or object as is even the case in domestic law, where there are classifications such as *crimes against persons, crimes against property, crimes against morality, crimes against public order, and hence likewise crimes against humanity*. This therefore is a demonstration that a crime is defined or elaborated through the pointing of the legally protected values that the law is targeting. From this background, crimes against humanity implies that the legally protected value is “*humanity*” at large, meaning therefore that this is a crime which is designed to protect humanity as the object of the law and a value that the law is intended to be protected..

THEORETICAL FRAMEWORK

The term ‘crimes against humanity’ is partly premised on the theory that human beings as political beings live under the permanent threat of politics gone cancerous, and therefore:

- a) All humans share an interest in suppressing grave acts of destruction of human livelihood, dignity, and value;
- b) Crimes against humanity are simultaneously offences against humankind and injury to humanness;
- c) Crimes against humanity are so odious that they make the criminal *hostis humani generis* (an enemy of all humankind);
- d) Crimes against humanity are universally odious because they injure something fundamental to being human in a way that municipal legal systems fail to address, and,
- e) Crimes against humanity represent the worst of threats to the well-being of humans and their survival (David, 2004).

According to *David Luban*, the theory of crimes against humanity is based on the finding that human beings are political animals who cannot live without politics (David, 2004). He propounds that human beings as political animals live under the permanent threat of politics gone cancerous. All statutory definitions of crimes against humanity have something in common; that is, the element of criminalization of atrocities and severe persecutions inflicted on civilian populations as part of a political plan by a State, semi-state like organization or a political body as will more fully appear in the definition of crimes against humanity in the ICTY Statute, ICTR Statute and ICC Statute. Crimes against humanity therefore refer to organized attacks of great and gravest

magnitude which is most barbaric, which is carried out by political entities against those that are under their control or influence, as clearly elaborated in the Sudanese and Kenyan Situations.¹ Therefore the crime carries a great political and legal weight in the international sphere.

Justification of the research

Since the term crimes against humanity has been frequently used and preferred to define or condemn actions by political players in the contemporary era, it has become imperative to revisit the definition so that there is a clear understanding of the crime. Because politics has many a times involved violence and killing in many instances even outside armed conflict, it is important to study and understand at what level any violent political activity becomes a crime against humanity. It has become clear that there is use of the term as a general definition of condemnation of intolerable political behavior in the eyes of political activists, and political news reporters. For those practicing or studying international criminal law, they must be guided to understand and distinguish the term crimes against humanity from a socio-political perspective and the one referred to in international statutes and understood by judges in the courts dealing with the legal aspects of the crime. Crimes against humanity must therefore be distinguished from street political violence and death struggles.

Political struggles will always be fought as long as human beings exist, but they can be waged without murder, extermination, enslavement, rape, or persecution of civilian populations, and these are the acts that international criminal law aims to punish under the provision for the crimes against humanity. The political actors must be in a position to realise or to be advised that their actions have ceased to be just political activism, but purely criminal, and this is only possible when the common crime under international law, that is, crime against humanity is demystified so that it can be easily understood. This research will seek to unpack the content of the crime referred to as crimes against humanity as well as distinguish it from other international crimes. The origins of the crime will be traced from Nuremberg Trials to the ICC with a view of making a clear assessment. This research will investigate the content and context of the crime as has been understood and developed in the contemporary international criminal justice system by the International Criminal Tribunals and the ICC.

Background

Crimes against humanity have origins from various

¹ Prosecutor vs AL-Bashir, Case number ICC-02/05-01/09 and Prosecutor vs Uhuru Kenyatta and others, Case number ICC-01/09-01/11

conflict situations in the 19th and 20th century and the term was first used in the Nuremberg trials². These conflicts were really wide spread and committed on a massive scale, which resulted in a desire to codify rules to regulate the conduct of individuals and groups in both armed and unarmed conflicts as well as defining core crimes that reflected behavior that can never be tolerated in any political conflict at all.³ Crimes against humanity therefore refer to all acts or conduct that are atrocious and are committed on a large scale.⁴ In the foregoing, a crime against humanity can be described as *a crime of all crimes*, in that the acts which constitute crimes against humanity are crimes on their own, such as rape, enslavement, torture and murder, but will only become crimes against humanity when committed on a larger scale and targeting a civilian population. Any such acts which are discrete and offensive to common humanity or which conflict with laws of humanity are qualified as crimes against humanity.

Lary May⁵, has observed that crimes against humanity is a term that has been widely used in the 20th century without natural boundaries or limits, but to describe the unacceptable acts that are destructive to common human existence. Numerous conflicts that have resulted in serious loss of life, wide displacements, massive sexual violence, abductions and enslavement in many parts of the world, from the World War II, to situations in Somalia, Bosnia, Rwanda, Kosovo, East Timor, Sudanese, DRC, Uganda, Central Africa Republic and Kenya, to mention but a few have made the term crimes against humanity more common, popular and widely used. The global spread of international criminal justice which characterized the formation of international tribunals and courts also contributed much to the popularity of crimes against humanity. The term crimes against humanity has been more commonly used than genocide and as such has become a more useful term for purposes of discussions and descriptions of various conflict situations because it is broader than genocide which is specific.⁶

The origins of crimes against humanity are therefore historical, social, political and legalistic. It is based on the desire by the human community to prevent human excesses during political conflicts. It is a crime that is defined more precisely by its content and not based purely on any statute or convention from a socio-political perspective. The crime has been used as a meaningful and comprehensive tool for intervention in trouble spots, where there is widespread political violence such as the

Ivory Coast and Libya, where both the legal and political intervention was done. Crimes against humanity can be regarded historically as a legacy of the Nuremberg trials.

Origins of crimes against humanity

At the end of the World War II, it was realized that a lot of crimes had been committed, which were unprecedented but which the world could not afford to ignore. The most significant crimes observed at the end of the devastating war were war crimes, crimes against peace and crimes against humanity as well as persecution (now genocide). In the definition of all these crimes, war or armed conflict was an integral part of the elements of the crime. At that early stage, genocide took a centre stage as the mother of all crimes. This was first explained by Raphael Lamkin⁷ and subsequently developed in the Genocide Convention⁸. By its definition and the manner and method in which it is committed, genocide is a crude crime, which frightens the entire human existence. However, because it is very difficult to establish the essential elements, particularly the mental element of "*intention to destroy in whole or in part*", very few convictions have been sustained. In the history of the ICC it has been even difficult to pass the confirmation of charges stage, in a number of cases brought before the Court such as in the Sudanese situation⁹. As a result, the assessment reflects that crimes against humanity can be easily investigated in situations of political violence in both armed and unarmed conflict, as has been done by the ICC in its interventions in the situations in Sudan, Kenya, Ivory Coast, and Libya. Crimes against humanity charges are more preferred than genocide because of the complexity of proving the specific intention to destroy in whole or in part required for genocide charges to be sustained.

Crimes against humanity were first preferred against the Nazi leadership during the Nuremberg trials in 1945 and were defined by the Court as "*including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhuman acts committed against any civilian population, or persecution on political, racial or religious grounds whether or not in violation of the domestic laws of the country were perpetrated*"¹⁰. At that point, this offence had not been clearly defined anywhere before and thereafter, no convention has been made to clearly define crimes against humanity. In the Nuremberg trials, crimes against humanity were used interchangeably with war

² Peter T. Burns: Aspects of crimes against humanity and the International Criminal Court: International Centre for Criminal Law Reform and Criminal Justice Policy: February 3-4; 2007. Beijing, China

³ See 1 @page 1

⁴ See 1 @ page 1

⁵ Crimes Against Humanity: A Normative Account: Cambridge University Press 2004. 310pp

⁶ United States Institute of Peace: Confronting Crimes Against Humanity: Study Guide 2008

⁷ Axis Rule in occupied Europe (1973) page 79

⁸ Convention on the Prevention and Punishment of the Crimes of Genocide 9th December 1948

⁹ The Prosecutor vs Al Bashir: International Criminal Court 02/05-01/09-3

¹⁰ Jurisdictional basis of the twelve subsequent war crimes trial at Nuremberg. Nuremberg military tribunals under control council law no. 10 October 1946-April 1949.

crimes and crimes against peace.¹¹

The legacy of the Nuremberg trials was to establish the term crimes against humanity. One of the greatest developments pursuant to this was the gradual erosion of State sovereignty, in particular, relating to crimes against humanity and the assertion of individual rights and responsibilities in the course of justice, as a clear demonstration of the desire to defend individual rights of human beings everywhere,¹² hence confirming the sovereignty of humanity, and crimes against humanity developed into independent and specific crimes apart from war crimes or armed conflict situations.

In its development, crime against humanity relates to a wide range of cruel conducts performed by States or non-State actors in times of war or peace consisting of a wide range of most severe and abominable acts of violence and persecution of victims because of their membership to a particular group rather than their individual characteristics.¹³ The offence from the wording implies or suggests an offence that aggrieves not only the victim and their communities, but all human beings, regardless of their community and refers to conduct that cuts deep and violates the core of humanity that we all share and that distinguishes us from other natural beings.¹⁴

In this scenario, the transgressor becomes a criminal against humanity an enemy and legitimate target of all humankind, a "*hostis humani generis*", who, in principle, anyone can bring to justice.¹⁵ Crimes against humanity have not been clearly defined in any convention but have been referred to in the statutes of international tribunals and latest in Article 7 of the International Criminal Court Statute¹⁶, structuring crimes against humanity in terms of context and individual acts which amount to crimes against humanity. It reads thus;

"...for the purpose of this Statute, crimes 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..."

There are distinct elements or requirements that are highlighted in the ICC Statute which are very important in order to determine whether under any particular situation, crimes against humanity has been committed, which are:

- (i) The disjunctive widespread or systematic attack;
- (ii) The civilian population as object of attack;
- (iii) The distinct element of planning;

¹¹ McAuliffe, 346, F. Honig "War crimes trials. Lessons for the future" International Affairs (Royal Institute of International Affairs 1944; 26, No. 4 (1950):524

¹² Bishai "*Leaving Nuremberg*" 437

¹³ David Luban, A theory of crimes Against humanity 29 Yale Journal for International Law 85, 93 (2004)

¹⁴ See 4 at 86

¹⁵ Kai Ambos: Crimes against humanity and the International Criminal Court. Sadat 1st ed 2011.

¹⁶ The Rome Statute of 1998

- (iv) A special mental requirement of the knowledge and,
- (v) The existence of individual criminal acts committed within the framework of the attack such as murder, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, persecution, enslavement, extermination, enforced disappearances, deportation, apartheid and torture¹⁷.

It is in this framework that the content of the crime must be considered as a development or evolution from the Nuremberg trials to the International Criminal Court regime and it assists in finding out whether in a particular situation the political activities have become criminal acts forming part of crimes against humanity.

The significant aspect dealt with under Article 7 of the Rome Statute is the widespread or systematic component. It confirms that acts only qualify to be crimes against humanity when they are committed as part of a widespread or systematic attack. This is intended to ensure that only serious violations are the concerns of the international community and as a result, single, isolated or random acts do not qualify as such. This is derived from the case of *Prosecutor vs Milutinovic*¹⁸ as well as the case of the *Prosecutor vs Katanga & Ngudjolo*¹⁹. In these cases, the expression or phrase "widespread" was interpreted to mean or reflect a quantitative assessment of acts in terms of impact. It requires that the act be carried out on a large scale and involving a large number of victims. In these instances the most important component will be the number of victims not the number of acts in as far as the definitional element is concerned. In the *Katanga case*²⁰, a single act was held to be sufficient to constitute crimes against humanity if it is of an extraordinary magnitude. It is the depth of the impact of the act that is evaluated, in terms of the far reaching consequences.

In the case of *The Prosecutor vs Al Bashir*²¹ on the prosecution's application for a warrant of arrest against Omar Hassan Ahmad Al Bashir, the Sudanese President, and the widespread component was interpreted to mean the targeting of the large group in the acts, as sufficient basis to charge a suspect for crimes against humanity. In this case, the attack of the *Fur, Masalit and Zaghawa* groups because of their ethnicity by groups believed to be under Al Bashir's influence or command was the basis to raise the charges of crimes against humanity. The Pre-Trial Chamber refused to confirm charges and issue a warrant of arrest for alleged genocide on the grounds that there was no sufficient evidence to establish the special intent to destroy in whole or in part the target groups. This was despite the fact that the United States of

¹⁷ Kai Ambos: Crimes Against humanity and the International Criminal Court. Sadat 1st ed 2011

¹⁸ Case no. IT.05-87-T.judgment

¹⁹ International Criminal Court case 01/04-1//07-717

²⁰ See 10

²¹ International Criminal Court-02/05-01/09-3

America and various humanitarian agencies had declared that genocide was being committed in Darfur. The Sudanese case makes it clear that, it is easier to prosecute an accused person for crimes against humanity than genocide, as long as there is proof of a greater degree of impact of the cruel acts, because there is no specific intention required. Any political activities which result in the commission of acts constituting crimes against humanity may lead to prosecution regardless of the intentions of the actors as long as such acts were systematic or widespread.

In the case related to the post-election situation in the Republic of Kenya²², the ICC Pre-Trial Chamber held that the attacks must not be random occurrences but targeted at a perceived group using a variety of means to identify the group. The Court went on to explain that both requirement of widespread and systematic may exist in one scenario but the existence of either of them is sufficient to establish the offence. The Court held that an act may either be widespread or systematic or may be both widespread and systematic. The systematic element connotes a rather qualitative meaning requiring that the attack be carried out as a result of a methodological plan,²³ whereas widespread refers to the magnitude or extent of the attack.

From the Sudanese and Kenyan case authorities cited above, the widespread element has been read disjunctive or alternative to systematic and as such, an attack can either be widespread or systematic. This definition in Article 7 of the ICC Statute was an adoption of the reading in the case of *Prosecutor vs Akayesu*²⁴ which defined widespread as “... a massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims” and systematic “as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources...”. In a sense, the commission of crimes against humanity involves either the quantitative element of the attack or the methodology of the attack. In some instances, both the qualitative or methodological elements may be available yet in some only one element may be pronounced.²⁵

However, in order to clearly understand the provisions of Article 7 (1) of the Rome Statute, it is important to also read it together with Article 7 (2) (a) of the same, which explains “.....a course of conduct involving the multiple commission of acts....., pursuant to or in furtherance of a State or organizational policy to commit such attack.....”. From reading the provisions of Article 7, it would reflect that widespread is replaced with “...multiple

commission of acts..” and systematic is replaced by “..a State or organizational policy...”, and in this instance, there is no longer any emphasis of the distinction of the two phrases as alternative modes but they are now interconnected in the sense that the multiple commission of acts must be in furtherance of a policy, and as a result, *policy* becomes a very important and decisive element of the crime²⁶. As in the Kenyan situation²⁷, the prosecutor explained a combined elementary view of crimes against humanity, as he sought to establish in the confirmation of charges that there were “.....coordinated attacks that were perpetrated by the Mungiki and Pro-Party of National Unity (PNU).....” and that “.....these attacks were not random occurrences but were targeted at perceived Orange Democratic Movement (ODM) supporters.....” and also that “.....the attacks affected a large geographical area.....”²⁸. This version was the same version founded in the post World War II case law and the International Law Commission Draft Codes.²⁹

Although the case of *Prosecutor vs Kunarac*³⁰ and *Prosecutor vs Visikjevic*³¹ as well as the case of *Prosecutor vs Muvunyi*³² made it clear that it is possible to establish the offence of *crimes against humanity* by exhibiting the existence of either widespread or systematic attacks, the development of the law as per Article 7(2) makes it clear that it is easier and more desirable to establish both elements. This is meant to show that crimes against humanity intend to deal with some elements of political power as well as organizational planning that facilitate politically motivated criminal activities. As clearly put by Kai Ambos³³, there is a difference between a systematic attack and a widespread attack. He explains that the former entails a link between the individual perpetrators to the prospective victim and the later connotes the link between the perpetrator and the ultimate policy or organization in terms of acquiescence and knowledge of both the existence of the plan as well as its execution.

The other element dealt with is the civilian object of the attack. In the Nuremberg trials, crimes against humanity are linked to civilians killed in an armed conflict³⁴. Article 7(1) of the Rome Statute criminalizes any acts when they are directed against a civilian population. The ICTY recognized this problem when the Court was dealing with the case of *Prosecutor vs Kupreslak*³⁵ and it held that “....One fails to see why only civilians and not also

²² The prosecutor vs Fransis Kirmin Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali. International Criminal Court-01/09-2/11-382 red 23-/01/12

²³ Kai Ambos. Crimes against humanity and the International Criminal Court .Sadaf. 1st ed 2011.

²⁴ Case no. IO CTR-96-4-T Judgment 579

²⁵ Prosecutor vs Milutinovic, case no. IT-05-87-7 Judgment 150 (Feb 26, 2009) and Prosecutor vs Akayesu case no. ICTR 96-4-7 Judgment 579 (Sept 2 1998)

²⁶ .see 14

²⁷ See 13

²⁸ See 13 at page 42-43

²⁹ Kai Ambos and With Sleffen: the current Law of Crimes Against Humanity. An analysis of UNTAET Regulations 15/2000

³⁰ Case no. IT-96-23 and IT-96-23/I-A Judgment 98 of 12th June 2002

³¹ Case no. IT-98-32T Judgment 36 November 29 2002.

³² Case no ITRR 2000-55A-T Judgment 512 September 12, 2006

³³ See 6 at page 286

³⁴ Nuremberg Charter 1945

³⁵ IT-95-16-T Judgment 547 (January 24, 2000)

combatants should be protected by these rules. (in particular by the rules prohibiting persecution), given these rules maybe held to possess a broader humanitarian scope and purpose than those prohibiting war.....". This, it is argued by Kai Ambos,³⁶ as a reflection, that crime against humanity is not recognized as a crime in its own right, but rather as an extension of war crimes into peace times only. The major difficulty is in the definition of a civilian in peace times since, everyone is a civilian including soldiers because there will be non combatant³⁷. The civilian population requirement in Article 7 (1) of the ICC Statute reflects the unwillingness of the drafters and States to expand the definition of the crime to protect all human beings. This indicates that the protection is not intended for the collective nature of the attack but on the individuals affected. This definition has not been developed since the Nuremberg Charter 1945 which defined crimes against humanity as "murder, extermination, enslavement, deportation and other human acts committed against any civilian population before or during the war".

Article 7 (1) of the ICC Statute also has the knowledge requirement in the definition of crimes against humanity. This implies that the accused person must know the existence of the attack as well as that his/her conduct or acts form part of the broad objective of the attack.³⁸ This knowledge requirement is an additional element to be distinguished from the *mens rea* requirement in Article 30 of the ICC Statute. This requirement is designed to link the individual acts of the perpetrator with the general attack. In the case of *Prosecutor vs Kordic and Cerkez*³⁹ it was held that an accused person may not be held accountable for crimes against humanity unless he or she was aware that his acts form part of the collective attack on the group. Knowledge includes deliberate taking of risk in the form of constructive knowledge⁴⁰, which implies general knowledge of the existence of the attack or detailed knowledge of its peculiarity and circumstances that may render the perpetrator's conduct to contribute to the crimes of others.⁴¹ This was clearly articulated in the Kenyan situation, where the ICC Pre-Trial Chamber linked the politicians with the militia on the basis that they knew what the militia was doing and condoned the acts and the acts were clearly benefiting the accused politicians. The politicians had general knowledge of the attacks on their opponents by the supporters of their parties.

Article 7 of the Rome Statute has gradually expanded the individual acts and the contextual elements of crimes against humanity. The ICTY Statute included deportations, imprisonment, torture and rape as individual

acts of crimes against humanity. The Draft Code⁴² went further to include discrimination based on racial, ethnic or religious grounds, forcible transfer, forced disappearances, enforced prostitution and other forms of sexual violence. In Article 7 of the Rome Statute, there is an extension to include sexual crimes such as forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity. The Rome Statute reflects a clear progression on what acts constitute the crime as long as it constitutes a destructive and dangerous effect to the victims or the target group in pursuant to the policy. Article 7 (1) (h) has also expanded the scope of the target group to include political and gender based violence. In this instance, crimes against humanity can be referred to as a broader crime than genocide, which only protects or punishes acts of violence intended to "destroy, in whole, or in part, a national, ethnical, racial or religious group".

Article 7 of the Rome Statute, contrary to Article 3 of the ICTR Statute, no longer requires a special discriminatory intent or motive and also removes completely the link between crimes against humanity and armed conflict. The link had long been ruled to be undesirable and unnecessary as indicated in the *Tadic case*⁴³, where it was held "...there is no logical or legal basis for (a war nexus) and it has been abandoned in subsequent state practice with respect to crimes against humanity..." In this regard, there is a clear distinction between international humanitarian law, which was applicable during the Nuremberg trials and international human rights law, applicable in the contemporary. International criminal law is broader and applicable in all times, whereby international humanitarian law applies in situations related to international armed conflicts.

From the foregoing, it is clear that crime against humanity is broader than that the crime of genocide and as such it is the most ideal crime to address the contemporary human rights violations and political excesses. Larry May (Robert, 2002) has put it clear that "...when a state deprives its subject of physical security or substance or is unable or unwilling to protect its subjects from harm to security or subsistence, it loses its right to prevent international bodies from crossing its borders for remedial purposes....". In a sense prosecutions are intended to signify the importance or magnitude of the violations perpetrated against human civilian populations by States or organizations in furtherance of their policies or political agendas. Crimes against humanity incorporate already existing common crimes such as murder, rape, torture and slavery, into international crimes, if their magnitude is so great that they cannot be ignored by the international community. It is only when the governments or domestic legal actors

³⁶ See 6 at page 287

³⁷ Antonio Cassese: International Criminal Law 122-123 (2nd ed 2008)

³⁸ See 20 at 39-40

³⁹ Case no. IT-95-14/2T. Judgment 187 (February 26, 2001)

⁴⁰ Prosecutor vs Tadic, case no. IT-94-1-T judgment 656-59 (May 7, 1997)

⁴¹ See 20 at page 41

⁴² Draft code of crimes against peace and security of mankind. Report of the International Law Commission on its forty Eight session. Article 18. UN.GAOR, 51st session, Supp No.10 at 9. UN Doc A/5/10(1996)

⁴³ Prosecutor vs Tadic, IT-94-1-T. R 117

are complacent to act that it becomes imperative to apply international criminal justice mechanisms. In the Kenyan situation as well as the Sudanese situations, crimes against humanity were preferred against the most influential and powerful political players for their involvement in the organization or supporting or conspiracy or abetting gross human rights violations.

There is a higher probability of success in prosecuting crimes against humanity than genocide as reflected in the Sudanese and Kenyan situations⁴⁴ because all that is required is to establish that there exists an attack against a civilian population, which is systematic or wide spread. The specific intention of the attack is not looked into when prosecuting crimes against humanity, whereas for purposes of genocide, it is not enough to show that there has been an attack on a civilian population but that the population must be part of the national, ethnic, racial or religious group and the ultimate intentions must be to “*destroy in whole or in part*”. If the prosecutor fails to establish that the group so targeted is within the four specific categories or that the intention is to wipe out in whole or in part, the charges of genocide automatically falls. Under these circumstances crimes against humanity become the ideal crime to tackle political excesses, which may result in serious violation of civilian and vulnerable populations. Political excesses may not be within the intention to destroy in whole or in part, but for other purposes, such as to change voting patterns or to weaken opposition elements.

When dealing with crimes against humanity with particular reference to Article 7 (1) (h) of the Rome Statute, it becomes clear that genocide is one side of crimes against humanity⁴⁵. The acts under genocide general qualify to be crimes against humanity but if the prohibited act is accompanied by specific genocidal intent (*dolus specialis*), and is committed against a protected group it can now be punished under genocide⁴⁶ and as such, genocide can be regarded as the most serious and most aggravated type of crimes against humanity (Schabas, 2004). As a general consideration, acts of genocide also form part of crimes against humanity, which are seriously aggravated by the existence of some specific intention, which would require to be specifically attended to in a special way because of the level of culpability. It is the mass destruction element of the acts that calls for it to be addressed as genocide, since the *mens rea* becomes higher and more frightening. For genocide, the intention to destroy a large number or all the members of the target group is the most important element, where as for crimes against humanity, the offence is committed when acts affect large group

regardless of whether or not the group is homogenous.

Crimes against humanity may be committed against an individual, whereas genocide can only be committed against individuals who belong to a specifically protected group characterized by national, ethnical, racial or religious identity (Short, 2003). As alluded in the *Akayesu* case, the four protected groups usually share a common feature, that such membership would not be normally and easily challengeable by its members, who belong to it automatically, by birth, in conscience and often irremediable manner,⁴⁷ such that the target and the victim is the group itself and not the individual.⁴⁸ It is very difficult to investigate the existence of the elements referred in the genocide crime and would take longer and require more time to establish than to simply establish that an attack was made against a civilian population in a wide spread or systematic manner. As far as *actus reus*, *mens rea* and victim requirements are concerned, there is a higher level of rigidity in prosecuting the crime of genocide than in prosecuting crimes against humanity. The two crimes are intersecting crimes which only call for some higher level of specialization in order to determine whether it is genocide or crimes against humanity (Cassese, 2003). From the foregoing, it is clear that genocide is restricted to act perpetrated against certain protected groups and further more an intention to destroy in whole or in part, which is very difficult to prove, since the perpetrators will not ordinarily document or publish their policies. Clearly as a threshold for intervention to stop atrocities, the definition is a very difficult one to work with. Crimes against humanity on the other hand is broader and arguably more useful for purposes of discussing intervention proposals because it is not legally restrictive (United States institute of peace, 2008). since it requires acts to be committed against any civilian population and does not require any specific intent like genocide. It is much easier to justify an international intervention for the prevention of crimes against humanity than for genocide because all that is required will be to prove that there has been an attack on a civilian population for whatever reason of the attack, as long as the attack is either widespread or systematic. The development of crimes against humanity reflects a continued desire to hold accountable those responsible for serious violations of humanity. It has also arisen to show that even non-state actors can be held to account as subjects of international criminal law, and has greatly strengthened the principle of individual criminal responsibility and accountability under international criminal law.

It is clear that crime against humanity is the most preferred crime than it was in 1945. Because its essential elements have been expanded and broadened, since the Nuremberg Charter, it has become the most preferred

⁴⁴ See 12

⁴⁵ Yuvuz Aydin: Distinction between crimes against humanity and genocide focusing most particularly in the crimes of persecution: Judge General Directorate of EU Ministry of Justice for Turkey

⁴⁶ Prosecutor vs Bagilishama case no. ICTR-95-1-A-T (trial chamber) June 7 2001 paragraph 55.

⁴⁷ ICTR. Akayesu (Trial Chamber) September 2-1998.

⁴⁸ ICTR Prosecutor V Niytegeken, Case no. ICTR 96-14 (trial chamber) May 16 2003

crime to charge on human rights violation in times of war and peace and has grown naturally as its original nature permitted. It is arguably the most significantly preferred charge in the contemporary times. Although in its early development, crime against humanity was treated as a component of war crimes, it has developed in the recent changing history and has become an ideal crime of international justice. Its broad elements as articulated in Article 7 of the Rome Statute have made it possible to prefer crimes against humanity instead of genocide to deal with non-armed conflict situations and the Courts have also been quick to confirm charges of crimes against humanity referred to it than genocide, because the charge is less technical and fairly broad.

History shows that the practice of prosecuting for crimes against humanity was very weak since no trials before International Criminal Tribunals were held subsequently to the Nuremberg trials until the early 1990s (Gerhard, 2005). The Yugoslavia and Rwanda Tribunals reaffirmed the customary law character of crimes against humanity and the ICTY Statute, in Article 5 clearly pronounced that the crime must occur in armed conflict and the ICTR Statute in its Article 3 limited the crime to acts committed on "*natural, political, ethnic, racial or religious grounds*". It is only in the broad definition of the crimes against humanity in Article 7 of the Rome Statute that gives the crimes a wide definition, which makes it a core crime which can play an important role in the international criminal justice system and enable intervention and punishment for international violations. Crime against humanity has gradually developed to become the most significant and frequently preferred crime in the international criminal court history as compared to genocide.

In tracing the history of the development of crimes against humanity, it related to mass crimes committed against a civilian population (Gerhard, 2005) and most of the serious acts which form part of genocide also form part of crimes against humanity. In the Nuremberg trials, all the genocide that was committed against European Jews was viewed and punished as crimes against humanity. Crimes against humanity was first explicitly formulated as a category of crimes in Article 6 of the Nuremberg Charter and since then it has been specifically referred to in dealing with subsequent political violence in different parts of the world (Gerhard, 2005). The preference of crimes against humanity has grown stronger during the International Criminal Court era as the most convenient and usable tool against political violence.

The charge of crimes against humanity is designed to protect specific human interest. The threat to peace, security and wellbeing of the civilian populations of the world in a widespread and systematic form and the general attack and the violation of fundamental human rights is what crimes against humanity stands to address. The label of crimes against humanity is against the

organized violence and setting of minimum standards on how political humans can exist and core-exist. Crimes against humanity generally enforce values which transcend the individual and protects the victim's rights to life, health, freedom as well as dignity which are threatened and usually compromised in political violent situations.

Conclusion

Crime against humanity is not just a semantically-neutral label but it has an internal structure and a history, which is both legal and political. It is a crime with a contextual relevance to deal with excesses in political activities done by political entities against vulnerable civilians under their control or influence. It is a crime that is designed to contain political excesses by making sure that those who exceed the limits become enemies, not only of their political opponents in their area of influence or control, but become enemies and legitimate targets of all humankind. The crime is broad and less technical than that of genocide and war crimes, as clearly illustrated by precedents in international criminal tribunals and courts. Crimes against humanity are designed to vindicate human interests which are under constant threat from political excesses. There is a lot in the wording of this crime, which has become very useful in international criminal justice system's quest to end or avert political excesses. This crime represents the limit to where political events in a particular situation are legally reviewed and regarded as *ultra vires* and punishable under international criminal law.

The historical developments and content of crimes against humanity is purely a legal response to political excesses. It validates the theory by David Luban to the effect that human beings as political animals live under the permanent threat of politics gone cancerous. The crime is designed as a measure on how political excesses which are a concern to the whole human family can be curtailed. The name is neatly chosen to fit both the political as well as the legal scope of international criminal law. Although the label has been casually used in politics and in the media, it has managed to develop into a scientific definition of the political excesses that the international community intends to proscribe. There is no other better term or label that could have been used to define the crime in terms of content and context other than crimes against humanity to define prohibited acts in hot and deep political environments that the civilian human population finds itself under.

Conflict of Interests

The author has not declared any conflict of interests.

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