A. Introduction

Crimes against humanity derive from various terms in their substantive matters defined in several international instruments. However, they lacked of detailed definition.

1 This paper was presented at the internal seminar on International Criminal Law at the Faculty of Law University of Melbourne on 28 April 2002.

2 Still, Lecturer of International Law at Qadji-Mada University. The writer wishes to thank to Prof. Tim McCormack and Mr. Gerry J. Simpson who gave comments and advice for the completion of this paper.

3 Article 6 (c) of Nuremberg Charter: it excludes murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecution on political, racial or religious grounds in execution of or in connection with the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated; Nuremberg Charter, Charter of International Military Tribunal, 82 UNTS 279, Vol. 12, entered into force 8 August 1945 (London 8 August 1945). Article I (b) (c) of: atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecution on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated, Allied Control Law No.19 Punishment of Felony Guilty of War Crimes, Crimes Against Peace and Humanity, Official Gazette of the Control Council for Germany, No. 3, Berlin, 21 January 1946 (CCL 10); Article 5 (c) of the Tokyo Charter: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, or persecution on political or 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, International Military Tribunal for the Far East, Proclaimed at Tokyo, 19 January 1946, Trial (1946) 119 (entered into force with respect to United States 26 April 1946). Article 7 of the International Criminal Tribunal for Former Yugoslavia: the international Tribunal shall have the power to prosecute persons responsible for the following crimes committed as part of a widespread or systematic attack against any civilian population, or political, racial or religious grounds; other inhumane acts, SC Res 827 (May 23, 1993), UN Doc S/25704 (May 23, 1993), JLM 11/19; Article 3 of the International Criminal Tribunal for Rwanda: the International Criminal 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 any civilian population, or political, racial or religious grounds; murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial or religious grounds; other inhumane acts, SC Res 827 (November 8, 1994), UN Doc S/1994/480; M.C. Bastos Monteiro, International Criminal Law, Crimes (Vol. 1, 1986), 147-68 and Kelly Dawn Atkin, War Crimes Against Women (1997), at 343-46; Article 29 of the Draft Statute for an International Criminal Court 1994, Report of the International Law Commission, 46th Session, UNGA49, 49th session, Supp. No. UN Doc A/49/10 (1994); Article 9 of the 1996 Draft Code Provisions on Crimes Against Humanity: murder, extermination, torture, enslavement, persecution on political, racial, religious or other grounds, racial or religious or grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disorganizing or dismembering a part of the population, arbitrary deportation or forcible transfer of population, forced disappearance of persons, rape, enforced prostitution and other forms of sexual abuse, other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as maiming and severe bodily harm, Usul S. Singha, The Emerging System of International Criminal Law (1997), p. 159, and Article 7 of the Rome Statute on the crime being committed as part of widespread or systematic attack directed at a civilian population: murder, extermination, torture, deportation or forcible transfer of populations, persecutions of any group on grounds including politics, race, nationality, ethnicity, culture, religion and gender in connection with any other crime within jurisdiction of the Court, Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 17 ILM 999.
scenarios of elements of crimes for their existence. Penalties are rarely set forth and mention of particular fora for the prosecution is scarce. This creates obstacles to prosecute them and also highlights the significance nexus with armed conflict. For example, the people executed under the Nurungji Ryong were convicted of war crimes, crimes against humanity, or both. The use of the term or indicates lacking detailed definitional orientation or element of crimes for both crimes especially crimes against humanity.

Subject matters and procedural proceedings of crimes against humanity evolved from their inception reflecting customary international law founded by the states practices and opinio juris. From their subject matters, crimes against humanity evolve from their requirements of situation (nexus with the armed conflict) with respect to the thresholds (widespread and or systematic attack) and elements of crimes (discriminatory motive and mens rea). On the other hand, the procedural enforcement evolved in Nurungji and Tokyo trials, ICTY, ICTR and it is the ICC from ad hoc tribunal to permanent tribunal and from using the principle of ex post facto (nullum crimen, nulla poena sine lege) which has become part of international law to principle of legality.

Due to broad range of their evolutionary aspects, this essay is going to analyze the situation requirement (nexus with the armed conflict) with respect to the thresholds of applicability, discriminatory motives and mens rea and their relationship with customary international law. Therefore, it focuses on first, what are the major outcomes of the customary international law for the existence of crimes against humanity. Second, what is the relevance of the historical development (situation requirement) for the existence of crimes against humanity as an international distinguished crime in the ICC? Finally, what can be legally predicted in the future for their law enforcement?  

9 MEBAR BUNUN

136

B. The International Court of Justice

Cu opinio juris psychol of law context arguing not be two elements if inter aliadiscuss

Ac State practice the m.o.

ation process from sp descr
B. The Relationship between Customary International Law and Crimes against Humanity

Customary international law founded by opinio juris and state practice or material and psychological elements is one of the sources of law recognized by international community, although there are many scholars arguing that customary international law can not be regarded as the source of law. Those two elements consist of several criteria that they vary for the formation of customary international law and depend on judicial discretion.

According to Anthea Elizabeth Roberts, State practice reflects the traditional customary international law, while opinio juris indicates the modern customary international law. In addition, state practice is mainly an inductive process in which a general custom is derived from specific instance of state practice to form descriptive accuracy based on States’ conduct.

Irrespective, opinio juris is a deductive process that begins with general statements of rules rather than particular instances of practice to form substantive normativity based on State’s consent. In fact, modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly. But, at one end, highly consistent of state practice can establish a customary rule without requiring opinio juris. However, as the frequency and consistency of state practice decline, a stronger showing of opinio juris will be required.

Therefore, this pendulum theory of customary international law in going to be used to identify the relationship between customary international law and the existence of crimes against humanity.

1. Opinio Juris Element

This element of customary international law mainly dictates in conventions,

\[ \text{Opinio Juris, note 7.} \]


\[ \text{5 ICJ determined in Rights of Passage Case, the number of states parties applying international customs is only two, India and Portugal. In the South Sea Continental Shelf Case, ICJ recognized that the generality of state practices does not necessarily accepting the universal acceptance and Judge Tansui gives dissociating opinion by stating that in formative process of a customary law exist or not, is a delicate and difficult matter. The repetition, the number of examples of state practice, the duration of time required for the generation of customary law can not be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances (1999) 27 ILM 1, 35.} \]

\[ \text{Anthea, OpCIt n.7 p.758.} \]

\[ \text{Ibid, p.756} \]

\[ \text{Ibid, p. 758, Quoted from Eduardo Jimenez de Arechaga, Custodes, in Change and Stability in International Law Making 1 (Antoni Casas and Joseph H H Weiler eds 1988).op. 44.} \]

\[ \text{Ibid, p. 760.} \]

\[ \text{Proposed by Jack L. Goldsmith and Eric Posner, Understanding the Receptance between Modern and Traditional Customary International Law", 40 Virginia Journal of International Law 639 (2000). They argue that every two hundred years, the jurisprudence of the customary international law changes from opinio juris to state practice and from state practice to opinio juris. This theory is relevant to the condition of the requirement of nexus with the armed conflict for the prosecution of crimes against humanity because they are formed by opinio juris and state practice (general practice).} \]

MENBAR HUKUM
declarations, resolutions and statutes where States represent their representatives to negotiate, to create and to exercise their powers of consent for the formation of crimes against humanity. The opinio juris is a belief that a state activity is legally obligatory and the States will behave a certain way because they are convinced it is binding upon them to do so. Therefore, opinio juris concerns statements of belief rather than actual belief from the States.

Accordingly, treaties, conventions and declarations represent opinio juris because they are statements about the legality of action, rather than example of action. As the result, the element of opinio juris of custom and custom itself has become an increasingly significant source of law and a helpful way to compensate for scarcity of supporting practice in human rights obligations. This could be happened because human rights are a matter of international concern particularly for the prosecution of crimes against humanity which lack of consistent state practice. The term of crimes against humanity relates to and defines in several resolutions, international conventions, statutes and draft on human rights and humanitarian law (that support and complement each other proposed by the UN).

Here, the States’ consent based on opinio juris is the major will to create, to decline existing customs, to crystallise emerging customs and to generate new customs for the existence of crimes against humanity.

First of all, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is the first Convention proposed the concept of crimes against humanity in which not only the terms of the intent to destroy and discriminatory motive appeared but also the obligation to punish rulers or public officials and individuals who contravened the genocide.

This Convention, in relation to the existence of crimes against humanity, is the first time the conviction of crimes against humanity-emerged by the United States government as his opinio juris that they separate from war crimes in order to cover atrocities committed by a government against his own civilian population.

Moreover, in 1968, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity was drafted by General Assembly. In this Convention, the State Parties undertake to adopt all necessary domestic measures, legislative or
otherwise, with a view to making possible the extradition in accordance with international law for the perpetrators committed crimes against humanity. In 1973, General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid that the parties declare apartheid is a crime against humanity and violate the principles of international law. Both of those Conventions are composed by consent of States reflecting opinio juris of a deductive approach to determine specific normativity of crimes against humanity and the State parties are obliged to do so.

Secondly, resolutions, both from General Assembly and from Security Council are also related to the notion of crimes against humanity. In 11 December 1946, the General Assembly adopted by unanimous vote Resolution 9(II) entitled the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal which directly recognizes the existence of the Article 6 (c) of the crimes against humanity. Moreover, in Resolutions 2444 (1961) and 2675 (1970), the UN General Assembly has unanimously affirmed that the principles of international law in Common Article of Geneva Conventions 1949 and Protocol II are correct statement of principles of customary international law. This affirmation is also applied for crimes against humanity because it relates to the nexus of armed conflict contained in Geneva Conventions of 1949.

Finally, the most notable Statute is the Rome Statute resulted from multilateral conference from 15 June to 17 July 1998 in Rome. The Statute determines crimes against humanity in Article 7 which contains a significant difference between the definitions in Nuremberg and Tokyo Charter. Its importance is that the definition and the scope of applicability of crimes against humanity are first determined by multilateral consensus and negotiation among 160 states rather than by the vicissitudes and the Security Council resolutions.

Moreover, multilateral consensus of among subjects of international law at Rome Conference created actual belief and consent of opinio juris binding upon them to oblige the consensus. This result answers the doubt of some scholars arguing that customary international law can not be used as a source of international law because it lacks of consent and commitment of the nations. Moreover, this multilateral treaty can serve as source of customary international law because it has met three basic requirements, i.e. accepted by sufficient number of States in the international system, the most interests of States are contained by the treaty and not subject to reservations by the accepting States.
Therefore, the notion of crimes against humanity is mainly derived from the consent of States, and international organizations by their statements and negotiations. Those elements of opinio juris highlight and determine, first, the legality, secondly, the substantive normativity and, thirdly, the applicability of crimes against humanity. This is because the delegations in the Rome Conference agreed that the purpose of the Conference on the definition of crimes was to identify existing customary international law and not to progressively develop the law

To conclude, the significance of opinio juris for the development of crimes against humanity are first, it determines the element of their substantive normativity; what is crimes against humanity and what should crimes against humanity be (Emphasis added). It lays down detailed rules about what constitute culpable conduct, about what non-normative states are requisite for criminal liability, about when particular results will be attributed to particular actor, about responsibility for the conduct of others and for inchoate crimes, about general justifications for otherwise wrongful conduct that reshape and complicate the boundaries of particular prohibitions, about excuses that entirely or partially exclude culpability and about the grading of offences and sanctions according to different levels and degrees of culpability and harm for crimes against humanity.

---

44 Robinson, Op.Cit.n 9, p. 35.
48 International level such as the ICTY, Tokyo Tribunal, ICTY and ICTR, whilst national level represents States trials relating to crimes against humanity, such as in Attorney General of Israel v Eichmann, (1966) 36 ILR 5, Pilavina v Peninsula, (1980) 630 F.2d 876 (24 Cir. 1980) and Ivan Puljowski v Commonwealth of Australia and Others, (1991) 172 CLR 520.
This threshold, however, relates to several issues in which vary due to several legal questions such as, first, the matter of jurisdiction and procedural fairness. Here, the question is: do the Courts have the jurisdiction and what principle of jurisdiction should be applied for the crimes against humanity. In Nuremberg trial, the court then argues that the making of the Charter was exercised of the sovereign legislative power by the counties to which the German Reich unconditionally surrendered; it is the expression of international law existing at the time of its creation; and to that extent it is itself a contribution to international law. In Pijarowska v Poland (1995), an individual was directly involved in the atrocity. In the case, the Court rejected the argument that crimes against humanity should be labeled as delicta juris gentium and as the enemies of all people.

The second consideration is the fairness issue. The notion fairness reflects the application of the certain rights for the accused for trial trials, i.e. language understood by the accused, fair evidence and witness. Simpson argues that procedural fairness relates to two related facts, i.e. the capacity of witness to testify of the offenses happened and statutory limitation applied for the crimes that happened long time ago. For example, in Nuremberg trial, the accused were accused on the basis of war crimes and crimes against humanity in which clearly shows that there were no precise element of crimes against humanity. In addition, the Tokyo trial recognized the problems of fairness due to its internal composition. However, the tribunal refused to entertain any questions for the challenge the fairness of its composition.

Most recently, in Prosecutor v Tadic, the counsel of the accused contended the fairness of the trial on the jurisdiction of the court based on principle of non bis in idem since the accused had arrested and was subjected to the trial before a German court in which the judges rejected this argument.ii

---

ii Gerry J Simpson argues that the problem of legality, generally, Nuremberg Crimes Sine Lege and procedural fairness is the most serious objection of the war crimes trials which also apply for crimes against humanity, in McCormack and Simpson, Op.Cit. n 6, p. 11 and see also M.C. Bassoussi and Peter Markis, The law of its International Criminal Tribunal for Former Yugoslavia (1996), p. 267.


v (1983) 776 F.2d 571, 582.

vi See Peter Papasinos, The Eichmann Trial (1964), p. 32.

vii Ibid, p. 54.

viii Ibid, p. 592. The Court stated that NAI and NAZI's collaborator are crimes universally recognised and condemned by the community of nations and that these crimes are offenses against the law of nations or against humanity and that the prosecution of nations is acting for all nations, (emphasis added), see Bassouissi, Op.Cit. n 21, p. 325.


xii Richard H Minzer, Victor L. Jusczak the Tokyo War Crimes Trial (1972); He argues that the Trial lacks of legal process that contributes major problems for fairness, p. 74-124.


xv Ibid.

MIMBAR HUKUM

141
Therefore, the significance of practice for the formation of crimes against humanity lies, first, in determining the application of the thresholds of crimes against humanity; especially on the question of principle of legality. Secondly, it gives precedents on how to prosecute the crimes against humanity's criminals. Those precedents, in fact, are very influential for the existence of crimes against humanity determined in the ICC; i.e., the maxim of nulla poena sine lege and ex post facto are formal and for the establishment of permanent trial. Prior to the ICC, these maxims are enacted as sui generis principle which, then, is accepted as nullam crimen sine lege, there can be no crime without law as the manifestation of customary international law principle applied in the criminal law, including crimes against humanity.

Therefore, the relationship between customary international law for the formation of crimes against humanity can be concluded as follows; first, from philosophical terms, customary international law answers the substantive normativity premises; what are crimes against humanity and what should crimes against humanity be in the international community. Therefore, crimes against humanity are distinguished crimes which every person committed them are liable for the punishment and crimes against humanity should be independent from the nexus with the armed conflict and should be distinct from other crimes such as war crimes and genocide. This phenomenon is concluded by the independent continuous from States to form and to prosecute crimes against humanity. In addition, customary international law also contributes the descriptive accuracy for the premise what crimes against humanity should be toward practices exercised by judicial organ either

\[ \text{international or national.} \]

Secondly, from the elements and precedents of the formation of crimes against humanity, the opinio juris emerged formerly rather than the practice for the prosecution of crimes against humanity. This fact is relevant until the existence of crimes against humanity in the ICC. Therefore, as the ax of the formulation of crimes against humanity based on opinio juris rather than the practice, the following prosecution of crimes against humanity exercised by the ICC will be dominated by practice of judicial discretion from the judges, the prosecutors and the defense counsel rather than the use of opinio juris in the future.

C. The Development of Crimes against Humanity

The development of crimes against humanity relates to the historical perspective that resulted peculiarities applied to the situation (nexus with the armed conflict) with respect to the threshold of applicability, discriminatory motives and measures. However, the definition of crimes against humanity should be distinguished first due to ambiguity definition with war crimes, (Harry J Simpson pointed out that the notion of war crimes has given its proliferation meaning distinguished based on the situation, peace and war, in which genocide and crimes against humanity included\[6\]). This distinction, furthermore, relates to the nexus with the armed conflict and the criteria of civilian population. In addition to this distinction, according to Steven Ramsey, it gives legal obstacle and confusion for the prosecution of crimes against humanity but at the end it results crimes against humanity as a distinguished crime without relation to armed conflict.

\[ \text{See } \]

\[ \text{Tox } \]

\[ \text{Rom } \]

\[ \text{Post } \]

\[ \text{Lyso } \]

\[ \text{and } \]

\[ \text{Sun } \]

\[ \text{Op } \]

\[ \text{Pro } \]

\[ \text{Cia } \]

\[ \text{Sui } \]

\[ \text{Cl } \]

\[ \text{and } \]

\[ \text{mov } \]

\[ \text{ute } \]

\[ \text{Sun } \]

\[ \text{Cos } \]

\[ \text{Sui } \]

\[ \text{and } \]

\[ \text{Ad } \]
Their historical development is going to be examined below.

III.1. Jocpition Period (prior to Nuremberg and Tokyo Trial to 1950)

Before 1945 the concept of crimes against humanity scarcely existed, but there are evidence that crimes against humanity existed with the notions of principle of humanity and laws of humanity. In fact, those notions created ambiguity because there were no fixed and universal standard of humanity. However, it was accepted the individual responsibility principle for those abuses. Following this, crimes against humanity defined first in Nuremberg Charter by US Government. He argued that the horrendous persecution perpetrated by Germany against its own nationals as a matter of international concern and crimes against humanity should be separated from war crimes because war crimes did not cover offenses committed by Germans against Germans. This approach was accepted by Russian and British Government that directly formulated their elements.

As the result of this formulation, there are key features at Nuremberg Tribunal for the existence and prosecutions of crimes against humanity as follows: first, crimes against humanity are dependent crimes that only could be enforced with the nexus of armed conflict. Thus, the nexus with armed conflict situation was the ultimate condition for the Tribunal to have the jurisdiction over crimes against humanity. This reality was supported in the IMT judgment for Julius Streicher and Hess who were prosecuted in both count 3 (war crimes) and Count 4 (crimes against humanity). Secondly, the notion of common plan and conspiracy to persecute against any civilian population emerged. Furthermore, the term against any civilian population underscores the terms of crimes against humanity covers crimes against the government own nationals, not just persons of enemy or foreign nationality. This term, in fact, could be used to separate crimes against humanity with the nexus with armed conflict because the meaning of its own nationals negate the definition of armed conflict and could be happened in peacetime. Thirdly, the threshold of systematic and organized persecution of any civilian population for crimes against humanity was the condition applying charge of crimes against humanity.
Fourthly, the existence of individual responsibility for crimes against humanity was applied as a form of liability of conduct that was not recognized before when the perpetrators surpassed the element of crimes against humanity.

Therefore, crimes against humanity were termed as "crimes under the jurisdiction of the International Law Commission" and they were developed pursuant to the Genocide Convention as the "crimes under international law" which related to several explicative principles for prosecuting both of them. In fact, the explicative rules of what are the consequences as international crimes (jusdictio), how to prove mens rea of intent to destroy for the discriminatory motives and individual responsibility are conceptualized which need examination later on for the prosecution of crimes against humanity and genocide. Next, the period also goes legacy and certainty for the prosecution of crimes against humanity as distinct crimes under Statutes 2.


In this period, the development of crimes against humanity related to the drafting from International Law Commission. The draft mainly seeks the suitable substantive matters of "ratio materiali" of crimes against humanity. In 1950, the International Law Commission (ILC) adopted a report on the principles of International Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal. Moreover, the ILC limited itself to drafting the content of these principles relating to crimes against humanity because these principles have been affirmed as positive law by Resolution 95(1) of the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal. Principle I and VI state the significant term of any person who commits a crime under international law is responsible and liable for the punishment. Moreover, the terms any person consists of broad meaning for the perpetrators and the notion crimes under international law needs exploration of the legal consequences.

Finally, in 1996, ILC proposed the Draft Code of Crimes against the Peace and Security of Mankind. Crimes against humanity were articulated in Article 15 with their chapeau; a crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a government or by any organization or group (Emphasis added). This chapeau, in fact, can be inferred that the nexus with the armed conflict (near) is not necessary needed, the conditions of species have to be systematic or on a large scale and the criminal responsibility bear on the individuals, government, organization, or group. A significant aspect in this draft is that there are many deletions of international crimes articulated in the previous draft due to objection from western countries insisting only on the core international crimes. Therefore, a more restrictive and precise international criminal code would promote greater objectivity, fairness and predictability in their implementation, especially for the law enforcement of crimes against humanity.

Furthermore, the work of ILC from 1950 to 1996 makes clear conflict in the ratio crimes, in order to avoid crimes against humanity in war are a serious argument against the concrete of indivi human nature and not be used, it support for the plain predicate of I.C.C. of crime crimes, Furthermore, it not to be crimes.