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REVIEW OF THE DEFINITION OF CRIMES AGAINST HUMANITY IN CASE-LAW OF THE *AD HOC* TRIBUNALS

ABSTRACT: Crime against humanity is one of the oldest international crimes, sanctioned by the international community since the early twentieth century. Throughout the twentieth century, the concept of this international crime has evolved, and its definition and scope have undergone changes from the Nuremberg Tribunal, through ad hoc international tribunals for the former Yugoslavia and Rwanda, up to the Statute of the International Criminal Court. However, ever since the first codification of this international crime, there has been a challenge in fully determining it. This is evident from continuous efforts at the United Nations to adopt a comprehensive special convention that will codify all rules related to crimes against humanity. This paper will demonstrate the development of the definition of crimes against humanity through statutory prescriptions in the statutes and jurisprudence of ad hoc tribunals and the International Criminal Court, which have significantly influenced the definition of crimes against humanity.

Keywords: *crime against humanity; ad hoc tribunals; Rome Statute.*

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1. Introduction

Crime against humanity is one of the oldest international crimes. The prohibition of the commission of this crime, and the obligation of states to prevent and punish the perpetrators of this crime, is part of both international customary law and many international legal instruments. These obligations, what's more, have been elevated to rank *ius cogens* norms, that is, they represent international legal norms of a peremptory character (Draft articles on Prevention and Punishment of Crimes Against Humanity (hereinafter: Draft), 2019, Preamble). As part of *ius cogens* norm, prohibition has *erga omnes* effect, and derogation or deviation from this obligation is not allowed (Wald, 2007, p. 621). This rule is considered inherent to civilized society. No country, therefore, must depart from the prohibition of crimes against humanity (Galland, 2019, p. 33), because compensation for these crimes is in the interest of the community (Orakhelashvili, 2008, p. 288).

Although it appeared sporadically even before the 20th century, the very term *crime against humanity* was used for the first time, in the modern sense, on the occasion of the massacre of the Armenians by the Ottoman Empire in 1915 (Shabas, 2007, p. 98). Namely, the term was officially used in the joint Declaration of the Allied governments, that is, the governments of France, Great Britain and Russia, as allied powers in the First World War (Shabas, 2007, p. 34). To denote the massacre of the Armenians, the term "crime against Christianity and civilization" was initially proposed, but later the term "Christianity" was changed to the term "humanity" (Cassese, 2008, p. 101).

The circumstances of the case that resulted in the appearance of the concept of a crime against humanity – the massacre of the Armenians – could be presented through a couple of important elements: 1) the crime was committed during the war, 2) it began against the civilian population, 3) it was characterized by a large number of victims and 4) was carried out in an organized manner by engaging the state apparatus (similarly to Šurlan, 2011, p. 89). Two positions expressed in the aforementioned Declaration of the Allied Governments, from the aspect of establishing the concept of crimes against humanity, stand out in particular: 1) the understanding and position is expressed that the Turkish state carried out the massacre and 2) the understanding and position is expressed that all members of the Turkish government will be considered personally responsible. Attitudes expressed in this way are still considered fundamental elements of crimes against humanity (Dadrian, 1996, p. 213). Therefore, the Declaration defines and incriminates that behavior which is evidently such that only the state can implement it with

its coercive apparatus, and in addition to the responsibility borne by the state, it is also a personal responsibility – of all those who represent the state and participate in conducting such a policy. By the Peace Treaty of Sèvres from 1920, it was foreseen that the Ottoman Empire would hand over to the Allied Powers those persons who were wanted as responsible for the massacres that took place on the territory of the Ottoman Empire (Cassese, 2008, p. 102). However, the Treaty of Sèvres never entered into force, and a new one was adopted – the Treaty of Lausanne – which amnestied all Turkish crimes. The crime of aggression will not be discussed in more detail on the international stage until the end of the Second World War (Shabas, 2007, p. 99).

The return to the international scene, and the further development of the definition of the term "crime against humanity" is realized through the definitions of crimes against humanity in the statutes of the International Military Tribunal in Nuremberg and the International Military Tribunal in Tokyo, and the definitions of crimes against humanity in the statutes of the *ad hoc* tribunal for the former Yugoslavia and Rwanda (Bassioun, 2010, pp. 575-593). Today, the most relevant and complete definition of a crime against humanity is the one contained in Article 7 of the Rome Statute of the International Criminal Court (similarly to Đorđević, 2014, p. 139). This definition, along with the practice of the International Criminal Court (see extensively: Stanojević, Pavlović & Prelević, 2010), will serve as a starting point for regulating this issue at the level of public international law.

This, however, does not mean that the international community has ceased to be interested in and strives to further, on a rounded level, regulate the issue of crimes against humanity and responsibility for the violation of the ban on the commission of this crime, both at the level of individual criminal responsibility and at the level of state responsibility for violations of this *jus cogens* norms. To this end, the adoption, within the UN, of a special convention on preventing and punishing crimes against humanity has been discussed for several years, and the International Law Commission prepared a draft and published it in 2019.

2. Crimes against humanity before the Nuremberg and Tokyo tribunals – first definitions

The crime against humanity, understood in the modern context, was for the first time incriminated and prosecuted before the International Military Tribunal in Nuremberg (hereinafter: the Nuremberg Tribunal) and the International Military Tribunal in Tokyo (hereinafter: the Tokyo Tribunal).

After the end of the Second World War, the London Conference, which began on June 26, 1945, gave birth to the Agreement on the Prosecution and Punishment of the Main War Criminals of the European Axis, which, in August 1945, was signed by the four Allied Powers. The Statute (Charter) of the Nuremberg Tribunal was an annex to this agreement (Shabas, 2000, p. 37).

The definition of crimes against humanity contained in the Statute of the Nuremberg Tribunal undoubtedly represents, in its essence, the initial and most characteristic phase of the development of this crime as an international criminal offense (Shurlan, 2011, p. 200; Lopičić, 1998, p. 59). Thus, Bassiouni (1994), points, "out that this definition served as a model and legal basis for the latter definitions, but also as a confirmation of the status of the international custom of crimes against humanity in the work of the *ad hoc* Tribunal for the former Yugoslavia" (p. 457). Namely, as a result of the negotiations between the representatives of the four allied powers in London, an agreement was reached regarding the definition of what will become a crime against humanity, as it reads in Article 6(c) of the Charter of the International Military Tribunal in Nuremberg:

> *"c) crimes against humanity: that is, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during war, or persecution on political, racial, or religious grounds in the commission of or in connection with of any crime within the jurisdiction of the Court, regardless of whether or not it violates the laws of the country where the crimes were committed."*

However, the very definition of crime against humanity in Article 6(c) is meager, since it does not refer to a wider context, does not contain a general concept, i.e. *chapeau*, viewed in isolation, does not reflect the specifics of this work (Šurlan, 2011, p. 204). It is obvious that the authors were not inclined to prescribe this act as an independent crime. This, Schabas (2007) "points out, was because the Allies were uneasy about the consequences that wider, fuller and more independent regulation might have in terms of the treatment of minorities in their countries (and especially colonies)" (p. 99). Therefore, the Allies insisted that crimes against humanity could only be committed if they were connected to one of the other crimes within the jurisdiction of the Tribunal, namely war crimes or crimes against peace. By prescribing this and binding it to another crime, the Allies, as an obligation, predicted the existence of a nexus between crimes against peace or labor crimes, on the one hand, and crimes against humanity, on the other. Therefore, a crime against

humanity, *ipso facto*, was not and could not be an independent crime. It also points to the fact that, at the time of the writing of the Nuremberg Charter, crime against humanity did not yet exist as an independent crime as part of customary international law.

However, viewed in a wider context, i.e. primarily in the context of the entire Article 6, the incrimination of crimes against humanity acquires sufficient characteristics when paragraph 1 of Article 6 of the Charter is taken as a *chapeau* , i.e. a contextual element of crimes against humanity, by which the narrowly and insufficiently defined paragraph (c) acquires other unifying elements.

Thus, paragraph 1 of Article 6 of the Charter primarily determines that the Court is established *"as a court for the trial and punishment of the main war criminals of the European Axis countries."* The individual responsibility implied by this expression is further emphasized below, where it is determined that *"the court is competent to judge and punishes persons who, either as individuals or as members of an organization"* have committed any of the aforementioned crimes. The circumstance that these are not just an individuals, although already emphasized by the designation "major war criminals", is additionally accentuated by the requirement that the activities undertaken by the individuals were in the "interest of the countries of the European Axis . We believe that the linguistically logical formulation *"interest of countries"* has the function of a contextual element which in the modern redaction of crimes against humanity is determined as a plan or policy, i.e. an element which should show the crime against humanity not as an isolated, sporadic act of an "ordinary" individual, but as an organized action of the state against individuals (Bassiouni, 2008, pp. 448-450). Therefore, Schabas (2008) "argues that it is probably for this reason that the requirement for the existence of an element of state or organizational policy was omitted from the definition of crimes against humanity in the Nuremberg Tribunal Charter" (p. 953). The correctness of this understanding is additionally reflected in the last paragraph of Article 6.27, which states that *"leaders, organizers, instigators or accomplices, who participated in the creation or execution of a joint plan or conspiracy for the execution of a joint plan or conspiracy for the execution of any of the mentioned crimes, are responsible for all acts committed in the execution of such a plan by any person."* Like Schabas, we believe that from these mentioned *"secondary"* elements a clear conclusion can be drawn that even the Charter of the Nuremberg Tribunal required the existence of a state or organizational policy, i.e. undertaking a specific action as part of this policy,

as a necessary precondition for the existence of crimes against humanity and its prosecution.

The acts of committing crimes against humanity listed in the Nuremberg Charter represent the first list of concrete or relatively specific acts of commission enumerated for this crime. Although the list of acts of execution only expanded over time, those enumerated in the Nuremberg Charter were retained in modern incriminations of this crime. The specificity of the solution of the Nuremberg Statute regarding enforcement actions is reflected in the fact that enforcement actions are grouped into two categories, of which the first group of actions includes actions aimed at the existence and physical integrity of a person. However, with the words "other inhumane acts", the enumeration of this group of acts is left open for the introduction of other acts that are characterized by brutality, inhumanity, monstrosity and which, due to such characteristics, may represent the act of committing a crime against humanity. This open ended provision, in its essence, is contained in the provision of Article 7(k) of the Rome Statute. The second group of acts of execution – persecution, by definition does not have to contain elements of physical abuse of people, but it is enough for the persons to leave the country, scared of the evil fate that could overtake them if they stay, so that in that case they are considered exiled (Šurlan, 2011, p. 208), where in the case of persecution, as a manifestation of the act of committing a crime against humanity, differences appear in terms of the motives of expulsion, which could be political, racial and religious.

The definition of crimes against humanity in the Nuremberg Charter as one of the constitutive elements of this crime includes the primacy of international law. This means that the circumstance of whether the acts of execution violated the law of the country where the crimes were committed has no influence on the existence of the crime against humanity and the prosecution and responsibility of its perpetrators. The reason for such a prescription is a direct consequence of the then valid legislation of Nazi Germany, which actually represented the basis for the commission of crimes against humanity. Since, in the pre-war period, Germany passed a considerable number of laws that enabled *lege artis* discrimination against Jews, their complete disenfranchisement, confiscation of property, expulsion, killing, it was necessary in the definition of crimes against humanity to directly eliminate the effect of those laws, that is, to determine that their existence, as well as (dis)compliance with national regulations is not important.

The Nuremberg Charter laid the foundations and provided for almost all the elements of crimes against humanity, as known by modern international criminal law.

The decision on the judicial prosecution of the main war criminals was applied in parallel to the events that took place in the Far East. The Tokyo Tribunal was formed on the model of the Nuremberg Tribunal, with the aim of prosecuting the main persons responsible for mass crimes by applying the concept of individual criminal responsibility, while most of the participants in the crimes were left to be processed by domestic courts, whereby the Japanese Emperor Hirohito was exempted from prosecution and individual criminal responsibility for crimes within the jurisdiction of the Tokyo Tribunal.

The international crimes for which the Tokyo Tribunal had jurisdiction are defined in Article 5 of the Tokyo Charter. In prescribing the crimes that will fall under the jurisdiction of the Tokyo Tribunal, basically, the same legal and nomotechnical methodology was applied as in Article 6 of the Nuremberg Charter, prescribing a single *chapeau*, and then grouping them into three categories of crimes: crimes against peace, classic war crimes and crimes against humanity. Thus, it is foreseen that the Tribunal will be competent for the trial and punishment of war criminals of the Far East who were either as individuals or as members of an organization suspected of having committed acts as part of crimes against peace. Responsibility is conceived as individual and subjective. A crime against humanity is defined as "*murder, extermination, enslavement, deportation and other inhumane acts committed before or during war, or persecution on political or racial grounds in the execution of or in connection with other crimes within the jurisdiction of the Tribunal, regardless of whether they constitute violation of the internal laws of the state in which they were committed"* and *"Leaders, organizers, inspirers and accomplices who participated in the design or implementation of a joint plan or conspiracy for the execution of any of the aforementioned acts are responsible for the acts performed by any person in terms of the implementation of the plan.*"

Although the statutes of both *ad hoc* tribunals were created in an almost identical period, the inevitability of their comparison shows us that the approach to defining crimes against humanity was nevertheless different. While in the Nuremberg Statute all the main general elements are expressed in *a chapeau* common to all three categories of acts, in the Tokyo Charter, the wording is done differently. Namely, common elements establish in principle individual responsibility, both individually and as a member of a group, and the commission of a crime in the connotation of a crime against peace, thus

establishing a connection with war (Bassiouni, 1994, pp. 468-469). The category of crimes against humanity is further determined by the elements of the plan or policy either in terms of formulation or implementation. With the introduction of this element, the crime against humanity received its rounded, complete physiognomy, by means of which it is fundamentally different and independent from the other two categories of crime. The element of differentiation also appears in the criterion of discriminatory behavior. Namely, while in the variant of the Nuremberg Charter persecution is related to the criteria of political orientation, race or religion, in the version of the Tokyo Charter discrimination is directed towards groups of different political orientation and racial affiliation. Unlike the war in Europe, religion did not appear as an important factor in warfare in the Far East (Kittichaisaree, 2001, p. 119). The element of crime against humanity that is specifically stated in both the Nuremberg and Tokyo Charters is the existence of responsibility for the crime independent of the solution of internal legislation, while in later definitions of crimes against humanity this element is no longer explicitly stated. However, we believe that this is due to the simple fact that with the later development of international law, it was crystallized as a general rule of international law that no one can invoke their internal law to justify the violation of an international legal obligation or prohibition. These first steps in establishing and defining crimes against humanity, although a great step forward, were nevertheless limited. As the biggest limitation, we consider the non-independence of this crime, that is, the condition of prosecuting this crime only with some other crimes that fell under the jurisdiction of the Nuremberg and Tokyo Tribunals. Dissatisfaction with such a restriction emerged within weeks of the Nuremberg verdict. Namely, the General Assembly of the United Nations quickly decided to, on a universal level, determine and define the most serious form of crime against humanity – genocide – as a separate and independent crime that could be committed both in peace and in wartime (Schabas, 2007, p. 100). In the period from 1945 to 1948, there were several variants of proposals according to which the definition of crimes against humanity does not require the existence of war. This has led many to take the view that, from a common law perspective, the definition has evolved to definitively cover crimes committed in peacetime (Schabas, 2007, p. 101). However, the UN Security Council introduced a dose of uncertainty into the definition when, in 1993, it established the International Criminal Tribunal for the former Yugoslavia, whose Statute, in Article 5, required that a crime against humanity must be committed within the framework of an armed conflict, whether international or internal character. Nevertheless, the same

UN Security Council, just one year later, however, when establishing the International Criminal Court for Rwanda, did not insist on the existence of an armed conflict. Although there would be little doubt about the status of crimes against humanity as part of customary international law and its constituent elements at the time of the establishment of these *ad hoc* international tribunals, these inconsistencies in the actions of the international community, and especially the UN Security Council, called into question the common law content of crimes – what exactly does the common law prohibition of committing crimes against humanity mean?

3. Crime against humanity in the Statute and practice of the ad hoc International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (hereinafter: the Tribunal or ICTY) was established by United Nations Security Council Resolution no. 827 of May 25, 1993 as *ad hoc* criminal tribunal. Many contested the legality of this tribunal, that is, the right of the UN Security Council to establish a judicial body in order to preserve world peace and stability, acting on the basis of Chapter VII of the UN Charter. Agreeing with the claim that the UN Security Council should not have established the Tribunal in this way, denying it legitimacy and giving it the attribute of a political court, and obliging all member states to cooperate with it, in terms of legality, we nevertheless take a different position. Without going into the complex matter of international public law and rules related to the United Nations system, we nevertheless point out that the UN Security Council is essentially unlimited when it takes measures based on Chapter VII of the UN Charter, with the aim of establishing and protecting world peace and stability.

In any case, one of the crimes for which this Tribunal was competent to prosecute is a crime against humanity. Namely, the actual jurisdiction of the Tribunal is determined by Article 5 of the ICTY Statute. The definition of crimes against humanity of the ICTY Statute is the first modern and positive legal definition adopted after the end of the Second World War.

As we pointed out, the crime against humanity is defined in Article 5 of the Statute as follows: "*The International Court is competent to prosecute persons responsible for the following criminal acts when they were committed in an armed conflict, either of an international or internal nature and directed against the civilian population: a) murder; b) extermination; c) enslavement; d) deportation; e) closure; f) torture; g) rape; h) persecutions on political, racial and religious grounds; i) other inhumane acts*" This definition of

crime called *crime against humanity*, however, does not correspond to the definition and does not include elements that, at that time, could be considered customary law. Bassiouni (1994), "gives the definition contained in the ICTY Statute so incomprehensibly modest and unusable that it inevitably encourages consideration of the reasons that led to it" (p. 459). Namely, the deviation from the customary law definition of the act, as well as the elements of this crime established since Nuremberg, is striking to such an extent that it raises doubts regarding the nature of the deviation – whether this definition is contrary to the general concept of crimes against humanity in the international customary law that was present at the time, or are deviations of such a character that they do not violate the essence of the of this crime (Šurlan, 2011, p. 221). We'll see, the Tribunal, through its practice, will change this definition a lot.

As we pointed out, at the time of the adoption of the ICTY Statute, as a part of customary international law, it undoubtedly included certain basic elements of this part, namely: 1) a crime against humanity can be committed both in times of war and in times of peace, 2) the crime is directed against the civilian population, 3) the crime must be committed systematically and widely and 4) the crime must be committed as part of a plan or (organizational) policy. Of the aforementioned four basic elements of crimes against humanity, and as defined in Nuremberg and Tokyo (which will later appear in the Rome Statute), in the statutory solution of the Statute of the *ad hoc* Tribunal for the former Yugoslavia, only one appears – the element of the civilian population

The element of committing an act whether in war or in peace is narrowed down and the act is related to armed conflicts, either international or internal. Namely, it was still decided in Nuremberg that the crime against humanity refers to acts committed "*before or during the war.*" The possibility of peacetime execution of this crime, according to customary international law, was therefore not disputed. Although the Tribunal's mandate was to try crimes committed on the territory of the former Yugoslavia, which were predominantly involved in armed conflicts, this, we believe, cannot be a sufficient and justified reason for the UN Security Council to deviate from the definition of this crime under international customary law, thereby introducing uncertainty into the international legal order.

The element of distribution and organization is completely omitted, as well as the element of having a policy or an organizational plan. A simple linguistic interpretation would lead to the conclusion that, for example, every single case of murder committed during an armed conflict automatically constituted a crime against humanity. Such an approach is absurd and contrary to both the existing general concept of crimes against humanity according to

customary law, as well as the logic and purpose of international criminal law and justice.

The definition of crime against humanity in the Statute of the Tribunal stands out all the more strikingly from the general flow and development of the concept of this crime and even more directly highlights the one-time nature of its purpose, bearing in mind the fact that it was not conceived in the codification and nomotechnical way of defining the act according to the model "a crime against humanity is..." but it was already done according to the model of authorizing the Court to prosecute for certain actions (Bassiouni, 1994). Namely, the basic logic that was applied in the cases of the *ad hoc* tribunals in Nuremberg and Tokyo was reduced to adaptation to the situation and the directly committed crimes, and was also applied in the case of the ICTY. Certainly, to a certain extent, it was justified and, at first glance, rational. However, since the jurisdiction of the ICTY was not limited in time, and as the crimes took place even after the drafting of the Statute, it turned out that the logic of binding to the created and factually clear situation is irregular and that the determination of this part is unnecessarily restrictive (Šurlan, 2011, p. 222).

Nevertheless, the Tribunal, through its rich practice, did not stop or limit itself to the definition set by the Statute, but the Tribunal interpreted the crime against humanity in the categories of customary law definition, referring to the Nuremberg Charter, draft codes, and theoretical works, thus supporting its arguments for expanding the definition of crimes against humanity. In this way, in the practice of the Tribunal, the unnecessary narrowing of the concept of crime against humanity was primarily corrected, and its essential legal essence was confirmed. On the other hand, by referring to customary law, the Tribunal tried to prevent possible objections of violation of the principle of legality (Šurlan, 2011, p. 231).

As a consequence of insufficiently appropriate statutory regulations, as well as the creative role of judicial panels, in considering the basic elements of crimes against humanity in the context of the *ad hoc* Tribunal for the former Yugoslavia, two categories are distinguished: crimes against humanity as defined in Article 5 of the Statute and crimes against humanity as is shaped in the practice of the Tribunal.

Thus, from the perspective of the Tribunal's judicial practice, unlike the elements of crimes against humanity defined in Article 5 of the Statute: 1) that the act can and must be committed within the framework of an armed conflict and 2) that it is directed against the civilian population, the Tribunal, through its practice, as elements of crimes against humanity decided: 1) that the crime

can be committed during an armed conflict, whereby the armed conflict extends to the territories of states where there is neither a factual conflict nor a formal relationship between the warring parties, if it can be established that there is a connection between of a primary armed conflict with that territory – which, viewed essentially, introduces the element of peace in a hidden form; 2) the crime is directed against civilians; 3) the act must be part of an attack; 4) the work is an integral part of a widespread and systematic action; 5) the act must be committed with the awareness of participation in the widespread and systematic implementation of the plan and 6) the act is characterized by distinct inhumanity and brutality that shake the conscience of humanity (Schabas, 2006, p. 187 et seq.; Šurlan, 2011, p. 231).

From the point of view of the modern definition of crime, but also from the point of view of the definition of crime from the time of Nuremberg, an essential characteristic of this crime appears to be that it can be committed both in times of war and in times of peace. As the concept existed even at the time of Nuremberg, the reason for the restrictive definition of this element of crimes against humanity in the ICTY Statute is unclear. From the point of view of the implications of the restrictive definition of crimes against humanity in the Statute, the Tribunal itself has repeatedly dealt with the issue of the possibility of existence and prosecution of crimes against humanity exclusively in times of armed conflict.

The element of systematic and widespread attacks is completely omitted in the definition of the crime referred to in Article 5 of the Statute. Without this element, a crime against humanity conceived in this way could rather be understood as a simple sum of individual criminal acts connected by the circumstances that they were committed against civilians during the war, rather than pointing to a specific and unique international crime, undoubtedly different in relation to other criminal acts. or international crimes (Šurlan, 2011, p. 225).

Although the element of knowledge or awareness of participation in the wider aspect of the commission of crimes against humanity does not appear in the text of Article 5 of the Statute, the Tribunal, through its practice, quite rightly highlights it. Namely, in addition to the mandatory existence of imagination as the only acceptable category of *mens rea* for all international crimes[1], in the case of crimes against humanity, in addition to the conscious

[1] Ignoring, of course, the absurd and widely criticized approaches of the Tribunal regarding the definition of individual criminal responsibility according to the model of joint criminal enterprise.

and willing undertaking of actions, another element is essential – that the perpetrator of the crime had knowledge and awareness that his action belongs to a wider context of events, i.e. that he undertook his action with the intention of participating, executing or achieving a certain policy, plan or goal, thereby *mens rea* for a crime against humanity is raised another level higher in the requirements of the psychological attitude towards the act.[2]

Through it is practice, the tribunal also modified the definition of the civilian population element. Namely, at first glance, the wording used in Article 5 of the Statute "*any civilian population*" indicates the broadest concept of that term, which includes all categories of the civilian population, including its own citizens. However, the scope of this understanding is automatically limited by linking the existence of crimes to armed conflicts. However, the Tribunal, through its case-law, interprets this wording – "*any civilian population*" – extensively so that it also extends to the civilian population of its own citizens (Ivanišević, Ilić, Višnjić & Janjić, 2008, pp. 86-87). The emphasis is therefore placed on the phrase "any" and then explained to refer to all people who are not combatants regardless of their nationality – and therefore *any* civilian population. Subsuming the concept of civilians was additionally expanded at the expense of the concept of *combatants*, so that *civilians,* for the purposes of prosecution for crimes against humanity in ICTY practice, can be considered both members of the armed forces and resistance forces who are *hors de combat*, as well as prisoners (Cassese, 2008, p. 102).

In the ICTY Statute, discrimination does not appear as an element of the general concept of crimes against humanity, but appears only in the context of persecution and essentially affects the assessment of the actions that are perpetrated by persecution. However, despite the undoubted omission of the element of discrimination from Article 5 of the Statute, this element, also through the case-law of the Tribunal, was introduced into the category of constitutive elements of crimes against humanity. However, unlike the other elements of crimes against humanity that have been modified through the practice of the Tribunal in accordance with customary law, this element is proving to be the most controversial.

[2] In terms of the psychological attitude of the perpetrator towards the act, this level of awareness and will, that is, intention, is not as high as in the case of genocide. It is generally accepted that genocide requires a special intent to destroy a group or part of a group. That degree of intent, awareness and will is not required in crimes against humanity; for the existence of this crime, it is sufficient (and necessary) for the perpetrator to be aware that he is undertaking his actions in the context of a systematic or widespread attack as part of state or organizational policy.

Bearing in mind the rather meager definition of crimes against humanity contained in Article 5 of the ICTY Statute, and especially bearing in mind that the definition contained in Article 5 of the Statute deviates so much from the customary law definition of crimes against humanity (Scharf, 2019, p. 67) starting from the Nuremberg Trials, the creative role of the Tribunal was undoubtedly not only useful, but also necessary in the construction and crystallization of crimes against humanity. However, not a single court, especially not an international criminal tribunal, should be a legislator, to create law and implement a normative function. It is a general legal principle that criminal law is *lex stricta*, so the creative role of the court can only be extremely justified and only when it is in favor of the defendant. Such a creative approach as demonstrated by the Tribunal, as well as the inconsistency and complete arbitrariness in the freedom to choose the direction of reasoning from case to case cannot be considered acceptable in international justice. Although certain creative interventions by chambers in the definition of crime (such as insisting on the existence of a widespread or systematic attack) were correct and acceptable, such changes in rationale, and frequent adaptation and correction of the definition of crime by the chambers, violate not only the principle of legality (*nullum crimen sine lege*), but also many rights of the defense because the defense did not know or could reasonably expect which direction and which definition of crime the acting panel would choose.

The ICTY Statute did not even have to offer a definition of crimes against humanity. It would not be impossible if the text of Article 5 stated – a crime against humanity as defined in customary law, so the court panels would not have to resort to legal and logical gymnastics in order to determine the definition of this crime. However, the existence of the definition of crime against humanity in the Statute and its second-class treatment are disapproving both for the creators of the Statute and for the entire work of the Tribunal (Šurlan, 2011, pp. 232-233). We admit that the Tribunal found itself in a serious dilemma: whether to remain faithful and apply an absolutely unusable, inappropriate and incomplete definition of crimes against humanity (which is also inconsistent with the common law definition) that would hinder, if not absolutely prevent, the achievement of the goal of establishing the court and prosecuting the crime, or to, through creative interventions, correct and adapt the statutory definition, relying on the definition of crimes against humanity under international customary law, in order to conduct criminal proceedings for acts that are subject to the jurisdiction of the Tribunal. However, despite the fact that certain creative (and legislative) interventions of the Tribunal were justified, we still believe that the answer to the dilemma should have

been: it is neither the purpose nor the mandate of the Tribunal to correct an imperfect legislator (the UN Security Council).

4. Crime against humanity in the Statute and practice of the ad hoc International Criminal Tribunal for Rwanda

The Statute of the International Criminal Tribunal for Rwanda (hereinafter: the Tribunal for Rwanda or ICTR) was adopted by Resolution 955 of the UN Security Council of November 8, 1994 with the aim of prosecuting individuals responsible for serious violations of international humanitarian law committed on the territory of Rwanda and Rwandan citizens responsible for such violations committed on the territories of neighboring countries, in the period from January 1, 1994 to December 31, 1994.

In the Statute of the Rwanda Tribunal, crimes against humanity are defined in Article 3: "*The International Tribunal for Rwanda shall have jurisdiction to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack directed against any civilian population on the national, political , on a racial or religious basis: a) murder; b) extermination; c) enslavement; d) deportation; e) closure; f) torture; g) rape; h) persecutions on political, racial and religious grounds; i) other inhumane acts.*" This definition differs significantly from the definition from the ICTY Statute, and represented a somewhat modified and corrected definition from the ICTY Statute. Most notably, it includes as a mandatory element the existence of a widespread or systematic attack. If one takes into account the fact that the definitions of the two *ad hoc* tribunals were created almost at the same time, the question inevitably arises as to why the Security Council, which established the tribunals, decided on different approaches. Since the Statute of this Tribunal was drawn up only after the events took place, it was based on and adapted to suit the existing facts and the needs of the proceedings (Bassiouni, 1994). Therefore, this provision deviates from the customary law definition of crimes against humanity to the extent that it was expedient in relation to the specific events in Rwanda (Cassese, 2008). Despite this, the definition of the Tribunal for Rwanda is still much closer to the general concept of crimes against humanity, since it contains all the essential elements of this crime, including the element of a widespread and systematic attack (in contrast to the definition from the ICTY Statute). In addition, the definition of crimes against humanity by the Rwanda Tribunal adds another element that does not exist in the customary law definition – the element of discrimination (Schabas, 2007). On the other hand, like the ICTY

Statute's definition of crimes against humanity, the ICTR Statute's definition does not contain an element of plan or policy of a state or other organization. This element will only appear in the Rome Statute, for the first time after the Nuremberg and Tokyo trials.

Article 3 of the ICTR Statute expressly contains an element of discrimination based on distinction on national, political, ethnic, racial or religious grounds. However, discrimination, regardless of what basis, as a constitutive element is a typical feature of the crime of genocide, not a crime against humanity (Schabas, 2007, p. 90 et seq.). The crime against humanity at its core should not be linked to discrimination, because this act does not have to be directed towards a single group (Ntoubandi, 2007, pp. 58-64). Certainly, the element of discrimination is inevitably present in the subtext, in the logic, in the reasons that determine widespread or systematic behavior towards some people, but that element does not need to be formalized, because a formalized element would introduce an additional misconception into the distinction between genocide and crimes against humanity, and could represent and additional burden during processing (Šurlan, 2011, p. 238). In its work, however, the Tribunal relativized the element of discrimination, adopting the position that although the discriminatory element is explicitly stated, it is possible to commit a crime against humanity against an individual who does not belong to any of the listed groups if the perpetrator consciously wanted to commit a crime against humanity. This position is directly opposed to the statutory definition of crime, which, among other things, requires that the act was undertaken with regard to one of the listed personal characteristics. This court had the opposite problem and approach from the ICTY. As we have seen, the ICTY, partly under the influence of the provisions of the ICTR Statute, wanted to introduce these elements into the definition contained in the ICTY Statute, while, on the other hand, the ICTR sought to remove this element from the definition of the crime it is prosecuting. Although the ICTR was correct in terms of defining a definition that would be consistent with the customary law definition of crimes against humanity, it must be criticized the same as the ICTY: it is not the tribunal's mandate to correct an imperfect legislator (the UN Security Council). It is particularly absurd that the ICTY referred to the practice of the ICTR to support its position on the discriminatory element as an essential feature, while the ICTR referred to the practice of the ICTY to support its position that the element of discrimination is not an essential element and feature of the crime.

5. Concluding remarks

What is certain is that crimes against humanity is a relatively broad concept that includes most forms of crimes committed against innocent civilians, including war crimes in the classical sense. However, what seemed also certain – the general and customary law definition of crimes against humanity – became uncertain, mainly due to the inconsistent Security Council, but also the wanderings of ICTY and ICTR jurisprudence in the extremely arbitrary and inconsistent definition of the essential elements of this crime. Criticism from the legal society and scholars of the statutes of *ad hoc* tribunals and their case-law, as well as the turbulent waters of international criminal law, created through the legislative actions of the Security Council, will result in the fact that the UN Security Council will never again unilaterally create an *ad hoc* tribunal, and will result in the international community approaching the definition of this crime in a unique way at the universal level – by creating a (permanent) International Criminal Court and adopting its Statute (Rome Statute), which in Article 7 contains, from the aspect of international criminal law, the final definition of this crime which contains a precisely defined contextual element (paragraph 1): "*for the purposes 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*" whereby, removing any doubt about the definition of the term attack, paragraph 2 of the same article defines that "*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*" Hereby, the contextual element of this crime, based on the Nuremberg Charter and the judgments of that tribunal, also respecting the criticism directed at the account of *ad hoc* statutory solutions of the *ad* hoc tribunals and their jurisprudence, finally defined in the clearest and most precise way that can be done. This definition was adopted by the International Law Commission in its drafts of the international public law convention on crimes against humanity. It can therefore be said that the definition of the contextual element of this crime from the aspect of customary international law is, finally, a settled issue.

In defining crimes against humanity, it was a long road from Nuremberg to Rome, with a lot of wandering, both in the legislative interventions by the UN Security Council and in the case law of the tribunals, which, instead of consolidating the usual rule of crimes against humanity, only introduced

additional legal uncertainty and called into question the common law status of this crime, which was by no means acceptable. Organized efforts of the entire international community, embodied in the framework of the Rome Conference, will be needed to definitively define this crime on a universal level. Regardless of the answer to the question whether this definition of crimes against humanity in the Rome Statute was only a codification of the existing customary law or a completely new rule of international criminal law, in the light of statutory solutions and the case law of the *ad hoc* tribunals referred to in this paper, twenty-four years later there is no dispute that this definition reflects customary law on the definition of crimes against humanity as it stands today.

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OSVRT NA DEFINISANJE ZLOČINA PROTIV ČOVEČNOSTI U PRAKSI *AD HOC* TRIBUNALA

REZIME: Zločin protiv čovečnosti jedno je od najstarijih međunarodnih krivičnih dela, odnosno krivičnih dela sankcionisanih od strane međunarodne zajednice, počev od ranog dvadesetog veka. Kroz dvadeseti vek, koncept ovog međunarodnog krivičnog dela je evoluirao, pa je i definicija i obim ovog zločina pretrpela izmene od Nirnberškog suda, preko ad hoc međunarodnih tribunala za bivšu Jugoslaviju i Ruandu, sve do Statuta Međunarodnog krivičnog suda. Međutim, još od prvog kodifikovanja ovog međunarodnog zločina, javlja se problem sa potpunim određivanjem radnji izvršenja ovog krivičnog dela, koji nije u celosti otklonjen ni u poslednjem

aktu međunarodnog krivičnog zakonodavstva – Rimskog statuta. Tome svedoče kontinuirani napori na nivou Ujedinjenih nacija da se donese i sveobuhvatna specijalna konvencija koja će kodifikovati sva pravila koja se odnose na zločin protiv čovečnosti. Ovaj rad će prikazati razvoj definicije zločina protiv čovečnosti kroz statutarna propisivanja zločina u statutima i sudskoj praksi ad hoc tribunala i Međunarodnog krivičnog suda, a koja su uticala na definisanje zločina protiv čovečnosti.

***Ključne reči*:** *zločin protiv čovečnosti, ad hoc tribunali, Rimski statut.*

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