

International Criminal Justice (Crimes Against Humanity) العدالة الجنائية الدولية (الجرائم ضد الإنسانية)

Mouats Madjid

Lecturer Class B

University of 20 august 1955 Skikda

Madjiddoctorat@hotmail.fr

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Abstract: Crimes against Humanity has its origin in customary international law, and there was no authoritative definition of these crimes. The concept has evolved via the international criminal tribunals, which paved the way for the development of jurisprudence, helping the drafters of Rome Statute to introduce innovations, and enlarge their scope. The process of evolution resulted in an outcome that was significant to the practical effectiveness of the ICC in punishing large-scale and inhumane atrocities that deeply shock the conscience of humanity.

As set forth in Rome Statute's Preamble; these crimes must not go unpunished and their effective prosecution has to be ensured. In fact, the perpetrators of these egregious crimes have been tried and punished. Unfortunately, the sentences provided for by the Statute are not severe enough to ensure deterrence.

Key words: Crimes against Humanity-atrocities-evolution-Rome Statute-punishment

ملخص: يعود أصل الجرائم ضد الإنسانية إلى القانون الدولي العرفي ، إذ لم يكن هناك تعريف موثوق به لهذه الجرائم، تطور المفهوم من خلال أحكام المحاكم الجنائية الدولية ، التي مهدت الطريق لتطوير الاجتهاد القضائي ، ومساعدة واضعي قانون روما الأساسي على الابتكار حيث أسفرت عملية التطور عن نتيجة كانت مهمة للفعالية العملية للمحكمة الجنائية الدولية في معاقبة الفظائع غير الانسانية واسعة النطاق، والتي صدمت بعمق ضمير البشرية.

وعلى النحو المنصوص عليه في ديباجة النظام الأساسي لروما ؛ تم التأكيد على أن الجرائم ضد الإنسانية يجب أن لا تمر دون عقاب ويجب ضمان متابعة قضائية فعالة لها. ففي الواقع ، تمت محاكمة ومعاقبة مرتكبي هذه الجرائم الفظيعة. ولكن لسوء الحظ فإن الأحكام المنصوص عليها في النظام الأساسي لروما غير قاسية بما يكفي لضمان الردع.

الكلمات المفتاحية: الجرائم ضد الإنسانية - الفظائع - التطور - نظام روما الأساسي - العقوبة.

*Corresponding author

Introduction

Crimes against Humanity are among the most serious crimes of concern to the international community as a whole. They are perceived to be heinous crimes that prick the consciousness of humanity and offend against humanness implicating the interests of all mankind because they threaten the peace, security and well-being of the world.

Mindful that millions of children, men and women have been victims of atrocious crimes against humanity and that peace has been jeopardized, the international community has decided that these inhumane crimes must not go unpunished and that their effective prosecution and punishment must be ensured by engaging procedures at national and international levels.

The concept of Crimes against Humanity has evolved through time. Most scholars argue that the first time it was made reference to the Crimes against Humanity, was in the preamble to the 1899 Hague Convention with respect to the laws and customs of war and later on in 1907 Hague Convention. It was introduced by Professor von Martens, the Russian delegate at the Hague Peace Conference: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience. Subsequently, on May 1915, a joint declaration issued by France, Great Britain and Russia denounced the massacre of Armenians in Turkey as Crimes against Humanity and civilization, and warned of prosecution. It was also mentioned in the 1919 report¹ of the Commission on the Responsibility

¹ - Report presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War. It recommended the creation of a high tribunal to try persons belonging to enemy countries who were guilty of "offences against the laws and customs of war or the laws of humanity".

of the Authors of war (Axis States) recommending individual criminal accountability for infringing the “ laws of humanity”. These crimes were later enshrined in the Statutes of the International Criminal Tribunal for Former Yougoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.

This paper scrutinizes the evolution of crimes against humanity and their distinctive features as enshrined and enforced by the various international criminal tribunals (Chapter 1), it also examines the final evolution of these crimes as laid down in Rome Statute. The prosecution and adjudication of these core international crimes by the International Criminal Court (ICC) are addressed as well. (Chapter 2).

Chapter 1- Historical Developments of Crimes against Humanity

The concept of Crimes against Humanity has a long and storied history. We examine the developments of these crimes, and see how they operate on the Nuremberg Charter, then we look at these crimes under the International Criminal Tribunals for Former Yougoslavia (ICTY) and Rwanda (ICTR) respectively.

1.1- Crimes Against Humanity under Nuremberg Charter

The notion of Crimes against Humanity as known today has been introduced for the first time as an international grave crime in Nuremberg Charter following the end of World War Two; it was one of the great legal innovations, but whether this was a legislative act creating a new crime or whether it simply articulated a crime already embedded in the fabric of customary international law remains controversial¹.

At the end of the Second World War, the Governments of the Allies concluded an agreement in order to prosecute and punish the major war criminals of the European Axis, especially members of the Nazi Party who have been responsible for the atrocities and inhumane acts. It was signed at London on 8 August 1945.

¹-Darryl Robinson, “Crimes Against Humanity” at the Rome Conference, the American Journal of International Law, Cambridge University Press. Vol.93, NO.1, Jan 1999, p.44.

The drafters of the Nuremburg Charter found themselves confronted with an appalling policy of atrocities and persecutions against civilian populations, which in many cases did not fit the technical definitions of war crimes. These abominable deeds were unquestionably contrary to the dictates of the public conscience and general principles of law¹. The drafters qualified these deeds as Crimes against Humanity and considered that they were crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility. The Charter of the International Military Tribunal² stipulated that "Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organisers, instigators or accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan"³.

What could be said about Crimes against Humanity operating on the Nuremberg Charter is that article (6) lists a number of different acts that qualify as Crimes against Humanity directed against civilian populations, and it highlights the nexus between Crimes against Humanity and armed conflicts; it means that these crimes are war nexus; they occur in connection with armed conflicts. The article delineates Crimes against Humanity into two categories: inhumane acts; such as murder, enslavement and extermination, and persecutions related to protected groups based on political, racial or religious grounds.

¹ -Ibid.

² - Abbreviated IMT (International Military Tribunal); the Charter nominated it " Tribunal".

³ - Article (6/C) of the Charter of International Military Tribunal (Nuremberg), annexed to the Agreement for the prosecution and punishment of the major war criminals of the European Axis. Signed at London, on 8 August 1945.

1.2-Crimes Against Humanity under the International Criminal Tribunal for Former Yougoslavia (ICTY)

Because of the atrocious and graves breaches of the international humanitarian law that were committed in the former Yougoslavia by the Serbs against Muslims and Croats who proclaimed independence from Yougoslavia, the Security Council acting under Chapter 7 of the Charter of the United Nations established the International Criminal Court for Former Yougoslavia in 1993, and adopted its Statute by virtue of the Resolution 827 on 25th May 1993 for the prosecution of persons responsible for serious violations of international humanitarian law perpetrated in the territory of the former Yougoslavia since 1991. Among the crimes that were included in the Statute and that fell under the jurisdiction of the Tribunal "Crimes against Humanity".

As far as Crimes against Humanity are concerned, Article (5) of the Statute stipulated that "the International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts"¹.

The wording of Article (5) of the ICTY Statute of 1993 brought a renaissance of the humanitarian law origins of Crimes against Humanity. It required for the first time since 1951 a new version of war nexus ² and reintroduced the requirement that possible victims be civilians. This new version of war nexus can be justified in the fact that Crimes against Humanity are connected with armed conflicts whether international or non-international. The ICTY raised the legal status of the crime of rape, as such, to that of a crime against humanity. This is a new judicial specificity. To this effect, the ICTY's rules of Procedure and Evidence provide

¹ - Article (5) of the Updated Statute of the International Criminal Tribunal for the Former Yougoslavia adopted 25 May 1993 by Resolution 827 of the Security Council.

² - Crimes against Humanity can be perpetrated in international or non-international armed conflicts.

measures requiring a lighter burden of proof in cases of sexual assault¹. It is important to know in this context that rape and torture were included and considered for the first time as acts amounting to Crimes against Humanity. Thus, the ICTY played a significant role with the inclusion of rape and torture as international criminal offences, it prosecuted and adjudicated those considered most responsible for these gravest crimes committed in former Yugoslavia.

1.3- Crimes against Humanity under the International Criminal Tribunal for Rwanda (ICTR)

In 1994, an armed conflict of international character was triggered between the Tutsis and Hutus in Rwanda. It was a large scale civil war which was fought between the Rwandan Armed Forces, representing the government, and the Rwandan Patriotic Front (RPF) from October 1990 to 18 July 1994. The war arose from the long-running dispute between the Hutus and Tutsi groups within the Rwandan population. The war resulted in commitment of atrocious massacres that lasted and occurred in a systematic way. Many unarmed civilians were victims of violations in several parts of the country; particularly in areas under control of government armed forces. The collapse of the country encouraged the conflicting parties to commit serious violations of international humanitarian law².

Having considered the reports about the genocide and other systematic, widespread and flagrant violations of international humanitarian law that have been committed in Rwanda, the Security Council acting under Chapter 7 of the United Nations Charter, decided to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring States, between 1st January 1994 and 31 December 1994,

¹ -International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR). <https://guide-humanitarian-law.org/content/article/3/International> criminal -tribunals- for the former- yougoslavia-icty. Consulted on 4th March 2022.

² -الطاهر مختار علي سعد، القانون الدولي الجنائي (الجزاءات الدولية)، دار الكتاب الجديدة المتحدة، لبنان، بيروت، 2000، ص ص 160-161.

and to this end, a Statute of the International Tribunal for Rwanda is adopted¹.

It is worth noting that the International Criminal Tribunal for Rwanda² was competent to prosecute persons having committed genocide, violations of Article 3 common to the Geneva Conventions and of Additional Protocol 2 and it had the power to prosecute persons responsible for Crimes against Humanity as well.³ Crimes against Humanity were mentioned in Article 3 of the Statute: “ The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation; (e) Imprisonment; (f) Torture; (g) Rape; (h) Persecutions on political, racial, and religious grounds; (i) Other inhumane acts”.

The acts enumerated above are committed by the perpetrators as part of a widespread or systematic attack against any civilian population. This is actually unlike to the ICTY and also to the Nuremburg Statutes because the ICTR Statute emphasized on widespread and systematic attack. This takes Crimes against Humanity away from something that has to be connected to armed conflicts; the contextual qualifiers are not armed conflicts, whether they are internal in character or international. The discriminatory motives remained in the ICTR Statute pertaining to the facts that Crimes against Humanity are perpetrated on national, political, ethnic...grounds.

¹ -Preamble of Resolution 955 (1994) Adopted by the Security Council at its 3453rd meeting, on November 1994.

² - Abbreviated ICTR (International Criminal Tribunal for Rwanda). The Security Council nominated it “Tribunal”.

³ - See Articles 2, 3, and 4 of the Statute of the International Criminal Tribunal for the Prosecutions of Persons Responsible for Genocide and other serious violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994.

Chapter 2- Crimes against Humanity under the International Criminal Court (ICC)

The second part of the Article aims at providing a detailed examination of Crimes against Humanity under the International Criminal Court Statute (Rome Statute). After some 50 years of prolonged discussion and debates, the creation of a permanent international criminal court (ICC) became a reality on July 17 of 1998 with the adoption of the Rome Statute. It came into force on July 1, 2002 upon 60 ratifications.

The International Criminal Court came to fulfil two objectives :-(1) safeguarding higher values such as the protection of human rights, an obligation that transcends State border; (2) and accountability for those responsible for the commission of the crimes under the jurisdiction of the ICC, so as to put an end to the impunity that is often associated with these violations¹. These violations are recognized as the most grave crimes of concern to the international community that threaten peace, security and well-being of the world. The Court has jurisdiction in accordance with Rome Statute with respect to: the crime of genocide; war crimes; the crime of aggression and crimes against humanity.²

In the second part of the paper, we try to survey Crimes against Humanity in the Rome Statute, noting that Rome Statute was highly inspired by the features that characterized this crime in the previous Statutes of the International Criminal Tribunals. We focus herein on the contextual elements of Crimes against Humanity in Rome Statute, what differentiates Rome Statute from the prior Statutes in terms of definition, and prosecution and adjudication of these abominable crimes by the International Criminal Court (ICC).

¹ -Muhammed Tawfik Ladan, An Overview of the Rome Statute of the International Criminal Court: Jurisdiction and Complementarity Principle and Issues in Domestic Implementation in Nigeria, Journal of Sustainable Development Law and Policy, Afe Babalola University, Vol. 1 Iss. 1, (2013), p. 37.

² - See paragraph 3 of the Preamble of Rome Statute and Article 5.

2.1- Contextual Components of Crimes against Humanity

Crimes against Humanity belong to the category of core crimes listed in Article (5) of the Statute that are considered to be “the most serious crimes of concern to the international community as a whole”. Article 7 of the Statute is presumed to codify the customary law definitions of Crimes against Humanity. Despite differences between the delegations at the Diplomatic Conference in Rome, the delegates succeeded to overcome them, and adopted by way of compromise, the text of Article 7 of the Statute which contains three paragraphs: Article 7(1) encompassing the chapeau elements reflecting the contextual elements of Crimes against Humanity in which the individual elements are set out. Articles 7 (2) and 7(3) contain statutory definitions in relation to selected terms used in Article 7(1) of the Statute¹.

We try to carry out an analysis pertaining to the important features of the chapeau of Article (7), which will be examined below, are: the absence of a requirement of a nexus to armed conflict, (2) the absence of a requirement of a discriminatory motive, except the crime of persecution (3) “the widespread or systematic attack” criterion, the element of mens rea, and attack against a civilian population.

2.1.1-Nexus to armed conflict: One of the most important features of the definition in the ICC Statute is that it makes no reference to a nexus to armed conflict, affirming that Crimes against Humanity can occur not only during armed conflict but also during times of peace or civil strife. This outcome was essential to the practical effectiveness of the ICC in responding to large-scale atrocities committed by governments against their own population². Therefore, the ICC took inspiration from the International Criminal Court for Rwanda in this regard. The plenipotentiaries were also determined to put an end to impunity for the perpetrators of the most heinous crimes that shock the conscience of humanity.

¹ -Morten Bergsmo and Song Tianying, On the Proposed Crimes Against Humanity Convention, FICHEL Publication Series, Torkel Opsahl Academic E Publisher, No 18, Brussels, 12 December 2014, pp. 51-52.

²-Darryl Robinson, op.cit., pp. 45-46.

2.1.2-Discriminatory motive: It is worth underlining that there were diverse opinions in the negotiations between the plenipotentiaries in the Conference about whether the definition should require a discriminatory motive, i.e., that the crime be committed on national, political, ethnic racial or religious grounds. All participants agree that the specific crime of persecution required a discriminatory motive (as discrimination is the essence of persecution)¹.

Article (7/h) brought many clarifications as to any kind of persecution on any basis pertaining to any identifiable groups. The IMT, ICTY and ICTR Statutes included the crime of persecution, provided it is committed only on political, racial and religious grounds. In this regard, and unlike the previous tribunals, Article (7/h) adds other protected groups, namely; cultural, ethnic and gender groups, or other grounds that are recognized as impermissible under the general rules of international law.²

2.1.3-Widespread or Systematic Attack: As referred to in Article (7/1) Crimes against Humanity shall be committed as part of a “widespread or systematic attack”. Many delegates in the Rome Conference exerted a great pressure to impose one criterion; widespread or systematic (disjunctive), on the other part, French, American and British delegates pushed in favour of adopting the two components together (conjunctive). In the end, the first option prevailed³.

It was agreed by all participants at the Rome Conference that not every inhumane act amounts to a “crime against humanity”, and that a stringent threshold test is required. Delegations readily adopted the qualifiers “widespread and systematic”. The term “widespread” requires large-scale action involving a substantial number of victims, whereas the

¹ - Ibid, p.46.

² - Article 7 (h) of Rome Statute provides that: “ for the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack...: persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph3, or other grounds that are universally recognized as impermissible under international law...”.

³ - د. علي جميل حرب، منظومة الجزاء القضائي الدولي (المحاكم الجزائية الدولية و الجرائم الدولية المعتبرة)، الجزء الثاني، منشورات الحلبي الحقوقية، لبنان، بيروت، 2013، ص 407،

term “systematic” requires a high degree of orchestration and methodical planning.¹ Moreover, the concept of “widespread” may be defined as massive, frequent, large-scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of “systematic” may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.² Consequently, any kind of sporadic acts or violence does not constitute Crimes against Humanity.

2.1.4-Attack against a civilian population: It is understood to mean a course of conduct involving the multiple commission of acts referred to in Article (7), paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population.³

A difficulty arises about the definition of civilian population: a narrow approach would imply that civilian population excludes any members of armed organizations; it never encompasses armed groups. Whereas a broad approach would mean that anyone can be part of a civilian population provided they are not actively participating in an armed conflict at the relevant time. Civilians need to be the targeted object and not incidental victims in a military attack. In brief, civilian population refers to people not taking part in hostilities.⁴

-Mens Rea Requirement: The definition in the ICC statute confirms that the accused must at least be aware of the attack (with knowledge of the

¹ - Darryl Robinson, Idem, p.47.

² - See ICTR Prosecutor versus. Akayesu, Judgement, Case No. ICTR-96-4-T.Judgement (Sept.2, 1998), available at: <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-96-4/trial-judgements:en/980902.pdf> Consulted on 4 February 2022

³ - International Criminal Court, Elements of Crimes, ISBN, No. 92-9227-2, 2011, p.3.

⁴ - د. رقية عواشيرة، حماية المدنيين و الأعيان المدنية في النزاعات المسلحة غير الدولية، رسالة دكتوراه، كلية الحقوق، جامعة عين شمس، السنة الجامعية 2001، ص 108.

attack)¹. Hence the approach taken at the Rome Statute is more consistent with fundamental principles of criminal law. The obligation of the prosecution to prove all elements of crimes, including the mental elements, has been described as the “golden thread” of criminal law².

Knowledge of the attack is an interesting innovation in Rome Statute. The Office of the Prosecutor has to prove that the accused has perpetrated the prohibited acts enumerated in Article (7) with knowledge of the attack and as part of a widespread and systematic course of conduct; this is how to determine the mens rea.

Finally, the acts listed as Crimes against Humanity have known an evolution in ICC Statute in comparison with Nuremburg, ICTY and ICTR. The ICC added other incriminated acts: in addition to imprisonment, it included other severe deprivation of physical liberty in violation of fundamental rules of international law; sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence; enforced disappearance of persons and the crime of Apartheid.³

2.2- Trial of perpetrators of Crimes against Humanity before the ICC

As it is laid out in the Preamble of the Rome Statute, the Court (ICC) investigates, and where warranted, tries those responsible for committing the gravest crimes of concern to the international community that deeply shock the conscience of humanity. The Court exercises its criminal jurisdiction over the crimes stipulated in Article 5: the crime of genocide; war crimes; the crime of aggression and crimes against humanity. Our focal point in this paper are Crimes against Humanity. We try to study some of the cases that were brought before the Court for trial.

¹ -The contextual component “knowledge of the attack” is set out in Article (7/1) of the Rome Statute.

² - Darryl Robinson, Op.Cit., p.52.

³ - See Article 7 paragraphs (e-g-i-j) of Rome Statute.

2.2.1-Referral of a Situation by the Democratic Republic of the Congo to the ICC: April 2004

In April 2002, the government of the Democratic Republic of the Congo (DRC) which ratified Rome Statute in 2004, referred the situation in its territory since the 1 July 2002 to the ICC. The ICC therefore may exercise its jurisdiction over crimes listed in its Statute committed on the territory of the DRC or by its nationals from the 1 July 2002 onwards.

The situation was referred to the ICC as a result of the armed conflict that ignited between the governmental forces and the rebels (Congolesse Assembly for Democracy) whose aim was to overthrow the government. During the conflict, atrocities were committed and grave violations of international humanitarian law occurred¹.

The Prosecutor started the investigations leading to a number of cases, which have involved among other crimes; Crimes against Humanity allegedly perpetrated in the East of Ituri region and the North of Kivu provinces since 1, July 2002. The alleged crimes against humanity that were committed included: murder and attempted murder, torture; rape; sexual slavery; inhumane acts; persecution; forcible transfer of population; attacking a civilian population; destroying property; and pillaging. The investigations that were conducted by the Office of the Prosecutor led to three convictions and one acquittal:²

-The Prosecutor v. Germain Katanga: Germain Katanga was found guilty on 7 March 2014, as an accessory to one count of a crime against humanity (murder). The judgement was final, as both the Defence and Prosecution withdrew their appeals on 25 June 2014. He was sentenced to a total of 12 years imprisonment. Besides the criminal punishment, on 24 March 2017, Trial Chamber 2 of the International Criminal Court issued an Order awarding individual and collective reparations to the victims of crimes committed by Katanga Germain on 24 February 2003.

¹ - هشام مجد فريجه، القضاء الدولي الجنائي و حقوق الإنسان، دار الخلدونية للنشر و التوزيع، الجزائر، 2012، ص 273.

² - Situation in the Democratic Republic of the Congo (Investigation), ICC-01/04. <https://www.icc.cpi.int/drc>. Consulted 11 May 2023.

The reparations were meant to repair the harm they caused to the victims, and to enable the Court to ensure that offenders account for their acts.¹

- **The Prosecutor v. Bosco Ntaganda:** On 8 July 2019, ICC Trial Chamber found Bosco Ntaganda guilty, beyond reasonable doubt of 18 counts of war crimes and crimes against humanity, committed in Ituri, DRC. On 7 November 2019, he was sentenced to a total of 30 years of imprisonment. On 30 March 2021, the ICC Appeal Chamber confirmed the conviction and the sentence in the case. In addition to the conviction and sentence, on March 2021, Trial Chamber 4 of the International Criminal Court delivered in a public hearing its Order on Reparations to victims under Article 75 of the Rome Statute in the case of the Prosecutor v. Bosco Ntaganda².

-2.2.3-Referral of the Situation in Darfur (Sudan) to the ICC by the Security Council (UNSC) Pursuant to Resolution 1593 (2005)³

Sudan is not a State Party to the Rome Statute. However, since the United Nations Security Council (UNSC) referred the situation in Darfur to the ICC, the latter may exercise its jurisdiction over crimes listed in the Rome Statute committed on the territory of Darfur, Sudan, or by its nationals from 1 July onwards. The referral can be justified by article (13/b) of Rome Statute which provides that the Court may exercise its jurisdiction with respect to a crime referred to in article (5) in accordance with the provisions of this Statute if a situation in which one or more of such crimes appear to have been committed is referred to the Prosecutor by the Security Council acting under Chapter 7 of the Charter of the United Nations. It appears that articles (25) and (48/1) grant the Security

¹ - Katanga case, *ibid*.

² -ICC-1/04 Situation in the Democratic Republic of the Congo. <https://www.icc-cpi.int/drc>. Consulted on 7 April 2022.

³ -Article (13/b) of the court's Rome Statute, vests the UN Security Council, acting under Chapter 7 of the UN Charter, with the authority to refer situations to the ICC, including those where crimes were committed on the territory of non-states parties or by nationals thereof. To date, this is the only way to make ICC jurisdiction universal-i.e., extended to any State Party or not. Till Papenfuss, The Relationship between the ICC and the Security Council: Challenges and Opportunities, International Peace Institute, March 2013, p. 4.

Council the authority to undermine the principle of sovereignty when maintenance of international peace and security are challenged. These two Articles require that UN members accept to carry out the decisions taken by the Security for the maintenance of peace and security¹

As regards the Situation in Darfur, the ICC investigations found out that those war crimes, crimes against humanity and genocide were committed on 1 July 2002, and these investigations concluded that high officials in the Sudanese government, militia Djendjaouid leaders and leaders of the Resistance Front have allegedly perpetrated genocide, war crimes and crimes against humanity. The crimes against humanity included: murder; persecution; forcible transfer of population; rape; inhumane acts; imprisonment or severe deprivation of liberty; torture and extermination².

There was a growing concern that impunity in the face of egregious atrocities were no longer tolerated and that effective prosecution must be ensured to punish the perpetrators even though they hold high political positions and they are nationals of non-states parties to Rome Statute. Relating to this approach, warrant arrests and investigations were launched against some high officials.

-Ahmed Harun v. Prosecutor: a warrant of arrest for alleged war crimes and crimes against humanity was issued (Darfur, Sudan) on 27 April 2007. Ahmed Harun is still at large. His case will remain in the Pre-Trial stage because the ICC does not try individuals unless they are present in the courtroom. He was Minister of State charged with 20 counts of crimes against humanity: murder, attacks against a civilian population,

¹ - Mouats Madjid, The Effect of the Security Resolutions on the International Criminal Court Complementarity Regime, Journal of Legal Studies, International Academic and Scientific Review published by the Laboratory of Sovereignty and Globalization, Yahia Fares, University of Médea, Volume 7, Number 1, January 2021, p. 280.

² - د. موات مجيد، دور المحكمة الجنائية الدولية في حماية ضحايا النزاعات المسلحة، أطروحة مقدمة لنيل شهادة دكتوراه علوم في العلوم القانونية، تخصص قانون دولي انساني، جامعة الحاج لخضر باتنة، كلية الحقوق والعلوم السياسية، قسم الحقوق، 2018، ص 234.

destruction of property, rape, pillaging, and outrage upon personal dignity, allegedly committed at least between 2003 and 2004 in Darfur.¹

-Omar Al Bachir v. Prosecutor: Omar El Bachir was President of the Republic of Sudan, two arrest warrants were issued against him: 4 March 2009 and 12 July 2010. The Prosecutor charged him of five counts of crimes against humanity: murder, extermination, forcible transfer, torture and rape, and counts of war crimes. Until Omar Al Bachir is arrested and transferred to the seat of the Court in the Hague, the case will remain in the Pre-Trial stage. The ICC does not try individuals unless they are present in the courtroom.²

-Ali Muhammed Ali Abd-Al-Rahman v. Prosecutor: He was transferred to the ICC's custody on 9 June 2020, after surrendering himself voluntarily in the African Republic. According to the Prosecution's submission of the document containing the charges, Mr Abd-Alrahman is suspected of war crimes and crimes against humanity allegedly committed between 2003 and 2004. On July 2021, Pre-Chamber 2 confirmed all the charges, and on 8 September, Trial Chamber 1 scheduled the opening of the trial for 5 April 2023³.

As for the legality of referring the situation of Sudan to the ICC, some experts argue that the ICC cannot exercise jurisdiction over crimes committed by Sudanese nationals because the Republic of Sudan is not a State Party to Rome Statute, thus, in accordance with their viewpoint; the decision of the Prosecutor Louis Moreno Okambo is not binding upon Sudan⁴ because the latter has not signed and ratified the ICC Statute⁵. However, other scholars support the idea that the Security Council when

¹ -Situation in Darfur-Sudan, Harun Case, ICC-02/05. <https://www.icc-cpi.int/darfur>. Consulted on 11May 2023.

² -ICC-02/05 Darfur, Sudan. <https://www.icc-cpi.int/darfur>. Consulted on 8 March 2022.

³ - ICC-02/05 Darfur, Sudan, Op.cit.,

⁴ -Article (34) of Vienna Convention on the Law of Treaties, 1969 provides that: "A treaty does not create either obligations or rights for a third State without its consent...an obligation arises for a third State if...the third State expressly accepts that obligation in writing".

⁵ -د. علي أبو هاني و د. عبد العزيز العشراوي، القانون الدولي الإنساني، دار الخلدونية للنشر و التوزيع، الجزائر، 2010، ص ص 336-337.

acting under Chapter 7 of the UN Charter is vested with the primary responsibility to preserve and maintain peace and security in the world, as a result, it issues resolutions that are binding to all UN members whether they are States Parties to Rome Statute or not.

2.2.4- ICC Prosecutor opens proprio motu investigations :

The Court may exercise its jurisdiction with respect to Crimes against Humanity referred to in Article (5) if the Prosecutor initiates investigations proprio motu on the basis of information collected from different actors.

The ICC Prosecutor opened investigations on alleged Crimes against Humanity committed in the context of post-election violence in Kenya in 2007/2008. Kenya ratified the Rome Statute on 15 March 2005. The investigation led to allegations against some suspects who allegedly committed crimes against humanity: murder, deportation or forcible transfer of population, persecution, rape, and other inhumane acts.¹

And many other situations were referred to the ICC in order for the perpetrators to be punished for the inhumane acts they have committed. Situations relating to Mali, Cote D'ivoire and Uganda were referred to the Court for opening investigations and conducting procedures and trials. The situation referred to the ICC by the government of Uganda in January 2004 for alleged war crimes and crimes against humanity in the context of a conflict between the Lord's Resistance Army and the government of Uganda. The alleged crimes included crimes against humanity: enslavement; murder; sexual enslavement; rape and inhumane acts of inflicting serious bodily injury and suffering².

¹ - Situation in the Republic of Kenya (investigation), ICC-01/09. <https://www.icc.cpi.int/Kenya>. Consulted on 11 May 2023.

²-Situation in Uganda, ICC-02/04. <https://www.icc-cpi.int/uganda>. Consulted on 11 April 2022.

Conclusion

This paper has explored Crimes against Humanity as the most egregious and inhumane crimes that shock the consciousness of humanity. They are of customary nature and can be traced to Martens' Clause which set forth for the first time that they constitute transgression to the laws of humanity and the requirements of the public conscience. That is why the international community has affirmed that they must not go unpunished and that their effective prosecution must be ensured to adjudicate the perpetrators.

It is worth highlighting that Crimes against Humanity have known many developments in terms of their contextual components and the prohibited acts that constitute them. In accordance with Nuremburg Charter, there was a requirement, they had to be committed in connection with armed conflicts. In ICTY, the requirement of the nexus of armed conflicts remained as it was the case in Nuremburg Charter, whether the conflict was internal (inspired by the Geneva Conventions 1949) or in international in character. Torture and rape were new acts that constituted Crimes against Humanity in the ICTY and ICTR Statutes. The inclusion of rape is quite significant, because the Ad Hoc Tribunals acting this way, included sexual offences as Crimes against Humanity.

Crimes against Humanity in the ICTR Statute added something different; the qualifier is that this offence has to be committed as part of a widespread and systematic attack, and does not establish a nexus between Crimes against Humanity and armed conflict.

The International Criminal Court Statute is the ultimate evolution of Crimes against Humanity. It has codified a number of developments pertaining to Crimes against Humanity in relation to Customary International Law. Firstly, the Rome Statute does not require a connection between armed conflict and Crimes against Humanity; the plenipotentiaries in the Rome Conference took inspiration from the ICTR Statute in that regard, they also excluded any evidence of discriminatory intent as well. Crimes against Humanity can be perpetrated in times of international armed conflict, non-international armed conflicts and in

times of peace as well, and the requirement that the crimes must be carried out as part of a widespread and systematic attack is maintained.

As far as persecution is concerned, the ICC Statute builds on the precedent and brought an extension by adding national, ethnic and gender grounds that are universally recognized as impermissible under international law. Finally, the acts listed as Crimes against Humanity have known an evolution in ICC Statute in comparison with IMT of Nuremburg, ICTY and ICTR. The ICC added other incriminated acts as mentioned above.

As Crimes against Humanity are crimes against humanness as well as crimes against mankind, recognized as the most barbaric atrocities and humiliations, I contend that the penalties imposed on the perpetrators of Crimes against Humanity by the Court were not severe enough to prevent such crimes in the future, and were inappropriate in relation to their gravity and unjust with regard to the prejudices caused to the victims and the international community as a whole.