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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS

ON THE CASE *SANTIAGO BRYSON DE LA BARRA ET AL*
(ON CRIMES AGAINST HUMANITY)

AMICUS CURIAE BRIEF
FOR THE CONSTITUTIONAL COURT

OF PERU

by

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I. Memorial on crimes against humanity

Anne Peters

This memo consists of six parts:

- A. Texts of the most important codified norms on the crime
 - B. Analysis of those elements of a crime against humanity which seem to be relevant for the Fronton case
 - C. Discussion of the customary law status of the crime in 1986
 - D. The non-limitation of prosecution of the crime
 - E. Conduct qualified as crimes against humanity, and sentencing practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda
- Annex: List of important cases and bibliography

The full references of all cases and literature quoted in the footnotes are given in the annex to this memo.

II. A. Legal Bases: Codifications

In this section, the “hard law” norms on crimes against humanity are given in chronological order, followed by the most important soft law texts. A brief comment highlights the most important *divergences* in the texts.

A. Control Council Law No. 10 of 20 Dec. 1945

Article II: 1. Each of the following acts is recognized as a crime: (...)

“(c) **Crimes against Humanity.** Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against **any civilian population**, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”

Comment: No link to an armed conflict. Nevertheless, the term “civilian population”, a term of international humanitarian law, is used.

B. Art. 5 c of the International Military Tribunal for the Far East Charter (IMTFE) of 19 January 1946

Art. 5: Jurisdiction over persons and offences

“The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(...)

c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against **any civilian population, before or during the war**, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. (...) “

Comment: Identical to the Nuremberg statute, which was enacted later.

C. Art. 6 c Nuremberg Statute of 8 August 1949

“6(c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against **any civilian population, before or during the war**; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. (...)”

Comment: The crime is linked to an armed conflict. It consists of two different types. The second type “persecution”, is ancillary to other crimes falling under the jurisdiction of the Nuremberg tribunal.

D. ICTY-Statute (Annex to Security Council Res. 808 (1993) of 25 May 1993)

Article 5 Crimes against humanity

“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when **committed in armed conflict**, whether international or internal in character, and directed against **any civilian population**:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.”

Comment: *Stricter* link to armed conflict (the commission of the crime is possible only “in armed conflict”). This limitation is owed to the specific situation in Yugoslavia.

E. ICTR-Statute (Annex to Security Council Res. 955 (1994) of 8 Nov. 1994)

Article 3: Crimes against Humanity

“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a **widespread or systematic attack** against **any civilian population on national, political, ethnic, racial or religious grounds**:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation;
- e) Imprisonment;
- f) Torture;
- g) Rape;
- h) Persecutions on political, racial and religious grounds;
- i) Other inhumane acts.”

Comment: No link to war; but link to “widespread or systematic attack”. Additional requirement of discriminatory “grounds” (French text: “en raison de”). This is owed to the specific situation in Rwanda.

F. ICC-Statute of 17 July 1998

Article 7: Crimes against humanity

“1. For the purpose of this Statute, ‘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:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

- (h) Persecution against any identifiable group or collective on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) '**Attack directed against any 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;
- (b) '**Extermination**' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;"

Comment: No link to an armed conflict; but link to "widespread or systematic attack". Also, a legal definition of "attack" is given which contains the "policy element".

A legal definition of "extermination" (and of the other acts [not reproduced here]) is given.

Discriminatory grounds required only for the crime of persecution.

G. Soft Law

Draft Code of Offences against the Peace and Security of Mankind 1954, Art. 2

"The following acts are offences against the peace and security of mankind:

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities."

Comment: No link to war. Discriminatory ground, as in the statute of the Rwanda Tribunal.

Draft Code of Crimes against the Peace and Security of Mankind 1991, Article 21

"Systematic or mass violations of human rights

An individual who commits or orders the commission by another individual of any of the following shall, on conviction thereof, be sentenced [to...]:

— violation of human rights in a **systematic manner** or on a **mass scale** consisting of any of the following acts:

- (a) murder;
- (b) torture;
- (c) establishing or maintaining over persons a status of slavery, servitude or forced labour;
- (d) deportation or forcible transfer of population;
- (e) persecution on social, political, racial, religious or cultural grounds."

Comment: The term "mass scale" is used instead of "widespread attack".

Draft Code of Crimes against the Peace and Security of Mankind 1996,

Article 18: Crimes against humanity

"A crime against humanity means any of the following acts, when committed in a **systematic manner** or on a **large scale** and instigated or directed by a Government or by any organization or group:

- (a) murder;
- (b) extermination;

- (c) torture;
- (d) enslavement;
- (e) persecution on political, racial, religious or ethnic grounds;
- (f) institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
- (g) arbitrary deportation or forcible transfer of population;
- (h) arbitrary imprisonment;
- (i) forced disappearance of persons;
- (j) rape, enforced prostitution and other forms of sexual abuse;
- (k) other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.”

Comment: The term “large scale” is used instead of “widespread attack”.

III. B. The elements of a crime against humanity

A crime against humanity (which can be committed in various forms) normally consists of the following elements: One or several **objective elements** (an inhumane act/conduct, such as murder), a **contextual element** (widespread and systematic attack against any civilian population), a **subjective (or mental) element** (knowledge of both the objective element and of the contextual element). For example, the “Elements of Crime”, the authoritative explanation of the crimes codified in the ICC-Statute, adopted by the states parties to the Rome Statute,¹ define the crime against humanity of murder (Art. 7(1)(a) ICC-Statute) as follows: “(1) The perpetrator killed one or more persons; (2) The conduct was committed as part of a widespread or systematic attack directed against a civil population; (3) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.” Some other forms of crime against humanity may consist of four or five elements.² The Elements of Crime state that the provisions of article 7 ICC-Statute must be “strictly construed, because crimes against humanity are most serious crimes of concern to the international community as a whole.”³ Even if the ICC-Statute is in any case not directly applicable to the *Fronton* case, the rationale for a narrow construction is generally relevant.

This part of the memo analyses only those elements of the crime which seem to be relevant for the *Fronton* case. The full references of all case quoted in the footnotes are given in the annex to this memo.

H. I. The context of the crime: Inside and outside an armed conflict

It is meanwhile acknowledged that under *customary law*, the crime can be committed in times of peace. The narrower formulation in the ICTY-statute is a deviation from customary law.⁴

The requirement of a link to an armed conflict, still made in the Nuremberg Charter and in the Charter for the Far East Tribunal (“before or during the war”), is no longer part of customary international law.

I. II. “Chapeau requirement”/contextual element: “Attack”

1. The “acts” and the contextual element (the “attack”) can be one and the same (*uno actu*)

The texts state that an act must be committed “as part of” the attack. This is called the “**nexus requirement**” between the acts of the perpetrator and the attack.⁵ In determining

¹ Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, first session, New York, 3-10 Sept. 2002.

² See the Elements of Crimes at pp. 5-12.

³ Elements of Crimes, p. 5.

⁴ ICTY, *Tadic* AC, para. 251.

⁵ ICC, *Bemba confirmation decision*, para. 84.

whether a nexus exists, the ICC pre-trial chamber II has considered “the characteristics, the aims, the nature or consequences of the act.”⁶

It might be questioned whether the act (or rather multiple acts) and the attack can be constituted by one and the same behaviour. In that case, the nexus is unquestionably present, because act (or acts) and attack fall into one.

The prototypical cases of a crime against humanity were the killing, persecution, and denouncement of Jews in the context of a larger national socialist policy. In that historical situation, what would now be called the “attack” formed the *surrounding, background, or context* of individual crimes. If such a context were needed, the bombardment of a prison could only be qualified as a crime against humanity if the overall policy of the state at the time could be qualified as an “attack”.

However, it seems that the acts and the attack can be formed by one and the same behaviour.⁷ This understanding is corroborated by the statutory definition of “attack” in Art. 7(2) a) of the ICC-Statute which says: “ ‘Attack directed against any civilian population’ means **a course of conduct involving the multiple commission of acts** referred to in paragraph 1 against any civilian population, ...”. This clause implies that the commission of the acts themselves (or the single act itself, see below) in itself forms the “attack”. In that sense, the ICC pre-trial chamber II held that “[t]he commission of the acts referred to in article 7(1) of the [ICC-]statute constitute the ‘attack’ itself and, besides the commission of the acts, no additional requirement for the existence of an ‘attack’ should be proven.”⁸

For example, the attack on the World Trade Center of 9/11/2001 is mentioned in textbooks as an example for a crime against humanity.⁹ In that case, the acts were multiple murders, and these were committed through the attack itself. There was no “surrounding” attack against any civilian population. Other textbook examples are bombing of a city and poisoning of a well, without mentioning any surrounding, different “attack”.¹⁰

To conclude, the “act” and the “attack” can happen *uno actu*. This means that the **blowing up of a prison** itself might constitute **both the “attack” and the “act” (murder)** in the sense of a crime against humanity, if the further requirements are met.

2. “Attack” need not be a military attack

The acknowledgement that the crime can be committed in peace times implies that the “attack” is not necessarily an attack in the sense of international humanitarian law. It need not be a military attack.¹¹ The attack can be structural violence.¹² This understanding is corroborated by the statutory definition in Art. 7(2) ICC-Statute: “a course of conduct involving the multiple commission of acts”. The “course of conduct” need not be a military one. Laying dynamite may be an “attack”.

3. The attack can be one single action

The ICC-Statute in Art. 7(2) defines that the “[a]ttack directed against any civilian population’ means a course of conduct involving the **multiple commission of acts**”. But according to the case law of the ICTY and the ICTR, the attack can consist in one single act with many victims. It need not consist in a series.¹³ This understanding makes sense. It would be irrational not to punish a mass killing performed by a weapon of mass destruction in one act, while punishing a perpetrator who used a different type of weapon and committed a series of killing.

⁶ ICC, *Bemba confirmation decision*, para. 86.

⁷ Ambos, pp. 251 and 257.

⁸ ICC, *Bemba confirmation decision*, para. 75.

⁹ Kolb, p. 98.

¹⁰ Ambos, p. 251.

¹¹ Elements of Crimes, at p. 5.

¹² Kolb p. 98.

¹³ ICTY: *Kordic*, para. 178; *Blaskic*, para. 206; *Kupreskic*, para. 550; *Tadic* TC, para. 648. ICTR, *Prosecutor v. J. Kajelijeli*, case no. ICTR-98-44A-T, para. 867.

4. The targeted group of the attack: “any civilian population”

The targeted group of the attack and the actual victims of the act (e.g. murder) are normally not fully identical. But if the attack and the act fall into one (see above), they are identical.

a) Functional analogy to “hors de combat” in times of peace

The term “civilian population” is a term of international humanitarian law (IHL), and a relic of the origin of the crime in that body of law. Given the fact that the crime can also be committed in times of peace, the term is misleading. “Civilian population” cannot mean “civilian” in the sense of the Geneva Conventions and the Additional Protocols.

The term must be understood broadly.¹⁴ It must be construed in analogy to civilians in armed conflict.¹⁵ A **functional analogy to those “hors de combat”** must be drawn.¹⁶ This means that all persons who are not able to use arms, and who cannot defend themselves are “civilians” for the purposes of the crime. **The crucial criteria are the incapacity to use arms,¹⁷ and/or the need for protection.¹⁸**

With regard to the *different* situation of persons carrying arms, it is disputed whether these persons always fall out of the group of civilians (narrower definition of civilians), or whether those carrying arms only fall out of the group of civilians when they are allowed to use those arms (e.g. soldiers, police, etc.).¹⁹ The latter view would imply that rebels, criminals, etc., who carry arms although they are under domestic law not allowed to do so, would still form a part of the “civilians” (broader definition of civilians). But this dispute does not seem to be relevant for the *Fronton* case, because the prisoners there in any case did not carry arms.

Detainees in a camp have been qualified as civilian population for the purposes of a crime against humanity by an Israeli court.²⁰ Prisoners in a prison are without arms and can not defend themselves. They form a “civilian population” in the sense of the crime.

b) Not necessarily the entire population of a geographic entity

“Any civilian population” does not need to comprise the entire population of a geographic entity.²¹ An attack against parts of the population suffices.

In contrast, attacks against “limited and randomly selected individuals”, or “single and isolated acts” would not fulfil the requirement of an attack against any civilian population.²²

On the other hand, an ICTY trial chamber in *Limaj* stated that “killing of a number of political

¹⁴ ICTY, *Kurpescic*, para. 547; ICTY, *Jelusic*, para. 54; ICTY, *Krajisnik*, para. 706.

¹⁵ ICTY, *Tadic* TC, para. 639.

¹⁶ Kolb p. 97.

¹⁷ Kolb p. 97.

¹⁸ Ambos p. 256.

¹⁹ ICTR, *Prosecutor v. Kayishema*, Case No. ICTR-95-1, TC Judgement of 21 May 1999, para. 127: “The Trial Chamber considers that a wide definition of civilian is applicable and, in the context of the situation of Kibuye Prefecture where there was no armed conflict, includes all persons except those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the FAR, the RPF, the police and the Gendarmerie Nationale.”

²⁰ *D.C. (T.A.), Attorney-General of the State of Israel v. Enigster*, 13(B)(5), 1952 (on file with the Harvard International Law Journal): “The detainees at the Greiditz camps and the detainees at the Paulbrick camp consisted of a civilian population in the sense of the aforementioned definition”. In the alternative, the court might have found that the fate of those civilian detainees is closely related to that of other civilians, notably those living in the area where those people were captured, and that they therefore only constitute one part of a larger “civilian population.” Under such circumstances, the prosecution could establish that the detention and mistreatment reserved to the civilian detainees was just one aspect of a broader criminal campaign which covered a given area and which, for example, saw the burning of houses, the killing and rape of civilians and other violence generally attached with such campaigns.”

²¹ ICTY: *Tadic* TC, para. 644; *Kunac* AC, para. 90; *Stakic*, AC para. 247; *Laletilic* TC, para. 235; *Brdanin* TC para. 134. ICTR, *Bisegimana* TC, para. 50. ICC, *Bemba confirmation decision*, para. 77.

²² ICC, *Bemba confirmation decision*, para. 77.

opponents” is **not** an “attack” in the sense of the crime.²³ The prisoners in a prison are of course only a limited part of the population. However, these prisoners are not randomly selected. * Blowing up a prison with a hundred persons inside does not fall outside the scope of the crime merely because it is not directed against the entire population.

c) The targeted group may include persons who once performed acts of resistance

The targeted group may include persons who once performed acts of resistance. Their previous resistance does not bring those persons outside the ambit of the targeted group.²⁴ Along that line, the French Cour de Cassation had, in the *Barbie* case, stated that a crime against humanity can also be performed against political opponents.²⁵

d) Irrelevance of the presence of soldiers or police

The presence of non-civilians, such as soldiers or policemen, does not deprive the targeted group of its quality as “any civilian population”. It is sufficient that the group is predominantly civilian.²⁶

5. The quantity and quality of the attack: “widespread or systematic”

The requirement that the attack must be “widespread or systematic” features only in Art. 3 ICTR-Statute and in Art. 7 ICC-Statute (and in soft law in the ILC drafts of 1991 and 1996). Although the term does not appear in the ICTY-statute, the ICTY has used it in its case law as well.

It depends on the definition of the targeted group whether these qualifications are fulfilled, and therefore the group needs to be defined first (see above).

a) Alternative, not cumulative requirements

The attack must be either widespread *or* systematic, according to the wording of Art. 7 ICC-Statute and Art. 3 ICTR-Statute. During the drafting process of the ICC-statute, this had been controversial. Some states had favoured a cumulative requirement, but were defeated. A compromise was the adoption of the “policy requirement” (see below).

b) Widespread

The requirement of a “widespread” attack refers to the **scale** of the attack. It is widespread when it causes a number of victims, a multiplicity of victims.²⁷ This reading is borne out by the texts of the ILC Draft Codes of 1991 and 1996 which use the term “mass scale” and “large scale”, respectively. The quantitative criterion is not objectively definable.²⁸ In a recent decision, the ICC pre-trial chamber II considered “that the term ‘widespread’ connotes the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”²⁹

c) Systematic

A conduct is systematic if it is organised or follows a plan or pattern. It need not be a formal policy of the state.³⁰ An attack is not systematic if it is a random or isolated attack.³¹

²³ ICTY TC, *Limaj*, para. 187.

²⁴ ICTY, *Kupresic*, para. 549; *Limaj* TC, para. 186; *Naletilic* TC, para. 235.

²⁵ French Cour de Cassation, 20 Dec. 1985, *Barbie*, ILR 78 (1988), p. 125 *et seq.* (128).

²⁶ ICTY, *Blaskic*, para. 214; *Galic*, AC, para. 144; *Brdanin* TC, para. 134; *Limaj* TC, para. 186; *Naletilic*, TC, para. 235. ICTR, *Akayesu* TC, para. 582.

²⁷ ICTY, *Tadic* TC, para. 648, ICTY, *Blaskic*, para. 206. ICTR, *Akayesu* TC, para. 580, ICTR, *Bisengimana* TC, para. 44.

²⁸ ICTY, *Blaskic*, para. 1148.

²⁹ ICC, *Bemba confirmation decision*, para. 83.

³⁰ ICTR, *Akayesu*, para. 580.

³¹ ICTY, *Tadic* TC, para. 649.

6. No additional “policy element” required

The statutory definition in Art. 7(2) a) ICC-Statute defines the “attack”, and here mentions that it must be “*pursuant to or in furtherance of a State or organizational policy* to commit such attack”. So the ICC-definition mentions the so-called “policy-element”. The phrase in the provision has been interpreted by ICC pre-trial chamber II as implying “that the attack follows a regular pattern”, and that the attack “is planned, directed or organized – as opposed to spontaneous acts of violence”.³²

It has been and still seems to be **controversial whether the “policy-element” is an additional requirement**.³³ The insertion in Art. 7 ICC-Statute was a compromise between those negotiating State parties which sought “systematic” and “widespread” as cumulative requirements, and those which sought them as alternative requirements. The wording in Art. 7(1) posits them as alternative (“or”). But the understanding of “systematic” is that the attack must be organised or follow a plan or pattern (see above). So the additional mentioning of “a State or organizational policy” seems to reduplicate the requirement of “systematic”.

In the result, this means that an attack which is only widespread but not systematic (= following a policy in the sense of Art. 7 sec. 2) will not fulfil the requirement.

The bombing of the *Fronton* prison seems to have followed a state policy to combat a resistance group, so that the “policy requirement” is fulfilled anyway.

J. III. The conduct/acts

A conduct constitutes a crime against humanity, if – in the context of the attack as defined above – an inhumane act is committed with knowledge.

This memo only discusses the two types of conduct relevant for the *Fronton* case, murder and extermination.

1. Murder

The objective element of murder is that the perpetrator kills one or more persons.³⁴ (Even a conduct against *one single victim* can constitute a crime against humanity if it is committed in the context of a widespread attack.³⁵) No other elements are required. In particular, premeditation is not required. Also, defences arising from domestic law, e.g. the need to combat terrorism or the like, are not admitted.³⁶

2. Extermination

The crime against humanity of extermination is characterised by an element of **mass killing**.³⁷ According to the statutory definition of Art. 7(2) ICC-Statute, the crime against humanity of extermination “includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”. Extermination notably covers measures of “**slow death**”. This form of the crime seems less pertinent for the *Fronton* case.

K. IV. The mental (subjective) element

1. General

The mental element of a crime against humanity requires that the perpetrator knew that his conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population. But the mental element does not require proof “that the

³² ICC, *Bemba confirmation decision*, para. 81.

³³ See the arguments against an additional policy requirement in Mettraux pp. 270-282.

³⁴ Elements of Crimes, p. 5.

³⁵ ICTY, *Kuprescic*, para. 550; ICTY, *Mrski* (“Vukovar Hospital case”), para. 30.

³⁶ Cf. Art. 6 c) Nuremberg Statute: “... whether or not in violation of the domestic law of the country where perpetrated.”

³⁷ ICTY, *Kristic*, para. 502. ICTR, *Kayishema*, paras 144-145; ICTR, *Akayesu*, para. 591. For the ICC-Statute: Elements of Crimes, p. 6.

perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.”³⁸

2. Discriminatory grounds

Discriminatory grounds are in most formulations of the crime required only for the act of persecution. The tribunal of the Rwanda tribunal (Art. 3) is exceptional in requiring discriminatory grounds for all forms of acts.³⁹ It is unclear whether discriminatory grounds are an objective or a subjective element of the crime.⁴⁰

IV. C. The customary law status of the crime in 1986

Obviously, to a crime committed in Peru in 1986, the ICC-Statute (adopted in 1998) does not apply. Neither the ICC nor any other existing international tribunal has jurisdiction.

While it is controversial whether the crimes already formed part of international law in the years of the Second World War, it is clear that the criminalisation of such inhumane acts as crimes against humanity crystallized into customary law quite quickly after 1949, through the intense judicial activity of national and international criminal tribunals in the aftermath of the Second World War. In result, crimes against humanity were international crimes under international customary law already in 1986.⁴¹

V. D. The non-limitation of prosecution of the crime

UN-member states have in 1968 adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.⁴² Peru has ratified this convention only on 11 Aug 2003, with the following declaration: “In conformity with article 103 of its Political Constitution, the Peruvian State accedes to the ‘Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity’, adopted by the General Assembly of the United Nations on 26 November 1968, with respect to crimes covered by the Convention that are committed after its entry into force for Peru.” This means that non-limitation for a possible crime against humanity in 1986 is not operative *by force of that convention*.

However, the UN-Convention of 1968 only confirms (in a declaratory fashion), that crimes against humanity are not subject to any limitation of prosecution. Its preamble states: “Recognizing that it is necessary and timely to *affirm* in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, ...”.

The non-limitation follows from the very nature of the crime. Non-limitation has, on those grounds, been asserted by numerous domestic courts all over the world.⁴³

Non-limitation can therefore be said to be either a principle of **customary international law** or a **general principle of law** (in the sense of art. 38 lit. b) and c) of the ICJ statute). This international legal principle has been accepted already before 1986, as the older case law of

³⁸ Elements of Crimes, p. 5.

³⁹ See in that sense also the ILC Draft Code of 1954.

⁴⁰ ICTR, *Akayesu* AC, para. 464 speaks of „discriminatory *intent*“, which has a subjective connotation.

⁴¹ Cassese p. 356.

⁴² UN GA 2391 of 26 Nov 1968. United Nations Treaty Series, vol. 754, p. 73. Other conventions (not pertinent for the *Fronton* case) are the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly of the United Nations on 30 November 1973, in force for Peru since 11 Dec. 1978; and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (in force since 2003).

⁴³ French Cour de Cassation, 6 Oct. 1983, *Barbie*, ILR 78 (1988), p. 125 *et seq.* (126). Cour de Cassation, 20 Dec. 1985, *ibid.*, p. 128. Argentina, Corte suprema de Justicia de la Nacion, Arancibi Clavel etc., causa no 259, 24 August 2004 (A 533, XXXXVIII), para. 25. Italy, Tribunale Militare di Roma, judgement of 22 July 1997, para. 12.d). Belgium, Belgian Tribunal of First Instance of Brussels (Investigating Magistrate), judgement of 8 November 1998, a judgement in the Pinochet affair (see Reydams Luc, *In re Pinochet*, AJIL 93 (1999), 700-703, p. 703).

domestic courts shows. This means that a crime against humanity committed in 1986 is not subject to statutory limitation.

VI. E. Criminalised conduct and sentencing practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda

Full references for the cases are given in the annex.

L. I. Sentences

1. Overview

The penalties imposable by the ICTY and the ICTR are limited to imprisonment (Art. 23 ICTY statute; Art. 23 ICTR-Statute). Death penalty is not foreseen. Perpetrators who have been sentenced for crimes against humanity had always committed other crimes as well, mostly war crimes, sometimes even genocide. The ad hoc tribunals have always imposed one single sentence. It is therefore not possible to isolate the penalty for the crime against humanity. The crimes were in some cases only committed in form of aiding and abetting.

The crimes against humanity were mostly committed in the following forms (roughly in order of frequency): persecution, extermination, murder, other inhumane acts, forcible transfer, torture, rape, enslavement.

The penalties for crimes against humanity have not *per se* been more serious than for war crimes. The ICC has so far not convicted any perpetrator.

Domestic courts have imposed sentences ranging from death penalty (Israel, *Eichmann*), over life imprisonment (France, *Barbie*) to 10 years (Netherlands, *Menten*).

2. Sentences between life imprisonment and three years

The ICTY has imposed sentences ranging from life imprisonment (in one case, *Galic*, concerning Sarajevo) to three years (*Kolundzija*). Penalties in between were 40 years (*Stakic*), 35 years (*Kristic*, concerning Srebrenica), 30, 28, 25, 20, 18, 15, 12, and 6 years.

The ICTR has imposed life imprisonment in four cases (*Akayesu*, *Musema*, *Muhimana*, and *Rutaganda*). All four perpetrators also committed genocide, besides crimes against humanity. The ICTR imposed 45 years of imprisonment on *Semanza*, 15 years on *Bisingimana*, 6 years of imprisonment on *Rutaginara*.

M. II. Conduct which has been qualified as amounting to a crime against humanity by the ICTY and the ICTR (examples)

ICTY

- ICTY, *Prosecutor v. Stanislav Galic*, TC judgement of 5 December 2003, IT-98-29-T, AC judgement of 30 November 2006, IT-98-29-A:

Galic was a commander of the Sarajevo Romanija Corps of the Bosnian Serb Army (VRS), based around Sarajevo, Bosnia and Herzegovina; from November 1992, held rank of Major General. He was sentenced to **life imprisonment**.

Crimes convicted of: Acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I to the Geneva conventions of 1949 (violations of the laws or customs of war); **Murder and inhumane acts other than murder (crimes against humanity)**.

- Stanislav Galić conducted a campaign of sniping and shelling attacks on the city of **Sarajevo** and did so with the primary aim to spread terror among the city's civilian population.
- These attacks, which took place almost on a daily basis, over many months, resulted in the killing of hundreds of men and women of all ages, including children and the wounding of thousands, with the intent to terrorize the entirety of the population.

- ICTY, *Prosecutor v. Goran Jelusic*, TC judgement of 14 December 1999, IT-95-10-T:

Goran Jelusic was sentenced to **40 years' imprisonment**.

During May and June 1992, Jelusic acted under the authority of the Brčko police, which at that time was under the control of the Serbian forces, and held a position of authority at the

Luka camp, a makeshift detention facility in Brčko, a town and municipality in north-eastern Bosnia and Herzegovina; called himself the "Serb Adolf".

Crimes convicted of: Murder; cruel treatment; plunder (violations of the laws or customs of war); **murder; inhumane acts (crimes against humanity)**.

- Goran Jelisić killed five people at the Brčko police station and eight at the Luka camp.
- On 6 or 7 May, he escorted an unknown male detainee down a street near the Brčko police station and then shot him in the back of the head with a "Scorpion" pistol.
- He systematically killed Muslim detainees at the Laser Bus Co., the Brčko police station and the Luka camp.
- On about 9 May 1992, near the main hangar building at the Luka camp, a former port facility, he beat a female victim with a police baton and then shot and killed her.
- Goran Jelisić stole money, watches, jewellery and other valuables from the detainees.

- ICTY, *Prosecutor v. Kupreskic et al.*, TC judgement of 14 January 2000, IT-95-16-T:

The Prosecutor v. Drago Josipović, Vladimir Sentić, Zoran Kupreskić, Mirjan Kupreskić, Vlatko Kupreskić & Dragan Papic.

Drago Josipovic: During April 1993, a member of the Bosnian Croat forces (HVO) in Sentić, a village lying in the Lasva Valley, in central Bosnia and Herzegovina. **Sentenced to 12 years' imprisonment.**

Crimes convicted of (examples): **Persecutions on political, racial or religious grounds; murder; inhumane acts (crimes against humanity)**.

- Drago Josipović was actively involved in a military attack on civilians in the village of Ahmići during which over 100 civilians were killed and 169 Muslim homes were destroyed.

Vladimir Sentic: In April 1993, the local commander of the military police and of the "Jokers", a unit of the HVO, in central Bosnia and Herzegovina. **Sentenced to 18 years' imprisonment.**

Crimes convicted of (examples): **Persecutions on political, racial or religious grounds; murder; inhumane acts (crimes against humanity)**.

- Vladimir Sentić was actively involved in a military attack on civilians in the village of Ahmići during which over 100 civilians were killed and 169 Muslim homes were destroyed. His presence at the scene of the attack, as a local commander of the "Jokers" and the military police, served as an encouragement for his subordinates to commit crimes.

- ICTY, *Prosecutor v. Dusko Tadic*, TC judgement of 7 May 1997, IT-94-1-T, AC judgement of 15 July 1999, IT-94-1-A:

President of the Local Board of the Serb Democratic Party (SDS) in Kozarac. **Sentenced to 20 years' imprisonment.**

- During the attack on Kozarac and surrounding areas, Dusko Tadić participated in the collection and forced transfer of civilians to detention camps.
- As part of a group of Serbs, he beat and kicked one victim until he was unconscious.
- He threatened one victim with a knife and then stabbed him.

Crimes convicted of (examples): **Murder (crimes against humanity** and violations of the laws or customs of war).

- Dusko Tadić killed two Muslim policemen in Kozarac on 26 May 1992.
- He participated in the killings of five men in Jaskići, a village near Prijedor.

- ICTY, *Prosecutor v. Kunarac et al.*, TC judgement of 22 February 2001, IT-96-23-T & IT-96-23/1-T, AC judgement of 12 June 2002, IT-96-23 & IT-96-23/1-A:

Dragoljub Kunarac: Leader of a reconnaissance unit of the Bosnian Serb Army (VRS) which formed part of the local Foca Tactical Group.

Sentenced to 28 years' imprisonment.

Crimes convicted of (examples): **Torture and rape (crimes against humanity** and violations of the laws or customs of war).

- Kunarac raped three victims at his headquarters at Osmana Džikića Street no.16 in Foc̑a.
- He aided and abetted the gang-rape of four victims by several of his soldiers.
- He and two other soldiers raped and threatened to kill a witness and also threatened to kill her son.

Enslavement (crimes against humanity). Kunarac personally committed the act of enslavement by depriving two women of any control over their lives and treating them as property.

Radomir Kovač: One of the sub-commanders of the military police of the Bosnian Serb Army (VRS) and a paramilitary leader in the town of Foc̑a

Sentenced to 20 years' imprisonment.

- Crimes convicted of (examples): **Enslavement (crimes against humanity).**

Imprisoning the girls and exercising his de facto power of ownership, treated the two victims as his property.

- **Rape (crimes against humanity and violations of the laws or customs of war):** He raped two victims along with other soldiers.

He raped two victims along with other soldiers during the period that they were kept in his apartment. He assisted other soldiers in the rape of three victims.

Zoran Vuković: He was one of the sub-commanders of the military police of the Bosnian Serb Army (VRS) and a member of the paramilitary in the town of Foc̑a.

Sentenced to 12 years' imprisonment.

Crimes convicted of (examples): **Torture and rape (crimes against humanity and violations of the laws or customs of war).**

Vuković, along with another soldier, took a victim from the Partizan Sports Hall, Foc̑a, to an apartment nearby and raped her despite knowing that she was only 15 years old.

- **ICTY, *Prosecutor v. Dario Kordic and Mario Cerkez*, TC judgement of 26 February 2001, IT-95-14/2-T, AC judgement of 17 December 2004, IT-95-14/2-A:**

Dario Kordic: He was one of the leading political figures in the Bosnian Croat community: from 1991 until 1995, President of the Croatian Democratic Union of Bosnia and Herzegovina (HDZ-BiH); from 1992 until 1995, Vice-President and a member of the Presidency of the Croatian Community of Herceg-Bosna (HZ H-B) and later the Croatian Republic of Herceg-Bosna (HR H-B)

Sentenced to 25 years' imprisonment.

Crimes convicted of (examples): Unlawful attack on civilians; unlawful attack on civilian objects; wanton destruction not justified by military necessity; plunder of public or private property; destruction or wilful damage to institutions dedicated to religion or education (violations of the laws or customs of war).

Wilful killing; inhuman treatment; unlawful confinement of civilians (grave breaches of the Geneva conventions).

Persecutions on political, racial, or religious grounds; murder; inhumane acts; imprisonment (crimes against humanity).

- As President of HDZ-BiH, Dario Kordić enthusiastically participated in a common design of persecution. He planned, instigated and ordered crimes in the municipalities of Travnik, Vitez, Busovac̑a, and Kiseljak in the vicinity of the Las̑va Valley in central Bosnia and Herzegovina.

- He was present at the meetings during which the 16 April 1993 attack on the village of Ahmići in the municipality of Vitez was authorised. This attack resulted in more than 100 Bosnian Muslim civilians being massacred, including 32 women and 11 children, homes being destroyed and the village being ethnically cleansed of its Muslim population. Dario Kordić participated as the senior regional politician in the planning of the military operation and the attack aimed at 'cleansing' the area of Muslims.

- He planned attacks in other areas of the Lasva Valley including the hamlets of Santići, Pirići, and Nadioci. These attacks, together with attacks on Vitez and Veceriska, among others, followed a common plan aimed at ethnically cleansing the area of its Bosnian Muslims population.
- As a political leader with substantial military influence, he instigated, planned and ordered the attack on Busovaca, which was directed against the Muslim civilian population and civilian objects. Many Muslim civilians were killed or expelled, and their property destroyed during the attack.
- Dario Kordić ordered the detention of Bosnian Muslims and the establishment of the detention facilities in the Lasva Valley and more specifically in Kaonik, the Vitez Cinema, the Veterinary Station, the SDK building (a block of offices in Vitez), the Chess Club, and the Dubravica School.

Mario Čerkez: Commander of the Vitez Brigade of the Croatian Defence Council (HVO) from its formation in 1992 until at least the end of May 1993, and during the HDZ-BiH/HVO takeover of the municipal functions within the municipality of Vitez

Sentenced to 6 years' imprisonment.

Crimes convicted of (examples): **Persecutions on political, racial, or religious grounds; imprisonment; unlawful confinement of civilians (crimes against humanity).**

- Mario Čerkez was individually criminally responsible for the imprisonment and unlawful confinement of Bosnian Muslim civilians in the Vitez Cinema Complex and the Vitez SDK building prior to the end of April 1993.
- The cinema complex was used to detain some 200-300 Muslim men of all ages, who had been rounded up. Many men were subjected to cruel treatment, forced to dig trenches and used as hostages and human shields. Of those that were forced to dig trenches some did not return.
- Detainees from the SDK building were taken to dig trenches. Some were taken to dig for five days close to the frontline where it was very dangerous. The detainees were threatened with an axe and had to work day and night. As a Brigade Commander, Mario Čerkez was responsible for the prisoners' wellbeing; however he failed to fulfil this responsibility adequately.

- ICTY, *Prosecutor v. Radislav Krstić*, TC judgement of 2 August 2001, IT-98-33-T, AC judgement of 19 April 2004, IT-98-33-A:

Chief-of-Staff/Deputy Commander of the Drina Corps of the Bosnian Serb Army (VRS); appointed Commander of the Drina Corps on 13 July 1995.

Sentenced to 35 years' imprisonment.

Crimes convicted of (examples): Aiding and abetting genocide, aiding and abetting murder (violation of the laws or customs of war), **aiding and abetting extermination, aiding and abetting persecutions on political, racial and religious grounds (crimes against humanity).**

- After the fall of the **Srebrenica** enclave to the Bosnian Serb Army, Krstić had knowledge of the genocidal intent of some of the members of the VRS Main Staff. Krstić was aware that the Main Staff had insufficient resources of its own to carry out the executions and that, without the use of Drina Corps resources, the Main Staff would not be able to implement its genocidal plan. Krstić knew that by allowing the Drina Corps resources to be used he was making a substantial contribution to the execution of Bosnian Muslim prisoners.
 - Between 13 and 19 July 1995, 7,000 to 8,000 Bosnian Muslim men were systematically murdered in mass executions, the remainder of the Bosnian Muslim population then present at Srebrenica – approximately 25,000 women, children and elderly - were forcibly transferred out of the enclave.
- Murder (violation of the laws or customs of war), persecutions on political, racial and religious grounds (crime against humanity)
- Krstić played a leading role in an operation code-named "Krivaja 95" which involved an attack on the Srebrenica enclave.

- Part of this operation was the shelling of Srebrenica, which was calculated to terrify the Bosnian Muslim population and to drive them to Potocari where there was a UN presence, and where a total lack of food, shelter and necessary services would accelerate their fear and panic and ultimately their willingness to leave the territory.
- Upon the arrival of the Serb forces in Potocari, the Bosnian Muslim refugees taking shelter in and around the UN compound there were subjected to a terror campaign comprising threats, insults, looting, burning of nearby houses, beatings, rapes and murders.

- ICTY, *Prosecutor v. Milomir Stakic*, TC judgement of 31 July 2003, IT-97-24-T, AC judgement of 22 March 2006, IT-97-24-A:

From 30 April 1992 until 30 September 1992, President of the Serb controlled Prijedor Municipality Crisis Staff and Head of the Municipal Council for National Defence in Prijedor in north-western Bosnia and Herzegovina. **Sentenced to 40 years' imprisonment.**

Crimes convicted of (examples): **Persecutions (crimes against humanity).**

- As the leading figure in the Prijedor municipal government, Milomir Stakić played an important role in a campaign aimed at ethnically cleansing Prijedor municipality by deporting and persecuting Bosnian Muslims and Bosnian Croats.
- He planned and ordered the deportation of around 20,000 primarily non-Serb residents from the Prijedor municipality.
- He actively participated in the establishment of the camps Omarska, Keraterm and Trnopolje where detainees were subjected to serious mistreatment and abuse which amounted to torture, on a daily basis: detainees were severely beaten, often with weapons such as cables, batons and chains.

Extermination (crime against humanity), murder (violation of the laws or customs of war)

- Milomir Stakić was a member of a joint criminal enterprise, the purpose of which was to consolidate Serb control over Prijedor municipality at any cost, resulting in widespread killings committed by Serb forces in towns, surrounding areas, and in detention facilities throughout the municipality.
- He was responsible for the murder of more than 1,500 people in the Prijedor municipality, including the killing of around 120 men in Keraterm camp on 5 August 1992 and executions of approximately 200 people at Korićanske Stijene on Mount Vlasović on 21 August 1992.

- ICTY, *Prosecutor v. Mitar Vasiljevic*, TC judgement of 29 November 2002, IT-98-32-T:

From mid-April 1992, a member of the "White Eagles", a Bosnian Serb paramilitary unit which operated together with the police and various military units stationed in Višegrad, eastern Bosnia and Herzegovina.

Sentenced to 15 years' imprisonment.

Crimes convicted of: **Aiding and abetting persecutions on political, racial or religious grounds (crimes against humanity)** and murder (violations of the laws or customs of war).

- Mitar Vasiljević participated in an incident which resulted in the death of five Muslim men. After holding them at the Vilina Vlas hotel in Višegrad, Vasiljević led seven Muslim men, at gunpoint, to the bank of the Drina River and ordered them to line up; all of the men were subsequently shot at and five were killed.

- ICTY, *Prosecutor v. Milorad Krnojelac*, TC judgement of 15 March 2002, IT-97-25-T:

From April 1992 to August 1993, commander of the Serb run "Kazneno-Popravni Dom" (KP Dom) detention camp in Foča, located south-east of Sarajevo, Bosnia and Herzegovina, near the border with Serbia and Montenegro.

Sentenced to 15 years' imprisonment.

Crimes convicted of (examples): **Torture; murder (crimes against humanity)**, violations of the laws or customs of law)

- Milorad Krnojelac knew or had reason to know that his subordinates were torturing detainees and failed to take any action to prevent this.
- He had sufficient information to put him on notice that his subordinates were involved in the murder of detainees. Being aware of beatings and suspicious disappearances, and having

seen bullet holes in the walls, he was in a position to ascertain that the perpetrators of these beatings were likely to have committed murders. He failed to carry out an investigation.

Persecutions (crimes against humanity)

- Milorad Krnojelac knew that the detention of non-Serbs was unlawful, and he also knew that his acts or omissions were contributing to the maintenance of unlawful detention.
- He was aware of the decision to use unlawfully detained non-Serbs as forced labour. He had regular meetings with the heads of the furniture factory, metal workshop and farm where the detainees worked, and he exercised final control over the work of detainees.
- He authorised his personnel to hand over non-Serb detainees to be deported and encouraged such departures by allowing them to continue. Many of the detainees were never seen alive again after leaving the KP Dom.

Cruel treatment (violations of the laws or customs of war).

- Milorad Krnojelac had knowledge that the conditions in the KP Dom were brutal. It was overcrowded; some could not find room to sleep lying down. The detainees were fed starvation rations. They had no change of clothes, and during the winter they had no heating. Detainees could hear the sounds of people being beaten in other buildings. As a result of the living conditions, the physical and psychological health of many detainees was destroyed. As commander, Krnojelac was aware that his failure to take any action contributed in a substantial way to the continuance of these conditions by giving encouragement to the principal offenders to maintain the conditions.

- ICTY, *Prosecutor v. Mladen Naletilic & Vinko Martinovic*, TC judgement of 31 March 2003, IT-98-34-T:

Mladen Naletilic: Founder and commander of the Bosnian Croat “Kaznjenička Bojna” (Convicts’ Battalion), a 200 to 300-strong body of soldiers based around Mostar in south-eastern Bosnia and Herzegovina.

Sentenced to 20 years’ imprisonment.

Crimes convicted of (examples): Torture; wilfully causing great suffering or serious injury to body or health; unlawful transfer of a civilian (grave breaches of the Geneva conventions).

Unlawful labour; wanton destruction not justified by military necessity; plunder of public or private property (violations of laws or customs of war); **persecutions on political, racial and religious grounds; torture (crimes against humanity).**

- Mladen Naletilić repeatedly committed torture, cruel treatment and wilfully caused great suffering, in Doljani, at the Tobacco Institute in Mostar and at the Heliodrom detention centre, west of Mostar. For instance, on one occasion Naletilić personally beat a young man named Zilić on the genitals and the face, then allowed his men to further beat him; in another instance, Naletilić inflicted torture on a 16-year old detainee by threatening to kill him if he did not provide information.
- He ordered the destruction of all Bosnian Muslim houses in Doljani on 21 April 1993.
- He forcibly removed approximately 400 Bosnian Muslim civilians from Sovići and Doljani on 4 May 1993.
- He used prisoners of war to dig a trench in the vicinity of his villa.
- Troops under Mladen Naletilić’s command looted private property of Bosnian Muslims in Mostar.

Vinko Martinovic: Commander of the “Mrmak” or “Vinko Škrobo” unit of the Convicts Battalion and subordinate to Mladen Naletilić

Sentenced to 18 years’ imprisonment.

Crimes convicted of (examples): Inhumane treatment; wilfully causing great suffering or serious injury to body or health; wilful killing; unlawful transfer of a civilian (grave breaches of the Geneva conventions); unlawful labour; plunder of public or private property (violations of the laws or customs of war); **persecutions on political, racial and religious grounds, inhumane acts, murder (crimes against humanity).**

- Vinko Martinović participated in the murder of Nenad Harmandžević who was taken from the Heliodrom detention centre to Vinko Martinović's base on 12 or 13 July 1993, where he was brutally beaten and mistreated before being killed by a gunshot through his cheek.
- He was responsible for and was personally involved in rounding up the Muslim civilian population of Mostar and unlawfully transferring and detaining them at the Heliodrom detention centre. Women, children and the elderly were intimidated and forced out of their homes at gun point, accompanied by blows from soldiers and their rifles. Thereafter, many of the apartments were looted.
- He used prisoners of war to dig trenches, build defences with sandbags and carry wounded or killed soldiers.
- On 17 September 1993, he forced four detainees to dress as soldiers, carry wooden rifles and stand in the line of hostile fire, thus making them human shields to Bosnian Croat soldiers.

- ICTY, *Prosecutor v. Radoslav Brdanin*, TC judgement of 1 September 2004, IT-99-36-T:

Leading political figure in the Autonomous Region of Krajina (ARK) and held key positions at the municipal, regional and republic levels, including that of First Vice-president of the ARK Assembly, President of the ARK Crisis Staff, and later Acting Deputy Prime Minister for Production, Minister for Construction, Traffic and Utilities and acting Vice-President of the Government of the Republika Srpska.

Sentenced to 30 years' imprisonment.

Crimes convicted of (examples): **Persecutions; torture; deportation; inhumane acts (forcible transfer) (crimes against humanity).**

- Radoslav Brđanin aided and abetted the torture committed by Bosnian Serb forces in the context of the armed attacks of the Bosnian Serb forces on non-Serb towns, villages and areas after 9 May 1992 until the end of December 1992. This torture included intentional infliction of severe pain or suffering on Bosnian Muslim or Bosnian Croat non-combatants by inhumane treatment including sexual assaults, rape, brutal beatings, and other forms of severe maltreatment in police stations, military barracks and private homes or other locations, as well as during transfers of persons and deportations.
- In the Petar Kocović school on the outskirts of Bosanska Krupa at least 50 Bosnian Muslims were detained at the school. In a small room, detainees were given electroshocks. Wires from a car battery were attached through clamps to the fingers and toes of detainees, and the electricity was turned on and off for periods of five minutes. Bosnian Serb policemen administered this treatment on a number of Bosnian Muslim detainees during interrogations in order "to make them sing". At least one of the detainees still suffers from the consequences of this treatment today.

- ICTY, *Prosecutor v. Momcilo Krajisnik*, TC judgement of 27 September 2006, IT-00-39-T:

A member of the Bosnian Serb (later "Republika Srpska") leadership during the war – on the Main Board of the Serbian Democratic Party of Bosnia and Herzegovina (SDS) and President of the Bosnian Serb Assembly.

Sentenced to 20 years' imprisonment.

Crimes convicted of (examples): **Persecution on political, racial or religious grounds; deportation; inhumane acts (forced transfer) (crimes against humanity).**

- Momcilo Krajisnik was found to be responsible for deportations in Zvornik, Banja Luka and Prnjavor and for forcible transfer in Bijeljina, Bratunac, Zvornik, Bosanska Krupa, Sanski Most, Trnovo and Sokolac. These crimes encompassed the forcible displacement of several thousands of Muslim and Croat civilians, among them women, children and elderly persons, throughout the period of April to December 1992.

- ICTY, *Sikirica et al.*, TC judgement of 13 November 2001, IT-95-8-S (involving three perpetrators):

Dusko Sikirica: Crimes convicted of (examples): **Persecutions on political, racial or religious grounds (crimes against humanity)**.

Damir Dosen: From 3 June to early August 1992, Damir Dosen was a shift leader at the Keraterm camp - Sentenced to **5 years'** imprisonment. Crimes convicted of (examples): **Persecutions on political, racial or religious grounds (crimes against humanity)**. Dosen permitted the persecutions of, and condoned violence towards, detainees in the camp, including beatings, rape, sexual assaults and killings, as well as harassment, humiliation and psychological abuse. He abused his position of trust.

Dragan Kolundzija: From early June to 25 July 1992, Dragan Kolundzija was a shift commander at the Keraterm camp. Sentenced to **3 years'** imprisonment. Crimes convicted of (examples): **Persecutions on political, racial or religious grounds (crimes against humanity)**. By continuing as a shift leader at the camp, although aware of the conditions, Kolundzija abused his position of trust.

ICTR

- ICTR, *Prosecutor v. Jean-Paul Akayesu*, TC judgement of 2 September 1998, ICTR-96-4-T:

TC: **Sentence of life imprisonment.**

Count 3 of the indictment, life in imprisonment for the crime - for crimes against humanity, **extermination**,

Count 5, 15 years of imprisonment for crimes against humanity, murder.

For Count 7, 15 years of imprisonment for the crime - for crimes against humanity, murder.

For Count 9, 15 years of imprisonment for crimes against humanity, murder.

For Count 11, 10 years of imprisonment for crimes against humanity, torture.

Count 13, 15 years imprisonment for crimes against humanity, rape.

Count 14, 10 years of imprisonment for crimes against humanity, other inhumane acts.

The Chamber decided that the above sentences shall be served concurrently and therefore sentences Akayesu to a single sentence of life imprisonment.

Affirmed by the Appeals Chamber.

- ICTR, *Prosecutor v. Musema*, TC judgement of 27 January 2000, ICTR-96-13-A, AC judgement of 16 November 2001, ICTR-96-13-A:

TC: Guilty of **Crime against Humanity (extermination)** - Count 5, and

Crime against Humanity (rape) - Count 7;

A SINGLE SENTENCE OF LIFE IMPRISONMENT.

AC: Sentence of life imprisonment affirmed.

- ICTR, *Prosecutor v. Vincent Rutaganira*, TC judgement of 14 March 2005, ICTR-95-1C-T:

TC:

- Count 16: crimes against humanity (**extermination**), under Article 3(b) of the Statute of the Tribunal: GUILTY, for having **aided and abetted**, as an accomplice by omission, between 14 and 17 April 1994 or thereabouts, the **massacres** that took place at Mubuga Church in Gishyita commune, resulting in thousands of deaths and many wounded among the Tutsi refugees who were at said location.

SENTENCE: **six years of imprisonment.**

- ICTR, *Prosecutor v. Rutaganda*, TC judgement of 6 December 1999, ICTR-96-3-T:

TC: Noting that Rutaganda has been found guilty of:

Crime against Humanity (**extermination**) - Count 2.

Crime against Humanity (murder) - Count 7.

The TC imposed a single sentence of **life imprisonment.**

- ICTR, *Prosecutor v. Muhimana*, TC judgement of 28 April 2005, ICTR-95-1B-T, AC judgement of 21 May 2007, ICTR-95-1B-A:

TC: For Rape as a Crime against Humanity (Count 3):

Imprisonment for the Remainder of Your Life

For Murder as a Crime against Humanity (Count 4):

Imprisonment for the Remainder of Your Life

AC: "AFFIRMS unanimously his conviction for rape as a crime against humanity (Count 3) in all other respects; and AFFIRMS unanimously his sentence of imprisonment for the remainder of his life entered for that conviction; AFFIRMS unanimously his conviction for murder as a crime against humanity (Count 4) in all other respects; and AFFIRMS unanimously his sentence of imprisonment for the remainder of his life entered for that conviction (...)."

ICTR, *Prosecutor v. Bisengimana*, TC judgement of 13 April 2006, ICTR-00-60-T:

TC: para. 199: "On examination of the sentencing practice of this Tribunal and the ICTY, the Chamber notes that principal perpetrators convicted of crimes against humanity such as murder and extermination *have received sentences ranging from ten years' to life imprisonment*. Persons convicted of secondary forms of participation have generally received lower sentences. The sentence should reflect the totality of the criminal conduct of the accused."

para. 203. "Having considered the Statute and the Rules, the general practice regarding prison sentences in Rwanda, the Parties' submissions and evidence during the Sentencing Hearing and having weighed the aggravating and mitigating circumstances, the Chamber convicts and sentences Paul Bisengimana for Count 4, extermination as a crime against humanity pursuant to Article 3 (b) of the Statute to **15 years' imprisonment**."

- ICTR, *Prosecutor v. Semanza*, TC judgement of 15 May 2003, ICTR-97-20-T, AC judgement of 20 May 2005, ICTR-97-20-A:

Single sentence of **45 years of imprisonment**, subject to credit being given under Rule 101(D) of the Rules for the period already spent in detention.

VII. Annex: Important judicial decisions

ICTY

(TC = trial chamber. AC = appeals chamber).

Prosecutor v. Dusko Tadic, TC judgement of 7 May 1997 (IT-94-1-T), AC judgement of 15 July 1999 (IT-94-1-A).

Prosecutor v. Jelusic, TC judgement of 14 December 1999 (IT-95-10-T).

Prosecutor v. Kupreskic et al., TC judgement of 14 January 2000 (IT-95-16-T).

Prosecutor v. Sikirica et al., TC judgement of 13 November 2001 (IT-95-8-S).

Prosecutor v. Blaskic, TC judgement of 3 March 2000 (IT-95-14-T), AC judgement of 29 July 2004 (IT-95-14-A).

Prosecutor v. Kunarac et al., TC judgement of 22 February 2001 (IT-96-23-T & IT-96-23/1-T), AC judgement of 12 June 2002 (IT-96-23 & IT-96-23/1-A).

Prosecutor v. Dario Kordic and Mario Cerkez, TC judgement of 26 February 2001 (IT-95-14/2-T), AC judgement of 17 December 2004 (IT-95-14/2-A).

Prosecutor v. Stakic, TC judgement of 31 July 2003 (IT-97-24-T), AC judgement of 22 March 2006 (IT-97-24-A).

Prosecutor v. Krnojelac, TC judgement of 15 March 2002 (IT-97-25-T).

Prosecutor v. Naletilic & Martinovic, TC judgement of 31 March 2003 (IT-98-34-T).

Prosecutor v. Vasiljevic, TC judgement of 29 November 2003 (IT-98-32-T).

Prosecutor v. Kristic, TC judgement of 2 August 2001 (IT-98-33-T), AC judgement of 19 April 2004 (IT-98-33-A).

Prosecutor v. Brdanin, TC judgement of 1 September 2004 (IT-99-36-T).
Prosecutor v. Limaj et al., TC judgement of 30 November 2005 (IT-03-66-T).
Prosecutor v. Krajsnik, TC judgement of 27 September 2006 (IT-00-39-T).
Prosecutor v. Galic, TC judgement of 5 December 2003, (IT-98-29-T), AC judgement of 30 November 2006 (IT-98-29-A).
Prosecutor v. Mrksic, AC judgement of 5 May 2009 (IT-95-13-1-A).

ICTR

Prosecutor v. Ignace Bagilishema, TC judgement of 7 June 2001 (ICTR-95-1A-T), AC judgement of 3 July 2002 (ICTR-95-1A-A).
Prosecutor v. Jean-Paul Akayesu, TC judgement of 2 September 1998 (ICTR-96-4-T).
Prosecutor v. Musema, TC judgement of 27 January 2000 (ICTR-96-13-A), AC judgement of 16 November 2001 (ICTR-96-13-A).
Prosecutor v. Rutaganda, TC judgement of 6 December 1999 (ICTR-96-3-T).
Prosecutor v. Muhimana, TC judgement of 28 April 2005 (ICTR-95-1B-T).
Prosecutor v. Bisengimana, TC judgement of 13 April 2006 (ICTR-00-60-T).
Prosecutor vs. Semanza, TC judgement and Sentence of 15 May 2003 (ICTR-97-20-T), AC judgement of 20 May 2005 (ICTR-97-20-A).
Prosecutor v. Kayishema, TC judgement of 21 May 1999 (ICTR-95-1-T).
Prosecutor v. Rutaganira, TC judgement of 14 March 2005 (ICTR-95-1C-T).

ICC

- *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09. So far only arrest warrant.
- *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 of 15.6.2009 (“**Bemba** confirmation decision”).

N. National Courts

France

Cour de Cassation, 3.6.1988, JCP 1988 II Nr. 21, *Barbie*, ILR 78 (1988), pp. 136 *et seq.*, and ILR 100 (1995), pp. 330 *et seq.*
Court of Appeal of Paris, *Touvier*, judgement of 13 April 1992, Court of Cassation, judgement of 27 November 1992 and 19 April 1994.
Cour d’assises de Gironde, *Papon*, judgement of 2 April 1998, Court of Cassation, judgement of 11 April 2004.

Canada

R. v. Finta, Supreme Court of Canada 1 (1994), 701 in ILR 104 (1997) & Ontario Court of Appeal, judgement of 29 April 1992, in ILR 98 (1994), 520 *et seq.*

Israel

D.C. (T.A.), Attorney-General of the State of Israel v. *Enigster*, 13(B)(5), 1952.
District Court of Jerusalem, Adolf *Eichmann*, judgement of 12 Dec 1961, ILR 36 (1968), 18 *et seq.* and Supreme Court of Israel, 29 May 1962.

Netherlands

Supreme Court of the Netherlands, *Menten*, 13 January 1981, ILR 75 (1987), 362 *et seq.*

Former German Democratic Republic

Hans Globke, Oberstes Gericht der DDR, judgement of 23 July 1963, NJ 1963, 449, 507 *et seq.*

Horst Fischer, Oberstes Gericht der DDR, judgement of 25 March 1966 in NJ 1966, 193, 203 *et seq.*

Follow-up cases of Nuremberg

U.S. v. Flick, Trials of War Criminals vol. 6 (1952)

U.S. v. Altstoetter, Trials of War Criminals vol. 3 (1951).

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