

All Rights Reserved

**HOW FAR SHALL STATES BE RESPONSIBLE FOR INHUMAN
TREATMENT OF IMMIGRANTS?
Guido Mario Cottino***

*Founder Shiningknowledge Blog. E-Mail guido@shiningknowledge.com

Abstract

This article aims to identify the conditions under which certain practices and policies concerning immigration may be considered crimes against humanity.

It deals with omissive behaviour as well as active conducts, mostly highlighting when failure to act by states shall be considered a crime against humanity.

The article sets out elements that constitute crimes against humanity as developed in customary international law, stressing decisions of the ad hoc Tribunals.

It focuses its attention on crimes against humanity of "Persecution" and "Other Inhumane Acts". Some references will be made to the crime of "Apartheid".

Furthermore, the article discusses the relationship between crimes against humanity and human rights legislations.

Keywords:

- Crimes against Humanity / Crimes contre l'Humanité.
- Fundamental Rights / Droits Fondamental.
- Inhuman Treatments / Traitements Inhumains.
- Migratory Movements / Immigration.
- Omissive Conducts / Omissions.

Abbreviations

ICC	International Criminal Court;
IMTFEC	International Military Tribunal for Far East Charter;
ICTY	Statute of the International Criminal Tribunal for Former Yugoslavia;
ICTR	Statute for the International Criminal Tribunal for Rwanda;
ECCC	Statute of the Extraordinary Criminal Chamber for Cambodia;
SCSL	Special Court for Sierra Leone.

INTRODUCTION

Topics concerning refugees and migration are among the most controversial questions at international level. The widespread migratory movements towards developed countries due to civil wars or other difficult situations registered in some territories raise important questions about the treatment of immigrants, especially as concerns respect for the dignity of civilians involved in such migratory movements.

Are states responsible for wreckages of innocent people in worldwide seas and oceans? On what conditions should countries be legally responsible for these and other inhumane treatments. Could omissive state behaviour of these kinds of modern atrocities be considered crimes against humanity

How far shall states be responsible for inhumane treatment of immigrants

of “*other inhumane acts*” or “*persecution*”? Do states have a legal duty, under customary and treaty law, to avert the violation of civilians’ fundamental rights? Are states bound to protect immigrants’ lives?

Do states need to protect civilians from possible inhuman treatments coming from hostile situations that have occurred in their native countries? Are states responsible for not adopting suitable measures that aim to safeguard immigrants’ fundamental rights?

Should the failure of states to take necessary and requested measures be considered a systematic attack against the civilian population?

In most of the refugee camps around the world, immigrants suffer from physical and mental illnesses. Cases of self-harm have also been registered.¹

Most of the refugee camps are overcrowded and few initiatives are taken by the international community to effectively manage the situation. human rights and crimes against humanity laws aim to protect civilians from conducts injuring their life or compromising their mental or physical health. Should active and passive conducts of the international community in front of these situations be labelled as crimes against humanity?²

¹In New Zealand, for instance, the government announces the imminent closure of the refugees’ camp based in the Manu Island due to the unlawful treatment to which immigrants are subject. In particular, it discusses the violation of some fundamental rights. See <http://www.bbc.com/news/world-australia-36150758> (last visited 14 October 2018). The situation in some refugees camps based in Europe and in the Middle East is hardly the same.

See http://www.bbc.com/russian/multimedia/2015/09/150911_v_un_refugees_emergency_help (last visited 14 October 2018), shows one of the refugee camps where immigrants are gathered when arrived in hosting states.

See also http://www.bbc.com/russian/multimedia/2016/06/160608_v_greece_teenagers (last visited 14 October 2018), where the author reports, immigrants are forced to prostitute themselves.

See also http://www.bbc.com/russian/multimedia/2016/06/160405_asylum_japan (last visited 14 October 2018), it is reported how immigrants are forced to live while accommodating in developed hosting countries.

²In particular, crimes against humanity of “*persecution*” or “*other inhuman acts*” generating serious mental or physical injury to civilian population. See, for instance, Nurnberg Charter, International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal For Rwanda (ICTR) Statutes.

1. CRIMES AGAINST HUMANITY LEGISLATION

Genocide, war crimes, aggression, and crimes against humanity are all considered to be international crimes.

The first three crimes have a stricter applicability than the latter. For instance, war crime legislation finds application to international or internal armed conflicts and deals primarily with the violation of the law of war, which is provided by the Hague Conventions of 1899 and 1907, the Geneva Convention of 1949 and the additional Protocols of 1977.

However, crimes against humanity can be committed both in armed and non-armed context³ and the law dealing with them cover a broader area in the prosecution and conviction of some of the conducts that violate fundamental rights. It could be argued that this law has residual application in respect to other international crimes. The 1899 and 1907 Hague Conventions argue that the “*law of humanity*” aims to protect civilians in armed conflicts.⁴

Successively, the expression, which is currently used, known as “*Crimes against Humanity*”⁵ was developed by the international community. The scope of the international legislation on crimes

States, aware of the sufferance of immigrants due to grave situations present in their native countries refrain from adopting measures aiming to relieve the critical situation. In some circumstances measures adopted give rise to an inhuman treatment creating mental and physical illnesses.

³ See ICTY, *Prosecutor vs. Tadic*, Case no. IT-94-1, Opinion and Judgement, 7 May 1997, <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> (visited on 14 June 2017) para 627, “*The inclusion of the requirement of an armed conflict deviates for the development of the doctrine after the Nurnberg Charter beginning with the Control Council Law No. 10 which no longer links the concept of crimes against humanity with an armed conflict*”.... “*In the Statute of the International Tribunal for Rwanda the requirement of an armed conflict is omitted, requiring only that the acts be committed as part of an attack against a civilian population*”.

Article 3 of the Statute of the International Tribunal for Rwanda does not provide a nexus with armed conflicts, see U.N. Founding Resolution 995, 8 November 1994.

⁴ See the preamble paragraph of the 1907 Hague Convention which states: “*the inhabitants and the belligerents remain under the protection and the rule of the principle of the law of nations, as they result from the usages established among civilized people, from the law of humanity, and the dictate of the public conscience*”.

⁵ A 1915 declaration of France, UK, Russia used for the first time this definition so as to describe the massacre of innocent Armenian civilians by Turkish.

against humanity, as also pointed out by the *ad hoc* regional Tribunals, is to prosecute the most serious violations of human rights concerning the relationship among human beings perpetrated at a large scale.⁶

This international legislation could be viewed as the extreme reaction to the worst violation of fundamental rights perpetrated at a large scale against civilian populations.

The law on crimes against humanity has to be read and interpreted with reference to international and regional human rights conventions.

International and regional human rights conventions, as well as customary international law, describe the fundamental rights, which must be protected against any possible violation. They constitute the basis for reading and interpreting the requirements of “*persecution*” and “*other inhumane acts*” provided for crimes against humanity customary legislation. However, conducts that violate fundamental rights could be viewed as a crime against humanity. The case is that such behaviour is perpetrated towards an uncountable number of people, above a certain threshold or as part of a systematic attack against the civilian population.

Crimes against humanity are still regulated by customary international law. It aims to punish conducts perpetrated against civilians known by the general community as causing great sufferance to civilian populations. The International Military Tribunal for Far East Charter (IMTFEC), the Nuremberg Charter, the Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY), the Statute for the International Criminal Tribunal for Rwanda (ICTR), the Statute of the Extraordi-

⁶See also R. Arnold, The Prosecution of Terrorism as a Crime against Humanity, 64, *Zeitschrift für Ausländisches Öffentliches Rechts und Völkerrecht (ZaöRV)*, at 980, 981 (2004), who noted as regards the establishment of the International Military Tribunal (IMT): “*the idea was that the breach of fundamental aspects of human being should be repressed independently of the nationality of the victim*”.

According to ICTY Jurisprudence “*Crimes against humanity are inhuman acts which by their extend or gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity*”, see ICTY, *Prosecutor vs. Erdemovic*, Case No. IT-96-22, decision of the Trial Chamber 1, 1 November 1996, <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj961129e.pdf> (visited on 14 June 2017), para 28.

nary Criminal Chamber for Cambodia (ECCC), and relevant judges' decisions constitute, in part, customary law.⁷ These Charters and Statutes provide for the crimes against humanity defined as “*other inhumane acts*”.⁸

The ICTR Statute added two alternative requirements: the “*widespread*” or “*systematic*” nature of the attack. The law establishing the ECCC adopts the same definition of crimes against humanity found in precedent *ad hoc* Tribunal Statutes⁹, confirming the general knowledge about the core elements of such international crimes.¹⁰

Since the establishment of the ICC in 2003, there has been an attempt to codify what the international community considered at that time to be crimes against humanity.

⁷ Article 6 of the ITC provides for crimes against humanity as “*murder, exterminations, enslavement, deportation and other inhuman acts committed against any civilian populations, before or during the war, or prosecution on political racial, religion ground....*”.

Article 5 ICTY Statute defines as crimes against humanity “*murder, exterminations, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial or religious ground or other inhuman acts*”.

According to article 5 ICC Statute “*Crimes against Humanity are any acts committed as part of a widespread or systematic attack direct against a civilian populations, on national, political, ethnic, racial or religious grounds such as murder, exterminations, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial or religious ground or other inhuman acts*”.

Article 3 ICTR Statute states: “*murder, exterminations, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial or religious ground or other inhuman acts when committed as part of a widespread or systemic attack against any civilian population on national, political, ethnic, racial or religious grounds*”.

Part of customary international law are also the Statute of the Special Court for Sierra Leone (SCSL) and the UN Regulation establishing the Special Panel to adjudicate crimes committed in East Timor.

⁸ Further, the ICTY Statute lists torture and rape among crimes against humanity.

⁹ In particular, in the ICTR Statute.

¹⁰ It confirms the absence of any nexus with armed conflict. It further requires the presence of the discriminatory element, as stated in the ICTR Statute.

Part of the Doctrine declares there is not a unique definition of crimes against humanity in national and international law. See M. M. DeGuzman, ‘Crimes against Humanity’, in W. A. Schabas & N. Bernaz, *Routledge Handbook of International Criminal Law* at 121, (Oxon, New York, Routledge, 2011). See also C.C. Jalloh, What makes a Crime against Humanity a Crime against Humanity, 28 n. 2, *American University of International Law Review* 405-408; 408-411 (2013).

However, from national and international laws and decisions of the courts one may note an agreement about the core elements of crimes against humanity.

On one hand, the Rome Statute better clarifies some expressions already used in customary international law.¹¹ However, it fails to codify what the international community considers to be elements of crimes against humanity. For instance, the ICC Statute provides for the “*multiple commission of acts*” ... “*pursuant to a policy*”.¹² Meanwhile, customary international law provides for the commission of crimes against humanity with a single extraordinary action. Furthermore, the expressions “*multiple commission*” and “*pursuant to*” do not clearly represent the alternative readings of the words “*widespread*” and “*systematic*” used in customary law.¹³ In fact, the ICC Statute drafted in 2004 on the basis of an agreement between the UN and the Cambodian Government, after the ICC Statute, clearly confirms that the attack must be “*widespread*” or “*systematic*”.¹⁴

Scholars point out that the requirements of “*other Inhumane acts*” as well as “*persecution*” would not be as precise as required by criminal law principles. There is no description of which conducts or crimes should be prosecuted and punished.¹⁵

Some criticism might be levied to such a view. In fact, crimes against humanity could be perpetrated by indefinite conducts. A complete codification of all possible conducts runs the danger of let-

¹¹The ICC drafter, in particular, have mostly contribute to define the expression: “*Other Inhuman Treatment*” In particular, Article 7, 1(g) ICC Statute states: “*all other type of conducts which are able to create serious body or mental injury to civilian population.*”

This open and final clause could be viewed and read as a confirm of the link existing between crimes against humanity and human rights. In fact, human rights conventions and the fundamental rights mentioned therein may serve as a basis for determining the perpetration of any inhuman treatment to civilian populations.

¹² See Article 7 ICC Statute which states: “*Attack directed against a civilian population in this context elements is understood to mean a course of conducting involving the multiple commission of acts referred to in Article 7 paragraph 1....*”.

¹³ Some commentators point out the multiple acts requirement would represent a compromise between the alternative and conjunctive reading of the terms “*widespread*” and “*systematic*”. In particular, it would change the word “*or*” with “*and*”. See M. Boot, *Nullum Crimen sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, (Antwerp/Oxford, Intersentia 2002). Contrary to this interpretation D. Robinson, Defining Crimes against Humanity at the Rome Conference, Vol. 93, No. 1, *The American Journal of International Law*, 47-50, (1999).

¹⁴ In the same way, the SCSL Statute provides for an act be “*part of a widespread or systematic attack....*”.

¹⁵ See H. v. Hebel and D. Robinson, ‘Crimes within the Jurisdiction of the Court’, in S. Roy and K. Lee, *The International Criminal Court: the Making of the Rome Statute*, at 81-85 (New York, Kluwer Law International, 1999).

ting behaviour go unpunished, causing great sufferance to the civilian population. In fact, the importance of crimes against humanity legislation for the protection of human beings does require open provisions convicting all possible conducts threatening the existence of humanity.

Consider, for instance, criminal legislations of states concerning the punishment of the most important crimes such as murder or environmental crimes.¹⁶ There is no reference made to the means or conducts or the precise type of substances used for committing the crime, but the dispositions only provide for the final result.

In both types of crimes, the purpose of legislators is to prosecute all kinds of conducts that can threaten the public health of a nation or injure or murder civilians.

The serious offense of crimes against humanity committed in the form of different and unpredictable conducts, mainly in the modern world needs a disposition aiming to prosecute as many behaviour as possible. If the crimes against humanity provisions aim to protect the life of an uncountable number of civilians against any conducts that threaten their existence, there cannot be an exhaustive list of conducts. This international crime is characterized by the appurtenance of the single crime/conduct perpetrated to a widespread or systematic attack against the civilian population. Behaviour of citizens or non-state entities is considered a crime by nearly all criminal legislations. For instance, torture, slavery, rape and other crimes prohibited by crimes against humanity customary law are prosecuted and punished by states according to their own procedural and substantial laws.¹⁷

¹⁶Article 575 Italian Criminal Code charges with murder, no matter the conducts used.

According to Article 221-1 French Criminal Code, constitutes a murder the fact of willfully causing the death to whoever. "*Le fait de donner volontairement la mort à autrui constitue un meurtre.*" "*The circumstances of willfully killing someone constitute a murder*".

Article 216-6 of French Environmental Code provides for the punishment, whatsoever substance used might be detrimental to health or dangerous to flora or fauna. "*Une ou des substances quelconques dont l'action.....effets nuisible sur la santé ou des dommages à la flore ou à la faune*". "*one or more substance, which is bad for one's health or injurious to the flora and fauna.*"

¹⁷Different legislative legal systems do provide for the commission of relevant crimes by an active or omissive conducts.

2. OMISSIVE CONDUCTS AND CRIMES AGAINST HUMANITY

Crimes against humanity perpetrated with an omission represent an important topic which the international community is called to discuss. In fact, in modern society, passive conducts in some contexts and circumstances may be the origin of atrocities committed against a civilian population.

The concept of fundamental rights, as developed throughout the XXth century, concerns the right of every person not to be subject to inhumane treatments.

The expression “*other inhumane acts*”, as highlighted by *ad hoc* Tribunal decisions and precisely defined in the ICC Statute, regards every threat to mental and physical health.¹⁸ It includes any active or passive conduct that generates great sufferance to civilian populations.

The word “*persecution*” means any act aiming to violate fundamental rights. Acts of persecution, though not necessarily involving the use of violence could certainly constitute a crime against humanity. The ICTY has in some decisions pointed out that acts of persecution systematically perpetrated in any manner might lead to a crime against humanity.¹⁹ Persecution can also be committed by denying education or employment opportunities.²⁰ Accordingly, the definition of crimes against humanity should comprehend all different passive conducts, which in some circumstances might

¹⁸ See Article 7 (1) (k) ICC Statute. See also ‘Prosecutor vs. Naletic and Martinovic’, Case No. IT-98-34, 31 March, 2003, para 247, quoted by Human Rights Watch, “*Genocide, War Crimes, Crimes against Humanity: Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia*” 450, (Human Rights Watch, 2006).

¹⁹ See ‘Prosecutor vs. Simic, Tadic, Zaric’, Case No. IT-95-9-T, Trial Chamber II, 17 October 2003, para 47, quoted by Human Rights Watch, *supra*, note 18, 264, “*The Kupreskic et al, Trial Chamber, January 14th, 2000, defines persecution as “the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty Law reaching the same level of gravity as the other acts prohibited in article 5”*”

See also ‘Prosecutor vs. Bordjanin’ Case No. IT-99-36.T, Trial Chamber II, 1 September 2004, quoted by Human Rights Watch, *supra*, note 18, 265, “*while a comprehensive list of such acts has never been established, it is clear that persecution may encompass acts which are listed in the Statute, as well as acts which are not listed in the Statute*”.

²⁰ See ‘Prosecutor vs. Kvočka et al’, Case No. IT-98-30/1-T Trial Chamber, 2 November 2001, quoted by Human Rights Watch, *supra*, note 18, 268, “*Jurisprudence from World War II trials found acts or omissions such as denying bank account, education, Employment opportunity,....., constitute persecution*”.

provoke death or mental and physical suffering to a civilian population. One of the cases might be the situation of immigrants.

An important problem related to crimes perpetrated with an omission is to decide which states are bound to avoid the violation of fundamental rights, in particular, if states have an international legal duty to avoid the commission of crimes against humanity. In most legal systems, crimes committed with an omissive behaviour²¹ are usually imputable to subjects who are legally bound to prevent or avoid the commission of the crimes themselves.²²

Part of the doctrine notes that genocide might be committed with an omission in case the person has a duty to avoid the commission of such crime.²³

In the circumstance that the ICC does not provide for a general provision concerning omission, it shall not be deemed a waiver of punishment of omissive behaviour.²⁴

In some decisions, the ICTR convicts people for genocide perpetrated with an omission.²⁵ The IC-TY recognizes the possibility of crimes against humanity committed with omissive behaviour.²⁶

²¹Known as commission by omission or indirect omissions.

²²Every states provide for the prosecution of murder crime committed with an omission in case the person owns a duty to protect some king of people. See also M.C. Bassiouni, introduction to International Criminal Law, 665 (Martinus Nijhoff Publishers, 2013). He observed that “*it is possible to establish policy by states or non-states actor through intentional, deliberates or purposeful failure to act....*” a failure to act might integrate the “*actively promoting and encouraging*” requirements.

²³See W. A. Shabas, *Genocide in International Law: the Crime of Crimes*, 156 (Cambridge, Cambridge University Press, 2000).

²⁴See L.N. Sadat, *Forgiving a Convention for Crimes against Humanity*, 229, (Cambridge, Cambridge University Press, 2011), noted: “*the failed attempt of the ICC drafters to draw up a general provision on omission should not be interpreted as rejecting omission liability altogether.....silence on the part of the legislators should not be taken as to exclude omission liability from article 25 ICC Statute. A strict interpretation of the legality principle cannot be an obstacle to extending criminal responsibility as laid down in article 25 to include criminal omission.*”

See also M. Boot, ‘Nullum Crimen sine lege and the Subject Matter Jurisdiction of the International Criminal Court Genocide, Crimes against Humanity, War Crimes’, quoted by L.N. Sadat, *ibid*, 229, “*the statutory provision in Article 22 containing Nullum Crimen sine Lege, does not concern article 25 concerning provisions on individual criminal responsibility. Article 25 only comes into play after it has been established that the conducts in question constitutes, at the time it takes place, a crime within the jurisdiction of the court*”.

The term “*attack*” against a civilian population is not necessarily linked to armed or violent actions. It could also be linked to a neutral behaviour, lawful under a certain legal systems.²⁷

Consider, for instance, the crime of apartheid. Conducts carried out are non-violent, but are an inhumane treatment for the victims of such behaviour.²⁸

ICTR and SCSL decisions clearly allow of the possibility that crimes against humanity can be perpetrated by systematic active or passive conducts which are not necessarily violent. The expressions “*course of conducts*” and “*mistreatment of the civilian populations*” do encompass omissive conducts that may bring about sufferance to civilian populations.²⁹

Under customary international law, the attack must be “*widespread*” or “*systematic*”. The word “*widespread*” regards the diffuse and massive effect of the attack perpetrated with several straggling conducts or with a single devastating action.³⁰

²⁵ See *Prosecutor vs. Jean Kambanda*, Case No. ICTR-97-23-S, Trial Judgement, 4 September, 1998, <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict-97-23/trial-judgements/en/980904.pdf> (visited on 25 July 2017), para 40.

²⁶ See *Prosecutor vs. Blagojevic and Jokic*, Case No. IT-02-60-T, Trial Chamber I, 17 January 2005, Para 556, quoted by Human Rights Watch, *supra*, note 18, 266. “*In the Jurisprudence of both the Tribunal and the ICTR Murder has consistently been defined as the death of the victim which result from an act or omission by the accused committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death*”.

See also *Prosecutor vs. Galic*, Case No. IT-98-29, Trial Chamber I, 5 December, 2003, <http://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf> (visited on 14 August 2017), para 150.

²⁷ See for instance Apartheid in South Africa Legal System until 1990s.

²⁸ See ‘*Prosecutor vs. Akayesu*’, Case No. ICTR-96-4 Judgement Trial Chamber I, para 581, 2 September, 1998 quoted by M. M. De Guzman, *supra*, note 10, 10, “*an attack means an unlawful act of the kind enumerated which can be non-violent in nature, like imposing a system of apartheid*”.

²⁹ See also ‘*Prosecutor vs. Fofana and Kondewa*’, Case No. SCSL-04-14-T, judgement 111, 2 August, 2007, quoted by M.M. De Guzman, *supra*, note 10, 10 “*Campaign operation or course of conducts not limited to the use of armed force but also encompass any mistreatment of the civilian populations*”.

³⁰ See ‘*Prosecutor vs. Akayesu*’, Case No. ICTR 96-4-T Judgement, para 580 quoted by M.M. DeGuzman, *supra*, note 10, 12 “*the concept of widespread may be defined as massive frequent, large scale action carried out collectively with considerable seriousness and directed a multiplicity of victims*”.

See also ‘*Blagojevic and Jokic*’, trial Chamber I, 17 January 2005, para 545, quoted by Human Rights Watch, *supra*, note 18, 214 “*A crime may be widespread by the cumulative effects of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude*”.

The term “*systematic*” regards the subjective element. In particular, the policy or the ideology behind the perpetration of certain conducts. The existence of a plan as an expression of a policy or ideology might result from different factors.³¹

According to customary international law the phrase “*civilian populations*” does not refer to a particular population of a definite area, but rather to the number of civilians victims from the attack.³²

The “*widespread*” and “*systematic*” requirements are drafted with the precise intention of not limiting the definition of civilian population to a definite area.³³ ICTR Judges highlight the intention of the drafter to allow the possibility of broadening the prosecution of those crimes to all possible sce-

See also ‘Deronjic’, Appeals Chamber, 20 July, 2005, para 109, quoted by Human Rights Watch, *supra*, note 18, 213, “*In order to constitute a crime against humanity the acts of an accused must be part of a widespread or systematic attack directed against a civilian population*”.

See also ‘Baskic’, Appeals Chambers, 29 July 2004, para 102, quoted by Human Rights Watch, *supra*, note 18, 213, “*The Appeals Chambers concludes that the Trial Chamber was correct in stating that acts constituting crimes against humanity must be part of a widespread or systematic attack against civilians*”.

³¹See, ‘Prosecutor vs. Blaskic’, Case No. IT-95-14, Trial Chamber, 3 March 2000, quoted by R. Arnold, *supra*, note 6, 985, “*the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute, or weaken a community*”.

See also ‘Kunarac, Korac and Vukovic’, Appeals Chamber, 12 June 2002, para 95, quoted by Human Rights Watch, *supra*, note 18, 215 “*A Trial Chamber must....first identify the population which is the object of the attack and in light of the means, methods, resources, and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic*”.

Some ICTY decisions noted, there is no need to demonstrate the existence of a policy behind the attack perpetrated. See Blaskic, Appeals Chambers, 29 July 2004, paras 100, 126, quoted by Human Rights Watch, *supra*, note 18, 217,218, “*In the view of the Appeals Chamber, the existence of a plan or policy may be evidentially relevant but is not a legal element of the crime*” “*there is no legal requirement of a plan or policy.....*”.

See ‘Prosecutor vs. Blagojeric and Jokic’, Trial Chamber, 17 January 2005, para 546, quoted by Human Rights Watch, *supra*, note 18, at 218, “*neither the attacks nor the acts of the accused need to be supported by a policy or plan*”.

³²See *Prosecutor vs. Tadic*, case No. IT-94-1-T, Trial Chamber, 15 July 1999, opinion and judgement, 7 May 1997, <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> (visited on 14 August 2017) para 644 “*The requirement in Article 5 of the Statute that the prohibited acts must be directed against a civilian population does not mean that the entire population of a given states or territories must be victimised by these acts in order for these acts to constitute a crime against humanity. Instead, the population element is intended to imply crimes of a collective nature.....*”.

³³Interesting, the ICTY Statute does not provide for the “*widespread*” and “*systematic*” requirements. ICTY jurisprudence argues that the concept “*attack directed against a civilian population*” already implies the widespread and systematic quality of the attack. See *Prosecutor vs Tadic*, *supra* note 32, para 648.

See also Blaskic case no. IT-95-14-T judgement 3 March 2000, para 202 quoted by K. Ambos and S. Wirth, “*The Current Law of Crimes against Humanity: An Analysis of UNTAEDT Regulation 15/2000*”, 15, 13 Crim. L. Forum 1, 3, 2002.

narios of civilians that might be involved no matter which nationality they belong to. In particular, the ICTR jurisprudence wants to avoid that an attack perpetrated against a number of civilians not situated in the same territory might go unpunished.³⁴

3. MIGRATORY MOVEMENTS, FUNDAMENTAL RIGHTS AND CRIMES AGAINST HUMANITY.

Civil wars, terrorist groups and other hostile situations³⁵ affecting some states, threaten the lives of civilians and force them to leave their native countries to find a temporary place to stay. States are well aware of the violations of fundamental rights that occur in these contexts. According to international and regional human rights conventions states must adopt any measures necessary to avoid any violation of fundamental rights. Provisions enclosed in these conventions force states to acknowledge a legal obligation to guarantee the respect of such fundamental rights.³⁶

³⁴ See also *Prosecutor vs. Kamuhanda*, case No. ICTR-95-54-A-T, Trial Chamber II, 22 January 2004, <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-99-54a/trial-judgements/en/040122.pdf> (visited on 16 August 2017) para 669 “*It was also noted in Bagilishema that the term population does not require that the crime against humanity be directed against the entire population of a geography territory or area.....The victim of the enumerated acts need not necessarily share geographic or other features with the civilian population that form the primary target of the underlying attack, but such characteristic may be used to demonstrate that the enumerated acts forms part of the attack*”.

³⁵ For instance, grave economic situations.

³⁶ Article 2 of the European Convention on Human Rights states that “*everyone’s right to life shall be protected by law....*”.

Article 5, ECHR entitled “*right to liberty and security*” states that “*Everyone has the right to liberty and security of person*”.

Article 4 of the American Convention on Human Rights states that “*every person have the right to have their life respected. This right shall be protected by law....*”.

Article 5 states that “*every person has the right to have his physical, mental, and moral integrity respected....*”.

In some events, the situation of immigrants might be compared to that of civilians living in ongoing civil wars.³⁷ There is no difference between the violation of fundamental rights that occurred in the former Yugoslavia from 1991 to 2001 or in any internal armed conflict and violation currently occurring to immigrants while trying to escape from their countries that are afflicted by hostile circumstances.

During forced migratory movements the right to life and the right not to be submitted to inhuman or degrading treatment of every civilian involved are often violated.³⁸ In fact, most of the time migratory travels give pain, death or mental and physical sufferance to civilians. Furthermore, mental and physical illnesses appear while being accommodated by hosting states.

In such situations, states are responsible under customary international and treaty law for this type of inhumane treatment. In fact, as subjects legally bound to protect the fundamental rights of civilians, it is essential to implement necessary measures imposed by customary and treaty law for the safeguard of human rights.

During civil wars, fundamental rights are violated in the territories interested by the armed conflicts, whereas, in migratory movements human rights are mostly violated outside the territories interested by civil wars or other grave scenarios. In both circumstances, the number of people involved in physical or mental sufferance or death is nearly the same. The international community does intervene during civil wars – as it did in the Former Yugoslavia – with the objective of contrasting atrocity which breaches every fundamental right. In other similar situations, states intervene with the same purpose of avoiding the rising up of civil wars or the violation of fundamental rights. The existence of customary and treaty laws, which encourage states to adopt positive action to protect fundamental rights confirms the existence of an international legal duty to avert the violation of

³⁷For instance in Syria or in the former Jugoslavia from 1992 to 2001.

³⁸Consider, for instance, civilians who find death due to wreckages occurred while attempting to cross seas and oceans. In this situation, it may be considered a violation of the fundamental right to life.

fundamental rights. States have a legal duty towards civilians whose lives are worldwide threatened for whatsoever reasons.

A potential passive conduct held by states in front of violations of fundamental rights shall be deemed a breach of international and regional human rights conventions as well as customary law.

Passive behaviour of states in front of these violations of fundamental rights systematically perpetrated might give rise to a crime against humanity if they are deemed as part of a widespread or systematic attack against civilian populations under the meaning and interpretation given by the *ad hoc* Tribunals jurisprudence aforementioned.

For instance, omissive behaviour might be considered an act of persecution. As a consequence of passive conducts held by states, immigrants are deprived of their internationally recognized fundamental rights³⁹. The act of persecution can also be committed by denying civilians⁴⁰ the assertion of their rights.⁴¹ The failure to react by states when required under customary and treaty law shall be considered a denial or a violation of fundamental rights.

Refusal of states to adopt suitable measures is viewed as an attack against civilian population. The attack against civilian population, in fact, can also be moved with non-violent conducts or omissions that create serious mental or physical sufferance.⁴²

The systematic character of the attack would result from the policy pursued by states in front of these critical situations. Decisions of states to remain passive or avoid taking the necessary

³⁹ As noted above in the text, failure of states to adopt positive actions aiming to figure out hostile situations present in some states and to control the migratory movements violate the immigrants' right to life and to a human treatment. It could be considered as an indirect crime.

⁴⁰ As already observed the term population, under international customary law, does not only include a certain population of a territory/state. See, *supra*, note 34.

⁴¹ The same passive conduct held by states does not allow immigrants to exercise their right to life in their countries, the right to an education, the right to employment opportunities.

⁴² See, *supra*, note 28, 29.

measures witness the existence of a policy plans, namely avoidance of any intervention, and in some circumstances tolerance of the continuous violations of fundamental rights.

The intention (subjective element) is demonstrated by the knowledge of the states that the failure to adopt suitable measures will or might result in the violation of immigrants' fundamental rights.

The discriminatory character of the conducts results from the willful waiving to take action aiming to protect fundamental rights, on the basis of the different nationality of civilians involved.

The same omissive behaviour might also be labelled as crime against humanity of the kind "*other inhumane acts*". The failure to act provokes mental and physical sufferance to an uncountable number of civilians.⁴³

The practice of accommodating immigrants in refugee camps where most of them suffer from mental and physical illnesses may be considered a crime against humanity of the kind "*persecution*" or "*other inhumane acts*" generating great sufferance to civilian populations.

States are aware that the gathering of immigrants in such camps might cause mental and physical sufferance. Furthermore, although there are witnesses of the sufferance of these civilians, most of the states refrain from adopting measures that aim to relieve the critical situation. These circumstances show the existence of the subjective element, namely the knowledge that unsuitable measures adopted might foster great sufferance to civilian populations.

The systematic requirement results from the policy of states concerning the immigrants' situation. The adoption of certain measures confirms the existence of a policy plan, aiming to discriminate and bring about sufferance and other mental or physical illnesses to a certain civilian population.

⁴³ As concern the acts of persecution, the systematic character as expression of the state policy, results from the fact that no suitable measures are adopted by states before these situations.

The subjective requirement is satisfied by the knowledge of states, their omissive conducts are able to create serious mental or physical illnesses to a certain civilian population.

The policy that is described above, which is adopted by states, might be considered an act of persecution. As pointed out above, “*persecution*” means any conduct aiming to violate fundamental rights recognized by international customary and treaty human rights law. In most refugee camps immigrants are denied to assert their fundamental rights. There are no educational plans or employment opportunities for them. Measures adopted by States before migratory movements, as expression of their policy or ideology, demonstrate the systematic character of the attack perpetrated against certain civilians.⁴⁴

Should this practice be considered a form of apartheid? By analyzing the behaviour of states towards immigrants, one can identify affinity with the crime of apartheid. The UN Apartheid Convention defines the crime of apartheid as “*inhumane acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them*”.⁴⁵ These passive and active conducts might be considered as an expression of a policy with the sole purpose to maintain domination over these civilians.⁴⁶

The lack of adopting suitable measures required under customary international law for solving the critical situation, present in the immigrants’ native countries alongside accommodating them in refugee camps, might be viewed as an intention of maintaining a domination and oppressing these civilians.⁴⁷

⁴⁴ *Ad hoc* Tribunal jurisprudence observes that the existence of a particular policy or ideology as part of a systematic attack might result from different aspects, see, *supra*, note 31.

⁴⁵ See Article II of the International Convention for the Suppression and Punishment of the Crime of Apartheid, 1973.

⁴⁶ For instance the refraining of states from adopting suitable measures.

⁴⁷ Active and passive conducts of states might be labelled as one or more acts set out in Article II Apartheid Convention. For instance article II a) ii) provides for “..... *infliction..... of serious bodily or mental harm by the infringement of their freedom*”.

CONCLUSION

In 1945, the concept of “*crimes against humanity*”, as part of customary law regarding the protection of fundamental rights, an extension of the law of the war,⁴⁸ was formed to punish conducts shocking the conscience of mankind.⁴⁹

At that time, the international community required a punishment of the conducts perpetrated in wartime, particularly dangerous for civilians and beyond what was normally practiced in armed conflicts and not stated in regulations signed by contracting parties.⁵⁰

The definition of “*crimes against humanity*” evolved throughout the XXth century narrowing to international and regional human rights conventions. Interestingly, the ICTR Statute does not require

⁴⁸See M. De Guzman, “*Crimes against Humanity*”, *supra*, note 10.

⁴⁹The term “*shock*” was elaborated by the Charter of the Nuremberg Tribunal of 1945 which defines crimes against humanity as “*crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied....endangered this international community or shocking the conscience of mankind*”. See “*History of the United Nation War Crimes Commission and the Development of the Law of Wars, 1943*”, quoted by R. Dixon, “*Crimes against Humanity*” in O. Triffterer, C. Ambos, “*The Rome Statute of the International Criminal Court: A Commentary*”, (C.H. Beck-Hart-Nomos, 1999).

More precisely, the concept of “*crimes against humanity*” was used for the first time in 1915 in a declaration issued, by France, UK, Russia, for condemning the mass killings of Armenians.

See, in particular, the Marten clause which states: “*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*”.

In 1996, the ICJ pointed out, the Marten Clause becomes part of the International Customary Law. See, “*Legality of the Threat or Use of Nuclear Weapons*” (Advisory Opinion), ICJ Reports 1996, at 259, <http://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (visited on 17 August 2017) para. 84.

⁵⁰In particular, the so called “*Marten Clause*” finds application in situation between legality and unlawfulness (grey area), as might be a series of attack perpetrated against military objectives involving civilians too. In this situation the attack perpetrated shall be contrary to the demand of humanity cause the excessive involvement of lives and assets of civilians. See *Prosecutor vs. Kupreskic et al.*, Case No. IT-95-16, 18 May 1998, <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>, (visited on 17 August 2017) Paras 525, 526.

a nexus with armed conflict.⁵¹ The Rome Statute confirms the lack of a link between crimes against humanity and armed conflict.⁵²

Decisions of the *ad hoc* regional Tribunals highlight the relationship between crimes against humanity and human rights legislations.⁵³

At the beginning of the XXth century, when the expression "*Crimes against Humanity*" was developed, atrocities or other inhuman acts perpetrated against civilians in war contexts, constituted a serious breach of the law of humanity.

Under a modern reading of crimes against humanity legislation, death and other inhuman treatments to which immigrants are systematically submitted as a result of omissive conducts consciously held by states shock the international community.

The community sensibility is also shocked by mental and physical sufferance of civilians gathered in most of the refugees' camps.

States have an international legal duty to avoid the violation of fundamental rights. In the case of failure to act in situations requiring an intervention, they might be responsible for crimes perpetrated against civilians.⁵⁴

⁵¹ As results from ICTR decisions, crimes against humanity legislation has to be adapted to modern age. A modern reading of this International Crime leads to enclose any kind of non-violence behaviour which aims at inflicting to civilian population series mental and physical diseases.

The absence of a war nexus clearly evidences the intention of the drafter to prosecute any serious violation of fundamental rights perpetrated everywhere and at any time.

⁵² The ongoing evolution of crimes against humanity legislation, also justifies the absence of an overall codification of the different conducts, as occurred for other international crimes such as crimes of war and aggression.

⁵³ See *Prosecutor vs. Blaskic*, Trial Chamber, Case No. IT-95-14-T, 3 March 2000, <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf> (visited on 18 August 2017) para 220, "*Infringements of the elementary and inalienable rights of man, which are 'the right to life, liberty and the security of person,' the right not to be 'held in slavery or servitude,' the right not to 'be subjected to torture or to cruel, inhuman or degrading treatment or punishment' and the right not to be 'subjected to arbitrary arrest, detention or exile' as affirmed in Articles 3, 4, 5 and 9 of the Universal Declaration of Human Rights, by their very essence may constitute persecution when committed on discriminatory grounds*".

⁵⁴ All legal systems provide for the crimes committed with an omission. The so called "*commission by an omission*" or "*indirect omission*". The same principle has been developed in customary international law.

Such active and passive conducts held by states as part of a widespread or systematic attack against civilian population shall also give rise to a crime against humanity.

BIBLIOGRAPHY:

- AMBOS K. WIRHT S., “*The Current Law of Crimes against Humanity, an Analysis of UNTAEDT Regulation 15/2000*”, 2002, 13 *Crim. L. Forum* 1, 3.
- ARNOLD R., “*The Prosecution of Terrorism as a Crime against humanity*”, 2004, *ZaöeRV*, 64.
- BASSIOUNI M.C., “*Crimes against Humanity: the Case of a Specialized Convention*”, *Washington University Global Studies Law Review*, 2010, Vol. 9, Issue 4.
- BOOT M., “*Nullum Crimen sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*”: *Genocide, Crimes against Humanity, War Crimes*, Intersentia, School of Human Rights Research, 2002.
- DIXON R., “*Crimes against Humanity in Commentary of the Rome Statute of the International Criminal Court*”, O Triffler, 1999.
- JALLOH C.C., “*What Makes a Crime against Humanity a Crime against Humanity*”, 2013, *American University of International Law Review* 28 n. 2.
- LATTIMER M. and SANDS P. “*Justice for Crimes against Humanity*”, QC Oxford and Portland, 2003.
- LEE K. ROY S., “*The International Criminal Court: the Making of the Rome Statute*”, Kluwer Law International, 1999.
- SADAT L. N., “*Forgiving a Convention for Crimes against Humanity*”, Cambridge University Press, 2011.
- SHABAS W., “*Genocide in International Law: the Crime of Crimes*”, Cambridge University Press, 2009.