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**A CRITICAL ANALYSIS OF CRIMES AGAINST HUMANITY IN
NATIONAL AND INTERNATIONAL PERSPECTIVE**- Swesthiga K¹**ABSTRACT**

Crimes against Humanity strengthen the idea of humanity as a global community of justice, and we also want to administer justice in the name of humanity. Crimes against humanity adopt globalization by acknowledging that these crimes affect all humans, therefore legalizing the establishment of global organizations to fight these crimes. The term humanity is nothing but the quality of being a human or mankind. So, in simple terms, crimes against humanity are nothing but crimes against mankind. Crimes against humanity are very serious, and they are not just human rights violations, they are beyond that. Crimes Against Humanity has evolved from customary international law. The Author of the Research Paper has focused on the history, definition, elements, and judgments of the crimes against humanity in India as well as globally.

INTRODUCTION

On June 4, 1854, Theodore Parker, a Unitarian minister, and abolitionist, gave a message titled “A new crime against humanity” in disagreement with the legal proceedings that allowed Anthony Burns, a man from Boston, to be returned to Alexandria, Virginia, by the Fugitive Slave Act of 1850. In 1890, Crimes against Humanity was used by George Washington Williams, an American minister, politician, and historian, when describing the atrocities committed by Leopold II of Belgium’s administration in the Congo Free State. Also, in the Second Hague Convention of 1899 and the Fourth Hague Convention of 1907 under International Humanitarian Law, if you look at the Preambles, the laws of humanity have been included as an expression of underlying inarticulated humanistic values.

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In the Nuremberg Trial, after World War II came to an end, the Nazis tortured and killed millions of Jews, including prisoners of war, dissenters and innocent civilians. This trial was held between 20 November 1945 and 1 October 1946. Seven organizations and 24 defendants were prosecuted. For the first time, Crime against humanity was adopted in Article 6 of the Charter of the Nuremberg Tribunal as 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 the 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. This was later incorporated in the Rome Statute of ICC. According to the decision of the first Nuremberg trial, even though many of these crimes were revolting and horrible, it has not been satisfactorily proved that they were done in execution of, or connection with, war crimes or crimes against peace, regardless of the policy of persecution, repression, and murder of civilians and persecution of Jews within Germany before the beginning of war in 1939. A wider definition of crimes against humanity was used in the following Nuremberg trials.

In the Tokyo Trial, the Empire Japanese leaders were put on trial for three different categories of crimes that were committed during the Second World War before the International Military Tribunal for the Far East, that is, the Tokyo Trial. They are crimes against peace, war crimes, and crimes against humanity. Crimes against Humanity were not used against any of the defendants in the Tokyo Trial. The Nanking Massacre prosecutions were classified as violations of the Laws of War.

DEFINITION

The concept of crimes against humanity has evolved since WW II through the jurisprudence of the International Criminal Tribunal for Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Rome Statute of the International Criminal Court (ICC). After the trials as mentioned above, the Rome statute, ICTR, and ICTY statutes were created. The definition of Crimes against Humanity in ICTY - Article 5 and ICTR - Article 3 are the same. It states 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:

(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.”*

There is one small difference between the two definitions. After the words “*the following crimes*”, in ICTY, it has been mentioned as “*when committed in armed conflict, whether international or internal in character*”, and in ICTR, it has been mentioned as “*part of a widespread or systematic attack*”.

Article 7 of the Rome Statute has defined crimes against humanity as,

“*Any of the following acts, when committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

- (a) *Murder;*
- (b) *Extermination;*
- (c) *Enslavement;*
- (d) *Deportation or forcible transfer of population;*
- (e) *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;*
- (f) *Torture;*
- (g) *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- (h) *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as*

impermissible under international law in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or mental or physical health.”

ELEMENTS OF CRIME

The International Criminal Court (ICC) has published “Elements of Crimes”, which includes the explanation of each element of different offenses like genocide, crimes against humanity, etc. Also, it has included the elements of crimes against humanity under Article 7 of ICC. The important elements of crime against humanity under Article 7 of ICC are the accused commits a prohibited act, there should be an attack that is widespread or systematic and is directed against any civilian population, and there should be a nexus or connection between the accused’s act and the attack. In the introduction part of the elements of crime against humanity, ICC has mentioned three elements. They are the PHYSICAL ELEMENT, which is prohibited acts; the CONTEXTUAL ELEMENT, which is part of a widespread or systematic attack directed against any civilian population which includes geographical area, methodical type of violence, etc. and the MENTAL ELEMENT, which is the knowledge of the attack. Now let us look into the important elements of each act that have been mentioned under the definition of crimes against humanity.

Murder – The perpetrator caused the death of a human being intentionally. Men's rea is another important element under murder. This act is committed as part of a widespread or systematic attack directed against a civilian population.

Extermination – The perpetrator killed one or more persons directly or indirectly on a massive scale, that is, Actus reus, and the killing can also be the subjection of a widespread or systematic number of people. The destruction also includes the deprivation of access to food and medicine. Finally, mens rea should also be there.

Enslavement –Actus reus and Mens rea should be there. The important elements under enslavement are control of someone’s movement, control of the physical environment, psychological control, measures taken to prevent or deter escape, force, and threat of force,

the assertion of exclusivity, subjection to cruel treatment and abuse, control of forced labor and its duration, etc.

Deportation or forcible transfer of population – It includes forced displacement or forced evacuation of the persons concerned, and it must be by expulsion or other coercive acts. The act must be from the area in which they are lawfully present without the ground permitted under international law. The perpetrator's intent and knowledge of the factual situation are necessary.

Imprisonment or other severe deprivation of physical liberty – The perpetrator imprisoned or severely deprived physical liberty of one or more persons with intent. There must arise a breach of fundamental rules of international law.

Torture – There must be mental or physical severe pain or suffering; the persons who suffered the pain must have been under the control of the perpetrator.

Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity

- The elements of rape include the perpetrator's invasion of the body with penetration of any part or sexual organ or anal or genital opening part of the body with intent. The invasion was committed by force or threat of force or coercion and against a person incapable of giving genuine consent.
- The elements of sexual slavery include enslavement, and nature should be sexual.
- The elements of enforced prostitution include the engaging person(s) in a sexual nature by force, threat, coercion, etc, or by taking advantage of a coercive environment or that person's incapacity to give genuine consent.
- The elements of forced pregnancy include the confinement of one or more women and making them forcibly pregnant with intent.
- The elements of enforced sterilization include deprivation of the capacity of biological reproduction of one or more persons, and this act was not justified by the medical treatment of the person(s) and not carried out with his/her genuine consent.
- The elements of any other form of sexual violence of comparable gravity include the perpetrator's act of a sexual nature by force, coercion, etc, of one or more persons. This act must be of a gravity comparable to the other offenses, and knowledge of the factual situations that established the gravity of the act should also be there.

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court— A specific discriminatory intent is required. This discriminatory conduct exists where a person is targeted based on religious, political, or racial considerations, that is, for his membership in a certain victim group targeted by the perpetrator.

Enforced disappearance of persons – Important elements include deprivation of freedom, arrest, detention, refusing to give information, etc.

The crime of apartheid –The act was inhumane against one or more persons, knowledge of factual situations that established the character of the act, and the act was an institutionalized regime of systematic oppression and domination by one racial group over any other racial group(s) with intention.

Other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body or mental or physical health – An act or omission of similar seriousness, a serious attack on human dignity, the act was performed deliberately, etc., are the elements of other inhumane acts.

CASE LAWS

The *Blaskic*² case talked about the term civilian under the civilian population as per the definition of crimes against humanity. The Trial Chamber, in this case, has stated that the head of a family who tries to protect his family by having a gun in his hand does not lose his status as a civilian. It has also stated that the term civilian is wide and has stated that “even when few members of an armed group are intermingled with the targeted civilian population, and then the whole group will be considered to be civilian as the group is predominantly civilian”.

In the *Kunarac*³ case, the term enslavement was defined. The Trial Chamber has stated that enslavement, as a crime against humanity during the time relevant to the indictment, was defined by customary international law as the act of exercising any or all of the rights associated with the ownership over a person. The Chamber has also held that it’s not enough

²ICTY, The Prosecutor v. Tihomir Blaskic, IT-95-14-T.

³ ICTY, The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, IT-96-23 and IT-96-23/1.

to prove that someone was held in captivity. Other evidence of captivity, such as exploitation, forced labor, sex, prostitution, or human trafficking, must also exist.

In the *Krstic*⁴ case, three counts of forced transfers and deportations were brought against the defendant. A total of 25,000 Bosnian Muslims were transported via bus to other parts of Bosnia and Herzegovina after being removed from Srebrenica. Thus, it was declared that the unlawful transfer of people from the countries where they currently reside is a factor in both deportation and forced transfer.

In the *Kordic*⁵ case, the ICTY Trial Chamber defined the term imprisonment for the first time. In short, the Chamber has interpreted the term imprisonment as “an arbitrary imprisonment which is the deprivation of liberty of the individual”.

CAN PIRACY BE CONSIDERED A CRIME AGAINST HUMANITY?

Crimes against humanity under ICC include an act that is of a widespread or systematic nature of attack with knowledge, and the attack should be directed against any civilian population. Piracy means an act of robbery, attack, or criminal violence at the ships at sea. Piracy includes attacks on civilian populations, but it can be considered a crime against humanity only when that attack is widespread or systematic, and it should be on a large scale. For instance, many ships were taken into captivity during the Somali Piracy Crisis in the early 2010s, which also saw many seafarers held captive. So, whether piracy is a crime against humanity depends on the facts and circumstances of the case.

DIFFERENCE BETWEEN CRIMES AGAINST HUMANITY AND HUMAN RIGHTS VIOLATION

In Crimes Against Humanity (CAH), the crimes are very serious. An offense will be considered as CAH when it is committed as part of a widespread or systematic attack directed against any civilian population. These crimes are committed during an armed conflict or peacetime. HRV is nothing but a violation or an infringement of the fundamental rights and freedoms of an individual, and they are not as serious as CAH.

DIFFERENCE BETWEEN CRIMES AGAINST HUMANITY AND WAR CRIMES & CRIMES AGAINST HUMANITY AND GENOCIDE

⁴ ICTY, *The Prosecutor v. Radislav Krstic*, IT-98-33.

⁵ ICTY, *The Prosecutor v. Dario Kordic, Mario Cerkez*, IT-95-14/2-A.

In war crimes, there should be a connection to an armed conflict, but CAH does not need that, and CAH requires an attack on civilian populations. War crimes focus on the protection of certain protected groups, including enemy nationals, whereas CAH protects victims regardless of nationality or affiliation to the conflict. War crimes happen on the battlefield or against military objectives. On the other hand, CAH happens against the civilian population.

Genocide focuses on the destruction of groups, which means Genocide requires the intent to destroy a particular group. CAH focuses on the killing of large numbers of individuals. Genocide targets a specific group, like ethnic or religious groups, while crimes against humanity can be committed against any population group.

CRIMES AGAINST HUMANITY IN INDIA

India has neither signed nor ratified the Rome Statute. CAH has not been defined under Indian laws. We have only the National Human Rights Commission (NHRC) and the Central Bureau of Investigation (CBI). In 1984, the mass killing of Sikhs during the anti-Sikh riots can be taken as an example of CAH. In the case of Sajjan Kumar, the Court held that Indian law does not include the definition of “crimes against humanity” or genocide, which is a gap that requires immediate filling. The court has also held that these types of killings are engineered by political actors with the support of law enforcement authorities, which will fall under the definition of crimes against humanity.

So, to conclude, India’s potential participation in the International Criminal Court and the Rome Treaty will set the way for an increase of human rights-oriented strategies of Indian administration in the future. Also, India’s active participation at the ILC for a CAH treaty will support the rule of law, both globally and nationally, with an effort to make it less arbitrary and more moral.

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