CRIME AGAINST HUMANITY: THE UNTAPPED AREA OF VIOLENCE

Sayantani Chakraborty(Mukherjee)

Advocate, B.A. LL.B(Hons.)

ABSTRACT

Despite various concepts evolving in the field of criminology, the criminologists have ignored the very odious of crime, i.e. the crime against humanity. Though crime against humanity embraces rape, murder, genocide, enslavement, torture, persecutions on political, racial, religious grounds, still it is one of the neglected aspects of criminology. During the 20th century tracing back to World War II as well as at present the state sponsored crimes have caused more deaths than any other crimes in the world. The international law that address these atrocities are relatively at a nascent stage and there is a need to investigate into the international crimes in the light of the existing apparatus. Further this article offers a perspective to lessen the gap between the international law and the justice system confirming to fair procedural system and understanding the nuances of the crime against humanity.

INTRODUCTION

The criminological lacuna lies in the fact that crime against humanity which involves the most heinous types of crimes is a neglected area of criminology. Initially the crime against humanity was comprehended under the Nuremberg trials which focused mainly on offences and atrocities on any civilian population. Most recently Article Seven of the Rome Statute of the International Criminal Court have included enforced prostitution, forced pregnancy, enforced sterilization, extreme forms of sexual violence, the enforced disappearance of persons, apartheid, and other inhumane offences deliberately causing great torment or serious injury, when such acts are knowingly committed as part of widespread and organized violence directed against any civilian population with the knowledge of attack. To capsulate crime against humanity beyond armed conflict is a debate which was ongoing in the twentieth century. The ICC was the first court to remove armed conflict as a requirement for atrocity against any civilian population as “crime against humanity”. The provision of ICC statute that defines the crime against humanity is Article 7, only defines "crimes against humanity"

for the purpose of the ICC. Also Article 7 came into being after deliberate negotiation with 160 states at large .Therefore the Article 7 of the ICC is a detailed provision that any other definitions included in any other statute. Here the states agreeing to the definition knowing the contours of the offences would take corresponding responsibility to fulfil the obligations. For the same reason, one might expect the definition to be more restrictive than previous definitions. The definition of crime against humanity as provided under Article 7 of the ICC most comprehensive as it does not require any nexus with the armed conflict, which is in accordance with the recent developments in the field of criminology. But the mere existence of the ICC can be an advantage for the States to develop their own judicial system to try crimes against humanity with ate mechanisms. States willing to preserve their sovereignty would retain control over the prosecutions[1]. This empowers the States to take a leading role to fight against the menace of crime against humanity. It is also pertinent to notice that, though the states agreed to abide by the obligations under ICC but the ICC failed to deal with state sanctioned crimes. The ICC by leveraging the power to encourage states to promulgate their own judicial system has also given rise to attacks by the State on the civilian population which are systematic and state sponsored. There has been hardly any discussion over the state sponsored crimes forcing the civilians to fly away from their own countries for their lives.

It is a well established fact under the ICC and other existing statutes that, all the attacks encompassing the atrocities and inhuman torture cannot be characterized as crime against humanity. The states have dealt with two terms “widespread” and systematic. The former includes large scale destruction and attacks on victims while the latter means targeting the civilian population in an organized manner. The main issue with respect to widespread and systematic is whether they should be used in isolation. But the disjunctive aspect is already discussed and debated in the existing authorities. In the ICTR statute itself crime against humanity requires any inhuman act against civilian population be committed as widespread and systematic attack by the perpetrators, leading to an inclusive view of it. Since any widespread attack does not constitute a crime which are unrelated crimes under the existing authority[2].

[1] Catalyzing National Judicial Capacity: The ICC’s first Crime Against Humanity Outside Armed Conflict, By Carey Shenkman.
[2] Crime Against Humanity as a nexus of individual and State responsibility, Berkley Journal of International Law, By Adam Day.

All though crime against humanity has been a topic of the international law for a long time. But it cannot be confined to the study of the international law without uncovering the essence of such crimes and why it is distinct from other crimes and offences.

ARTICLE 7 OF THE ICC STATUTE: LOOKING INTO THE NEST

The Article 7 of the ICC statute characterizes crime against humanity as a widespread or systematic attack over any civilian population with the knowledge of attack. The definition under the Statute can be analyzed as below:

The most important part of the Definition under the ICC Statute is that, it does not related crime against humanity with war crimes. If the crime against humanity forms a nexus with war crimes it would render the concept very redundant and subsumed to the category of armed conflict only. It is also viewed as inconsistent with the situation while addressing crimes such as Apartheid and Genocide[3]. ICC does not make any reference to armed conflict confirming that occurrence of armed conflict is not necessary, and crime against humanity can occur even during peace times and any civil war. This helped largely in addressing crimes committed against the civilians by the government[4].

Another issue with respect to the war crimes is whether it should have nexus with any discriminatory motive. The discriminatory motive is not required in all the cases, be it, national, political, racial etc., but the crime of persecution is the only crime which requires discriminatory motive. Such a requirement appeared in the ICTR Statute but nevertheless it appeared in the ICTY Statute. Therefore this requirement is not supported by the relevant international instruments as well and hence should be rejected as a criterion[5].

Crimes against humanity, in its strict sense, only first entered positive international law in 1945 when the four Allied powers, France, the Soviet Union, the United Kingdom and the United States established the International Military Tribunal at Nuremberg and granted it

[3] The concept of "widespread" may be defined as massive, frequent, large-scale action, carried out collec- tively with considerable seriousness and directed against a multiplicity of victims. The concept of "systemn- atic" may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources

[4] <http://sa.democrats.org.au/Media/2003/1205_a%20democrats%20only%20voice%20for%20refugees.htm>

[5] Prosecutor v. Tadic, Form of the Indictment, No. IT-94-1-T, para. 11

jurisdiction to try the captured Nazi leaders with three categories of crimes: 'crimes against peace' (Article 6(a)); 'war crimes' (Article 6(b)); and 'crimes against humanity' (Article 6(c)).[6] Hence, the concept of crimes against humanity is heavily associated with the Nuremberg Trial. It would be wrong, however, to think that the idea has no genealogy before that date. Its roots, in fact, can be traced back over the centuries.

To trace the history of those roots one has to provide a working definition of 'the concept of crimes against humanity', in its loose or non-technical sense, rather than its definition as an international crime *stricto sensu*. The concept, in essence, has three elements:

(1) The existence of a crime under a higher, basic, natural or international law which applies to all persons, irrespective of position or status, and regardless of any contrary positive or local law.

(2) Such higher law applies to persons of all nations at all times and can never be the subject of any state derogation.

(3) Perpetrators of such crimes can be subject to individual criminal responsibility before courts applying directly that higher law, not merely the local law of a particular state.[7]

The defining, though not exclusive, aspect of the concept of crimes against humanity is the notion that certain conduct is unlawful and liable to punishment, even when committed by a sovereign or a Head of State towards its own people under the colour of local law or state authority. It is suggested that this loose concept of crimes against humanity has gone through four historical phases[8].

[6] *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,* done in London, England, opened for signature 8 August 1945, 82 UNTS 280 (entered into force 8 August 1945), to which was annexed the Charter which established the Nuremberg Tribunal (hereinafter the London Agreement and Nuremberg Charter respectively).

[7] These three elements contain the essence of the Nuremberg Principles. See: *The Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal,* Report of the International Law Commission to the United Nations General Assembly, dated 29 July 1950, UN GAOR, 5th sess, Supp (No. 12), UN Doc A/1316 (1950).

[8] Paper by Dr Robert Dubler, What is in a name? A Theory of Crime Against Humamity.

STUDY OF CRIME AGAINST HUMANITY IN THE LIGHT OF CRIMINOLOGY

During and just after the Second World War there was a flurry of criminological interest in Nazi war crimes, but it was more jurisprudential than social scientific. Sheldon Glueck, the Roscoe Pound Professor of Criminology and Criminal Law at Harvard Law School, was in support for a Universal declaration of Human Rights, which turned out immensely successful in the post war situation. In the wake of the war revelations as to how the Nazis treated the people, the war crime tribunals were established and trials were concluded. After that, the criminological attention turned away from crime against humanity[9].

From 1948 to 1960 the structure of the International relation saw a drastic change. The post World War II war crimes was replaced by the Cold War. This change was reflected in different national policies and the focus was shifted the focus of criminology to national crimes at large. The failure of the international crime to develop a device a proper indtrument for the crime against humanity led to the various difficulties in applying the law to prevent crimes against humanity[10]. Thus a comprehensive and elaborative international instrument must be formulated to address specifically the crimes against humanity. Recent studies have shown that the crime against humanity has been a persistent phenomenon throughout the past several years. And attacks on civilian population as a weapon of war by the rebels hence calling for a strategic convention on victims and victimization as part of criminological studies. Crimes against humanity has been committed in many parts of the World such as killing fields of Cambodia; ethnic cleansing in the former Yugoslavia; abduction, sexual violation, mutilations, and torture in Sierra Leone, the Democratic Republic of the Congo (DRC), and Uganda; forced disappearances in Latin America; attacks upon civilians by both Israel and Hamas in the Israeli/Palestinian conflict and attacks upon civilians in East Timor. Each of these situations has resulted in some combination of death, displacement, torture, sexual violence, and other inhumane acts against civilians. Each has been severe enough to warrant international intervention: International tribunals have been established, national courts or truth commissions have been convened in conjunction with international civil society, or international observers have issued reports alleging the commission of crimes against humanity. Sadly, these represent just a few examples[11].

[9] http://infopoland.edu/classroom/J/final.html.
[10] http://crimesagainsthumanity.wustl.edu.
[11] http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/#more-3782.

In the modern conflicts the death of the civilians are in vogue than that of the combatants. The violence carried on by the perpetrators is so heinous that, even the hardest of the observers view it as crime against humanity in its most brutal form. Women are raped body parts are slashed off and the victims are forced to feed on them, children are abducted, forced to kill family members, and then to fight as child soldiers, political dissidents are disappeared, imprisoned, tortured, and murdered, individuals are targeted because of their actual or apparent connection to the "wrong" group, whether it be ethnicity, religion, social class, or political beliefs. If committed during armed conflict these atrocities may be deemed war crime, but not if they occur in peacetime[12].

The plain meaning of the term attack against civilian population raises a question of a political element involved in it. Any attack on the population which is systematic and organized has certainly a political element. But many of the authorities do not recognize the political element on the ground that, it makes prosecution very difficult. Since the Nuremberg Charter the policy element has been on the surface for crime against humanity. The policy of repression, torture, rape, persecution, murder of civilian population is called "policy of terror". Even the military tribunal's trial reveals that, the policy element of the State is imperative in the commission of crime against humanity[13].

Many authorities recognize the policy element as a requirement of crime against humanity as mandatory. But some authorities have also argued against the requirement of policy element of the Government. The ICC has defeated many such controversies regarding the policy element. This policy issue has also been dealt under ICTY and ILC saying that all the crimes against humanity is required to be committed by the Government or any group or any organization. There must be some form of Governmental link with the group or organization committing crime against humanity. Previously the conception was that there should be a policy element existing and the policy has to be of the State. But now the customary international law has evolved so much that referring to State policy alone would be too narrow a definition, a certain group of organization's involvement is a necessary requirement to commit such crimes. Further the recognition of the State policy to commit crime against humanity is also dealt under the ICTR Statute. It is stated there that systematic attacks require

[12] http://www.icrc.org/eng/assets/files/other/icrc_002_0798_women _facing_war.pdf.
[13] http://werle.rewi.hu-berlin.de/High%20Command%20Case.pdf

more organizational strategies, whereas the ICTY states that, the policy requirement is much flexible contrary to the systematic policy for attacks against the civilian population[14].

CONCLUSION

The initiatives of the United Nation for addressing the crimes against humanity are by and far commendable. But in the recent past the organizations dealing with crimes against humanity have become dysfunctional, lacking basic structure, sufficient stuffs and other resources. The starting point must be to accept that State courts are not well equipped to prosecute extraterritorially all the world's perpetrators of crimes against humanity as defined under Article 7 of the ICC Statute. The impossibility of relying on the national courts was the sole reason for the creation of international tribunals. But the mere creation without any action on the part of such tribunals will yield no results. The loopholes and gaps in the jurisdictions of the ICC makes it all the more impractical to address the crimes against humanity. This leads to prosecution by the States which do not have the sufficient laws to implement in case of such crimes as mentioned above and the States being the perpetrators themselves itself, injustice prevails in the State. The twenty first century's first aim is to uproot crime against humanity and make a tribunal which can act a model in the regional world in the field of human rights.

[14] The American Journal of International Law, Vol. 93, No. 1 (Jan., 1999), pp. 43-57