European Master's Degree in Human Rights and Democratisation

CRIMES AGAINST HUMANITY UNDER CUSTOMARY INTERNATIONAL LAW AGAINST THE BACKGROUND OF COMMUNAL VIOLENCE IN INDIA

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Date: July 15, 2003
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ACKNOWLEDGEMENTS

I would like to express my deepest appreciation to my supervisor, William A. Schabas, for his guidance during the preparation of this project.

I would also like to dedicate this thesis and give my deepest appreciation to Max Plog for his great help, Marinella Bebos, Guiseppe Luppino, Clarice Da Silva E Paula and Eva Puhar and my family for motivation and support.

ABSTRACT

The concept of crimes against humanity has evolved since its incorporation in legal instrument in 1945. One important development is that the war-nexus is not considered as an element of the crime. Its removal confirms the idea that the law of crimes against humanity is a tool which copes with the worst violations whether in war or peacetime and, thus it allows that situations as communal violence could amount to a crime against humanity. The difference between a domestic crime and a crime against humanity is focused in the term "attack". The attack must be carried out against the civilian population and be either widespread or systematic. The existence of a policy, whether from the State or from an organization, is not an element of the crime under customary international law. Never the less, it is no without legal importance: the existence of a policy can evidence mainly, the systematic character of the attack.
Under customary international law, a crime against humanity can be instigated or tolerated by the State. However, it is not clear when a failure to prevent and to punish can be paramount to an "active" State action. Legal concepts as commission through omission, aiding or abetting and the application of the so-called "imputed command responsibility" might be used to show that a chain of failure from low- raking agents to high-state officials could constitute a policy *per se*.

Key words:

communal violence
widespread or systematic
plan or policy
failure to act
aiding or abetting
command responsibility

ABBREVIATIONS

BJP	Bharatiya Hindu Parishad
HRW	Human Rights Watch
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law commission
ICC	International Criminal Court
NHRC	National Human Rights Commission
NGO	Non-governmental organisation
RSS	National Volunteers Corps
UNGA	United Nation General Assembly
VHP	Visha Hindu Parishad

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INTRODUCTION

Odious offences, which wound the human dignity and constitute a grave humiliation and degradation of the humanity, are not new concepts. The concept of crimes against humanity was for the first time invoked by the British, French and Russian Governments regarding the massacre of Armenians in Turkey in 1915. However, the concept of crimes against humanity was not introduced in a legal instrument until 1945 with the London Charter. Although, the London Charter has been labelled by some authors as a "victors' product", it cannot be denied that it constituted the starting point of the development of a legal corpus of international crimes. Since Nuremberg, the definition has been following a process of continuous transformation, in which the International Law Commission's efforts of codification and the consistent jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) must be emphasized. Its latest development, at international level, has come with the adoption of the Statute for the International Criminal Court in 1998. Article 7 of the Rome Statute has been the product of an international agreement by States. In that sense, States, in the use of their sovereign powers, have arrived to a definition of crimes against humanity that in some aspects set forth, and in others, broadened or narrowed the definition given by customary international law.

Currently, the Rome Statute has 90 signatures. However, countries with a large democratic tradition, as India, have joined the United States' position against this International Criminal Court. The absence of ratification is not without significance in international law. However, countries that have not ratified the Rome Statute yet, are still bound by the definition of crimes against humanity under international customary law. Thus, it is the definition given by international customary law, which is going to be applied in the context of this study. Consequently, one of the main questions is: what is the definition of crimes against humanity under international customary law?

This paper will attempt to solve this and other legal questions in the context of the communal violence in the state of Gujarat, India. For that purpose, in a first step, some background information will be given about the events in Gujarat in February and March 2002. It will be an attempt to compile what has been reported by international and local non-governmental organizations (NGOs) as well as by governmental human rights departments. In that connection, it must be emphasized that the aim of this study is not to demonstrate that communal violence in Gujarat actually constituted a crime against humanity, but rather to illustrate some of the legal difficulties and grey areas surrounding the definition of crimes against humanity, and in that sense, to determine the threshold under which communal violence might be considered an international crime.

In the first chapter of this study, an analysis of the different elements that constitute the definition of crimes against humanity under customary law will be addressed. Therefore, the first Chapter will attempt to demonstrate how international criminal law defines the term of crimes against humanity. However, references to article 7 of the ICC Statute will be made in order to show the development of the definition.

Additionally and for the reason that the Indian Delegation was reluctant, during the Rome Conference, to accept that crimes against humanity can also be committed in internal conflicts and in peacetime, an especial emphasis will be given to the no war- nexus requirement.

The second chapter will focus on the existence of a policy or plan. This Chapter contents two sections. The first one will, mainly, tackle the debate about the significance of a policy or plan as an element of the crime or as an accessory element, whose importance rests merely on the proof of the systematic or widespread character of the attack against the civilian population.

The second section will analyse several questions that have been interpreted differently by the tribunals regarding the content of such a plan or policy. Does a policy have to

come from the State or from a non-state actor? If it comes from a non-state actor, which characteristics must a non-state actor have in order to be analogised with a state actor? Moreover and, for considering the existence of a plan, does it have to be actively promoted by a State, as is required by the ICC Statute? Can a failure to prevent, to intervene or to punish the perpetrator evidence a state policy? In this context, concepts such as aiding or abetting, complicity through omission and imputed command responsibility, primarily developed for criminal responsibility purposes, will be used in order to evidence a state action. The reasoning behind this is that a plan or policy is in general, formulated by high-ranking officials and implemented by state agents, but one might consider that a chain of failure of a legal obligation to act from the low-level officials to the higher ones can constitute a policy itself.

THE COMMUNAL VIOLENCE IN THE STATE OF GUJARAT

India has a democratic, bicameral parliamentary system of government with representatives elected in multi- party elections. It is a federal political system where the Central Government is lead by multi-party coalition. The National Democratic Alliance is head by the Prime Minister Atal Bihari Vajpayee from the Bharatiya Janata Party (BJP), This political party also leads state government in Gujarat, Goa and Himachal Pradesh. On the other hand, President A.P.J. Abdul Kalam, who was elected in July by an electoral college consisting of Members of Parliament and members of state assemblies, is Head of State and also has special emergency powers.

India has 28 states with its own legislative, executive and judicial machinery defined by the Constitution of 1949.[1] Each State has a Governor appointed by the President for five years. The states government have exclusive jurisdiction over law enforcement and maintaining order, in that respect each state control its own police forces through its own home affairs ministry.[2]

The Constitution provides for secular government and the protection of religious freedom. In that sense, it is worthy mentioning that the National Human Rights Commission, an autonomous body constituted by the Central Government under Chapter II of the 1993 Human Rights Act, "*is an expression of the India's concern for the protection and promotion of human rights*"[3]

A. Religious tensions in India and the Ayodhya temple issue

In 1528, the mosque Babri Masjid was built in Ayodhya by the Mughal emperor Babur. Vishwa Hindu Parishad (VHP) activist have argued that the mosque was built in the

[1] *U.S Department of State. International Religious Freedom Report 2002: India. Released by the Bureau of democracy, Human Rights and Labour* www. state.gov/g/drl/rls/irf/2002/14023.htm (accessed May 15, 2003).
[2] *UK Home Office Report, 2002. Country Assessment: India. Country Information and Policy Unit.* http://www.ind.homeoffice.gov.uk/default.asp?pageid=177 (accessed May 15, 2003)
[3] *National Human Rights Commission*, www.nhrc.nic.in

same site of an earlier Hindu Temple.[4] In 1984, the VHP launched a campaign in order to build a temple to the Hindu god Ram in the town of Ayodhya, for achieving the Ram Rajya in India.

"The BJP[5], the Shiv Sena, the militant Hindutva youth organization Bajrang Dal, and the RSS[6] all joined in the campaign. In 1985, the Ramjanambhoomi Nyas (Birthplace of Ram Trust) was formed with the intention to raise funds and coordinate the construction of the Ram temple." [7]In 1991, the BJP won state elections in the Indian State of Uttar Pradesh, the elected Chief Minister declared that he was determined to construct a temple on the site of the Babur mosque. In 1992, karsevaks (religious militants) from all over India were mobilized by Hindutva organizations through public speeches, the print media, audio and videocassettes to travel to Ayodhya in order to build a Hindu temple".[8]

According to Human Rights Watch (HRW), in November 1992, the Supreme Court asked the Uttar Pradesh government to ensure that no construction would occur on the 2.77 acres of land on which the mosque stood. In December 1992, the mosque was destroyed. *"Within two weeks of the destruction of the mosque, 227 were killed in communal*

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[4]"A recent VHP booklet stated that "the intention" behind the [imperator] Babur's building of the mosque 'was deliberately offensive and meant to give a demonstration of Hindu humiliation for all time' " Gupwell, Dick "*Communal Violence in India provokes political crisis*". *European Institute for Asian Studies.* Vol.6 #3&4. Mar- April 2002 http://www.eias.org/pdf/Bulletin/EB02/EBMarApr02.PDF (accessed May 15, 2003).

[5] Bharatiya Janata Party

[6] The RSS (National Volunteers Corps) is an umbrella organisation founded in 1925 by Keshav Barilam Hedgewar. Its main mission is the creation of a Hindu State. A goal that has inspired the creation of RSS political, social and educational wings, that is, the so called "sangh parivar".which served as the religious wing of the RSS. The "sangh parivar" includes: The Vishwa Hindu Parishad (VHP), Bajrand Dal is the militant group wing of the VHP.. The Bharatiya Janata Party (BJP) is the political organisation.. See *UK Home Office Report, 2002 supra* note 2.
According to Pankaj Mishra, in the RSS manifesto "We, or Our Nationhood Defined" (1939), "Madhav Sadashiv Golwalkar, supreme director of the R.S.S. from 1940 to 1973, said that Hindus could "profit" from the example of the Nazis, who had manifested "race pride at its highest" by purging Germany of the Jews. According to him, India was Hindustan, a land of Hindus where Jews and Parsis were "guests" and Muslims and Christians "invaders."" Mishra, Pankaj "*The other Face of Fanaticism*" published in the NY Times Magazine, February 2, 2003,

[7]*Human Rights Watch Publications. Report: "India. Communal violence and the Denial of Justice".* April 1996. Vol. 8. No.2 (C). (accessed May 15, 2002).
http://hrw.org/reports/1996/India1.htm

[8] *Idem.*

violence[9] *in Gujarat, 250 in Maharashtra, fifty-five in Karnataka, fourteen in Kerala, forty-two in Delhi, 185 in Uttar Pradesh, one hundred in Assam, forty-three in Bihar, one hundred in Madhya Pradesh, and twenty-three in Andhra Pradesh".*[10]

The Indian Central Government condemned the demolition of the building and pledged to re-build it. Some BJP leaders, including L.K. Advani and the party's President, Dr. Murli Manohar Joshi, as well as some VHP leaders were arrested, the BJP Chief Minister of Uttar Pradesh resigned. The State legislature was dissolved and Uttar Pradesh was placed under President's Rule. On 8 December 1992 the security forces took full control of Ayodhya.[11]

B. Religious tensions in the State of Gujarat, 2002.

For three weeks preceding the violence, the city was busy receiving a great number of (VHP) activists coming to and from Ayohya to Ahmadabad, the capital of Gujarat. The VHP activist were bringing thousands of stone pillars in order to construct the Hindu temple in the dispute site of the Babri Masjid mosque.

In the BJP's cultural agenda was included the construction of a new Hindu temple to replace and ancient one that was believed to have been constructed on the site of such mosque.[12]

The communal violence began on 27 February after a Muslim mob in the town of Godhra[13] attacked and set fire to two train cars carrying Hindu activist.[14] By evening,

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[9] Labelled as "communal" because the violence involved communities identified by religious differences The term "communal conflict" originated in colonial analyses of religious conflicts in the Indian subcontinent. It is now used more widely to describe violent conflict and repression that target communities based not only on religious affiliation but on ethnic, racial or linguistic characteristics

[10] *Idem.*

[11] *UK Home Office Report, 2002 supra* note 2.

[12] The Vishwa Hindu Parishad (VHP), which was formed in 1964 and covers the social aspects of the RSS activities. "*The most publicized of the VHP's activities was its campaign to build a temple to the Hindu god Ram at the site of the Babri* [mosque]"[12]; Bajrand Dal is the militant group wing of the VHP. It was formed in 1984 in order to mobilize youth for the Ayodhya campaign. Although it is affiliate to the RSS, is not directly controlled by the sang parivar. The Bharatiya Janata Party (BJP) is the political organisation. It was formed in 1980 from the former Jana Sangh Party which was created in 1951 as the political wing of the RSS. Currently, the BJP heads the India's coalition government, leading the 24-party National Democratic Alliance (NDA). This political party also leads state government in Gujarat, Goa and Himachal Pradesh. It is important to mention that most of the BJP ministers and leading member of the party are RSS members. See *UK Home Office Report, 2002. supra* note 2

retaliatory attacks against Muslim began in several district of the State of Gujarat such as Ahmedahad, Godhra, Rajkot, Vadodara, Bharuch [15].

Shortly afterwards the incident, local members of the VHP arrived from the Hindu districts of the town and began the violence setting fire to Muslim houses.[16] According to witnesses "*attackers arrived by thousands in trucks, clad in saffron scarves and khaki shorts, the signature uniform of Hindu nationalist (...). Shouting slogans of incitement to kill, they were armed with swords, trihuls, sophisticated explosives and gas cylinders. Guided by computer printout listing*[17] *addresses of Muslims families and their properties (...) they embarked on a murderous rampage*"[18]

On the other hand, two local NGOs, the People's Union for Civil Liberties and Shanti Abhiyan issued an analysis of the role of the media during the violence. According to them, the newspaper *Sandesh* published "especially inflammatory headlines, pictures and stories the day after the Godhra attack."[19]

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[13] Godhra is a city with a estimated population of 150,000 inhabitants. It is split between Hindus and Muslims, most of them living in separated neighbourhoods. See Human Rights Watch Publications. Report: *Narula, Smita* "*We have no orders to save you". State participation and complicity in communal violence in Gujarat*". April 2002. Vol.14 No.3 (C) http://hrw.org/reports/2002/india/ (accessed March 2003)
[14] There are divergent opinions about the events leading to the dispute that resulted in the Godhra massacre. See Euroasia, *supra* note 4.
[15]. See *Human Rights Watch Report, supra* note 13
[16] *Eurasia, supra* note 4.
[17] Voter list were used to identify and target the Muslim community members.
[18] *HRW report, supra* note 14 at 22.
[19] *People's Union Civil Liberties- Vadodara, Shanti Abhiyan*, "*The Role of Newspapers during the Gujarat Carnage: February 28- March 24*" April 5, 2002. Cited in HRW Report, *supra* note 14 at 34.

C. Pattern of conduct

For the purpose of this study, and according with human rights reports, the pattern of conduct was the following:

- Burning and destruction of mosques and other religious places.

According to HRW, " [a]*ttackers also destroyed Dargahs, traditional meeting grounds for Hindu and Muslims and mosques*"[20] Historical monuments were also destroyed.. In many places, saffron flags, the signature flag of Hindu nationalist groups, were dug into the mosque domes.[21]

-Looting and burning of houses and business.

HRW reported that the looting and burning of Muslim homes, shops, restaurants, and places of worship was widespread: numerous victims testified that their property were looting or burnt during the attacks and in the followed days.

"*Ahmadabad's Muslim ghettos were attacked.(...) At least 50 buildings, including Muslim businesses and homes, as well as vehicles were set on fire. A crowd of 2000 people stone six Muslim-owned bungalows. The mod then poured kerosene and set them on fire*"[22]

"The violence and subsequent tensions caused the displacement of more than 100,000 persons, mostly Muslims. Most were housed in more than 100 camps throughout Gujarat."[23]

-Murder and rape.

"*The brutal killing and sexual violence was also accompanied by the widespread looting and burning of the houses."*[24] According to human rights reports, from February 27 to March 6, the number of causalities raised up to more than two thousand[25]

[20] *HRW report, supra* note 14 at 31.
[21] *Idem.*
[22] *Euroasia, supra* note 4 at 11.
[23] *USCR: World Refugee Survey Report 2003*, released 29.05.2003 http://www.refugees.org/world/articles/wrs03_scasia1.cfm.htm#india (accessed June 10, 2003)
[24] *HRW Report, supra* note 14 at 31.

It is worthy to cited the description of the attacks on February 28th taking into account that the same pattern of behaviour was repeated in the following days "*On February 28, at least sixty-five people were killed by a 5,000 strong mob that torched the entire locality* [of Naroda Patia] *within minutes. (....) Women and girls were gang raped in public view before being hacked and burned to death. Homes were looted and burned while the community mosque, the Noorani Masjid, was destroyed using exploding gas cylinders*." [26]

In the Euroasia analysis, Gupwell explains one of the methods used by the attackers: "*The militant Hindus flooded the lane with water and then attached cables to the main electricity supply leading them to into the flooded lane. Then, they smashed holes in the roofs of the dwellings and threw petrol bombs and Calor gas cylinders. As the people fled from their burning houses into the lane, they were electrocuted*." [27]

Most of the people died burnt in their homes and many of those who try to escape where captured and hunted down[28]. Muslim girls and women were brutally raped before being killed.[29] According to investigations by a fact-finding team of women's rights activists conducted at the end of March 2002, those crimes were underreported by the police[30]

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[25] *Concerned Citizens Tribunal enters into detail in the development of the attack in a report called "Mapping of Violence"*. http.sabrang.com/tribunal/voII/maping.html (25/6/2003)
HRW report, *supra* note 14 at 15.
[27] *Eurasia, supra* note 4 at 12.
[28] *Idem.*
[29] " *I have never known a riot which has used the sexual subjugation of women so widely as an instrument of violence as in the recent barbarity in Gujarat. There are reports everywhere of gang-rape of young girls and women, often in the presence of members of their families, followed by their murder by burning alive* " Harsh Mander, "*Cry, the Beloved Country: Reflections on the Gujarat massacre*" South Asia Citizens' Web cited in *HRW Report, supra* note 14 at 27.
[30] *HRW Report, supra* note 14 at 28-29.

CHAPTER I. THE THRESHOLD OF CRIMES AGAINST HUMANITY

1.The notion of crimes against humanity under international customary law

1.1 The origin of the notion of crimes against humanity.

The notion of crimes against humanity was for the first time proposed in 1915 on the occasion of the mass killings of Armenians in the Ottoman Empire[31]. On May 1915 the French, British and Russian governments issued a joint Declaration denouncing these acts as crimes against humanity and civilization through the invocation of the "*laws of humanity*".

The "*laws of humanity*" were proclaimed in the Martens Clause of the Hague Convention of 1907 which sought to extend to the entire population the protection of the "*principles of the law of nations, as established by and prevailing among civilized nations, by the laws of humanity and the demands of public conscience*"

It is in 1945, when the Allies decided to bring all the major war criminals to trial, the first time that a definition of crimes against humanity is stipulated in a legal document. The London Agreement embodying the Charter of the International Military Tribunal established a provision under which the Tribunal had jurisdiction to try persons guilty of crimes against humanity. Article 6 (c) of the London Charter makes a distinction between to different categories of crimes: (i) inhuman acts as murder, extermination, deportation committed against the civilian population; (ii) persecution on political, racial, or religious grounds. It also established an accessory element: they were punishable only if they were committed in execution or in connection with any crimes within the jurisdiction of the

[31] In Turkey, between 1915 to 1919, private Turkish citizens acting as mobs, carried out a popular action which resulted in the killing of Armenian. The Turkish public officials supported, encouraged, condoned or failed to prevent the violation in some occasions. See Dadrian, Vahakn N. "The History of the Armenian Genocide" cited in Bassiouni, Cherif M. "*Crimes against Humanity in International Criminal Law*" Kluwer Law International. The Hague, 1999 Second Revised Edition p. 263.

Tribunal, that is crimes against peace and war crimes. The outcome of the latter provision was that, in practice, the Nuremberg Charter treated crimes against humanity and war crimes as overlapping with the difference that crimes against humanity were those committed in Germany or in Austria and Czechoslovakia annexed as part of Germany, whereas war crimes were committed in territories occupied by Germany.[32]

On the other hand, even though the Nuremberg Charter established this accessory requirement limiting the scope of crimes against humanity, the creation of this new category of international crime widened the category of acts considered as an international concern. Thus, one might say that it put limits to the omnipotence of the state by making those acts punishable even when they were not punishable in accordance with domestic laws.[33]

Never the less, because crimes against humanity were prosecuted in connexion with other international crimes, the Nuremberg tribunal often failed to clarify its scope.[34]
Since Nuremberg, the gradual emergence of norms in international law for the punishment of the perpetrators or planners of crimes against humanity is mostly due to the increased awareness of the international community that it is necessary to react when there is an attack to "*one of the principles connected to the value and dignity of the human persons which are so essential for the social life of human being and for the existence of each person that no State (...) is entitled to break with such principles*"[35].

In that sense, the next major codification of the prohibition of crimes against humanity took place in the Control Council Law No.10, dated 20 December 1945, a law enacted by the Allied Control Council of Germany in order to give effect to the London Charter as well as to establish a uniform legal basis in Germany. The main characteristics of this

[32] Kittichaisaree, Kriangsak. "*International Criminal Law*". Oxford University Press, 2001. pag.87
[33] Cassese, Antonio. "*International Criminal Law*." Oxford University Press, 2003, p.70.
[34] Hwang, Phyllis. "*Defining crimes against humanity in the Rome Statute of the International Criminal Court*". 22 Fordham Int'l L.J. 457,December 1998 p.460.
[35] *B. Et al. Case, 15 November 1949, in Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*. Cited in Cassese, Antonio "*Crimes against Humanity*" in Cassese, Antonio; Gaeta, Paola and Jones, John R.W.D (eds.). "*The Rome Statute of the International Criminal Court*", Oxford, Oxford University Press, 2002. Volume .I p.355

Law are that it omitted the war nexus and added imprisonment, torture and rape to the list of crimes against humanity.
Then, the provision of crimes against humanity as defined by article 6 (c) of the Nuremberg Charter, and amended by the Berlin Protocol, was followed in the Tokyo Charter, with the exception of the requirement of persecutions based on religious grounds.[36]

On 11 December 1946 United Nations General Assembly (UNGA) adopted a resolution[37] confirming the principles of the Charter of the Nuremberg International Tribunal and its judgement. Additionally, that resolution instructed the International Law Commission (ILC) to prepare a Draft Code of Offences against Peace and Security of Mankind which was completed at its third session in 1951. The efforts of the ILC to codify "Crimes against Humanity" continued with 1991 the Draft Code of Crimes against the Peace and Security of Mankind and the 1996 Draft Code of Crimes against the Peace and Security of Mankind.

On the other hand, the latest attempts to define the concept of crime against humanity took place at domestic level, by national courts as France, Canada and Israel, as well as at international level, with the Statutes of the Ad Hoc International Criminal Tribunals (article 5 of the ICTY and article 3 of the ICTR Statutes) and the ICTY and ICTR jurisprudence.

One might say that those developments show that the category of crimes against humanity has been in the process of becoming part of customary international law. Nowadays, crimes against humanity, as an international customary rule, is an international crime and the perpetrators incur in international criminal responsibility

It is worthy to note that although the notion of crimes against humanity has been codified in an international treaty for the first time in article 7 of the Rome Statute, the category of

[36] Schwelb, E "*Crimes against Humanity*" 23 BYBIL 178 (1946) p.215-216 cited in *Kittichisaree, supra* note 2 at 88.
[37] *United Nation General Assembly Resolution 177 (II), Nov. 21, 1947.*

crimes against humanity as an international crime has been well defined under customary international law. Therefore the definition of crimes against humanity in the ICC Statute is not an innovation although it is more detailed and in some aspects more restrictive, but reflects the development of this category of crimes since Nuremberg.[38]

As Darryl Robinson pointed out, perhaps the most significant difference between article 7 of the ICC Statute and the most significant precedents on the definition of crimes against humanity is that the former was not imposed neither by the "victor" nor by the Security Council of United Nations but it has be settled through a multilateral agreement involving 160 states.[39]

In this section, the threshold or chapeau of the definition of crimes against humanity will be analysed. It will be shown how the different elements of the definition have been developed until they arrived at the definition given by art.7 of the Rome Statute, as well as it will be shown in which areas article 7 of the ICC Statute is narrower than customary international law and in which is broader. For the purpose of this survey, this analysis will additionally, focus on those elements that India, as a participant at the Rome Conference, was more reluctant to include in the definition but, however, they are relevant for the discussion on the communal violence.

[38]Robinson, Darryl "*Crimes against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience*". Essays on the Rome Statute of the International Criminal Court. Vol. I. Terarmo. Flavia Lattanzi & William A. Schabas (eds.) Il Sirente, 1999. pp 167-168
[39]Robinson, Darryl "*Developments in International Criminal Law: Defining "Crimes against Humanity" at the Rome Conference*". 93 A. J. I. L. 43 p.43

1.2. **The "chapeau" of crimes against humanity. Elements of the crime**

1.2.1 WAR NEXUS IS NO LONGER A REQUIREMENT.

At the Rome Conference, the majority of the states were reluctant to establish the requirement of the nexus to an armed conflict. The main reasons were not only that it would be inconsistent with the post- Nuremberg developments but also because one of the purposes of the ICC creation was to give the Court a *materiae* jurisdiction over large-scale atrocities committed by governments against their own population in times of peace or civil strife.[40] However, this idea was opposed by a minority of States including India that supported the retention of the war nexus requirement not only because it considered that a crime against humanity can not be committed in peacetime but also because it was reluctant to give ICC jurisdiction over internal armed conflicts.[41]

The Ad Hoc Committee on the Establishment of the ICC considered that the existence of customary law regarding the "nexus-war" requirement was questionable "*in view of the conflicting definitions contained in various instruments and that the matter called for further consideration*"[42]. Then, in 1996, the Preparatory Commission was the view that "*although crimes against humanity often occurred in situations involving armed conflict, these crimes could also occur in time of peace or in situations were ambiguous*"[43]. At present, the ICC Statute bans crimes against humanity whether they were committed in war (international or internal conflict) or peacetime.

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[40] *Idem*, p.46
[41] Human Rights Watch. "*French Stand on International Court 'Misted', says Rights Groups*". www.hrw.org/press98/july/icc-frnc.htm.
[42] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*. General Assembly, fifty- session, Supplement No 22 A/50/22, 1995. para.79.
[43] *Report of the Preparatory Commission on the Establishment of the International Criminal Court.* Vol1. Proceeding of the PreCom during March-April and August 1996. G.A 51st Sess. Supp. No 22. A/51/22, 1996. para.89.

On 17 July 1998, the Government of India explained the reasons for not signing the Rome Statute, however, none of the reasons given made any reference to the "war nexus" requirement.[44]

The concept of crimes against humanity was added in the Nuremberg Charter for the main purpose of including atrocities committed against Germans by their own compatriots that, otherwise, would have gone unpunished by the traditional concept of war crimes. This fact could be considered as a confirmation of the idea that citizens are under the protection of international law.[45]

However, because the concept of crimes against humanity leaves the doctrine of state sovereignty at stake, the Nuremberg Charter contained a limitation in the definition of crimes against humanity. This limitation consisted in the so called "war nexus", that is, "before or during the war". This condition was treated as a justification to extend the international jurisdiction over acts that, otherwise, would have been under the jurisdiction of the domestic courts. Those acts were punishable because they directly affected the interests of other states and, therefore, the doctrine of state sovereignty was not threatened.[46]

Never the less, as it was stated by Justice Robert H. Jackson, the war nexus constituted a great limitation to the scope of the crimes against humanity for the main reason that it excluded from the definition the same atrocities that were committed in peacetime.[47]

The Nuremberg Tribunal restricted the definition of crimes against humanity even more than the Charter drafters. The Tribunal limited prosecutions to those acts perpetrated after the war was officially declared and without requiring a high proof of the nexus between

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[44] "*Explanation of vote by Mr. Dilip Lahiri, Head of Delegation of India, on the adoption of the Statute of the International Court*". www.un.org/icc/speeches/717ind.htm.

[45] Schaack, Beth Van. "*The Definition of crimes against humanity: resolving the incoherence*" 37 Colum. J.Transnat'l L.787. p.791

[46] *Idem* p. 791-792.

[47] Although the formulation in article 6 of the Charter contain a discrepancy in punctuation which lead to some authors to think about the requirement of the war nexus only for the second category, that is the crime of persecution, other part of the doctrine, as Bassiouni considered that the drafters' intention was the war nexus requirement for both categories. See s*upra* note 31 at 29.

the war and the acts. It was considered that it was difficult to prove "in connection or in execution with war crimes and crimes against peace" for those acts committed before the war started.

One might say that this restriction was likely due to the ambiguity established in Art.6 (c) which stated that the acts must have been committed "either before or during the war" without specifying which period of time before the war. In that respect, the UN War Crimes Committee on Facts and Evidence in 1946, tried to clear up the ambiguity stated in the original provision of art. 6 (c) of the Nuremberg Charter, by stating that crimes against humanity (as it was defined in the Agreement of 8th August 1945) were war crimes within the jurisdiction of the Commission. In that sense, and as has been interpreted by the Commission of Experts for the Rwanda Tribunal "*crimes against humanity were interpreted by the Nuremberg Tribunal as offences that were connected to the Second World War, rather than to any situation that might have existed prior to it*"[48] The provision of crimes against humanity as defined by article 6 (c) of the Nuremberg Charter, as amended by the Berlin Protocol, was followed in the Tokyo Charter.

Never the less, the Control Council Law No 10 enacted by the Allied Control Council in Germany for the application of the London Charter and for conforming the legal basis in Germany for its prosecution, did not incorporate the war nexus requirement. The omission of the words " before or during the war" and "in execution of or in connection with any crime within the jurisdiction of the Tribunal" could be considered as having the effect of abolishing the war nexus requirement. However, this omission has been interpreted differently.

In that sense, several of the proceedings under the Control Council law No.10 addressed the war requirement, following the Nuremberg precedent, as the international element that distinguished crimes against humanity from domestic crimes. [49] In the Flick case[50],

[48] *Annex to the Final Report of the Commission of Experts established pursuant to Security Council resolution 935* (1994). S/1994/1405 (Annex), 9 December 1994.
[49] Lippman, Mathew "*International Law and Human Rights Edition: Crimes against Humanity*". 17 B.C. Third World L. J. 171 p. 205.

the tribunal rejected the argument that the omission limited the language in CCL No 10 and showed the intent to widen the scope of crimes against humanity. In that sense, it said that "nothing in the record indicated that crimes committed 'before and wholly unconnected with the war' should have been punished."

However, two tribunals considered that crimes against humanity could be perpetrated and prosecuted independent of the state of war. In the so-called Einsatzgruppen case[51] and in the Justice case[52], the Tribunals considered that the CCL No 10 differed materially from the Charter and, in that sense, the war nexus requirement was deliberately omitted. Crimes against humanity protect humanity at all times and not only in time of war.[53]

On 11 December 1946, a General Assembly resolution[54] affirmed "the principles of international law recognized by the Charter of Nuremberg Tribunal and the judgment of the Tribunal" and in Resolution 117 entrusted to the International Law Commission the formulation of those principles. The ILC affirmed in principle VI (c) the Nuremberg provision of crimes against humanity requiring that the inhumane acts must be committed in connection with either a war crime or crimes against peace but omitting the phrase "before or during the war". However, the Commission emphasized that crimes against humanity can also be committed before a war in connection with crimes against peace. Moreover, some delegates considered that the limitation pertained to the jurisdiction of the Nuremberg Tribunal and not to the definition of crimes against humanity. According to them, the international element of a crime against humanity is given by the fact that they are committed, sponsored or tolerated by a government and therefore, could only be adequately prosecuted at an international level[55]

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[50] *Flick and others, US Military Tribunal sitting at Nuremberg, judgment of 22 December 1947, TWC, VI, 1187-223.*
[51] In *United States v. Ohlendorf, Opinion and Judgement, 4 CCL 10 Trials*, the Tribunal stated that "This law is not restricted to events of war. It envisions the protection of humanity at all the times" cited in Schaack, supra note 15 p. 809.
[52] *United States v. Altstoetter, indictment*, 3 CCL 10 Trials.
[53] *Lippman, supra* note 49 at 217.
[54] *United Nation General Assembly. Res. 177 (II), Nov. 21, 1947.*
[55] *Lippman, supra* note 49 at 229.

Additionally, the U.N.G.A. resolution 117 instructed the International Law Commission to prepare a Draft Code of Offences against Peace and Security of Mankind that was completed at its third session in 1951. The Draft Code contained a provision defining crimes against humanity in which the requirement of "in execution or in connection with a war crime or a crime against peace" was substituted by "in execution or in connection with other offences defined in that article". In that connection, one might mention that the latter requirement suggests that the link with a war crime or a crime against peace had been excluded and what characterised a crime against humanity is that these crimes were committed in a systematic manner. However, the General Assembly postponed any consideration until the definition of aggression had been resolved.

On the other hand, despite the fact that there was a general recognition that genocide was a type of crime against humanity, the French proposal to define genocide as such was rejected[56]. As it was said during the negotiations for the adoption of the Genocide Convention, such inclusion would have breached with the parameters placed on the Committee by the General Assembly. Thus, one might argue that if we consider that genocide is included in the category of crimes against humanity, we could state that article 1 of the 1948 Genocide Convention "whether it was committed in time of peace or in time of war", confirms that a war nexus requirement is not required.

It should also be noted that in the 1968 Draft Convention on the Non- Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, there was a provision established that "*no statutory limitation shall apply to war crimes (...)[and] crimes against humanity whether committed in time of war or in time of peace*".

[56] In *Quinn v. Robinson*, the Tribunal stated the idea that genocide is a type of crime against humanity. It said "Crimes against humanity, such as genocide, violate international law and constitute an abuse of sovereignty because, by definition, they are carried out by or with the toleration of authorities of a state". Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986) cited in Paust, Jordan. J; Bassiouni, Cherif; Scharf, Michael; Gurulé, Jimmy; Sadat, Leila, Zagaris, Bruce; Williams, Sharon A. "*International Criminal Law Cases and Materials*". (Second Edition). Durham North Carolina. Carolina Academic Press, 2000.p. 855.

Furthermore, the Apartheid Convention[57] broadened the Nuremberg concept of crimes against humanity affirming that such acts could occur in times of peace as well as war.
In the 1980s, the General Assembly requested the ILC to continue with the Draft Code of Offences against the Peace and Security of Mankind. At that moment, the Delegates agreed that the concept of crimes against humanity had acquired a great degree of autonomy in customary international law and was not longer essentially linked with war crimes or crimes against peace. In that connection, the Special Rapporteur, Mr. Doudou Thiam observed that the concept of crimes against humanity have their own specific characteristic which differed them from war crimes, that is, either is an act directed against the mass people or against a single person which is part of a plan or system of persecution.[58]

In the 1991 Draft Code, the ILC partially ratified the Special Rapporteur's proposal and instead of defining crimes against humanity as such, article 21 was titled "Systematic or mass violations of human rights".[59] This article omitted the war nexus requirement and conceptualised crimes against humanity as a safeguard for fundamental rights.

The efforts of the ILC to codify "Crimes against Humanity" continued with the 1996 Draft Code of Crimes against the Peace and Security of Mankind. The ILC, clearly influenced by the ICTY jurisprudence, commented in its Report that the definition contained in article 18 "Crimes against Humanity" does not include the war nexus requirement as it was in Nuremberg Charter.[60] It continued saying that "the autonomy of

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[57] Article 1 of the "International Convention on the Suppression and Punishment of the Crime of Apartheid" 30th November 1973. declare that apartheid is a crime against humanity.
[58] *Draft Code of Crimes Against the Peace and Security of Mankind Seventh Report*, Mr. Doudou Thiam, Special Rapporteur, [1989] II Y.B. Int'l L. Comm'n 81, 86, U.N. Doc. A/CN.4/419/Add.1 cited in Lippman, supra note 19 at 261.
[59] Article 21 of the 1991 ILC Drat Code contained a general description of what systematic or mass violations are: "an individual who commits or order the commission of any of the following violations of human rights: murder, torture, establishing or maintaining over person a status of slavery, servitude or forced labour, persecution on social, political, racial, religious or cultural grounds, in a systematic manner or on mass scale; or deportation or forcible transfer or population (...)" *Draft Report of the International Law commission on the work of the Forty-Third Session, Draft Code of Crimes against Peace and Security of Mankid,43rd Session. UN Doc.A/CCN.A/L.464, 15 July 1991 at 26 para 5*
[60] *I.L.C. Draft Statute for a Permanent International Criminal Court*, Report of the I.L.C. on the work of its Forty- eight session, 6 May- 26 July 1996. U.N.G.A. A/51/10 (hereinafter 1996 ILC Draft Code)

crimes against humanity was recognized in subsequent legal instruments which did not include this requirement"[61].

On the other hand, article 5 of the ICTY Statute, grants the International Tribunal jurisdiction over the enumerated acts "when committed in armed conflict". In that sense, the United Nations Secretary General affirmed "[c]*rimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character*".[62]

Never the less, it is significant that the Tribunal stated "*despite the precedent* [of Article 6(c) of the Nuremberg Charter], *(...) the inclusion of the requirement of an armed conflict deviates from the development of the doctrine after the Nuremberg Charter.*"[63] Thus, one might say that it must be taken into consideration that the requirement of "nexus with an armed conflict" established in art.5 ICTY Statute was just reintroduced for the purpose of that Tribunal.[64] The type and nature of such conflict is not relevant and is not required that the perpetrator have the intention to participate directly in the armed conflict, neither that such crimes form part of an official policy or practice approved or tolerate by the belligerents. According to Virginia Morris and Michael Scharf, the nexus conflict requirement was imposed in order to limit the jurisdiction of the Tribunal rather than a limitation on crimes against humanity as a matter of international law.[65]

Furthermore, 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 a widespread or systematic attack against a civilian population.[66]

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[61] *1996 ILC Draft Code*, p.96.
[62] *Report of the Secretary General pursuant to paragraph 2 of the Security Council Resolution 808 (1993*) S/25704, 3 May 1993 and Corrigendum S/25704/Corr.1, 30 July 1993 (hereinafter report of the Secretary General pursuant Resolution 808 (1993))
[63] *Prosecutor v. Tadic* No IT- 94-1 Trial Opinion and Judgment (May 7, 1997) para.627
[64] *1996 ILC Draft Code*
[65] Morris, Virginia and Scharf, Michael. "*An Insider's Guide fro the International Tribunal for the Former Yugoslavia*". Transnational Publishers, Inc. Irvington-on-Hudston, N.Y, 1995. Volume 1. p. 82
[66] In the report issued by the Commission of Experts, established by the Secretary General of the Security Council pursuant the resolution 935 (1994) stated that "*The normative content of "crimes against humanity" originally employed by the Nuremberg Tribunal (...) has undergone substantial evolution since*

In addition, one might consider that, as customary international law showed, the war nexus can constitute a jurisdictional element[67], as it happens in the ICTY Statute, but not a legal ingredient of the definition of crimes against humanity.

Therefore the jurisdictional element of war nexus, which has operated to distinguish crimes against humanity from ordinary crimes, is no longer used. On the contrary, the alternative mechanism for rendering a domestic crime to an international one is going to be focus on the requirement of an attack against the civilian population. [see below]

1.2.2. ON DISCRIMINATORY GROUNDS.

Unlike in the ICTY Statute, the ICTR established the requirement of discriminatory grounds requiring "*attack against the civilian population on national, political, ethnic, racial or religious grounds*". However, as stated by the Appeal Chamber in the Tadic case, that requirement has not been imposed by customary international law.[68]

It might be argued that article 6 (c) of the Nuremberg Charter can be read as establishing the discriminatory grounds requirement not only for the offence of persecution but also for the first type of crimes against humanity. However, this interpretation has been rejected as inconsistent with the grammatical structure in English or in French as well as with the intention of such provision.[69] There are certain acts, such as murder,

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the end of the war. The content and legal status of the norm since Nuremberg has been broadened and expanded through certain international Human Rights instruments adopted by the U.N. since 1995 (...) [The Commission] considers that 'crimes against humanity are gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the armed conflict, as part as an official policy based on discrimination against an identifiably group of persons, irrespective of war and the nationality of the victim (...) " Annex to *the Final Report of the Commission of Experts established pursuant to Security Council resolution 935* (1994). S/1994/1405 (Annex), 9 December 1994.

[67] Justice Robert H. Jackson of the United States delegation argued that the reason why a internal affairs as the extermination of Jews becomes an international concern when "it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, i would think we have no basis for dealing with atrocities".

[68] *Prosecutor v. Tadic* No IT- 94-1 Appeal Judgment (July 15, 1999) para. 292.Neither art. 5 of the ICTY Statute, nor the Nuremberg, the Tokyo Charter and the Control Council No.10 contained such provision.

[69] *Robinson, supra* note 38 at 150.

extermination or torture that they are so horrible and so contrary with a person's humanity that the motive behind their commission is irrelevant because they *per se* constitute a crime.[70]

On the other hand, the report of the Secretary General issued for the ICTY Statute considers that "*crimes against humanity refer to inhumane acts of a very serious nature (...) committed as a part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds*"[71]. This view has also been shared by the United States[72] and could have influenced the adoption of a discriminatory element in Tadic Judgment.[73]

Never the less, the majority of the participants at the Rome Conference agreed that not every crime against humanity required a discriminatory motive, however, all of them maintain that the crime of persecution does.[74]

The rationale behind the exclusion of such an element from the definition of crimes against humanity is, mainly, that a discriminatory element could exclude some serious crimes from the jurisdiction of the Court[75], as well as, such a requirement would constitute an onerous burden on the prosecution[76]. Thus, although a crime against humanity will often involve an element of discrimination, because is based on some group affiliation, the Prosecution does not have to prove it[77].

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[70] Ratner, Steven R and Abrahms, Jason S. "*Crimes against Humanity and the In exactitude of Custom. Accountability for Human Rights atrocities in International Law. Beyond the Nuremberg Legacy*". Clarendon Press. Oxford, 1997. pp 61-63

[71] *Report of Secretary-General pursuant Resolution 808* (1993) para. 46

[72] *Letter dated 5 April 1993 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*. S/25575, 12 April 1993, article 10 (b) (i).

[73] *Prosecutor v. Tadic* No IT- 94-1 Trial Opinion and Judgment (May 7, 1997) para.652

[74] *Robinson, supra* note 39, p.46

[75] *Idem,* p.47

[76] In Kayishema, the Trial Chamber II dealt with the discrimination requirement. In that sense, it was stated that for the accomplishment of this requirement, it was necessary some form of the discriminatory intent from the accused.

[77] In the Finta case, Justice Cory of the Supreme Court of Canada said that the main distinction between a crime against humanity and a domestic one is that the "cruel and terrible actions which are the essential elements of the offence where undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race". Therefore, it seems that there is no a requirement of an additional mental element by requiring discriminatory intent on the part of the accused.

Turning to the ICTR, which explicitly required this element in art. 3, it is doubtful if it is the attack or, on the contrary, the criminal act itself which has to be based on discriminatory grounds. The Tribunal, in the Akayesu judgment, answered this question by stating "*inhumane acts committed against persons not falling within any of the discriminatory categories could constitute crimes against humanity if the perpetrator's intention was to further his attacks on the group discriminated against on one of the grounds mentioned in Article 3 of the Statute*."[78] In that respect, one might consider that the rationale behind this is that in crimes against humanity, the emphasis is not on the victim as an individual but on the victim as a member of a targeted civilian population.[79] Therefore, it seems that is the attack (understood as a course of conduct involving the commission of acts of violence), and not the act itself which has to based on discriminatory grounds.

1.2.3. ON A WIDESPREAD OR SYSTEMATIC BASIS

According to Bassiouni, the terms "widespread or systematic" have two purposes: one is to exclude isolated and random acts from the definition of crimes against humanity; and the second it is to reflect the existence of a policy by state or non- state actors.[80]

It was in article 3 of the ICTR Statute that this conjunctive requirement was expressly stipulated for the first time. However, meanwhile the English, Spanish, Chinese and Russian versions established a disjunctive requirement: widespread or systematic, the French one established the conjunctive one "generaliseé et systematique". The dilemma of the conjunctive or disjunctive requirement was dealt with by the Rwanda Tribunal in the Akayesu judgement: "Customary International Law requires only that the attack be either widespread or systematic".[81] On the other hand, although such a requirement is not expressly stipulated in art.5 of the ICTY Statute, the Tribunal had reiterated the idea that

[78] *Prosecutor v. Akayesu*, *Jean Paul*. Case No. ICTR-96-4 Judgment (September 2, 1998) para 312
[79] *Prosecutor v. Tadic* No IT- 94-1 Trial Opinion and Judgment (May 7, 1997) para 644.
[80] *Bassiouni, supra* note 31.at 245.
[81] *Prosecutor v. Akayesu*, Jean Paul. Case No. ICTR-96-4 Judgment (September 2, 1998) para 579, footnote 144.

the imperative existence of an attack against the civilian population implied the widespread or systematic character of the attack.[82] "*The rationale is that as a rule, a systematic mass action* (...)[is] *necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind)*"[83]

On the other hand, the ILC established as a first condition for a crime against humanity in the 1996 Draft Code, article 28, two alternative requirements: it must be committed in a systematic manner or on a large scale.

Therefore, according to customary international law, an attack against the population must be either widespread or systematic to amount a crime against humanity.

- The term "widespread"

In the Akayesu Case, the Chamber gives a definition of widespread and systematic: "*The concept of 'widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims*".[84]

The ILC commentary on the 1996 Draft Code of Crimes emphasized the idea of a large scale action meaning that the acts must be directed against a multiplicity of victims, "*either as a result of the cumulative effect of a series of inhuman acts or the singular*

[82] In Tadic case, the Chamber stated "it is now well established that the requirement that the acts be directed against a civilian "population" can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts." *See Prosecutor v. Tadic* No IT- 94-1 Trial Opinion and Judgment (May 7, 1997) para 646.
[83] *History of the United Nations War Crimes Commission and the Development of Laws of War* ,179 (The United Nations War Crimes Commission: London, 1948) cited in Prosecutor v. Tadic No IT- 94-1 Trial Opinion and Judgment (May 7, 1997) para 644.
[84] *Prosecutor v. Akayesu, Jean Paul*. Case No. ICTR-96-4 Judgment (September 2, 1998) para 580.

effect of an inhumane act of extraordinary magnitude".[85] It can be argued that this comment runs the risk of transforming a domestic crime into an international one, namely, a crime against humanity on the basis of the quantitative outcome of the harm. However, the ILC established a second condition to reach the threshold of crimes against humanity, the mass victimisation must be instigated or directed by a Government or by any organization or group.

This approach was followed by the ICTY in the Tadic Opinion and Judgment which established that even if it is a condition for the applicability of art. 5 of the Statute that the acts were part of a widespread or systematic occurrence of crimes against a civilian population, "*an isolate act can constitute a crime against humanity, if it is a product of a political system based on terror or prosecution*"[86]

Thus, the term "widespread" not only makes reference to the large-scale of the attack but also to the number of victims.[87]

- <u>The concept of 'systematic'</u>

The term systematic was also defined by the ICTR in the Akayesu case as "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources."[88]

According to the ILC, in a systematic manner means pursuance to a preconceived plan or policy, whose implementation could result in the repeated or continuous commission of inhumane acts.[89]

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[85] *1996 ILC Draft Code. p 95*
[86] *Prosecutor v. Tadic* No IT- 94-1 Trial Opinion and Judgment (May 7, 1997) para. 649
[87] *Prosecutor v. Kunarac, Korac and Vukovic*. IT-96-23 and IT-96-23/1 "Foca" Appeal Judgment (February 22, 2002) para. 94.
[88] *Prosecutor v. Akayesu, Jean Paul*. Case No. ICTR-96-4 Judgment (September 2, 1998) para. 307
[89] *1996 ILC Draft*, p.94

The concept systematic has been developed by the ICTY in the Blaskic Judgement. The Tribunal stated that "*the systematic character [of the attack] refers to four elements [that] may be expressed as follows:*

- *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*
- *the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another*
- *the preparation and use of significant public or private resources, whether military or other*
- *the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan."*[90]

According to the Blaskic Judgement approach, it seems that the proof of a plan or policy is a manner to demonstrate the systematic character of the attack. But does the systematic character of the attack necessarily refer to a mass scale attack or to repeated commission of inhumane acts? In that context, one might consider that the killing of a political or a religious leader could reach the threshold of a crime against humanity, even though the murder itself is not on a mass scale, but just a single act, as long as it is meant to intimidate the entire "civilian population" of his supporters.[91]

Not-with-standing, it is worthy to mention that in practice, these two criteria, widespread or systematic, will often overlap. A widespread attack targeting a large number of victims generally reflects patterns of similar abuses and often relies on some form of planning or organization[92].

On the other hand, it might be worthy to note that the Trial Chamber and then, the Appeal Chamber in the Kunarac case, considered that the assessment of what constitutes a

[90] *Prosecutor v. Blaskic* Case No. IT-95-14 "Lasva Valley" Judgment (June 25, 1999) para 203.
[91] *Ratner and Abrams, supra* note 70, p. 60.
[92] *Prosecutor v. Blaskic,* Case No. IT-95-14, Judgement, P207 (Mar. 3, 2000). *See also Prosecutor v. Jelisic*, Case No. IT-95-10, Judgement, P53 (Dec. 14, 1999)

widespread or a systematic attack is a relative exercise that depends upon the population attacked. So, first a Tribunal has to identify the population that has been attacked, before estimating, in the light of the methods, means, resources and the result, if this attack is widespread or systematic.[93]

On the other hand and turning to the question of the conjunctive or disjunctive requirement, it might be worthy to mention that this issue was again debated at the Rome Conference. All participant delegations agreed that not every inhumane act amounts to a crime against humanity. However, they disagreed about the disjunctive or conjunctive test. Some considered that this has already been established in existing authorities, that is, mainly in the jurisprudence of the ICTR. However, other delegations considered that a disjunctive test would be "overinclusive". Some of their main concerns were that a spontaneous wave of widespread but completely unrelated crimes were considered as a crime against humanity as well as it was necessary to distinguish between mass victimization and a crime against humanity.[94] These concerns were taken into account with the adoption of art. 7.2 (a) and the explanation of the meaning oft an "attack against the civilian population".[95]

1.2.4. ATTACK AGAINST THE CIVILIAN POPULATION.

- <u>The term attack</u>

According to the "Elements of Crimes", attack might be defined as a course of conduct involving the multiple commission of acts.

The Appeal Chamber, in the Kunarac case, has noted that the concepts of "attack" and "armed conflict" are not identical. As Mettraux pointed out "*this distinction is a logical consequence of the fact that crimes against humanity may (...) be committed independent*

[93] *Prosecutor v. Kunarac, Korac and Vukovic*. IT-96-23 and IT-96-23/1 "Foca" Appeal Judgment (February 22, 2002) para.95.
[94] *Robinson, supra* note 39, pp.47-48.
[95] Art.7 Crimes against humanity. Introduction para. 3 of the Elements of the Crime and Art.7.2(a) of the ICC Statute: "*Attack against the civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack*".

of an armed conflict. Therefore, even if the attack occurred in the context of an armed conflict it need not be part of it."[96]

As it has been defined, the attack is a pattern of conduct involving numerous acts. All of these acts can vary both in gravity and in nature, and in that connection not all involve the use of armed force but they can just consist in any mistreatment of the civilian population.[97]

On the other hand, one might consider that the given definition of the attack leaves us in the incertitude of considering that an act of omission might be considered as part of the attack.

In criminal law, a crime can be committed by commission or by or through omission. In the commission through omission crimes, the omitted behaviour is not expressly mentioned in the offence. In Law, the tendency is to prohibit certain actions, an active behaviour but not to impose a positive obligation to omit certain conducts. However, one might say that, for example, a mother commits an infanticide if she kills her child but also if she does not feed it and the child dies of starvation, thus in the end, both behaviours arrive at the same outcome, that is, the death. In that respect, legal and common sense demand to take into consideration this perspective and to include in the description of the offence acts of omission that can contribute to the prohibited result. But the omission is not tantamount to the commission in all cases. An omission is only equivalent to a commission when the person has a legal positive obligation[98] to act that places him in a warrant position, and additionally, when the result of an action could have been avoided if the person, who has this obligation, would have acted.[99]

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[96] *Prosecutor v. Kunarac, Korac and Vukovic*. IT-96-23 and IT-96-23/1 "Foca" Appeal Judgment (February 22, 2002) para.86.
[97] *Idem.*
[98] As a general rule, this kind of positive obligation is restricted to a certain circle of people which are in an specific situation of power or authority.
[99] Muñóz Conde, Francisco and Garcia Arán, Mercedes. "*La omisión. Derecho Penal. Parte General*". Valencia. Tirant lo blanch, 1996. p. 256-260.

In international criminal law, the evolution of this issue has taken some time. It was in the first Additional Protocol of 1977, article 86 (1), that for the first time, the principle of criminal liability for omissions was established and developed mainly through the notion of the criminal responsibility of superiors for their failure to prevent or punish crimes perpetrated by their subordinates.[100]

In that sense, it is worthy to mention that, as in article 7.3 of the ICTY and art.6.3 of the ICTR Statute[101], article 28 of the ICC Statute establishes that commanders or other superiors shall be criminally responsible for crimes within the jurisdiction of the Court as a result of his or her failure to exercise properly control over his or her forces or subordinates.

On the other hand, it has also been established that the attack does not need to constitute a military attack. In that connection, the ICTR in the Akayesu case stated "*an attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.*"[102]

- "any civilian population"

As it was stated above, a crime against humanity can be committed in war as well as in peacetime, therefore, the term "civilian" is going to be different in each case.

As it was stated in the Tadic Case, it is not the aim of the term "population" to include the whole population of a given State or territory but to indicate the collective character of

[100] *Cassese, supra* note 33 at.200-201.
[101] "*The fact that any of the acts referred to in articles (...) of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof*."
[102] *Prosecutor v. Akayesu, Jean Paul*. Case No. ICTR-96-4 Judgment (September 2, 1998) para 580.

the crime and, therefore, to exclude those isolated acts punishable as national crimes and not as international ones. In that respect, the individual victim is victimized because of its membership of a civilian population.[103]

Under customary international law, the victims of crimes against humanity need not necessarily be civilians but may include opponents of the policy of ideological supremacy, whatever the form of opposition is.[104]

The term "civilian" in crimes against humanity differs from the one established in the rules contained in the law of war, that is, civilian as a non-combatant. One could argue that the rationale behind this is that the scope of protection of crimes against humanity is wider and has a broader humanitarian purpose than in the case of a war crime.[105]

In the Vukovar case, the Tribunal adopted a wide definition[106] of civilian population stating that even "*those involved actively in a resistance movement can be qualified as victims of crimes against humanity"*[107]. On the other hand, in the Blaskic case, the term is even wider and open to interpretation by the Tribunal:

"Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants (...) but who were no longer taking part in hostilities when the crimes were perpetrated. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian."[108]

[103] *Prosecutor v. Tadic* No IT- 94-1 Trial Opinion and Judgment (May 7, 1997) para. 644.
[104] *Prosecutor v. Barbie*, Judgment of Oct. 6, 1983, Cass. crim., 1984 D.S. Jur. 113, J.C.P. 1983, II, G, No. 20, 107 (1983).
[105] *Prosecutor v. Kupreskic et al.* No. IT-95-16- T Judgement (January, 14 2000) pp 547.
[106] In Tadic, the Tribunal concluded that "*a wide definition of civilian population...is justified" See Prosecutor v. Tadic* No IT- 94-1 Trial Opinion and Judgment (May 7, 1997) para. 643.
[107] *Vukovar Hospital Decision,* IT 95-13-R61, (April 3, 1996) para. 643.
[108] *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgement, (Mar. 3, 2000).pp. 214

Therefore, one might say that the ICTY takes a broad definition of the term "civilian" for two different reasons, first because of the limitation of art.5 of the ICTY Statute[109] and second because the ICTY used the common art.3 of the four Geneva Convention as a guide.[110] On the other hand, the distinction between combatant and civilian is irrelevant in peacetime. In that respect, ICTR includes in the term "civilian" all persons except those who have the duty to maintain public order and the legitimate means to exercise force.[111]

According to Machteld Boot, another distinction must be made: persons occupying positions of authority can either be military or civilian and they must not be considered as a part of the civilian population[112]. It might be noted that the exercise of such authority does not need to be founded in a legal basis but it also can be deduced from the facts.[113]

1.2.5. THE EXISTENCE OF A POLICY

According to art. 7.2 (a) of the ICC Statute, "*an 'attack directed against any civilian population' means a course of conduct involving the multiple commission of acts (...) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack*".

However, because the requirement of a policy element in customary international law is one of the most controversial issues in the definition of crimes against humanity, it would be discussed in further details in the Chapter II, Section I

[109] *Prosecutor v. Kupreskic et al*. No. IT-95-16- T Judgement (January, 14 2000) pp 547.
[110] Boot, Machteld. "*Genocide, Crimes against Humanity, War Crimes. Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*". Intersentia, 2002. p.487
[111] *Prosecutor v. Clément Kayishema and Obed Ruzindana*. Case No. ICTR 95-1-T. (May 21, 1999). pp.127.
[112] *Boot, supra* note 110 at 490.
[113] *de iure* or de facto authority. See below.

1.2.6. THE MENS REA ELEMENT.

One might consider that in some cases, crime against humanity overlaps the crime of genocide, actually the last one is seen as a category of the former. However the crime of genocide require a heavier burden of proof. In that sense, crimes against humanity differ from genocide in that no *dolus especialis* to destroy members of a particular group is required.[114]

The chapeau of the crimes against humanity in art.7 of the ICC Statute requires that the perpetrator has at least knowledge of the attack. The approach taken by art.7 was not a controversial issue at the Rome Conference and reflects the principles of criminal law.
Even if art.5 of the ICTY and art.3 of the ICTR Statute do not establish explicitly this requirement, the case law of both tribunals developed the *mens rea* element. In that connection, in the Tadic case, the Chamber held that in addition to the intent to commit the underlying offence, the accused must know of the broader context in which the act occur.[115]

In the "Elements of the crime" it is clarified that the requirement of knowledge "*should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy*"[116] This approach has been followed by the ICTY[117] which considers that the *mens rea* element is satisfied if the perpetrator intended to further such an attack.

According to Cassese, the court simply required an objective link between the act and the policy or practice as well as the awareness of the policy and practice, and thus, it is not

[114] In the Akayesu Case, the Tribunal mentioned the Eichman case that states, "*crimes against humanity differs from genocide in that for the commission of genocide special intent is required. This special intent is not required for crimes against humanity*." See *Prosecutor v. Akayesu, Jean Paul.* Case No. ICTR-96-4 Judgment (September 2, 1998) para 568.
[115] *Prosecutor v. Tadic* No IT- 94-1 Trial Opinion and Judgment (May 7, 1997) para. 656 reaffirmed in Prosecutor v. Tadic, Appeal Chamber (July 15, 1999) para 271
[116] Art. 7 Introduction (2) of the Elements of the Crime.
[117] *Prosecutor v. Kunarac, Korac and Vukovic.* IT-96-23 and IT-96-23/1 "Foca" Appeal Judgment (February 22, 2002) para. 102

necessary the intention to commit the crime for the purpose of pursuing such policy or practice. The Touvier and Barbie cases confirm this point of view at national level.[118]

Thus, is the knowledge of the broad context but, overall, the awareness of the widespread or systematic character of the attack, the element which elevate a domestic crime to a crime against humanity. Therefore, the additional element is an actual or constructive knowledge that the offences are part of a systematic policy or a large-scale abuse.[119]

The motives of the accused are irrelevant[120] and in that sense, one might say that an act committed for purely reasons completely unrelated to the goal behind the attack against the civilian population does constitute a crime against humanity as long as his acts were part of the attack.[121] So, "*it is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim.* [but it must be note that]*, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack*."[122]

Finally, it must be said that except for the case of persecution, the courts do not require that the perpetrator have had the intent of targeting civilians because of their race or other religious or political beliefs.[123]

In addition, one might say that as a general rule, article 7 of the ICC Statute set forth some elements of the definition of crimes against humanity developed in international customary law, as a no longer requirement of war nexus and the mens rea element. In that sense, according with customary international law, a crime against humanity can be

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[118] *Cassese, supra* note 33 at 82.
[119] *Idem. See Kayishema and Ruzindana Judgment*, para 134 cited in *Blaskic*, para 249
[120] *Prosecutor v. Tadic* No IT- 94-1, Appeal Chamber (July 15, 1999) para 248 and 252. and *Prosecutor v. Kunarac, Korac and Vukovic.* IT-96-23 and IT-96-23/1 "Foca" Appeal Judgment (February 22, 2002) para.103.
[121] *Prosecutor v. Tadic* No IT- 94-1 Trial Opinion and Judgment (May 7, 1997) para. 656 and 659.
[122] *Prosecutor v. Kunarac, Korac and Vukovic.* IT-96-23 and IT-96-23/1 "Foca" Appeal Judgment (February 22, 2002) para.103
[123] *Prosecutor v. Blaskic,* Case No. IT-95-14, Judgement, (Mar. 3, 2000).pp. 244.

committed in an armed conflict, either international or internal, as well as in peacetime. On the other hand, the offender must have the knowledge of a widespread or systematic attack on civilian population.

1.2**.7.** ACTS CONSTITUING A CRIME AGAINST HUMANITY.

Crimes against humanity has been seen by the ICTY as "*serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health or dignity*"[124]. In that context, that acts constituting crimes against humanity will be generally characterized by the directness and the gravity of their assault.[125]

According to the ICTY and art ICTR, the act at the base of the crime must be one of the acts listed in Article 5 and Article 3, respectively, of the Statutes: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts.

It must be noted that art.7 of the Rome Statute broadens the classes of conducts amounting to crimes against humanity by including in the definition the category of force pregnancy, enforced disappearance of persons and apartheid. Similarly, it expands the category of persecution in the sense that it widens the discriminatory grounds adding cultural and gender grounds. However, it might be noted that for falling under the jurisdiction of the ICC, it has to be perpetrated, as it has been stated in art. 7 (1) (h), "*in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*". According to Cassese, this requirement goes beyond what is demanded by customary international law.[126]

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[124] *Drazen Erdemovic*, No IT-96-22-T, Sentencing Judgment. ICTY Trial Chamber, Nov. 29, 1996, para.28.
[125] *Ratner and Abrams, supra* note 70 at 66.
[126] *Cassese, supra* note 33 at 93-94

CHAPTER II. THE EXISTENCE OF A POLICY

SECTION 1. ELEMENT OF THE CRIME OR ACCESORY ELEMENT

The requirement of a policy as an element of the crime against humanity is one of the most controversial issues. One might say that the elimination of the conflict nexus requirement for crimes against humanity raised the concern about its definition. And in that sense, scholars, rightly or wrongly, have tried to find the existence of a policy, the element that distinguishes a domestic crime from an international one.

In the following section it will be analysed if the existence of a State or organisational plan is an element of the crime, and therefore, if it is an essential element for a crime against humanity exist or, on the contrary if is just an element whose presence is important to show especially the systematic character of such attack.

1. **Is the existence of a policy a legal element of the definition of crimes against humanity?**

The ICC Statute has explicitly established, for the first time, the policy element as a legal element of the definition of crimes against humanity. However, does the customary international law require it as well? The debate is à l'ordre du jour, mainly as an aftermath of the recent Kunarac Appeal Judgment which established as follows:

" *(...) neither the attack not the acts of the accused needs to be supported by any form of 'policy' or 'plan'. There was nothing in the Statute nor in customary international law* [footnote 114] *at the time of the alleged acts which required proof of a plan or policy (...) To prove these elements [widespread or systematic] it is not necessary to show that they were the result of the existence of a policy or plan.(...) It may be useful (...) the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime* "[127]

[127] *Prosecutor v. Kunarac, Korac and Vukovic*. IT-96-23 and IT-96-23/1 "Foca" Appeal Judgment (February 22, 2002) para. 98

Thus, the Appeal Chamber in the Kunarac Judgment arrived to the conclusion, after reviewing several case law and the international legal instruments enumerated in the footnote 114[128], that, under customary international law, the existence of a policy is not an element of the crime.

1.1 The policy element at international level

Article 6 of the Nuremberg Charter does not contain an explicit reference of the policy element, even though its drafts shows that this term was already addressed by the French delegation[129] and during the trials of the war criminals the state action was easily proved.[130]

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[128] " *(...) The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law. See, for instance, Article 6(c) of the Nuremberg Charter; Nuremberg Judgement, Trial of the Major War Criminals before the International Military Tribunal, Nüremberg, 14 November 1945 – 1 October 1945, in particular, pp 84, 254, 304 (Streicher) and 318-319 (von Schirach); Article II(1)(c) of Control Council Law No 10; In re Ahlbrecht, ILR 16/1949, 396; Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor, (1991) 172 CLR 501; Case FC 91/026; Attorney-General v Adolph Eichmann, District Court of Jerusalem, Criminal Case No. 40/61; Mugesera et al. v Minister of Citizenship and Immigration, IMM-5946-98, 10 May 2001, Federal Court of Canada, Trial Division; In re Trajkovic, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), P Nr 68/2000, 6 March 2001; Moreno v Canada (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, ?1994g 1 F.C. 298, 14 September 1993; Sivakumar v Canada (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, ?1994g 1 F.C. 433, 4 November 1993. See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, paras 47-48; Yearbook of the International Law Commission (ILC), 1954, vol. II, 150; Report of the ILC on the work of its 43rd session, 29 April – 19 July 1991, Supplement No 10 (UN Doc No A/46/10), 265-266; its 46th session, 2 May – 22 July 1994, Supplement No 10 (UN Doc No A/49/10), 75-76; its 47th session, 2 May – 21 July 1995, 47, 49 and 50; its 48th session, 6 May – 26 July 1996, Supplement No 10 (UN Doc No A/51/10), 93 and 95-96. The Appeals Chamber reached the same conclusion in relation to the crime of genocide (Jelisic Appeal Judgement, para 48). Some of the decisions which suggest that a plan or policy is required in law went, in that respect, clearly beyond the text of the statute to be applied (see e.g., Public Prosecutor v Menten, Supreme Court of the Netherlands, 13 January 1981, reprinted in 75 ILR 331, 362-363). Other references to a plan or policy which have sometimes been used to support this additional requirement in fact merely highlight the factual circumstances of the case at hand, rather than impose an independent constitutive element (see, e.g., Supreme Court of the British Zone, OGH br. Z., vol. I, 19). Finally, another decision, which has often been quoted in support of the plan or policy requirement, has been shown not to constitute an authoritative statement of customary international law (see In re Altstötter, ILR 14/1947, 278 and 284 and comment thereupon in Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor, (1991) 172 CLR 501, pp 586-587*"

[129] On July 1945, the French delegation submitted a draft whose aim was to give to the international tribunal jurisdiction over those acts which constitute a "*policy of atrocities and persecutions against civilian population". Bassiouni, Cherif "Crimes against Humanity in International Law*". Kluwer Law International. The Hague 1999 p.24.

[130] *Ratner and Abrahms, supra* note740 at 65.

The Nuremberg Judgement rendered by the IMT contains the following general statement concerning the concept of crimes against humanity:
"The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt."[131]

According to Mettraux[132], the IMT used the expression "policy of terror" in order to exclude isolated crimes from the definition of crimes against humanity but she emphasized that nowadays, this function is served by the concept of "attack."

Regarding the Streicher[133] and von Schirach[134] cases, both convicted just of crimes against humanity, the Tribunal did not require explicitly that the crimes of the accused were connected to a Nazi or German policy or plan, although they were connected in practice.[135] One might come to the conclusion that the primary purpose behind art. 6 (c) could be the encapsulation of programs of persecution and extermination that were carried out by the Nazis against identified groups of German nationality and of other origin[136] and, thus, persecution in art. 6 (c) of the London Charter is meant to evidence a policy to target a group and after all, in the von Schirach Judgment, the Tribunal even made reference to the policy of deportation.

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[131] *Trial of the Mayor War Criminals before the International Military Tribunal: Nuremberg*, 14 Nov.1945 –1 Oct. 1946 at 284 (1947)
[132] Mettraux, Guenael " *Crimes against Humanity in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and for Rwanda*" 43 Harv. Int'l L.J. 237 (Winter 2002).p.273
[133] "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes as defined by the Charter, and constitutes a crime against humanity."
[134] "The Tribunal finds that von Schirach, while he did not originate the policy of deporting Jews from Vienna, participated in this deportation after he had become Gauleiter of Vienna. He knew that the best the Jews could hope for was a miserable existence in the Ghettoes of the East. Bulletins describing the Jewish extermination were in his office."
[135] *Mettraux, supra* note 132 at.274
[136] It seems that this standpoint was confirmed by the Report issued by the Commission of Experts for the Rwanda Tribunal which stated that the normative content of crimes against humanity was employed by the Nuremberg Tribunal for its own specific purposes in connection with the Second World War. See Final *Report of the Commission of Experts established pursuant to Security Council Resolution 935* (1994). S/1994/1405 (Annex), 9 December 1994, p. 126.

Article II (1)(c) of Control Council Law No. 10 contained no reference to a plan or policy. However, as it has been noted by some scholars[137], the judgments given under Control Council Law No. 10 which omitted any allusion to the conflict nexus requirement also restricted its application to the systematic commission of State sponsored acts.[138]

Principle VI(c) of the *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal* also makes no mention of a policy element.

The work of the ILC also reflects the controversy. The 1954 ILC Draft Code requires that the acts be committed "*by the authorities of a State or by private individuals acting at instigation or with the toleration of such authorities*".[139] In the 1980s, it seems that the Commission started considering the possibility of crimes against humanity by private actors.[140] The 1991 Draft Code of Crimes contains a general description of systematic or mass scale violation of human rights without mentioning the policy element. On the other hand, as it was stated in the Commentary of art.21 of the Draft, not only government officials or agents but also private individuals with de facto power or organized in criminal gangs or groups might also be held liable for the crimes enumerated in such article.[141]

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[137] *Lippman, supra* note 49 at.220

[138] In re Alstotter was held that "Crimes against humanity as defined in [Control Council Law No. 10] must be strictly construed to exclude isolated cases of atrocities or persecutions whether committed by private individuals or by a governmental authority. As we construe it, that section provides for the punishment of crimes committed against German nationals only where there is proof of conscious participation in *systematic governmentally organized or approved procedures*, amounting to atrocities and offences of that kind specified in the act and committed against populations or amounting to persecutions on political, racial or religious." grounds. U.S. v. Alstotter, III Trials of War Criminals before the Nuremberg Military Tribunal 3ff, 284 (1954).

[139] *Report of the International Law Commission to the General Assembly*, U.N. GAOR, Supp. No. 9 at 140-150 U.N. Doc. A/2693 (1954).

[140] *Ratner and Abrahms, supra* note 70 at 66.

[141] *ILC.1991.Draft Code* at 26 para 5

In the 1996 Draft Code, it seems that the ICL assimilated the term systematic with the policy one stating that "*the inhumane acts* [must] *be committed in a systematic manner meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts*".

However, it established (as a second condition) that the acts must be instigated or directed by a government or by any organization or group[142].

Regarding the Report of the Secretary- General pursuant to Paragraph 2 of the Security Resolution 808 (1993)[143], there is no mention to the policy element neither.[144]

On the other hand, the Commission of Experts in its Report[145], noted as a condition for the crimes against humanity that the acts must on one hand, be carried out pursuant to an official policy of discrimination against an identifiable group of persons and, on the other, must also be committed in a systematic manner or on a mass scale. In that sense, Virginia Morris and Michael Scharf noted that the terms "*directed against any civilian population*" in art.5 of the ICTY Statute incorporates several elements. One of them is that the acts must be committed as a part of a systematic plan or general policy and, thus, random or isolated acts of violence are excluded.[146]

In the Tadic Opinion and Judgment on 7 May 1997, given by the Trial Chamber II, it was established that the concept of crimes against humanity necessarily implies a policy element noting that " [t]*he acts must occur on a widespread or systematic basis, there must be some form of a governmental, organisation or group policy to commit these acts and the perpetrator must know of the context within which his action are taken* (...)"[147]. However, there is some doubt as to whether the policy element is a requirement *strictu*

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[142] *Idem* p. 94
[143] *Report of the Secretary-General pursuant Resolution 808* (1993).
[144] Paragraph 48 of the mentioned Report states "*Crimes against humanity refer to inhumane acts of a very serious nature (...) committed as a part of a widespread or systematic attack against the civilian population on national, political, ethnic, racial or religious grounds*".
[145] *Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780* (1992).
[146] *Morris and Scharf, supra* note 65 at 80
[147] *Prosecutor v .Tadic*. No IT-94-1.Opinion and Judgment, (May 7, 1997) para.644

sensu for crimes against humanity. In that respect, the Chamber held that such a policy need not be explicitly formulated and can be deduced from the way in which the acts occur.[148]

In the ICTR case law, the Kayishema case tries to resolve this matter[149]. However, it seems that the ICTR tends to assimilate the concept "systematic" with the policy element.[150] Never the less, it must be noted that, the ICTR reiterates in the Akayesu Case the idea that there is no requirement that this policy has to be either official or a state policy.[151]

However, the Trial Chambers in Kupreskic[152], in Kordic and in Krnojelac Judgments[153].enter into this debate as well. As it was stated in Kupreskic and mentioned in Kordic, "*although the concept of crimes against humanity necessarily implies a policy element* (…) *there is some doubt as to whether it is strictly a requirement".* The Kordic Trial Chamber held that the presence of a policy to commit criminal acts "*should better be regarded as indicative of the systematic character of offences charged as crimes against humanity*."[154]

[148] *Idem.* para.653.
[149] *Prosecutor v. Clement Kayishema and Obed Ruzinanda*.. No. ICTR-95-1-T, Judgment (May 21, 1999) para 124.
[150] "*The concept of 'systematic' may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources". Prosecutor v Akayesu*. No ICTR-96-4, Judgment (Sep 2, 1998), para. 580.
[151] *Idem.*
[152] *Prosecutor v. Kupreskic et al*. No. IT-95-16- T Judgement (January, 14 2000) para. 555.
[153] *Prosecutor v. Krnojelac* No. It-97-25 "Foca" Judgment (March 15, 2002) para 58
[154] *Prosecutor v. Kordic and Cerkez* IT-95-14/2 "Lasva Valley" Judgment (February 26, 2001) para. 14

1.2 The policy element at national level

Several countries have adopted legislation or developed definitions in their jurisprudence dealing with crimes against humanity.

France, in the Nouveau Code Pénal, speaks about "*organized in the execution of a prearrange plan*". The Israeli Statute makes no reference to state action but it requires that the acts have taken place during the period of Nazi rule. [155] However, nor the Canadian[156] nor the Australian Law require governmental action. Thus, apparently there is not a uniform practice in national legislation.

Never the less, it is mainly their jurisprudence that has made reference to the policy element. In that sense, the policy element of crimes against humanity has been affirmed by national courts: in Barbie[157] and Touvier[158] Case, the Cour de Cassation required that the criminal act was affiliated with or accomplished in the name of "*a state practicing a policy of ideological hegemony*". In the Menten Case[159], the Dutch Tribunal considered that there exists the requirement of a system based on terror, even though was not expressed in so many words in the definition given in article 6 of the Nuremberg Charter. In the Eichmann case, the Jerusalem District Court stated: "*With the rise of Hitler to power, the persecution of Jews became official policy and assumed the quasi-legal form of laws and regulations published by the government of the Reich in accordance with legislative powers delegated to it by the Reichstag on March 24, 1933 and of direct acts of violence organised by the regime against the persons and property of Jews*."[160]. In the Finta case[161], the Canadian Court held that "*what distinguished a crimes against humanity from any other criminal offence (...) is that the cruel and terrible actions which*

[155] *Ratner and Abrahms, supra* note 70 at 65
[156] *Canadian Criminal Code* (subsection 7 (3.76))
[157] *Prosecutor v. Barbie*, Judgment of Oct. 6, 1983, Cass. crim., 1984 D.S. Jur. 113, J.C.P. 1983, II, G, No. 20, 107 (1983).
[158] *Prosecutor v. Touvier,* 100 I.L.R. 341, 350 (1992) (Court of Cassation, Criminal Chamber 1992).
[159] *Public Prosecutor v Menten*, Supreme Court of the Netherlands, 13 January 1981, reprinted in 75 ILR 331, 362-363
[160]District Court Judgment, *Eichmann case*, 36 *ILR*, 1968, para. 56.Cited in Blaskic Judgment, 3 March 2000, para. 451
[161] *Regina v. Finta*, [1994] S.C.R. 701, 812 (Can.).

are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race"

It is worthy to note that the Tribunal, in the Kunarac Appeal Judgment[162], mentions some cases under the Canadian Law in order to support that the State policy is not an element of the crime against humanity. In Moreno v. Canada[163] as well as in Sivakumar v. Canada[164], the Court deals with the clause of exclusion established in the 1951 Geneva Convention. In that connection, for the definition of crimes against humanity, the Convention of 1951 refers generally to "international instruments drawn up to make provision in respect of such crimes". In that sense, and according to the Handbook[165], "*there are a considerable number of such instruments dating from the end of the Second World war up to the present time (...)* [but] *the most comprehensive definition* [of crime against humanity] *will be found in the 1945 London agreement and the Charter of the IMT*"

However, the Moreno case deals mainly with "complicity" as a form of criminal participation without making any reference to the policy element. In Sivakumar v. Canada, on the contrary, the Tribunal refers to the debate around the policy element. Never the less, it seems that the Tribunal deals not with the policy element as constitutive of the definition of crimes against humanity but, it discusses if the policy must be from the state or from non-state actors.[166].

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[162] *Kunarac, Korac and Vukovic.* IT-96-23 and IT-96-23/1 "Foca" Appeal Judgment (February 22, 2002) para. 98. (footnote 114).

[163] *Moreno v Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, ?1994g 1 F.C. 298, 14 September 1993

[164] *Sivakumar v Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, ?1994g 1 F.C. 433, 4 November 1993

[165] *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status pf Refugees*. http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=MEDIA&id=3d58e13b4&page=publ

[166] "*It can no longer be said that individuals without any connection to the state, specially those involved in paramilitary or armed revolutionary movements can be immune from the reach of international criminal law". Sivakumar v Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, ?1994g 1 F.C. 433, 4 November 1993

Furthermore, in the Mugesera et al. v. Minister of Citizenship and Immigration case[167], it says as follows: " *In my opinion, Mr. Duquette erred. Subsections 7(3.76) and 7(3.77) of the Criminal Code, (...)require that the fact, i.e. an act or omission, including the counselling or abetting, constitute a "cruel and terrible" act* [footnote 3] *if not an inhuman act committed against a civilian population or an identifiable group of individuals".*

In that respect, although it seems that the Tribunal considers that the policy or plan does not constitute an element of the definition of crimes against humanity. One might note that the Judge in the footnote 3 made reference to the Finta case and, therefore, to the policy element (*see above*).

On the other hand, it is doubtful to what extent international law is influenced by the definition of an international crime at domestic level. In Polyukhovich v. The Commonwealth of Australian and Anor, in which the Tribunal deals with the validity of the Australian War Crime Amendment Act 1989 in International Law, copes as well with the mentioned matter. According to the Court "*what is left to municipal law is the adoption of international law as the governing law of what is an international crime (…*) [In that sense] *if a country introduces legislation describing some offence under its own criminal law (...) and includes within that term offences which do not strictly fall within the international law definition, then that law can only be invoked to establish jurisdiction against nationals or residents of the country in question (...) Equally, if a country uses in its national criminal law a definition that only partly meets the conditions of international law, especially if the offence in question has been defined in a treaty, the courts of that country would only be entitled to try those whose actions fall within its own definition.* [The Court concluded by saying] *International law distinguishes between crimes as defined by it and crimes as defined by municipal law and it makes a corresponding distinction between jurisdiction to try crimes as defined by international law and jurisdiction to try crimes as defined by municipal law.*"[168]

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[167] *Mugesera et al. v Minister of Citizenship and Immigration,* IMM-5946-98, 10 May 2001, Federal Court of Canada, Trial Division

[168] *Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor*, (1991) 172 CLR 501; Case FC 91/026In Polyukhovich v. The Commonwealth of Australian and Anor,

According to this judgment, international law cannot accept whatever definition of an international crime contained in domestic law. Never the less, this does not mean that customary international law might not be guided by the definitions of offences given in national jurisdictions, especially when it exist a common denominator in different national legal system.

1.3 The policy element in the crime of genocide.

For the purpose of this discussion, it might be worthy to compare the existence of the policy element in crimes against humanity and such element in the crime of genocide. Although it is commonly suggested that genocide is the ultimate crime against humanity, because the fact patterns of the two crimes tend to be quite similar[169], in customary international law, the crimes are legally distinct mainly in two aspects. First, the *mens rea* element in the crime of genocide goes further through demanding a specific intent "to destroy in whole or in part". Second, genocide can only be committed against individuals who belong to specifically protected groups characterized by their national, ethnical, racial, or religious identity whereas crimes against humanity may be committed against any individual.

As it has been pointed out by Schabas, it is almost impossible to think about genocide that is not planned or organized either by the State or by some clique associated with it[170]. Although one might think that it would be difficult to commit a crime of genocide without a plan, the Tribunal in Kayishema and Ruzindana has nonetheless, considered that the existence of a plan or policy does not constitute an element of the crime[171]. This approach has been reaffirmed in the Jelisic Appeal Judgment[172], which considers that the existence of a plan or policy is not a legal ingredient of the crime but the existence of

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[169] According to Mettraux, "*in several cases before the ICTY and the ICTR, the same set of facts form the basis of genocide and crimes against humanity charges*". *See Prosecutor v. Jelisic*, Case No. IT-95-10, Initial Indictment (July 21, 1995); *Prosecutor v. Brdjanin*, Case No. IT-99-36, Third Amended Indictment (July 16, 2001); *Prosecutor v. Krstic*, Case No. IT-98-33, Initial Indictment (Nov. 2, 1998)

[170] Schabas, William A. "*Twelfth Annual Philip D. Reed Memorial Issue the Balkans Region: Legal Perspectives and Analyses. Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Court for the Former Yugoslavia*". 25 Fordham Int'l L.J 23 (November, 2001). p.32

[171] *Kayishema and Ruzindana* No. ICTR- 95-1-T, Judgment (May 21, 1999) para. 94

[172] *Prosecutor v. Jelisic* No. IT-95-10 "Brco". Appeal Judgment (July 5, 2001) para 48

such policy may facilitate the proof of the intent of the crime. Thus, it seems that genocide does not require a policy.

Similarly, one might consider that, in customary international law, the policy element is not a legal element of the definition of the crime against humanity, although is nearly impossible to imagine a crime against humanity without a plan or policy behind it. Never the less, the existence of such policy might facilitate the proof of the widespread or systematic attack against the population, as it might facilitate the proof of the specific intent in the crime of genocide.

1.4 The policy element in the International Criminal Court.

Turning to the ICC Statute, the express recognition of the policy element in art.7.2(a) of the ICC Statute, following the Canadian proposal during the negotiations, has been criticised by non-governmental organizations (NGOs) observing that introducing the policy element is paramount to the widespread and systematic conjunctive test[173]. Darryl Robinson expressed that the test resulting from article 7 paragraph 1 "widespread or systematic" and subparagraph 2 (a) of the ICC Statute reflects a middle ground between the conjunctive test and the disjunctive one. As a consequence, if the Prosecutor decides to prove the widespread element (high threshold test), the policy element that relates the different criminal acts must be showed (low threshold test). On the other hand, if the Prosecutor decides to prove the "systematic element" (high threshold test), the scale of conduct (low threshold test) must be manifested. So, according to him, the definition of crimes against humanity is balanced[174].

On the other hand, it might be noted that Article 7(2) of the ICC Statute stated that for considering the existence of a State or an organizational policy, the State or organization must actively promote or encourage the attack against the civilian population. In that

[173] *See* widespread or systematic at Chapter I.
[174] *Robinson, supra* note 38 at 163

sense, it seems that it excludes those cases where the State or organization simply condone or tolerate the commission of the attack.

During the Rome negotiations, delegations supporting an active policy requirement were mainly concerned about the possibility that an inaction for reasons such as a lack of awareness of the crimes, a collapse of authority or other inability to respond would transform common crimes into crimes against humanity[175]. On the other hand, this approach would leave open the possibility to a misuse of the provision and thus, a deliberately inaction aimed at encouraging such attack could not amount to a crime against humanity.

However, as it was stated in a Draft finalized text of the Elements of the Crimes issued by the Preparatory Commission for the ICC[176], "such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action which is consciously aimed at encouraging such attack".[177]

It is doubtful, though, whether art. 7 of the ICC Statute confirms whether a policy is required in customary international law. According to Cassese, this requirement goes beyond what is required under international customary law[178] and would leave cases unpunished where, for example, there is a general practice of murder or rape accepted or acquiesced in by the State.

[175] Robinson, Darryl. "*The Context Of Crimes against Humanity*"in Lee, Frman, Fernández de Gurmendi, Hebel and Robinson (eds.) The International Criminal Court.Elements of the Crimes and Rules of Procedure and Evidence. Ardsley, New York. Transnational Publishers, Inc. 2001 p. 74
[176] *Report of the Preparatory Commission for the International Criminal Court.Doc*. PCNICC/2000/INF/3/Add. 2. 2 Nov.2000 p.9.
[177] Article 7. 3 footnote 6 of the Elements of the Crime.
[178]*Cassese, supra* note 33 at 93, *Kupreskic et al*. Trial Chamber's Judgment, IT-95-16, (January 14, 2000) para 551-555

1.5 Assessment

According to this study, it might be assumed that, regarding customary international law, the existence of a policy is not a legal requirement in the definition of crimes against humanity but is not without a legal significance.

Some scholars consider that it is nearly impossible to consider a crime against humanity without the "*active direction, or acquiescence of leaders (...) in a position to coordinate that power over a wide area of operations...*"[179]. This point of view is shared by Bassiouni who considers that the nature of crimes against humanity requires the use of governmental institutions, structures, resources and personnel acting in reliance on four interactive factors: power, terror, ideology, and the manipulation of law. He continues saying that the policy element whether explicit or implicit is integral and, in that sense, the policy element is the international one, which amounts a national crime to the category of international one.[180]

Never the less, as it was pointed out by Mettraux, we can say that crimes against humanity are "*a matter of historical or factual experience supported by some form of plan or policy*" but she proceeds saying that this does not imply the existence of such policy as a legal requirement.

One might consider that the existence of a policy serves for showing that there was a kind of motive behind the attack against a civilian population, although this motive is not required, by the definition of crimes against humanity as well as for demonstrating the systematic and/or widespread character of such attack[181].

[179] Keenan and Brown "Crimes against International Law" Washington, 1950, p117. Cited in *Robinson supra* note 38, at160.
[180] *Bassiounni, supra* note 31 at.249-256.
[181] See *Prosecutor v. Krnojelac* No. It-97-25 "Foca" Judgment (March 15, 2002) para 58.

2**. <u>The existence of a policy as a proof for the systematic or widespread character of the attack against the civilian population</u>**

Even if one considers that the policy element is not a legal ingredient of the definition of crimes against humanity, the existence of such policy plays an important role as a mean for proving the systematicity or the widespread character of the attack against the civilian population[182].

It was stated in the Tadic Judgment and Opinion that the policy does not need to be formalized and, thus there is no need to declared in an express and precise way, but it can be inferred from the way in which acts occurs.[183]

In that sense, it could be worthy to mention that in the Blaskic Judgment, the Tribunal stated that the policy or plan "*may be surmised from the occurrence of a series of events inter alia: the general historical circumstances and the overall political background against which the criminal acts are set; the establishment and implementation of autonomous political structures at any level of authority in a given territory; the general content of a political programme, as it appears in the writings and speeches of its authors; media propaganda; the establishment and implementation of autonomous military structures; the mobilisation of armed forces; temporally and geographically repeated and co-ordinated military offensives; links between the military hierarchy and the political structure and its political programme; alterations to the "ethnic" composition of populations; discriminatory measures, whether administrative or other (banking restrictions, laissez-passer,…) [and] the scale of the acts of violence*

[182] If we consider that a single act could constitute a war crime, on the issue of whether a single act committed by a perpetrator can constitute a crime against humanity, the prosecution needs to prove the link between this act and a criminal political system. In that respect, the Chamber in the Vukovar case stated that: "*although is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian population and thus even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution*" *Vukovar Hospital Decision*, IT 95-13-R61, (April 3, 1996) p 649.
[183] *Prosecutor v.Tadic*. No IT-94-1.Opinion and Judgment, (May 7, 1997) para.654

perpetrated – in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites."[184]

[184] *Prosecutor v. Blaskic*, No IT-95-14 "Lasva Valley"(March 3, 2000) para. 204.

SECTION 2: LEGAL QUESTIONS REGARDING THE EXISTENCE OF A POLICY

1. **A State policy versus a non-state actor policy**

It has been established that the existence of a policy is not a legal element of the definition of crimes against humanity, but a strong indicator for the element of widespread or systematic character of the attack.

Even as a subsidiary mean to determine elements of this crime, it is doubtful whether this policy has to be instigated by the state or whether by an non-state actor.

The traditional conception was that the policy must be carried out by the State because it was considered that the commission of crimes against humanity requires the use of governmental institutions, structures, resources and personnel acting under public or legal authority.[185]

However, since the Second World War, it has been considered that large scale victimization can be committed not only by agents of the state but also by non-state actors including paramilitary units or armed civilians bands.[186] In that context, the Nuremberg Tribunal declared the criminal character of some organisations that were created for the purpose or in connection with the commission of war crimes, crimes against peace and crimes against humanity. The Judgment of the Nuremberg Tribunal recognized the possibility of criminal responsibility based on the membership of an individual in such organisation.[187]

Therefore and in that respect, the need for a development of the definition of crimes against humanity formulated in the London Charter became self-evident and it has been

[185] *Prosecutor v. Tadic*. No IT-94-1.Opinion and Judgment, (May 7, 1997) para.654
[186] *Bassiounni, supra* note 31 at 274
[187] *ILC 1996 Draft Code*, p. 95, footnote 128.

promoted after taking into consideration the new pattern of conflicts nowadays and situations where a State disintegrates as a result of civil war.

The ICTY jurisprudence does not restrict the concept of crimes against humanity to those situations were just the State is involved. In the Nikolic case[188], the Tribunal stated that crimes against humanity do not need to be related to a policy at state level in the conventional sense of the term. Therefore, it seems that the Tribunal makes a broader interpretation in considering that the policy can be carried out not only by the State but also by a non- state actor.

In Kayishema and Ruzindana judgment, the ICTR affirmed "arguably, customary international law requires a showing that crimes against humanity are committed pursuant to an action or policy of a State". It is important to highlight that national case law[189] tends, as well, to stress that crimes against humanity are usually an expression of a criminal governmental policy. And even if there exist some cases where the authors of such crimes are individuals not acting on behalf of a governmental authority or not having official status, according to this national case law, there must be an implicit or explicit approval by the authorities.

However, this is not beyond doubt, because non-state actors have shown their capacity to committed crimes against humanity in a non-international conflict but also in an internal one, by exercising the same kind of control as a state actor. Post-Charter developments follow this line specially after removing the war nexus requirement from the definition of crimes against humanity. In that connection, the ICTY in the Tadic case, said that the policy do not need to be explicitly formulated, nor need it be the policy of a State. "The

[188] The *Prosecutor v. Dragan Nikolic*. Case No IT-94-2-PT (October 9, 2002)

[189] In Finta case, the Court stated that the central concern in the case of crimes against humanity is not that the private individual has a particular hatred against a particular group but that the acts have been sponsored by the State. In the Barbie and in the Touvier case, the Tribunal emphasized the policy of ideological supremacy exercised by the State. Although it might be worthy to note that in the Barbie case, the Advocate-General Dontenwille pointed out "*Are there not forces and organizations whose powers might be greater and whose actions might be more extensive than those of certain countries represented institutionally at the United Nations? Care is required because other methods of total abuse of the human condition could equal in horror, albeit from other aspects, those of which we have just spoken.".* *Fédération nationale des déportés et internés résistants et patriotes et autres v. Barbie* Vol. 78, ILR, 1988, p. 147.

entity behind the policy could be an organization with the facto control over territory" and leaves open the possibility that other organization could meet the test as well.[190]
In that respect and, according to Kittichaisaree, the fact that crimes against humanity may be committed in pursuance of a policy of either a State or non-state actor is no longer discussed[191]. However, some degree of organization is still required. In that sense, the main concern would be is which characteristics must a non-state actor have to have for being analogised to state actors.

Bassiouni takes the stance that for considering the existence of a non-state actor policy, the latter must share some characteristics of a state. The rationale behind the extension is that there are non-state actors which share the same legal characteristics of state actors, that is, they exercise dominion over a territory or people, or both, and they are able to perform a policy in a similar way as a state plan or policy.[192] Thus, a non-state actor must have at least, authority over a territory or/and over a population. In that context, one might say Bassiouni's interpretation is narrow and just includes rebels either groups which have control over part of the population or insurrectional movements that have authority over a territory and they exercise de facto sovereigns rights. This approach has been supported by the ICTY in the Kupreskic case, which stressed the need for crimes against humanity to have been tolerated by a State, Government or entity holding de facto authority over a territory.[193]

The ICTR confirmed in the Kayishema and Ruzindana case the Appeals Chamber's approach in the Tadic decision by affirming a broader interpretation of the term organisation referring to the idea that a group can also instigate that policy.[194] This Judgment follows the ILC opinion expressed in the 1996 Draft Code of Crimes Against the Peace and Security of the Mankind, which it was stated that: "the instigation or

[190] *Prosecutor v.Tadic*. No IT-94-1.Opinion and Judgment, (May 7, 1997), para. 654-655.
[191] *Kittichaisaree, supra* note32 at 98.
[192] *Bassiouni, supra* note 31 at 275.
[193] *Prosecutor v. Kupreskic et al*. No. IT-95-16- T Judgement (January, 14 2000) para.552.
[194] It was stated that *" (...) the Tribunal's jurisdiction covers both State and non-state actors. As Prefect, Kayishema was a State actor. As a businessman Ruzindana was a non-State actor. To have jurisdiction over either of the accused, the Chamber must be satisfied that their actions were instigated or directed by a Government or by any organization or group*."

direction of a Government or any organisation or group, which may or not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State"[195]

Therefore, it seems that the definition of crimes against humanity might bed and includes non-state actors in a broad sense, including organisations or groups, the latter term is even more flexible than the former. In that connection, Kittichaisaree[196] considers that a crime against humanity can be also committed by a "terrorist group or organisation" or by private individual organised in "criminal gangs or group"[197].

It is worthy to note that article 7 of the ICC Statute does require neither a discriminatory policy nor an official nor a state one. Nowadays, it is considered that reducing the scope of crimes against humanity to just a state policy would be very restricted.[198]

1.1. Is there a policy behind the communal violence in India?

The communal violence in India is a consequence of the hatred between communities. But one might say that even when the massacre is committed by armed bands of civilians, there is room for considering that there were instigated by a state action or by an organisational policy.

In that context, according to Human Rights Watch Report, the attacks on Muslims that took place on February-March 2002, were part of a "concerted campaign of Hindu nationalist organisations to promote and exploit communal tensions to further the BJP's political rule – a movement that is supported at the local level by militant groups".

The RSS (National Volunteers Corps) is an umbrella organisation founded in 1925 by Keshav Barilam Hedgewar. Its main mission is the creation of a Hindu State. A goal that

[195] *ILC 1996 Draft Code* , pp95-96
[196] *Kittichaisaree, supra* note 32 at.98.
[197] *Prosecutor v.Blakic*, No IT-95-14 "Lasva Valley" Judgment (March 3, 2000) para. 205 and *ILC 1991 Draft Code*, p.266.
[198] *Robinson, supra* note 39 at 50

has inspired the creation of RSS political, social and educational wings, that is, the so called "sangh parivar".[199]

One might consider the possibility that the RSS is an organisation sufficiently organized and powerful to instigate a policy. On the other hand, if we consider that there is an organisational policy, which characteristics this policy has to have? Does it have to be similar to a state policy?[200]

If we consider that an organisation is an entity with a juridical personality which has an organisational power structure, although less structured than a State, then an organisational policy would imply the use of this structures, resources, economic and others as well as personnel, normally members of such organisation.

But one might also go further and consider that a plan is carried out by an organization formed by private individuals that actively implement the organisational policy with an implicit or explicit approval of the Government. Thus, could we consider the possibility of the existence of both, an organisational and a governmental policy?

One might wonder when the failure to prevent, control or punish perpetrators evidence a policy from the Government or it constitutes a participation in the pursuance of an organisational policy.[201]

In that connection, if we take into consideration the failure to act, the next step would be, first, to analyse which kind of participation the Government of the State of Gujarat

[199] See above, "*The communal violence in the State of Gujarat*" (background information).
[200] According to professor Bassiouni, the notion of a state policy implies the use of governmental institutions, structures, resources and personnel acting under public or legal authority. See *Bassiouni, supra* note 31 at 249.
[201] The failure to take appropriate action by the State of Gujarat when the communal violence took place in Gujarat, in 2002, has been strongly criticized by non-governmental organisations (NGOs) both, at local at international level as well as by the National Human Rights Commission.
The National Human Rights Commission, in case No 1150/6/2001-2002. Order on Gujarat dated 31st May 2002, the NHRC stated in its "comments of the Commission on the response of the Government of Gujarat of 12 April 2002, in respect of its Preliminary comments of 1 April 2002" there was, among other things, a failure to protect rights to life, liberty, equality and dignity, failure of intelligence and failure to take appropriate action.

performed; and then, if such participation could substantially contribute to the commission of the criminal acts and therefore, to the implementation of a plan or policy.

2. When is failure to act evidence of a state policy?

According to Bassiouni, the existence of a state action or policy can be identified through the existence of some characteristics[202], such as, that the policy is normally based on discrimination and persecution of an identifiable group of persons within a society[203]. This discrimination can be expressed, for instance, by the exclusion, without a valid legal reason or justification, of a group of persons from the protection of criminal laws afforded to others. Second, that the acts committed against the targeted group are criminal under the law of the state. Then, the specific crimes are committed or instigated by agents of the state acting in their official capacity or they are allowed through the omission of the legal duty to prevent or punish them.

Regarding the policy of extermination of Jews by the Nazi Germany, one might say that it was undoubtedly developed at the state highest level and was carried out by state officials at various levels of the state hierarchy. However, this does not necessarily mean that a plan always needs to reach such a high standard of organization in order to be considered a state action. In that respect, a policy might be carried out with a lower level of state power structure participation and with a limited extent of utilization of the state personnel could be labelled as a state action.

As it has been already mentioned, in customary international law, a policy might be instigated in an active but also in passive way[204], for example, through the deliberate failure by the State to perform the legal obligation to protect[205] and to maintain the public

[202] *Bassiouni, supra* note 31 at 255-264.
[203] In that sense, in Tadic Final Judgment, one of the conditions laid down for the applicability of article 5 of the ICTY Statute was the existence of a discriminatory intent and a policy behind the discrimination.
[204] In the Kupreskic case, the Tribunal makes reference to "offences approved or at least condoned (…) by a governmental body" and then, to "explicit or implicit approval or endorsement". *Kupreskic et al.* Trial Chamber's Judgment, IT-95-16, (February, 14 2000) para 551- 551. *See Cassese, supra* note 33, p.93.
[205] In *Sundram Chetti and Others vs The Queen* (1883 IRL 6 Mad. 203 (F.B)) it was held that "*the first duty of the Government is the preservation of life and property, and, to secure this end, power is conferred on its*

order as a means of supporting or encouraging crimes against a particular group. This section will analyse when a failure to intervene, to control or to punish the perpetrators can amount to show evidence for the existence of a state policy.

According to the human rights activist's reports about the communal violence in Gujarat, the police forces were present or near the attacked sites and failed to protect the victims. In that sense, and for the purpose of this survey, it is useful to analyse some legal questions: first, if can we consider the inaction of the agents of the State, such as the police or military during a riot constitute a sign of a passive instigation or encouragement of a State policy and, then if is the failure to act, that is, the violation of the duty to prevent and to punish, by high- ranking officials towards their subordinates evidence for the existence of such policy.

2.1. The police was present or near during the attack and they failed to act.

Human rights activist and Muslims witnesses claimed that the police sided with the attackers rather than with the victims, they keep on saying that when the victims called the police, they just said "*You protect yourself*". It was reported that the perpetrators frequently chanted "*the police are with us*". According to SAHMAT, a non-governmental organization, there were graffiti on the walls of a burnt madrassa in Ahmedabad boasted of police support. In some cases, the police station were close to the affected places, however the police either arrived late either did not arrive at all. On the other hand, and according to investigations by a fact-finding team of women's rights activists conducted at the end of March 2002, the crimes committed against women were underreported by the police[206].

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officers (...)" cited by Justice J.S Verma, Chairperson of the National Human Rights Commission. New Delhi, who continues saying that "*it (...) remains fundamentally important, in such circumstances, that those who are responsible for the promotion of communal harmony and the maintenance of the law and order –whether in the political or administrative leadership- should discharge their duties (...) or be answerable for such acts of omission or commission that result in the violation of the law and the rights to life, liberty, equality and the dignity of their fellow human being*." *See National Human Rights Commission.* Case No. 1150/6/2001-2002, 1 July 2002. http://www.nhrc.nic.in/Gujarat.htm#no7. (accessed June 15, 2003)

[206] *HRW Publications, supra* note 13

The examination of a public official's presence in the commission of the criminal acts and failure to act not only might be used for establishing the individual criminal responsibility for one's own conduct or for the conduct on another but also for the purpose of imputing private conduct to a state action.[207]

Could one consider that the presence of the police during the riots constituted a form of participation, in the sense that their presence and failure to act assisted to the commission of the crimes? Could we consider that the police aided or abetted the perpetrators?
There have been some efforts in order to define the international standards of complicity. After the World War II, there were several convictions for the conduct of complicities[208]. However, none of the judgments described in detail the guidelines used. During the Diplomatic Conference on the 1949 Geneva Convention, it was stated that such matters would be decided case by case and by the application of national laws.

On the other hand, the ad hoc Statutes contain a general complicity provision applicable to all the offences over which the Tribunals have jurisdiction. It established criminal responsibility for persons who have "planned, instigated, ordered, committed or otherwise aided and abetting in the planning, preparation or execution of a crime". [209]
Accordingly, aiding or abetting represent one form of complicity. In both cases the person is responsible for the conduct of another person who is the perpetrator of the criminal act. According to Bassiouni, this provision is not intended to create a new crime but to express the principle of derivative or accessory responsibility.[210]

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[207] "*The inquiry into a public official's failure to act arises at two levels: (1) for purposes of imputing private conduct to 'state action or policy', and (2) with respect to individual criminal responsibility*" *Bassiouni, supra* note 31 at. 264
[208] Among others we can mention the following: *Trial of Lt. Gen. Kurt Maezel*. 11 L.R.T.W.C.53 (1949); The *Borkum Island case* (United States of America v. Goebell et al. (Case no. 12-489), 15 September 1948), the *Trial of Major Rauer and Six Others*. 4 L.R.T.W.C. 113, 116 (1948), *The Alamo Trial 1L.R.T.W.C. 35, 43 (1947)*
[209] art. 7 of the ICTY and art.6 of the ICTR Statutes.
[210] Bassiouni, Cherif "*International Criminal Law. A Draft International Criminal Code*", 110, 152-154 (1980) cited in *Paust, Bassiuoni, Scharf, Gurulé, Sadat, Zagaris and Williams. supra* note 56 at.48.

Aiding or abetting are not a unity, but each of them has its own meaning and, thus, they constitute two different ways of providing assistance. The ICTR has defined both terms and noted in that sense that aiding means "giving assistance to someone" whereas abetting involves "facilitating the commission of an act being sympathetic thereto"[211]. As Eser has suggested it,[212] it seems that the concept of aiding is closer to assisting, whereas abetting is closer to the term instigation.

The *actus reus* consists in the practical assistance, encouragement or moral support in the perpetration of the criminal act. According to the ILC 1996 Draft if the Code of Crimes, this assistance has to contribute directly and substantially to the commission of the crime.[213]

But, do the terms "directly" and "substantially" mean the necessity of a causal connection between the assistance and the principal crime? In that context, one might consider that making the causal connection a *conditio sine qua non* would render the assistance the character of co-perpetration. Thus, it is desirable that the causal connection is constructed in a less strict form. This is the approach taken by the ICTY in the Furundzija case, after analysing, among others, the "Hechigen Deportation" case as well as the ILC opinion[214], and in the Kunarac case, where the Tribunal states "*the act of assistance need not have caused the act of the principal (...)[in that sense] it may (...) take place before, during or after the commission of the crime."*[215]

[211] *Prosecutor v. Akayesu*, No. ICTR-96-4 Judgment (September 2, 1998) para 484
[212] Eser, Albin "*Individual Criminal Responsibility*". Cassese, Gaeta and Jones (eds.). The Rome Statute of the International Criminal Court. Vol.1. Oxford. Oxford University Press, 2002. p. 799.
[213] *1996 ILC Draft Code* of Crimes, p.24
[214] In the *Hechigen Deportation case*, the court pointed out that the culpability of an aider and abettor is not negated by the fact that his assistance could easily have been obtained from another The International Law Commission states that "participation of an accomplice must entail assistance which facilitates the commission of a crime *in some significant way"*. According to the Tribunal, the word "facilitates" suggests that it is not necessary that the aider and abettor cause the commission of the crime. In that sense, in the Hechingen Deportation case, the Tribunal states "the culpability of an aider and abettor is not negated by the fact that his assistance could easily have been obtained from another." *Prosecutor v. Furundzija* IT-95-17/1 "Lasva Valley". Trial Judgment (December 10, 1998) para 224
[215] *Kunarac, Korac and Vukovic*. IT-96-23 and IT-96-23/1 "Foca" Appeal Judgment (February 22, 2002) para. 391

On the other hand, in the Furundzija case[216], the Tribunal, after considering the Schonfeld, Rohde, the Synagogue and the Pig-cart parade case, arrives to the conclusion that the assistance does not need to be tangible.

Therefore, the assistance can consist in a failure to act. Such participation through omission takes often the form of mere presence at the scene of the crime. Thus, mere presence can give a moral support or tacit encouragement for the commission of the acts[217]. But, if the contribution to the perpetration of the crime has to be a substantial one, the mere presence is apparently not enough. It has to be accompanied by some sort of authority, in the sense that the supporter must be of a certain status and, overall, he must have a legal obligation or duty to prevent the commission of the crime. One might consider that the presence of a person in a position of authority in the scene of the crimes could be interpreted as a kind of silent approval or even, as an encouragement for the commission of the crime.

In that context, in the Borkum Island case, civilians brutalized and killed American fliers who were captured and paraded through the streets of the Island in 1944, without any intervention by the German police that was present when the brutalities were committed. The police officers and the commander were convicted.[218]

Tacit encouragement by the presence of an authority was also established by the ICTR in the Akayesu case. Akayesu was responsible for maintaining law and public order in the commune of Taba and he had authority over the communal police. The Chamber held that "*the fact that Akayesu, as a local authority, failed to oppose such killings and serious bodily or mental harm constitute a form of tacit encouragement, which was compounded by being presence during such criminal acts"*.[219]

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[216] *Prosecutor v. Furundzija* IT-95-17/1 "Lasva Valley". Trial Judgment (December 10, 1998) para 199-215.
[217] *Prosecutor v.Akayesu*, No. ICTR-96-4 Judgment (September 2, 1998) para 706-707.
[218] *United States of America v. Goebell et al.* (Case no. 12-489), 15 September 1948, USNA RG 338, File M1217, Roll 1. Cited in Schabas, William A. "*Genocide in International Law*". Cambridge, Cambridge University Press, 2000 p.297
[219] *Prosecutor v.Akayesu*, No. ICTR-96-4 Judgment (September 2, 1998) para. 705

It is worthy to mention that the presence at the crime can be actual, that is, the person is there, but might also be constructive. As it was stated in the Schonfeld case[220], it is not necessary that the person is actually present, that is, he was at the scene of the crime. It is possible to be criminally liable if the person was near enough to give the assistance. In that respect, one might consider that although in some cases, the police were not physically present in the scene of the criminal act the fact that the police station was near the place could be considered as a constructive presence.

Similarly, in the Synagogue case, one of the accused was found guilty of a crime against humanity, although he had not physically taken part in it, nor planned or ordered it. Never the less, his intermittent presence on the crime-scene, combined with his status as an "*alter Kämpfer*" (long-time militant of the Nazi party) and his knowledge of the criminal enterprise, were deemed sufficient to convict him[221].

With regard to the subjective element or mens rea, the person who abets or aids does not need to have the same intent as the perpetrator. The mens rea element resides in the knowledge that his action assists the perpetrator in the commission of the crime. That is, what is required is that "*the person supporting or assisting in the crime be aware that his action furthers and helps the perpetrator"*.[222] On the other hand, and as it was established in the Furundzija case, "*it is not necessary that the aider or abettor should know the precise crime that was intended and which in the event was committed"*.[223] However, according to the Kunarac Judgment, "the aider and abettor must know of the essential elements of the crime (including the perpetrator's *mens rea*)".[224]

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[220] Fr*anz Schonfeld and others*, British Military Court sitting at Essen, verdict of 26 June 1946, LRTWC, XI, 64-73.
[221] *Strafsenat. Urteil vom 10. August 1948 gegen K. und A*. StS 18/48 (Entscheidungen), Vol. I, pp. 53 and 56) cited in Prosecutor v. Furundzija IT-95-17/1 "Lasva Valley". Trial Judgment (December 10, 1998) para. 205.
[222] *Cassese, supra* note 33 at 188.
[223] *Prosecutor v. Furundzija* IT-95-17/1 "Lasva Valley". Trial Judgment (December 10, 1998) Fuundzija, para 246.
[224] *Prosecutor v.Kunarac, Korac and Vukovic.* IT-96-23 and IT-96-23/1 "Foca" Appeal Judgment (February 22, 2002) para. 391; *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgement, 24 Mar 2000, pars 162-165; *Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999, par 229.

It is doubtful how the prosecutor could prove the intent to participate in a conduct that constitutes a crime. In that context, the Aleksovski case gives some light to this matter: the *mens rea* can be deduced from the circumstances and it was considered that the position as an authority constitutes an important *indicium* in order to establish that his mere presence constitutes an act of intentional participation under Article 7(1) of the ICTY Statute. Nonetheless, responsibility is not automatic and merits consideration against the background of the factual circumstances. [225]

In addition, one might say that the presence at the scene of the crimes of persons characterized by having a degree of authority and their failure to comply with their legal duties, both constitute elements that can be interpreted as tacit encouragement and in that respect, can aid the commission of crimes and might even abet someone to the commission of further criminal acts.

In that context and taking into consideration that the police forces are agents of a State, whose main task within the State structure is the maintenance of the public order and the protection of the life and dignity of the civilian population, one might consider that its inaction could have constituted just one of the step in the implementation of a State policy. In that sense, it has to be considered that a State policy or action is often formed on the basis of a head of State decision or high- ranking public officials' plan. Thus, bearing in mind that a State policy relies upon the public resources and personnel to succeed, the question remains whether the inaction of the police, that is, low-ranking public agents, was committed with the tacit support or knowledge of the higher- ranking public officials, and therefore, was meant to implement a state plan.

Regarding the duties that public officials have under national and international law, one might consider that the standards of the "command responsibility" for omission could be applicable when higher- ranking public officials supported, condoned or failed to prevent or punish unlawful acts committed by lower-ranking public officials,

[225] *Prosecutor v. Aleksovski* IT-95-14/1 "Lasva Valley" Judgment (June 25, 1999), para.65.

Never the less, it has to be emphasized that for the purpose of this study, the application of the doctrine of command responsibility will not be used in order to impute international criminal responsibility to the superiors as individuals but to assess the existence of a policy action. [226]

2.2 The doctrine of command responsibility

- The doctrine of command responsibility and its application to non-military officials

The criminal liability of military and non-military superiors constitutes one type of the individual criminal culpability under which a superior incurs legal responsibility for the acts of his subordinates. The doctrine of command responsibility embraces two branches: the directed criminal responsibility of a commander who gives an order to his subordinate to commit an unlawful act; and an imputed responsibility for an illegal act committed by someone under his command.[227]

The question of the application of this doctrine to non-military officials is of particular importance if we consider the existence of a policy as an important indicator for the establishment of crimes against humanity. A policy normally involves not only military personnel but also civilian superiors in a hierarchical structure who either participate in the decision-making process or in the implementation of the crime. So, the rationale behind the application of the doctrine to non-military officials is that the civilians within the state structures should not be less accountable than the material perpetrators of the unlawful act.

[226] According to the UK Home Office Report, the armed forces are under civilian control. The Union Ministry for Home Affairs control most of the paramilitary forces, the internal intelligence bureaus and the nationwide police service. On the other hand, each State controls its own police forces through its own home ministry. UK. *See Home Office Report, 2002. supra* note 2

[227] The ICC Statute emphasized this distinction by placing each category in separates articles. Direct criminal responsibility is placed in article 25 with the others forms of participation whereas the feature of the imputed criminal responsibility has been established in article 28 of the Rome Statute.

Some scholars consider that it is not possible to apply the standard of military command responsibility to the civilian superiors. In that context, the civilian command responsibility must be assessed by the application of national laws, which differ from state to state with the subsequence outcome of a lack of symmetry in the treatment of those who have engaged in a similar conduct.[228] However, others, as Bantekas, on the contrary, states "*it has long been accepted that civilians may lawfully be charged with failure to act if (...) they maintain effective command or control over subordinate persons*"[229]. It must be said that Bantekas' argument follows the case law of Nuremberg[230] and Tokyo[231].

It is worthy to note, as it was pointed out by the International Law Commission, "*the reference to 'superiors' is sufficiently broad to cover military commanders or other civilian authorities*"[232]. In that sense, one might say that the UN Commission of Experts for the ICTY Statute[233] used the term superior in order to distinguish it from the term military commander considering that the latter has an especial obligation. This approach was consistent with Resolution 1994/77 issued by the United Nation Human Rights Commission.[234] and has been also supported by the case law under the ICTY."[235]

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[228] *Bassiouni, supra* note 31 at.443-445.
[229] Bantekas, "*Principles of direct and superior responsibility in international humanitarian law*". Juris Publishing. Manchester. Manchester University Press, 2002. p. 82.
[230] U.*S v. Pohl et al.* (case 4), VTWC, 958-1163, at 1011 and *US v. Brandt el al*. (Medical case 1), II TWC. In the Ministries case, officials in the Reich government were criminal responsible for the annihilation of the Jewish population because the have the effective power to prevent those crimes. The Tribunal held that if a person can influence another's decision making, that person is a source of authority for command responsibility purposes.
[231] The Tokyo Tribunal confirmed the application of the doctrine of command responsibility to civilian personnel. At the IMTFE, the Foreign Minister Hirota was held liable for disregard his duty of stop or prevent the Japanese cabinet to commit crimes because he was in a position that would enable him to do it. Membership in the cabinet justified the causal connection between the failure to act and the commission of atrocities. Similarly, the Prime Minister Tojo and the Foreign Minister Shigemitsu were held criminally responsible because " as members of the government they bore overhead responsibility*". Record of Proceedings of the International Military Tribunal for the Far East* (1946-49), pp 49, 831. Cited in *Bantekas, supra* note 229 at .83.
[232] *Prosecutor v. Aleksovski* IT-95-14/1 "Lasva Valley" Judgment (June 25, 1999), para 75
[233] *Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780* (1992).
[234]The Commission on Human Rights Resolution 1994/77 affirmed that "*all persons who perpetrate or authorize crimes against humanity and other violations of international humanitarian law are individually responsible for those violations, and that those in position of authority who have failed adequately to ensure that persons under control comply with the relevant international instruments are accountable together with the perpetrators". Idem*

The ICTR stated in the Akayesu case that the doctrine of command responsibility to civilians was contentious[236]. In that sense, the Chamber held, following the reasoning of Judge Roling[237], that "*it is appropriate to assess on a case by case basis the power of authority actually devolved upon the accused*." However, in the Kayishema and Ruzindana case, the application of the command responsibility to civilian superiors is not contentious as long as those civilians held a position of authority over the perpetrators of the unlawful act.[238]

Therefore, one might say that law, the doctrine of command responsibility can be applied to non-military superiors "only to the extent that they exercise a degree of control over their subordinates similar to that of military commanders"[239]. It is not necessary that the command position have been granted in a formal way. What it is important is that the superior has an actual possession of an effective power of control over the actions of his subordinates.

On the other hand, it must to be noted that article 28 of the ICC Statute differs from other international legal instruments because it bifurcates the notion of command responsibility between military commanders and civilian superiors, which includes political leaders, bureaucrats and ordinary civilians.[240]

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[235] I the Aleksovski case, the Trial Chamber stated that: "*The term "superior" in Article 7(3) of the Statute can be interpreted only to mean that superior responsibility is not limited to military commanders but may apply to the civilian authorities as well (…) The decisive criterion in determining who is a superior according to customary international law is not only the accused formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control*." *Prosecutor v. Aleksovski* IT-95-14/1 "Lasva Valley" Judgment (June 25, 1999), para 76.

[236] *Prosecutor v.Akayesu*, No. ICTR-96-4 Judgment (September 2, 1998) para. 491

[237] "*Generally speaking, a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the army in the field. Moreover, the Tribunal is here to apply the general principles of law as they exist with relation to the responsibility for 'omissions'. Considerations of both law and policy, of both justice and expediency, indicate that this responsibility should only be recognized in a very restricted sense*". *Hirota v. MacArthur* cited in *Prosecutor v. Akayesu*, No. ICTR-96-4 Judgment (September 2, 1998) para. 490.

[238] The Tribunal also considered that the generic term of "superior" coupled with art. 6 (2) of the ICTR Statute reflects the intention of the drafters to extent the provision of command responsibility to political leaders and other civilian superiors in position of authority. *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T Judgment (May 21, 1999) para.214.

[239] *Delalic, Munich, Delic, Landzo* (Celibici case) ICTY, 16 November 346.

[240] Some scholars as Greg V. Vetter consider that this distinction established a weaker command responsibility standard for non-military superiors, which could be undesirable. He continues saying that it

- The doctrine of the imputed command responsibility

The imputed command responsibility is a form of commission through omission. A command or a civilian superior is not criminal liable simply because of the position of authority but also because he has a positive obligation to act: the duty to prevent and the duty to punish.[241] In that sense, and in connection with the unlawful act committed by the subordinate, it can also constitute a form of "complicity through omission" because both, the superior and the subordinate are equally liable[242]. Thus, for considering the imputed command responsibility as a form of complicity, the omission of the superior must substantially contribute to the commission of the offence.

Although there was no provision of command responsibility, either in the London or in the Tokyo Charter, it was at the Nuremberg and, especially, at the Tokyo Tribunal, where the doctrine of command responsibility was developed. The IMT dealt mainly with the direct criminal liability of the highest Nazi official, while the IMTFE not only dealt with the direct but also with the imputed criminal liability[243] of both, military and civilian superiors. The *Yamashita* principle was the first authoritative articulation of the modern rule of command responsibility[244]: if a superior did not take all feasible measures to prevent or repress a breach, acts of subordinates would implicate his responsibility, if he knew, or had information that should have enabled him to conclude, that the subordinates were about to commit, or had committed, a breach. Under that principle, the commander

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has been demonstrated that civilian superiors should not be less accountable than military commanders. On the other hand, others consider that this distinction is laudable and expected after that the ICTR has even questioned whether the doctrine of command responsibility should be apply to civilians superiors or not. Vetter, Greg R. "*Command responsibility of no-military superiors in the International Criminal Court*". 25 Yale J. Int'l L. 89 (Winter 2000)

[241]. The duty to prevent starts once there exist an preparation or a plan of an offence and before the offence has been completed. On the other hand, the duty to punish arises after the commission of the offence. However, according to Bantekas, the ad hoc tribunals have found criminal liability without substantially differentiating between prevention and punishment in those occasions where the superiors have completely disregarded their duties. See *Bantekas supra* note 199 at.118.

[242] Bantekas, Ilias "*The Contemporary Law of Superior Responsibility*", 93 AJIL 573, 1999. p 577

[243] In *Unites States v. Yamashita*, the U.S. Supreme Court stated that the commander has an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.

[244] Meron, Theodor "*Crimes and Accountability in Shakespeare*" 92 A.J.I.L 1, 1998, p.13.

must enforce the law and make persons subject to his command accountable for compliance with the norms.

Despite the well-established principle in international criminal law, no express provision of superior responsibility was established in the 1949 Geneva Conventions. However, the law of Command Responsibility was reaffirmed in article 86 and 87 of the 1977 I Additional Protocol, which reflected the Yamashita decision[245]. The Additional Protocol influenced the construction of art.7 (3) of the ICTY Statute and the ICTR Statute provision of command responsibility follows the latter.

- Conditions for the imputed command responsibility

It was stated first in the Celebici case and then, reiterated in Aleksovski that for invoking the doctrine of superior responsibility, three concurrent elements have to be proved[246]:

(i) **a superior-subordinate relationship**

According to Bantekas, a superior-subordinate relationship requires a chain of command but without implying that all persons in the chain are equally responsible. On the other hand, it must be said that the concept of superior responsibility is not *per se* limited to the immediate superior on the higher echelons of command.[247] In that context, one might consider that the immediate responsible for acts committed by the police personnel is not only the chief of police but it could be, for instance, the Minister of Internals Affairs. The responsibility is not going to be equal, but in virtue of their command.

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[245] Green. L. C "*Command Responsibility in International Humanitarian Law*" (1995). 5 Transt'l Law and Contemporary Problems 319 p. 341.

[246] *"(i) a superior-subordinate relationship between the person against whom the claim is directed and the perpetrators of the offence; (ii) the superior knew or had reason to know that a crime was about to be committed or had been committed;(iii) the superior did not take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof". See Prosecutor v. Aleksovski* IT-95-14/1 "Lasva Valley" Judgment (June 25, 1999), para 69 and *Prosecutor v. Mucic* et al. IT- 96-21 "*Celebici camp"* Judgment (November 16, 1998) para. 346

[247] Ambos, Kai. "*Superior Responsibility*". In Cassese, Gaeta and Jones "The Rome Statute of the International Criminal Law". Oxford University Press, Volume I, 2002. p. 823.

The position of command is the precondition for the application of the command responsibility: *"a superior must have such powers prior to his failure to exercise them"*[248]. Such a position can be determined by a formal designation as superior, that is, *de iure*, but it can be also inferred by the actual possession of power over another person, that is, by a *de facto* position of authority[249]. Thus, for the imposition of command responsibility, one might take into consideration not just the situation which ought to be, but also the situation that really exists.[250] This approach has been followed by the ICTR jurisprudence. In that connection, in the Kayishema and Ruzindana Judgment[251], *the Tribunal states that "the principle of command responsibility must only apply to those superiors who exercise effective control over their subordinates. This material ability to control the actions of subordinates is the touchstone of individual responsibility under Article 6(3)."*[252]

The Appeal Chamber, in the Bagilishema case[253], did not used the distinction between *de iure* or de *facto* authority, instead, it made reference to the criteria of the effective control over the persons committing the unlawful acts, that is, the superior has "*the material ability to prevent and punish the commission of these offences* ".[254] Therefore, "*the ability to prevent and punish a crime is a question that is inherently linked with a given factual situation"*.[255]

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[248] *Prosecutor v. Aleksovski* IT-95-14/1 "Lasva Valley" Judgment (June 25, 1999), cited in *Prosecutor v. Mucic et al.* IT- 96-21 "Celebici camp" Judgment (Noember 16, 1998) para. 191.
[249] According to Bantekas, *de iure* command can be assessed through the distribution of tasks as well as through factors as if the person has the capacity to influence or issue orders.
[250] *Ambos, Kai, supra* note 247 p. 856.
[251] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T Judgment (May 21, 1999) para.229
[252] It is worthy to mention that this approach is not consistent with the International Law Commission's Draft Code, which considered that for a superior to incur criminal responsibility, he must have*, "the legal competence to take measures to prevent or repress the crime and the material possibility to take such measures." ILC 1996 Draft Code,* p.38.
[253] *Prosecutor v. Baglishema* ICTR-95-1A-T Judgment (June 7, 2001) para. 45.
[254] *Prosecutor v. Mucic et al*. IT- 96-21 "*Celebici camp"* Judgment (November 16, 1998) para.187
[255] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T Judgment (May 21, 1999) para.231.

(ii) The failure of a specific duty to act.[256]

International criminal law obliges superiors to observe two duties with regard of his subordinates. These duties are: the duty to prevent consisting in the duty to take measures and the duty to stop[257], and the duty to punish[258]. The action required depends on what the superior knew or had reason to know about the crime. Moreover, he is not criminal responsible in those cases where he has not the legal competence or has not the material possibility to take such measures.

(iii) the mens rea element

The superior is criminally responsible for the acts of his subordinates because it is considered that, in some way, he took part in the crime.

According to article 30 (3) of the ICC Statute, the term knowledge means "awareness that a circumstance exists or a consequence will occur in the ordinary course of events". The main problem is whether any commander or civilian superior knew or, under the reasonable person test,[259] should have known of an illegal activity and have failed to take a reasonable corrective action.

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[256] The duty to act has been expressly formulate in art. 86 of the AP of the Geneva Convention. (1977), art. 6 of the ILC Draft Code of Crimes against Peace and Security of Mankind, art. 7 (3) of the ICTY and art. 6(3) of the ICTR Statute and art. 28 (2) of the ICC Statute.

[257] This duty commence before the offence has been completed. During the period between the preparation or planning and the completation of the offence, the superior has the duty to do everything within his power to try to stop it. Bantekas, supra note 199 at 116

[258] Regarding the duty to punish, the ability of superiors to sanction is different in a military context from a civilian one. The ICTY concluded that the superior's ability to sanction is not essential. "The possibility of transmitting reports to the appropriate authorities suffices once the civilian, through its position in hierarchy, is expected to report whenever crimes are committed, and that, in the light of his position the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant." See *Prosecutor v. Aleksovski* IT-95-14/1 "Lasva Valley" Judgment (June 25, 1999) para. 78 Thus, once the offence has been committed, the superior is in the duty to investigate and punish the offenders.

[259] Paust, Jordan J. "*Superior Orders and Command Responsibility*" in Bassiounni, M. Cherif. "I*nternational Criminal Law. Enforcement*". Transnational Publishers. INC. N.Y, 1987, p. 88. The reasonable person test in law represents the community expectations about how a similarly situated person should or should not have acted under similar circumstances.

In the Yamashita case, it was said "*the atrocities were so numerous, involved so many people and were so widespread that accused's professional ignorance is incredible. Then, too, the manner of the commission reveals a striking similarity of pattern*"[260]. Furthermore, in the Trial of Koiso[261], an ex- Prime Minister, it was said that the atrocities were so numerous that it was improbable that a man in his position would not have been well informed.[262] It seems that in both cases, the knowledge of the superior could be directly presumed when there is a multitude of circumstantial evidence. As the Military Commission concluded, the fact that it the existence of widespread offences were proved gave the commander a reason or a basis to discover the scope of offences, and provided evidence that he must have failed to fulfil a duty to discover the standard of conduct of his troops.[263]

However, the ICTY, in the Celebici case[264], rejected the Yamashita argument. Instead, the Court held that an "actual knowledge" cannot be presume in international law, but, in absence of direct evidence of superior knowledge, can be inferred from circumstantial evidence. Thus, it was said that actual knowledge could be established through direct or circumstantial evidence. All the facts and circumstances must be taken into consideration to determine the criminal liability of a superior[265].

On the other hand, the "had reason to know" standard established in art.7(3) or 6(3) of the Statues of the ad hoc Tribunals has also been interpreted according to art. 86 (2) of the 1AP (1977), that is, "had information enabling to conclude". Under this standard, a

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[260] *Review of the Record of Trial by a Military Commission of Tomoyuki Yamashita, General Imperial Japanese Army, Gen. H. Q. U. S. Army Forces, pacific office of the Theatre Judge Advocate, Dec. 26, 1945* cited in *supra* note 133

[261] *Judgment of the IMT for the Far East 1178 (1948)*

[262] *Paust, supra* note 259 at 84.

[263] *Law Reports of Trials of War Criminals,* Vol IV, p 94 cited *in Prosecutor v. Mucic et al.* IT- 96-21 "*Celebici camp"* Judgment (November 16, 1998) para.230.

[264] *Prosecutor v. Mucic et al*. IT- 96-21 "*Celebici camp"* Judgment (November 16, 1998) para. 223

[265] In that respect, the UN Commission of Experts, responsible of the investigation of international humanitarian law gross violations in the former Yugoslavia, point out some factors from which one could inferred that a commander should have known. Some of them are the following: the number, type and scope of illegal acts, the time during which they occurred, the number and type of troops involved, the logistic involved, if any; the geographical location of the acts, the widespread occurrence of the acts, the tactical tempo of operations, the modus operandi of illegal acts, the officer and staff involved, and the location of the commander at the time. *Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780* (1992).

superior possesses *mens rea* for command responsibility when he had in his possession information of a nature that put him on notice or suggested to him the possible commission of crimes by his subordinates. This standard creates an objective negligence test that takes into account the circumstances at the time. The point here should not be that knowledge may be presumed if a person fails in his duty to obtain the relevant information of a crime, but that it may be presumed if he had the means to obtain the knowledge but deliberately refrained from doing so.[266]

It should be noted that the mens rea element in art. 28 (a) (i) of the ICC Statute, that is, "consciously disregarded information which clearly indicated…" differs from the one required in customary international law for non-military superiors. This provision establishes a higher threshold than the objective negligence As a result, it would be more difficult to prosecute civilians superiors than military superiors for a failure of supervision.[267]

- Assessment

Therefore, one might consider that the doctrine of command responsibility can be used to show that, because the State is based on a vertical hierarchical structure, the high-ranking officials could be considered as warrants of the actions of their subordinates. In that sense, even if a policy was planned by low- ranking officials, but condoned through the inaction of the high- ranking officials, that would be paramount to consider that the policy was designed by the latter and implemented by the formers.

Thus, the doctrine of imputed command responsibility shows that a high-ranking commander can be held criminally responsible for the acts of its subordinates, but it can be of great importance regarding the evidence of a plan or policy. The rationale behind is that a policy requires a number of individuals in low-level positions to implement it.

[266] *Prosecutor v. Mucic et al*. IT- 96-21 "*Celebici camp"* Judgment (November 16, 1998) para.393
[267] *Ambos, supra* note 242 at 870.

One might consider that its implementation can consist in the commission of criminal acts, but it must be taken into account that the omission of a legal duty to protect could lead to the same unlawful result. In that connection, the failure of the superior to prevent or to punish the subordinate's behaviour can contribute to the unlawful result or crime. Therefore, one might think that a chain of failure of a duty to act from low level positions to high level ones could evidence a plan or a policy to participate or to arrive to the same unlawful result wanted by the perpetrator[268].

According to human rights reports the state government, which has primary responsibility for maintaining law and order, failed to take appropriate action[269]. This view has been corroborated by the National Human Right Commission, which has also pointed out that, given the history of communal violence, the principle *res ipsa loquitur*, that is "the affair speaking for itself" could be apply in order to consider the Government's failure to prevent the violence.

In that connection, one might consider that the governmental authorities could disregard a danger to vengeance and hatred. It is worthy to note that the attack followed an altercation between Hindu activist and Muslim vendors at the train station, and thus, there was the possibility of a retaliatory response. It might be also taken into consideration that the attacks occurred during a tense period[270], the construction of a temple in the same site of a previous mosque, which cause communal violence in 1992.[271]

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[268] It should be mention the possibility to consider the existence of a criminal joint enterprise when the high-ranking officials relied on low-ranking officials for the execution of a common criminal action. The criminal joint enterprise is a form of complicity developed by the ICTY. The rationale behind is that holding as criminal responsible only the material perpetrator of the act would disregard the role of those who made possible the commission of the unlawful acts. In that sense, the contribution must be intentional and done with the purpose of furthering the criminal activity.

[269] Furthermore, the central Government which has the duty to provide support through the use of paramilitary forces throughout the country sent the army to Gujarat soon after the incident in Godhra. However, the state government refused to deploy the soldiers until 24 hours after they arrived and only once the worst violence had ended. "*After allowing thirty-six hours to pass without any serious intervention, the first of several contingents of army troops were sent to Ahmedabad, Rajkot, and Vadodara on March the 1st. The army's inability to rapidly intervene was also hindered by the state government's failure to provide requested transportation support and information regarding areas where violence was occurring"* See *Narula, Smita "Compounding Injustice. The Government is failure to redress massacres in Gujarat*" Human Rights Watch Publications. Report released the 1st July 2003. Vol.15 No4 (C). http://hrw.org/reports/2003/india0703/

[270]. See *Tillin, Louise "History of Indian Communal Violence*" 2 March 2002.

Therefore, one might say that the link with a state policy is not only inferred where some actions are approved by the holders of the authority but such link can also exist when those actions are tolerate by the inaction of the authorities which could create an atmosphere of impunity[272] that could allow further violence.

http://news.bbc.co.uk/1/hi/world/south_asia/1850759.stm

[271] According to Suzanne L. Schairer, the destruction of cultural property can be used to prove the mens rea of a crime against humanity or even, of genocide. "*One ought to recognized that [the] destruction of religious sites is highly symbolic of a group defined along ethno-religious lines, and if that pattern of conduct reaches the level of persecution as a crime against humanity, it may be used to prove the mens rea element of genocide*". It is not our aim to analyse if there were enough grounds to amount the destruction of cultural property to persecution as a crime against humanity but, rather to show its connection with the existence of a plan or policy to weak a community. Schairer, Suzanne L. "The intersection of human rights and cultural property issues under international law". B. Conforti et al, (eds). The Italian Yearbook of International Law, Volume XI (2001), p.85-88.

[272] "*Although the Indian Government initially boasted of thousands of arrest following the attacks, most of those arrested have since been released on bail, acquitted or simply let go. (...) Witnesses who (...) file complaints and identify their attackers have been harassed, threaten or bribed* (...)"www.hrea.org/lists/hr-headlines/markup/270203.php.

See also Narula, Smita "*Impunity in the Aftermath*" in "*Compounding Injustice. The Government is failure to redress massacres in Gujarat*" Human Rights Watch Publications. Report released the 1st July 2003. Vol.15 No.4 (C). http://hrw.org/reports/2003/india0703/

CONCLUSION

The creation of the Nuremberg and Tokyo Tribunals has represented a turning- point in a process towards the creation of a legal corpus of international crimes for which individuals can be held responsible before an international tribunal. This international criminal regime has been developed further, especially, at international level through the International Law Commission and, mainly, the ad hoc international tribunals, that is the ICTY and the ICTR. These two Tribunals have had a great impact on the evolution of the definition of crimes against humanity not only because they were invested with the authority of customary international law, but also they have given a great amount of jurisprudence. The Rome Statute represents the last development in that respect.

After analyzing the process of transformation that the definition of crimes against humanity has experienced, one might consider that this evolution warrants future developments in order to achieve its main goal: the protection of the life and dignity of the humanity.

One of the great improvements under customary international law has been the removal of the war nexus requirement which has been considered more as a jurisdictional element rather than an material element of the crime. Thus, crimes against humanity will be justiciable whether committed within a conflict, either international or internal, or in peacetime. On the other hand, it has also been analyzed that, although art. 7 of the ICC Statute explicitly requires the existence of a State or organisational plan or policy, this requirement goes beyond international customary law. Thus, an attack against the civilian population could constitute a crime against humanity without the need that such attack was linked to a conflict or to a state or organizational plan. The crucial element in the definition of this crime is therefore the notion of attack. First, such attack has to be aimed against the civilian population and, second, must be either widespread or systematic. The practice shows that, more often than not, one element implies the other.

However, the existence of a political or ideological plan or policy is not without legal significance in order to evidence the systematic or widespread character of the attack. Under customary international law, such a policy can come from a state but also from a non-state actor. Although it seems that there has been no uniformity in determining the characteristics that a non-state actor needs to have in order to be analogized to a state, the last developments in the jurisprudence tends to a wide interpretation of the term. In that sense, an organization, whether legal or criminal, is included within the category of non-state actors.

On the other hand, one might say that the implication of public or private resources or personal for the implementation of a policy often indicates, particularly, the systematic character of the attack. But what is the necessary degree of participation of the state power structure to evidence the existence of a policy? And above all, when does the state's failure of its legal duty to act could confirm the existence of a policy?

In that connection, as it has been analyzed, concepts in international criminal law, such as complicity through aiding or abetting and the doctrine of the imputed command responsibility, which have primarily been developed for the purpose of establishing the criminal responsibility of individuals, might also be useful for the purpose of imputing private conduct to a state action. And thus, the application of these concepts can be necessary in order to determine the existence of a state policy. In that sense, it has been examined how the actual or constructive presence of the police at the commission of the crime can constitute tacit encouragement to the commission of the crime by the perpetrator. Additionally, bearing in mind that the police are agents of a state hierarchical structure, it can be possible to apply the doctrine of imputed command responsibility in order to show the contribution of state officials, holding a position of superiority, in the commission of the crime. The rationale behind the application of these forms of participation is that a state policy normally involves not only low-level state agents but also state officials who either contribute in the implementation of the crime or in the decision-making process.

These legal questions are of great significance concerning the communal violence in the State of Gujarat, especially the attack carried out mainly against the Muslim population in February- March 2002. It was not the aim of this study to proof the facts or analyze the evidence provided by human rights organizations. However, these reports indicate that communal violence might have amounted to a crime against humanity regarding the course of conduct carried out against the Muslim population of the state of Gujarat.

Communal violence is by no means inevitable. A judicial response is necessary to reinstate the sense of order and to reaffirm the humanity of the victims. In that sense, atrocities left unpunished by either international or national courts will spoil the deterrence effect of justice. National systems of justice have an essential role to play while the international enforcement would have a subsidiary character.

Moreover, the existence of a crime against humanity has major implications under international law. International law has shown that certain crimes, because they shock the conscience of humanity and they can threaten the peace and the security of the mankind, are of international concern. It is the scale and the severity of these crimes that can justify a limitation of the sovereignty of a state. Crimes against humanity are considered *ius gentium* crimes and therefore, the perpetrators might even be tried in a foreign state.
Moreover, crimes against humanity are accepted as norms that create obligations *erga omnes,* that is, "flowing to all". An obligation *erga omnes* is an obligation that a state has towards the international community as whole and the latter has a legal interest in its fulfillment because it protect essential values and rights.

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