

## What Are Crimes Against Humanity?

November 4, 2013

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In the international criminal law, crimes against humanity are serious crimes that have been variously defined by international courts in accordance with the facts.<sup>1</sup>

Crimes against humanity, which have no statute of limitations, occurred in Cambodia during the Khmer Rouge period from 17 April 1975 to 6 January 1979. The Extraordinary Chambers in the Courts of Cambodia (ECCC), which was established with the agreement between the Royal Government of Cambodia and the United Nations in 2003, have jurisdiction over the crimes.

According to Article 5 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia (ECCC Law), crimes against humanity are any offences that includes:

- murder,
- extermination,
- enslavement,
- deportation,
- imprisonment,
- torture,
- rape,
- persecution of political, racial, and religious groups,
- and other inhumane acts.<sup>2</sup>

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<sup>1</sup> The definition of crimes against humanity in Article 5 of the Extraordinary Chambers in the Courts of Cambodia (ECCC) Law requires that "[...] Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, [...]." While Article 5 of the International Criminal Tribunal for former Yugoslavia (ICTY) Statute provides over "crimes against humanity" that ("[...]The [ICTY] shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population [...]." Different from the ECCC law and the ICTY statute, Article 7 of the International Criminal Court (ICC) Statute requires that "[...]crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...]." *See also* KAINING Guek Eav alias Duch, Trial Chamber Judgment, 26 July 2010, ¶¶ 281, 289-290, footnote 536 and 539, E188.

<sup>2</sup> *See* Article 5 of the ECCC Law. Likewise, Article 188 of the Criminal Code of the Kingdom of Cambodia 2009 defines the term "crimes against humanity" that [Article 188] Crime Against Humanity Each of the acts prescribed below when committed within the framework of a generalized or systematic attack carried out against civilian population, constitutes a crime against the humanity:

However, the offences listed above can only constitute as crimes against humanity if the following chapeau prerequisites are established to the required standard: (i) there must be an attack; (ii) it must be widespread or systematic; (iii) it must be directed against any civilian population; (iv) it must be on national, political, ethnical, racial or religious grounds; (v) there must be a nexus between the acts of the accused and the attack; and (vi) the accused must have requisite knowledge.<sup>3</sup>

Notably, Article 5 of the ECCC Law does not require a link between crimes against humanity and armed conflict.<sup>4</sup>

### ***Chapeau Requirements for crimes against humanity***

#### **1. Attack**

An attack is a course of conduct involving multiple commissions of acts of violence. The accused does not have to commit all of the acts that make up the attacks, but need only be part of a broader attack. There may exist, within a single attack, a combination of acts of violence. For example, acts of murder, rape and torture.<sup>5</sup>

Although the notion of what constitutes an attack is distinct from that of an armed conflict, an attack on a civilian population may precede, outlast, or continue throughout an armed conflict.<sup>6</sup>

#### **2. Widespread or systematic**

In accordance with customary international law, an attack must be either widespread or systematic. The term “widespread” refers to the large-scale nature of the attack and the number of victims, while the term “systematic” refers to the organised nature of the acts of violence and the improbability of their random occurrence. While the requirements are alternatives, in practice these criteria may often be difficult to separate since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation. A widespread attack may also refer to the “cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”<sup>7</sup>

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1. murder; 2. extermination; 3. induction into slavery; 4. forced deportation or transfer of the population; 5. imprisonment or any other form of serious deprivation of freedom in violation of the fundamental provisions of the international laws; 6. torture; 7. rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and all other form of sexual violence of the same seriousness; 8. prosecution of a group or a community under the political, racial, national, ethnic, cultural, religious or sexual motives. 9. forced disappearance; 10. apartheid; 11. All other inhuman acts which causes great sufferings or serious attack on physical integrity.

<sup>3</sup> KAING Guek Eav, Trial Chamber Judgment, 26 July 2010, ¶297, E188. [Hereinafter ‘Trial Chamber Judgment’]

<sup>4</sup> *Id.* ¶291

<sup>5</sup> *Id.* ¶298

<sup>6</sup> *Id.* ¶299

<sup>7</sup> *Id.* ¶300

The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities, or any identifiable patterns of crimes may be taken into account to determine whether the attack satisfies either or both of the “widespread” or “systematic” requirements.<sup>8</sup>

### **3. Directed against any civilian population**

The attack, described above, must be directed against any civilian population. The “*population*” element is intended to imply crimes of a collective nature and excludes single or isolated acts, which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity. The use of the term “*population*” does not mean that the entire population of the geographical entity in which the attack took place must be subjected to that attack. It is “sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way [that] the attack was in fact directed against a civilian ‘population’ as opposed to a limited and randomly-selected number of individuals.”<sup>9</sup> For the term “*civilian*” is defined as those who are not members of the armed forces and other combatants (militias, volunteer corps and members of organized resistance groups). The civilian population therefore includes all persons who are not members of the armed forces or otherwise recognised as combatants. A person shall be considered to be a civilian for as long as there is no doubt to his or her status.<sup>10</sup>

For the soldiers and members of the armed forces who are *hors de combat* may not be qualified as civilians. Additionally, the presence of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. In the context of a crime against humanity, a civilian population must be the primary object of an attack. Customary international law obliges parties to the conflict to distinguish, at all times, between the *civilian population* and *combatants*, and also obliges them not to attack a military objective if the attack is likely to cause civilian casualties or damages that would be excessive in relation to the military advantage anticipated.<sup>11</sup>

To determining whether the attack was directed includes:

- the means and methods used in the course of the attack,
- the status of the victims,
- their number the discriminatory nature of the attack,

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<sup>8</sup> *Id.* ¶301

<sup>9</sup> *Id.* ¶303. *See also* Kunarac Appeal Judgment, ¶90; Prosecutor v. Sesay et al., Judgment, SCSL Appeals Chamber (SCSL-04-15-A), 26 October 2009. ¶719.

<sup>10</sup> *Id.* ¶304

<sup>11</sup> *Id.* ¶308. *See also* Prosecutor v. Kunarac, Judgment, ICTY Trial Chamber (IT-96-23-T and IT-96-23/1-T), 22 February 2001, ¶426.

- and nature of the crimes committed in its attacking force may be said to have complied or attempted to comply with the precautionary requirement of the law of war.<sup>12</sup>

Provided the victims were targeted as part of an attack against a civilian population, it is unnecessary to demonstrate that they were linked—politically, ethnically, or otherwise – to any particular group. Crimes against humanity may therefore include a state's attack on its own population.<sup>13</sup>

#### **4. On national, political, ethnical, racial or religious grounds**

To determining whether an attack against the civilian population was a crime against humanity, it is necessary to show that the attack must be committed on national, political, ethnical, racial or religious grounds. This element refers to the nature of the attack and is not an element of the specific offence.<sup>14</sup> Therefore, there must be a discriminatory intent in carrying out the attack.

However, the discriminatory requirement is different from various international tribunals, such as the Extraordinary Chambers in the Courts of Cambodia (ECCC), the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR), etc. For instance, Article 5 of the ECCC Law requires that "*the attack against a civilian population in the case of crimes against humanity be based on national, political, ethnical, racial or religious grounds*".

The Trial Chamber of the ECCC interprets this Article as an added jurisdictional requirement, which refers to the nature of the attack and not to the underlying offences. The Chamber notes that any discriminatory basis requirement under the Nuremberg Charter, the Tokyo Charter and Control Council Law No. 10 was limited to the underlying offence of persecution, for which a discriminatory intent was specifically required.<sup>15</sup> However, jurisprudence from international criminal tribunals, as well as the ICC statute, has since clarified that except in the case of persecution, a discriminatory intent is not required by customary international law as a legal ingredient for all crimes against humanity.<sup>16</sup>

#### **5. Nexus between the acts of the accused and the attack**

The acts of the accused must, by their nature or consequences, objectively be a part of the attack in such a way that they are not wholly divorced from the context of the attack. A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack. However, a crime would be

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<sup>12</sup> *Id.* ¶309. See also *Prosecutor v. Mrkšić et al.*, Appeal Judgment, ¶25.

<sup>13</sup> *Id.* ¶312.

<sup>14</sup> Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, ¶1250, D390.

<sup>15</sup> Trial Chamber Judgment, *Supra* note 3, ¶313.

<sup>16</sup> *Id.* ¶314.

regarded as an isolated act when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, cannot reasonably be said to have been part of the attack.<sup>17</sup>

## **6. Knowledge requirement**

An accused of crimes against humanity must have known that there was an attack on the civilian population and that his acts were a part of it. The accused needs to understand the overall context in which the acts took place, but need not the details of the attack or share the purpose or goal behind it.

There is no specific method in determining whether an accused knew of the attack, but evidence of knowledge depends on facts presented of a particular case. As result, the manner in which this legal element may be proved may vary according to the circumstances.<sup>18</sup> If the requirement is lacking, depending on the circumstances, misconduct will amount to either a war crime or an ordinary criminal offence under domestic law.<sup>19</sup>

### **Crimes against humanity in Case 001 and 002 at the ECCC**

In Case 001, the Trial Chamber of the ECCC found Duch guilty of crimes against humanity (persecution on political grounds), (subsuming the crimes against humanity of extermination), (encompassing murder), (enslavement), (imprisonment), (torture - including one instance of rape), and (other inhumane acts).<sup>20</sup> Duch was sentenced to 35 years in prison. The sentencing also included the grave breaches of the Geneva Convention of 1949.

The Supreme Court Chamber of the ECCC, however, has quashed the Trial Chamber's decision to subsume under the crimes against humanity of persecution, the other crime against humanity for which it found Duch responsible,<sup>21</sup> but entered additional convictions for the crimes against humanity of extermination (encouraging murder), enslavement, imprisonment, torture, and other inhumane acts. Because of the additional convictions, the Supreme Court Chambers decided to sentence Duch of life imprisonment.

In Case 002, there were only two accused, Khieu Shampahn and Noun Chea, who were tried in the first trial that focused on crimes against humanity. The first trial was called Case 002/01. In the Case 002/01, the Trial Chamber tried all the crimes that occurred during the population movement phases 1 and 2 and the execution of Khmer Republic soldiers at Toul Po

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<sup>17</sup> *Id.* ¶318.

<sup>18</sup> *Id.* ¶319.

<sup>19</sup> Antonio Cassese, *International Criminal Law*, at 115 (2d ed. 2008).

<sup>20</sup> Trial Chamber Judgment, *Supra* note 3, ¶677.

<sup>21</sup> KAING Guek Eav, Supreme Court Chamber Verdict, 3 February 2012, at 320 (Disposition), F28.

Chrey execution site immediately after the Khmer Rouge takeover in 1975.<sup>22</sup> The underlying offences in crimes against humanity that was considered in the first trial were:

- (i) murders (during the population movement phase one and Tuol Po Chrey)
- (ii) exterminations (during the population movement phases one and two and Tuol Po Chrey)
- (iii) political persecutions (during the population movement phases one and two and Tuol Po Chrey)
- (iv) other inhumane acts (excluding forced marriage) (during the population movement phases one and two)
- (v) attacks on human dignity (during the population movement phases one and two)
- (vi) forced transfers (during the population movement phases one and two)
- (vii) enforced disappearances (during the population movement phase two).<sup>23</sup>

The Trial Chamber concluded its 10 days of the closing statements in Case 002/01 against Khieu Samphan and Nuon Chea on 31 October 2013. A judgment in this case is expected sometime in the first half of 2014.

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<sup>22</sup> Trial Chamber memorandum entitled "Notification of decision on Co-Prosecutions' request to include additional crime sites within the scope of Trial in Case 002/01, 8 October 2012, E163.

<sup>23</sup> ANNEX, List of paragraphs and portions of the Closing Order relevant to Case 002/01, amended further to the Trial Chamber's Decision on Ieng Tirth's Fitness to Stand Trial and the Trial Chamber's Decision on Co-Prosecutor's Redquest to Include Additional Crime Sites within the Scope of Trial in Case 002/01, E124/7.3.