

# Crimes against Humanity

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- Is it possible to surrender a Dutch national to Bosnia based on a referral request by the ICTY?
- Must a Dutch Court abide by a referral request issued by the ICTY?
- Can the Dutch authorities refuse?

Central Balkan Region



# recodification

- The overall recodification of  
“Crimes against humanity”
- is to be found in Article 7 of  
the Rome Statute
- in togetherness with the further  
clarifications as contained in the Annex  
to that article.

- The first legal recognition of “crimes against humanity” in
  - The St Petersburg Declaration of 1868 limiting the use of explosive or incendiary projectiles as “contrary to the laws of humanity”.
- The Declaration
  - should be further elaborated by the parties in additional instruments “in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity”.

# Martens

- The concept received further recognition in
  - “The Martens clause”  
being part of the Preamble of the 1899 the Hague Convention respecting the laws and customs of war on land”:
- Fyodor Fyodorovich Martens,
  - professor in international law at the University of St Petersburg  
was a representative in the Russian delegation, chairing several commissions.

# Preamble

- Preamble:
  - “Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience”.
- The Martens Clause has been incorporated unchanged in most subsequent humanitarian law treaties.

- The Clause seems to justify renditions of the elements of crimes in an extensive way and even by analogy.
- Problem: the Rule of substantive legality (nulla poena-maxime).
- Three main interpretation modalities:
  - (the most restricted):  
the Clause serves as a reminder that customary international law continues to apply after the adoption of a treaty norm
  - (wider):  
As few international treaties relating to the laws of armed conflict are ever complete, the Martens Clause provides that something which is not prohibited by a treaty is not ipso facto permitted
  - (widest):  
Conduct in armed conflicts is not only judged according to treaties and custom but also to the principles of international law referred to by the Clause.

- Failing an universally recognised legislator,
- apt to give an overarching, authoritative and globally binding interpretation to the Clause
- lots of dissimilarities in the rendition given to the Clause by national judiciaries are at hand.
- Recently:
  - ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons on 8 July 1996.



- A uniform interpretation appeared not to be sustainable.
- What are “principles of humanity”?
- What are “the dictates of public conscience”?
- Some elaborations of the Clause
- See the
  - Declaration of France, Great Britain and Russia on 24 May 1915
  - Denouncing the massacres by the Ottoman Empire of Armenians in Turkey as “crimes against humanity and civilization for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres”.
  - Charter of the International Military Tribunal annexed to the London Agreement dd 8 August 1945 article 6



- The 1968 Convention on the Non-Applicability of Statutory Limitations for War Crimes and Crimes Against Humanity
- The 1973 Convention on the Suppression and Punishment of the Crime of Apartheid
- 1993 ICTY-Statute
- 1994 ICTR Statute
- 1998 ICC Statute

- Chapeau of article 7 ICCS defines the substantial elements of the crime against humanity:
  - acts occurring during a widespread or systematic attack
  - on any civilian population
  - in either times of war or peace
- No consensus during the 1998 Rome Summit.

Dresden and Coventry



- A. Unsolved question:
  - Is a “crime against humanity” a crime that is inhumane”?”
- OR
  - Is a “crime against humanity” against a “collective body of individuals”?
- B. Unresolved remained:
  - whether a “crime against humanity” needs to take place during “an armed conflict”
  - whether a “crime against humanity” has to occur on discriminatory grounds
  - See para. 1 (h) forbidding “persecution”
- Unresolved remained even:
  - Has the “attack” to be both widespread and systematic” or only one or the other?
- Intention:  
to exclude isolated ad random acts and ordinary acts under national law.
  - See: Prosecutor versus Tadic Case No. IT-94-1-T 7 May 1997 para. 648.

- “It is, therefore, the desire to exclude isolated or random facts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian ‘population’, and either a finding of wide spread ness ... or systematically.”
- “For the purpose of this Statute”
- “any of the following acts”
- “committed as part of a(n) attack”
- “widespread or systematic attack”
- “against any civilian population”
- “with knowledge of the attack”

Idea:

this definition is intended only to be applicable before ICC





- There may other crimes against humanity than listed in art. 7 ICCS,
  - but they will fall within the jurisdiction of national courts or other international courts
- ANY act:
- any act alone can constitute a “crime against humanity”. There is no requirement of combination of two or more of the listed acts.
- No military attack is required,
- no armed hostilities;
- any mistreatment of the civilian population suffices.





- WHAT is “widespread”?
- ILC:
  - it means that there is the requirement of “a multiplicity of victims”. No reference to geographic extent.
  - The perpetrator has to have knowledge of the broader widespread or systematic attack on the civilian population.

# dolus specialis.

- KNOWLEDGE: dolus specialis.
- Knowledge of the attack
- Knowledge of the direction of the attack against a civilian population
- Knowledge that his/her acts are part of the attack.
- Motives are irrelevant.



# evidence

- What evidence will be sufficient to prove the widespread or systematic attack?
- Focussing on the planning, preparation and execution of the overall campaign at the highest levels of organisation:
  - there must be a criminal scheme.
- See Pohl
  - Case Neurenberg Tribunal No 10 Vol II p. 49:
  - In “an elaborate and complex operation” the execution thereof, occurs “far removed from the original planners. As may be expected, we find the various participants in the programme tossing the shuttlecock of responsibility from one to another.”