

CONCEPTUALIZATION MATTERS: CRIMES AGAINST
HUMANITY IN CRIMINAL LAW OF THE REPUBLIC OF
AZERBAIJAN

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Thesis Prepared for the Degree of
Master of Public Administration

ADA University

July 2022

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ACKNOWLEDGEMENTS

This work would not have been possible without the financial support of the Graduate Research Assistance Scholarship provided by ADA University. I am especially indebted to Dr. Anar Valiyev, Dean of the School of Public and International Affairs; Dr. Javid Gadirov, Professor of Law and my supervisor; and Dr. Lala Jumayeva, Program Director of MPA program who have always been supportive of my career goals and who worked actively to provide me with the protected academic time to pursue those goals.

I am grateful to all of those with whom I have had the pleasure to work during this and other related projects. Each of the members of my Thesis Committee has provided me extensive personal and professional guidance and taught me a great deal about both scientific research and life in general. I would especially like to thank Dr. Rashad Ibadov and Dr. Altay Mustafayev, the distinguished members of the Committee.

Special thanks go to Dr. Javid Gadirov, as my supervisor and mentor, who has taught me more than I could ever give him credit for here. He has shown me, by his example, what a good scientist and person should be.

Nobody has been more important to me in the pursuit of this project than the members of my family. I would like to thank my parents and friends; whose love and guidance are with me in whatever I pursue. They are the ultimate role models.

Abstract

The first national prosecution of international crimes in Baku Military Court proved national criminal law to be omitted certain internationalizing elements of crimes against humanity, namely the “State or organizational policy” and “the knowledge of the attack” requirements. In turn, the explanatory note of the Criminal Code of the Republic of Azerbaijan related to crimes against humanity provides a vague definition of those crimes. This shortcoming derives from the conceptualization of these crimes in domestic criminal law and makes it difficult to differentiate such crimes from ordinary criminality. It also undermines the generally recognized principles and norms of international law and, thereby, the functionality of international criminal justice in the national jurisdiction. This paper then argues that the criminal law of the Republic of Azerbaijan should reflect the current features of customary international law with regard to crimes against humanity by incorporating the “State or organizational policy” and “the knowledge of the attack” requirements into the Criminal Code.

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Introduction

Definition of crimes against humanity plays a pivotal role in ensuring international criminal justice.¹ Nevertheless, Azerbaijan’s criminal legislation and draft legislation in international criminal law² omit some “internationalizing components” of crimes against humanity.³ Criminal law of the Republic of Azerbaijan, on this account, lacks those components such as the ‘state policy’ requirement in *actus reus*, and certain *mens rea* elements attributed to this category of crimes.⁴ The first case of the prosecution of crimes against humanity in Azerbaijan - the case of *Mkrtchyan and Khosrovyan*⁵ in 2021 - provides an ideal opportunity to put the issue in the spotlight of national legal research.

Articles 105-113 of the Criminal Code cover the crimes against humanity as international crimes under the title of crimes against peace and humanity.⁶ The explanatory note on Article 105 defines the crimes, pointing out that the acts must be “committed as a part of a widespread or systematic attack against any civilian population either in peacetime or in time of war”, pursuant to the accepted definition in international criminal law, as will be discussed below. Nonetheless, the Commentary of the Criminal Code does not provide the precise definition

¹ William Schabas, *The International Criminal Court : A Commentary on the Rome Statute* (Oxford University Press) (2010), p. 144

https://books.google.az/books/about/The_International_Criminal_Court.html?id=iIbAkLRWPUgC&redir_esc=y

² See United Nations, *Draft articles on Prevention and Punishment of Crimes Against Humanity, with commentaries* (2019), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf

³ Christoph Barthe, Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary*, *Journal of International Criminal Justice*, (2008), p. 164, <https://doi.org/10.1093/jicj/mqy045>

⁴ See *Note of Article 105 of Criminal Code of the Republic of Azerbaijan*, <http://e-qanun.az/framework/46947>

⁵ See Caspian News, *Court Hearings Launched for Two Armenians Charged with Torturing Azerbaijani Captives* <https://caspiannews.com/news-detail/court-hearings-launched-for-two-armenians-charged-with-torturing-azerbaijani-captives-2021-6-4-0/>

⁶ The provisions include acts such as extermination, enslavement, deportation or forcible transfer of population, sexual violence and forced pregnancy, persecution, enforced disappearance of persons, apartheid, imprisonment in violation of rules of international law, and torture, see Article 105-113 of *Criminal Code of the Republic of Azerbaijan*, <http://e-qanun.az/framework/46947>

of ‘threshold context’ of crimes against humanity, that is to say, “widespread or systematic attack”.

On the other hand, article 7 (2) of the ICC Statute and its ‘Elements of Crimes’ define the notion of ‘attack’ in more detail, elaborating on the requirements for a crime to constitute a crime against humanity. Both ICC and *ad hoc* international criminal tribunals⁷ have also developed the context of the threshold requirements for a “widespread or systematic attack” through their extensive jurisprudence. Additionally, the International Law Commission (ILC) has also developed articles on crimes against humanity over the years.⁸

Virtually most of the legal systems in recent decades have developed an approach to a definition of crimes against humanity, both due to the relevance it has for prosecuting these crimes on the domestic level and because their suppression is of interest to “the international community of states as a whole”.⁹ In doing so, the developments that took place in international criminal law are a reference point for both the domestic legislation and for international courts and tribunals.

Furthermore, missing “internationalizing elements” of crimes against humanity, namely the “State or organizational policy” and “the knowledge of the attack” requirements underscore the seriousness of crimes against humanity. These elements largely contribute to the moral gravity of crimes against humanity as international crimes. Therefore, the missing elements

⁷ See *Kunarac et al. Trial Judgement*, para. 86, 89, 94, 97, 415; *Krnjelac Trial Judgement*, para. 54; *Kordić and Čerkez Appeal Judgement*, para. 93, 94, 666; *Limaj et al. Trial Judgement*, paras. 182, 194; *Blagojević and Jokić Trial Judgement*, para. 543; <https://cld.irmct.org/notions/show/214/crimes-against-humanity#> .

⁸ Robert Cryer, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2nd) (2010), p. 232

⁹ International Criminal Court (ICC), *Elements of Crimes*, 2011, ISBN No. 92-9227-232-2 <https://www.refworld.org/docid/4ff5dd7d2.html>

of crimes against humanity in question are of uttermost importance for differentiating international crimes from national criminality and from each another due to the essence of international crimes lies at these elements.

The research aims to examine how crimes against humanity are conceptualized in criminal law of the Republic of Azerbaijan and compare the approach of national criminal law to that of international criminal law. To this end, the research will identify existing gaps concerning the conceptual framework of crimes against humanity in the criminal legislation of Azerbaijan by studying relevant literature and case-law of national and international courts. It will mainly focus on the 'policy' and 'mental' elements of crimes against humanity in international criminal law. The paper, therefore, will answer the following research questions:

1. Which elements of crimes against humanity are missing in criminal law of the Republic of Azerbaijan?
2. What are the differences between the approach of Azerbaijani courts and that of the international criminal tribunals regarding the concept of crimes against humanity?

As a central part of the research, the methodology remains crucial in conducting the investigation. The above research questions are normative; they evaluate the problem in question and offer the solution.¹⁰ Therefore, the study will use a qualitative method to answer

¹⁰ Sanne Taekema. *Theoretical and normative frameworks for legal research: putting theory into practice*. (Law and Method) (2018) <https://ssrn.com/abstract=3123667>

the research questions provided. It is crucial to study both the primary and secondary sources on the topic.

Combining sources of Azerbaijani criminal legislation, national and international court cases, scholarly literature constitute a primary source within the boundaries of this research. Baku Military Court held the trial of two Armenian nationals accused of committing war crimes and crimes against humanity in July 2021. To analyze the conceptualization of crimes against humanity, observation conducted on the case of *Mkrtchyan and Khosrovyan* plays a key role in the data gathering techniques utilized in this study.

To understand the Azerbaijani approach to the concept of crimes, interviews with the prosecutor on the case of *Mkrtchyan and Khosrovyan*, and with two criminal law professors have been conducted. Taking the format of a semi-structured in-depth interview, the conversations were treated confidentially according to academic and ethical and data protection standards. The interview with the prosecutor lasted more than three hours and was held on two different dates. Another interview with one of the criminal professors from academia lasted approximately 45 minutes. One more interview was held in written format with one professor of international law in Azerbaijan. The first two interviews were conducted in Azerbaijani and were translated into English, while the latter was in English. All of them were transcribed, coded and analyzed during the research period. Overall, the interviews contributed to the reconstruction of the concept of crimes against humanity in domestic criminal law and understanding the approach of national prosecution. Furthermore, studying the case-law of international tribunals and scholarly literature on crimes against humanity formed a part of the research on the primary sources.

The secondary data includes commentaries in which the concept of crimes against humanity in international criminal law as well as domestic criminal law, and the research done by the International Law Commission on the subject. This research is comparative based, as it will check the approach of national law and that of international criminal law against selected *actus reus* and *mens rea* requirements.

The paper will provide a comprehensive overview of the problem by identifying and comparing the concept of crimes against humanity in international and criminal law of the Republic of Azerbaijan. The study thereby identifies the account of crimes against humanity generally accepted in international criminal law and compares it with the account provided by the Criminal Code of the Republic of Azerbaijan. Thus, the research will also discuss the shortcomings of the conceptualization of these crimes in national criminal law.

It will argue that the domestic criminal law approach to the notion of crimes against humanity should have taken advantage of developments in the conceptualization of these crimes in international criminal law, but it has not done so yet. Furthermore, whereas academic research on the concept of crimes against humanity at the international level has been extensive,¹¹ there has not been significant investigation and research over the missing elements of those crimes in criminal law of the Republic of Azerbaijan so far.

¹¹ See Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, 6 *International Peacekeeping - London* - , 243–244 (1999); Norman Geras, *Crimes against Humanity: Birth of a Concept* (Manchester University Press) (2011)

1. Chapter 1. The concept of crimes against humanity in international criminal law

1.1. Overview of the history and development of the concept

While crimes against humanity are “as old as humanity itself”,¹² the concept of those crimes in international criminal law has evolved and elaborated¹³ over the last thirty years. The concept received the first time international legal recognition in the *Declaration of St. Petersburg* in 1868.¹⁴ Marten’s Clause¹⁵ provided further recognition to the concept during the First Hague Peace Conference in 1899.¹⁶ Official recognition of the concept of crimes against humanity first appeared in the joint declaration by the Britain, France and Russia delegations condemning the Armenian massacre in the Ottoman Empire.¹⁷ Furthermore, individual criminal responsibility for violations of “laws of humanity” gained acknowledgement during the Versailles Peace Conference in 1919.

The contemporary concept, however, emerged during the Second World War, although "the violations of the laws of humanity" had to be charged by the international tribunal after First

¹² Jean Graven, *‘Les Crimes Contre l’ Humanite’* (1950) Paris: Librairie du Recueil Sirey, (1950), p. 433 cited in Cryer, see *supra* 8, p. 230

¹³ Christoph Barthe, Otto Triffterer and Kai Ambos *supra* 3, p. 151

¹⁴ See *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight*, reprinted in Roberts and Guelff (eds.), *Documents on the Laws of War* (2000) 53

¹⁵ The Marten’s Clause to the Preamble of the *Hague Convention respecting the laws and customs of war on land* is named after the Russian diplomat who drafted it, see Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011)

¹⁶ Hague Convention respecting the laws and customs of war on land of 1899, Preamble reads as "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 civilised nations, from the laws of humanity and the requirements of the public conscience"

¹⁷ The Joint Declaration denounced “crimes against humanity and civilization” and warned of “personal accountability” in 1915, see United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London 1948) <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/history-of-the-united-nations-war-crimes-commission-and-the-development-of-the-laws-of-war-compiled-by-the-united-nations-war-crimes-commission-london-his-majestys-stationery-office-1948-pp-xx-592-appendices-index-30-s/474B908869794C9843E1868740C20134>

World War.¹⁸ The Nuremberg Charter distinguished crimes against humanity in its Article 6 (c) from the war crimes because the latter had not covered crimes committed by a government against its own citizens.¹⁹ A significant advancement in the field occurred with establishing the International Criminal Tribunal of Yugoslavia (ICTY) and International Criminal Tribunal of Rwanda (ICTR) to charge the mass crimes in the former Yugoslavia and Rwanda.²⁰ Crimes against humanity were then included to the jurisdiction of International Criminal Court (ICC) at the end of the twentieth century.

Whereas acknowledging crimes against humanity by the international criminal tribunals and Courts lead to the acceptance of some “common features” in international criminal law, the Statutes of mentioned tribunals and courts have provided different definitions as to what amounts to crimes against humanity.²¹ In terms of ICTY and ICTR, the concept derived from the particular cases they were established to be concerned with, and in terms of ICC, it was the demand to create common grounds for state practice in international criminal law in relation to crimes against humanity.²²

Similarly, the development of the concept of crimes against humanity followed the same history while international and national courts had limited “amount of jurisdiction” concerning these crimes before the Rome Diplomatic Conference.²³ In the next four years

¹⁸ Cryer, supra 8, p. 232

¹⁹ Robertson, supra 11, p. 22

²⁰ Cryer, supra 8, p. 231

²¹ See Bantekas, I., and Nash, S., *International Criminal Law*, 2nd ed., p. 355 (2003, Cavendish, Portland); Chesterman, S., ‘An Altogether Different Order: Defining the Elements of Crimes Against Humanity’ (2000) 10 *Duke Journal of Comparative And International Law*, p. 310; Cassese, A., *International Criminal Law*, p. 64 (2003, Oxford University Press, Oxford); Mettraux, G., *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda* (2002) 43 *Harvard International Law Journal*, p. 268; and, Badar, ME., *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity* (2004) 5 *San Diego International Law Journal*, p. 91.

²² Alexandra V. Orlova, *A Hope for the Future - Prosecuting Crimes against Humanity in Russia's Courts*, 7 *INT’L CRIM. L. REV.* 45 (2007), p. 48 <file:///C:/Users/a/Downloads/7IntlCrimLRev45.pdf>

²³ Barthe, *Triffiterer and Ambos*, supra 3, p. 159

after the Conference, some judgements of national and international courts appeared which then contributed to the development of the concept of crimes against humanity in international customary law.²⁴ It also had a significant contribution to a number of international documents, such as Elements of Crimes, the ICC Statute and Draft Convention on Crimes Against Humanity by the International Law Commission. In turn, these international instruments have had an essential impact on *opinio juris* as well as on the jurisdiction of national courts, in particular, on national criminal legislation.²⁵

Despite the various definitions of crimes against humanity one could find in international criminal law,²⁶ article 7 of the ICC Statute seems, *inter alia*, the most restrictive provision or “authoritative definition” from several perspectives.²⁷ Most lawyers even regard this provision “as a codification of customary international law”²⁸ and the definitions provided in article 7 (2) being complied with “the traditional conception of crimes against humanity under customary international law”.²⁹ The provision also represents a “progressive development” in international law under the meaning of article 13 of the UN Charter.³⁰ Some scholars, however, argue of the specificity of article 7 only to the jurisdiction of the International Criminal Court for the purposes of article 10 of ICC Statute.³¹ On the other hand, crimes

²⁴ *Ibid*, p. 159

²⁵ See Antonio Cassese *International Criminal Law*, (Oxford University Press) (2003), p. 102; <https://global.oup.com/academic/product/cassese-international-criminal-law-9780199694921?cc=az&lang=en&>

²⁶ See Dungal, J., ‘Defining Victims of Crimes against Humanity: Martić and the International Criminal Court’, (2009) 22 *LeidenJIL* 727; Greenwood, C., ‘The Development of International Humanitarian Law by the International Criminal Tribunal for the former Yugoslavia’, (1998) 2 *MPYbUNL* 97; Fischer, H., Kress, C. and Lüder, S.R. (eds.), *International and National Prosecution of Crimes under International Law: Current Developments* (Arno Spitz 2001) 473

²⁷ *Schabas*, supra 1, p. 144 . See also *Geoffrey Robertson*, supra 11, p. 430

²⁸ *Cryer*, supra 8, p. 232

²⁹ *Barthe, Triffiterer and Ambos*, supra 3 p. 155

³⁰ See Feldbrugge and Pomorski (eds.), *International and National Law in Russia and Eastern Europe* (2001), p. 139, 139–156 cited in *Barthe, Triffiterer and Ambos*, supra 3, p. 155

³¹ Article 10 of the ICC Statute reads in the following way: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute”, see *Schabas*, supra 1, p. 144

against humanity have already acquired “a status of the universally recognized norm of international law”³² so that certain common elements should form a part of any national jurisdiction.³³ Article 7 then combines distinctive legal characteristics that can be regarded as “the common law of crimes against humanity”.³⁴ Hence, this chapter will look through the concept of crimes against humanity mainly based on the article 7 of the ICC Statute.

1.2. Chapeau: contextual element

In order to constitute crimes against humanity, the acts of an accused must be committed “as a part of a widespread or systematic attack directed against any civilian population”. The phrase originates from the Trial Chamber and Appeals Chamber judgements covering some distinctive elements of crimes against humanity from other international crimes such as genocide and war crimes. This part will discuss each of these elements below in detail.

First of all, any act that amounts to crimes against humanity, it should meet “an attack” requirement, and the acts of the accused must be part of the attack.³⁵ In this regard, a part of article 7 of the ICC Statute in which it contains the wording “acts committed as a part of ... attack”, to some commentators, elaborates “the context element” of crimes against humanity.³⁶ Additionally, according to one group of authors, the acts could also amount to

³² See *Cassese*, supra 25, p. 24 cited in *Orlova*, supra 22, p. 55

³³ Some national criminal legislation, e.g. Criminal Code of the Russia Federation, does not contain any provision concerning crimes against humanity which leads to “barriers in bringing those responsible for the perpetration of such offences to criminal responsibility in Russian domestic courts”, see *Orlova*, supra 22, p. 52

³⁴ Luban states such statement: “crimes against humanity are international crimes committed by politically organised groups acting under color of policy, consisting of the most severe and abominable acts of violence and persecution, and inflicted on victims because of their membership in a population or group rather than their individual characteristics” see David Luban, *A theory of crimes against humanity*. (Yale Law Journal) (2004), p. 90
<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1165&context=facpub>

³⁵ Antonio Cassese, *International Criminal Law: Cases and Commentary* (Oxford University Press) (2011), p. 181

³⁶ *Christoph Barthe, Otto Triffterer and Kai Ambos* supra 3, p. 165

the attack itself.³⁷ To give an example, being subject to mass torture of civilians might be considered as “an attack against the civilian population” in the contextual element of crimes against humanity.

There arise some questions in international criminal law about the reason why “an attack” is needed to be an international element of crimes against humanity. Firstly, if it did not require “the attack” as one of the “internationalizing factors” under customary international law that simply transforms acts, such as torture or murder to the orbit of crimes against humanity, it would easily fall into the category of ordinary criminality.³⁸ Secondly, the *rationale* behind this internationalizing element of crimes against humanity lies at the heart of “the protection of fundamental human rights”, and it also includes “underlying human dignity, against serious systematic and widespread human rights violations caused, supported, or tolerated by state or certain non-state organizations”.³⁹

On the other hand, the term of “attack” in the definition of crimes against humanity has a different meaning than the notion provided for war crimes in international humanitarian law.⁴⁰ According to the Elements of Crimes, it rather refers to “more generally to a campaign or operation conducted against the civilian population”.⁴¹ In other words, it refers to “a course of conduct” in the meaning of article 7 (2) of the ICC Statute.⁴² It was also then confirmed by the Appeals Chamber judgements that “the two – the ‘attack on the civilian population and ‘the armed conflict’ – must be separate notions, although of course under Article 5 of the

³⁷ Robert Cryer, *supra* 8, p. 229

³⁸ See William Schabas, *supra* 1, p. 144, and Christoph Barthe, Otto Triffterer and Kai Ambos *supra* 3, p. 165

³⁹ See *Prosecutor v. Kupreskic and others*, para 547.

⁴⁰ Art. 49 para.1 of Add Protocol I to Geneva Conventions defines “attacks” only within the military context, while Elements of Crimes states that “The acts need not constitute a military attack” within the meaning of Article 7. See 1996 Preparatory Committee I

⁴¹ Christoph Barthe, Otto Triffterer and Kai Ambos *supra* 3, p. 165

⁴² See *Situation in Kenya* (decision), note 35, para 80; *Gbagbo* (Confirmation Decision), note 30, para.209

Statute the attack ‘on any population’ may be part of ‘armed conflict’”. It turns out that the attack in the context of crimes against humanity does not limit “to the use of armed force”, it includes any “mistreatment conducted against the civilian population”.⁴³

On this occasion, the attack does not require the occurrence of military actions, “armed hostilities”, and “any violent force” by militants.⁴⁴ This view is also provided by customary international law, being contrary to the previous Nuremberg and Tokyo Tribunals.⁴⁵ Some cases emerging after these Tribunals were divided over the issue of ‘nexus to armed conflict’; cases like *Flick and Witzsäcker* put ‘armed conflict’ as a rigorous requirement, while *Alstötter* decision did not require this element.⁴⁶ The text of subsequent decisions, however, revealed that the attack can occur “before, during or after an armed conflict” and thus it does not need “a part of an armed conflict” to be regarded as “an attack” within the meaning of crimes against humanity.⁴⁷

Likewise, ‘nexus to an armed conflict’ was not required by international conventions either.⁴⁸ It was only in 1993 when the Security Council limited the scope of crimes against humanity to the acts “committed in armed conflict, whether international or internal in character” in the ICTY Statute. In the following year, however, it adopted the ICTR Statute without such a requirement, leading to the rejection of the ‘nexus to armed conflict’ aspect in the ICC Statute. Current international criminal law instruments explicitly reject this element, so no such requirement appears in the definitions of crimes against humanity today.

⁴³ Antonio Cassese, *supra* 35, p. 181

⁴⁴ See *Prosecutor v. Akayesu*, No. ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998.

⁴⁵ See *Tadic* (Decision on Interlocutory Appeal), paras 141-2

⁴⁶ *United States v. Alstötter et al.* (the ‘Justice Trial’) VI LRTWC 1

⁴⁷ *Christoph Barthe, Otto Triffterer and Kai Ambos* *supra* 3, p. 166

⁴⁸ Several international conventions such as the Genocide Convention (1948), the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968), the Apartheid Convention (1973) and the Inter-American Convention on Enforced Disappearance (1994) did not require such an element.

Apart from that, ‘discriminatory’ aspect of the attack arose as a requirement in some cases relating to crimes against humanity.⁴⁹ The ICTR Statute also demanded that “crimes against humanity be committed on national, ethnic, racial or religious grounds”, and for the sake of consistency, the ICTY followed the same way and set up a requirement of “discriminatory grounds”⁵⁰ for the acts to amount to crimes against humanity. On the contrary to the previous decisions, neither the ICTY Appeals Chamber nor ICC Statute required this element, so it has not appeared in the subsequent international documents.

1.3. “Widespread or systematic attack”

The most common internationalizing element of crimes against humanity is the requirement of “widespread or systematic attack” through which one can differentiate it from ordinary criminality. Although the concept of “widespread or systematic attack” in crimes against humanity emerged in the last thirty years and made certain contributions to the clarity of the notion of these crimes, it seems that some elements of this wording need further elaboration. This part will provide the exact contours of the concept based on international criminal literature and tribunal cases.

As is clear from the conjunction, the “widespread or systematic” requirement is disjunctive, meaning that one is sufficient to satisfy “the attack” within the concept of crimes against humanity. While St. Petersburg Declaration (1868), the Martens Clause (1899), or the Versailles Peace Conference Commission’s Report (1919) did not require this element, the

⁴⁹ *Barbie* case mentioned that “a policy of discrimination” is required within the crimes against humanity. See *Federation Nationale des Deportés et Internes Résistants et Patriotes and Others v. Barbie*, 78 I.L.R. 137 (1985)

⁵⁰ See *Akayesu*, supra 44, paras.583 and 584

latter contained some patterns which met each of these alternatives.⁵¹ This aspect of crimes against humanity first appeared in the Legal Committee of the United Nations War Crimes Commission in which the requirement took part of “a single cumulative internationalizing element” of these crimes:

As a rule, systematic mass action, particularly if it was authoritative, was 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 that 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 warranted intervention by a State other than on whose territory the crimes had been committed, or whose subjects had become their victims.⁵²

Following this analysis, the ICTY Trial and Appeals Chambers absorbed the disjunctive character of the contextual element, and then the 1996 Draft Code of Crimes included it with the same meaning but different wording as “systematic manner or a large scale”.⁵³ Eventually, the chapeau of article 7 of the ICC Statute and other international documents approved the disjunctive approach and formulated in the way of “widespread or systematic attack”. Some authors, however, believe that the attack should involve “minimal aspect of each” in order to meet the criteria of “directed against any civilian population” as it entails “some modest degree of scale and organization”.⁵⁴ This view is based on the characterisation of “the attack” in contemporary instruments of international criminal law.

⁵¹ *Christoph Barthe, Otto Triffterer and Kai Ambos* supra 3, p. 168

⁵² *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), p. 179

⁵³ See *Akayesu*, supra 44, para.579 “The act can be part of a widespread or systematic attack and need not be a part of both”) and note 154 (“Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation”). See also *Musema (Trial Chamber Judgment)*, para. 203

⁵⁴ *Robert Cryer*, supra 8, p. 236

When it comes to the exact scope of each term, there appear a number of various definitions in international criminal law. Historically, the 1991 ILC Draft Code named in different wording such as “mass scale” which not only referred “to the number of people affected by such violations” but also “to the entity that has been affected”.⁵⁵ The ILC then avoided this expression and replaced it with the term of “on a large scale” in its 1996 Draft Code.⁵⁶ It was mainly interpreted in the way that “the acts are directed against a multiplicity of victims. This requirement excludes an isolated inhumane act committed by a perpetrator acting on his own initiative and directed against a single victim”.⁵⁷ *Ad hoc* tribunals have also followed the same interpretation that ILC established in its Draft Code and the term ‘widespread’ appeared to be either only referring to “to the [large] number of victims” or “to the multiplicity of victims” or “to the commission of the acts ‘on a large-scale’”, or both to “the large-scale nature of the attack and the number of its victims”.⁵⁸ Generally, today the term largely refers to the latter which takes into account both the scale of the attack and “the multiple number of targeted persons”.⁵⁹

On the other hand, one could argue that this view is not commonly accepted in the international scholarly literature and cases. The ICC Pre-Trial Chamber II, for example, stated that the term ‘widespread’ is not to be assessed “strictly quantitatively” or “geographically” but “on the basis of the individual facts”.⁶⁰ It could therefore cover a large

⁵⁵ 1991 ILC Draft Code, article 21

⁵⁶ See *Draft Code of Crimes against the Peace and Security of Mankind with commentaries* (1996) https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf

⁵⁷ United Nations, *Report of the International Law Commission* (1999) cited in *Christoph Barthe, Otto Triffterer and Kai Ambos*, supra 3, p. 169

⁵⁸ See *Tadic* (Trial Chamber Judgment), para. 648; *Kayishema and Ruzindana* (Trial Chamber Judgment), para. 123; *Blaskic* (Trial Chamber Judgment), para. 206.

⁵⁹ *Robert Cryer*, supra 8, p. 231

⁶⁰ See *Situation in Kenya (Authorisation Decision)*, para 95 cited in *Christoph Barthe, Otto Triffterer and Kai Ambos* supra 3, p. 170

number of victims in a certain small area.⁶¹ Another group of experts think that even though the impact of these crimes should arise out of the “numerous inhumane acts”, some cases show that ‘widespread’ requirement “could also be satisfied by a singular massive act of extraordinary magnitude”.⁶²

Another important term – ‘systematic’ - within the contextual element of crimes against humanity first appeared in the 1996 ILC Draft Code of Crimes.⁶³ Until that, the Nuremberg Charter provided a detailed yet incomprehensive definition of this term explaining the acts being “committed as part of a policy of terror and in many cases being organised and systematic”.⁶⁴ Most of early tribunals set out quite ‘high threshold’ while interpreting the term; for instance, Akeyesu and Tadic trials clarified the meaning of this term “[t]he concept of ‘systematic’ may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources” and “a pattern or methodical plan”, respectively.

Subsequent trial chambers defined the term ‘systematic’ as “the organized nature of the acts of violence and the improbability of their random occurrence”.⁶⁵ In order an attack to be ‘systematic’ in accordance with these decisions, it should be lasted for over certain period and the acts which continued should follow “a similar pattern” of conduct.⁶⁶ The Pre Trial Chamber I then provided a detailed explanation to this term in the following way:

⁶¹ *Prosecutor v. Bosco Ntaganda*, (ICC-01/04-02/06-309), Decision on the Charges, Pre-Trial Chamber, 9 June 2014 (PURL: <http://www.legal-tools.org/doc/5686c6/>), paras. 22 (‘several locations’), 24 (in ‘a broad geographical area’ over a long period of time).

⁶² *Robert Cryer*, supra note 8, p. 231

⁶³ It elaborated the concept of “systematic manner” as “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. The thrust of this requirement is to exclude a random act which was not committed as part of a broader plan or policy”. See supra 56, art. 18.

⁶⁴ See supra 56, art. 18.

⁶⁵ *Bashir* (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hasan Ahmad Al Bashir, 4 March 2009, para 81.

⁶⁶ *Ibid*, para 85

The term "systematic" has been understood as either an organised plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as "patterns of crimes" such that the crimes constitute a "non-accidental repetition of similar criminal conduct on a regular basis." Thus, in the context of a systematic attack, the requirement of a "multiplicity of victims" pursuant to article 7(2)(a) of the Statute ensures that the attack involved a multiplicity of victims of one of the acts referred to in article 7(1) of the Statute.⁶⁷

The Pre Trial Chamber II has also followed the same way and extended the definition confirming that "[p]atterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence".⁶⁸ The prevailing view in the case law then remains the same so far; a 'systematic attack' is "one carried out pursuant to a preconceived policy or plan". However, some recent cases show that this phrase does not mean "plan or policy element is 'a legal element of the crime', but only that it serves as an indicator of the 'systematicity' of the attack".⁶⁹ *Katanga* case, for example, recognise the possibility of the 'systematic attack' even when there is no plan or policy.⁷⁰ It merely excludes random and isolated acts from the orbit of crimes against humanity which some argue should be separately regulated through adding the 'policy

⁶⁷ *Prosecutor v. Katanga*, Decision on the confirmation of charges (including Corrigenda), ICC-01/04-01/07-717 (ICC PTC I, Sep. 30, 2008), paras. 394-397

⁶⁸ ICTY: *Kordić* (Appeals Chamber Judgment), para. 94; *Blaškić* (Appeals Chamber Judgment), para. 101; *Kunarac* (Appeals Chamber Judgment), para. 94. ICTR: *Kajelijeli* (Trial Chamber Judgment), para. 872 ('Demonstration of a pattern of conduct will also carry evidential value'), *Muhimana* (Trial Chamber Judgment), para. 527 ('a deliberate pattern of conduct'). ICC: *Situation in Kenya* (Authorisation Decision), citing *Katanga and Ngudjolo* (Confirmation Decision), para. 397.

⁶⁹ See *Blaškić* (Appeals Chamber Judgment), para. 100; *Brdanin* (Trial Chamber Judgment), para. 137; *Tolimir* (Trial Chamber Judgment), para. 698; *Stanišić and Simatović* (Trial Chamber Judgment), para. 963; *Semanza* (Trial Chamber Judgment), para. 329; *Muhimana* (Trial Chamber Judgment), para. 527; Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 172; for more indicators of a 'systematic' attack see *ibid.*, 171; *Prosecutor v. Harun and Kushayb*, No. ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application, Pre-Trial Chamber 27 April 2007 (PURL: www.legal-tools.org/doc/e2469d/), para. 62 ('policy is an element from which the systematic nature of an attack may be inferred'); see also *Katanga* (Trial Chamber Judgment), note 30, paras. 1098, 1113 ('existence d'un schéma fait de comportements répétitifs...'; emphasis in the original), 1123; *Gbagbo* (Confirmation Decision), para. 216 ("policy" and ... "systematic" nature of the attack ... both refer to a certain level of planning, concepts should not be conflated'). For a critical view on the high threshold see Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 254-5 cited in *Barthe, Triffterer and Ambos*, *supra* 3, p. 171

⁷⁰ see *Katanga* (Trial Chamber Judgment), paras. 1111-1113

element'. The hallmark of 'systematic' being "consistent with the ordinary meaning of the term" then is a "high degree of organization", and within that some characteristics such as "patterns, continuous commission, use of resources, planning, and political objectives" are essential.⁷¹

As mentioned above, the "widespread or systematic" threshold is referred to "the attack" itself, not the "acts of the accused".⁷² Therefore, the acts therein might be "all of the same type or of different types",⁷³ so that "a single act of murder by a perpetrator may constitute a crime against humanity as long as the legal requirements concerning the contextual of crimes against humanity, including the nexus element, are met".⁷⁴ More precisely, "a single or limited number of acts on his or her [accused's] part would qualify as a crime against humanity, unless those acts may be said to be isolated or random"⁷⁵ The relationship between "the act (s) of the accused" and "an attack" should be clear "to analyse whether this act would have been less dangerous for the victim if the attack and the underlying policy had not existed".⁷⁶

By and large, the "widespread or systematic" test is applied to each case separately, taking into account the merits of the case in the adjudication phase.⁷⁷ Some scholars mention that

⁷¹ Robert Cryer, *supra* 8, p. 237

⁷² See *Kordic* (Appeals Chamber Judgment), para. 94; *Blaškić* (Appeals Chamber Judgment), para. 101; *Kunarac* (Appeals Chamber Judgment), para. 96.

⁷³ See *ICD - Kayishema & Ruzindana* - Asser Institute, 1999

⁷⁴ *Bemba* (ICC-01/05-01/08), *Decision to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecution against Jean Pierre-Bemba Gombo*, 15 June 2009, para 151.

⁷⁵ See *Kordic* (Appeals Chamber Judgment), para. 94; *Blaškić* (Appeals Chamber Judgment), para. 101; *Kunarac* (Appeals Chamber Judgment), para. 96; *Vukovar Hospital Decision*, para. 30

⁷⁶ *Barthe, Triffterer and Ambos*, *supra* 3, p. 172.

⁷⁷ *Ibid*, p. 172

the terms “widespread” and “systematic” are more likely to overlap in several recent cases and “manifest themselves in many of the same factors”.⁷⁸

1.4. “...attack directed against any civilian population”

Article 7 (1) of the ICC Statute and virtually all recent case law concerning crimes against humanity require these crimes to be committed as a result of an “attack directed against any civilian population”.⁷⁹ Some representatives in the Preparatory Committee of the ICC Statute vouched for the deletion of this wording, stating that the phrase was “vague, unnecessary and confusing since the reference to attack could be interpreted as referring to situations involving an armed conflict and the term ‘civilian’ was often used in international humanitarian law and was unnecessary in the current context”.⁸⁰ Then it became an irreplaceable part of the contextual element of crimes against humanity as it was a great discovery in relation to international criminal law that before “individuals associated with oppressive State apparatus could be prosecuted for crimes committed against foreign nationals whose protection by international law was already relatively well-established”.⁸¹

When it comes to the precise definition of the wording, a ‘population’ means an array of persons who share “common attributes”.⁸² In other words, a ‘population’ comprises “a sizeable group of people who possess some distinctive features that mark them as targets of

⁷⁸ Stephan Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem Römischen Statut des Internationalen Strafgerichtshofes*, Berlin: Berliner Wissenschafts-Verlag, 2004, p. 144 cited in *William Schabas*, supra 1, p. 149

⁷⁹ *William Schabas*, supra 1, p. 152

⁸⁰ Preparatory Committee I 1996 Report, Vol I, para 86 cited in *William Schabas*, supra 1, p. 152.

⁸¹ *Vasijevic* (IT-98-32-T), Judgement, 29 November 2002, para 33.

⁸² *Barthe, Triffterer and Ambos*, supra 3, p. 172

the attack”.⁸³ It must thereby form “a self-contained group of individuals, either geographically or as a result of other common features”.⁸⁴ In its *Kunarac* case, the ICTY Appeals Chamber explains the meaning of the word of ‘population’ which:

...does not mean that the entire population of the geographical entity in which the attack is taking place must have been 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 as to satisfy the Chamber that the attack was in fact directed against a civilian ‘population’, rather than against a limited and randomly selected number of individuals.⁸⁵

As seen from the provided definition, the use of ‘population’ implies “the collective nature of the crimes to the exclusion of single acts”.⁸⁶ The use of “directed against”, on the other hand, means that the civilian population in question must be “the primary object of the attack”:

The expression “directed against” is an expression that “specifies that in the context of a crime against humanity the civilian population is the primary object of the attack”. In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and methods used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary

⁸³ see Werle and Jessberger, *Principles of International Criminal Law* (2014) 334 (‘any group of people linked by shared characteristics that in turn make it the target of an attack’); see also *Bemba* (Confirmation Decision), note 30, para. 76; *Prosecutor v. Ruto and others*, No. ICC-01/09-01/11-373, Confirmation Decision, Pre-Trial Chamber, 23 January 2012 (PURL: <http://www.legal-tools.org/doc/96c3c2/>), para. 164

⁸⁴ *Ibid.*

⁸⁵ See *Kunarac* (Appeals Chamber Judgment), para. 90 (fn. omitted). Cited approvingly in *Kordic* (Appeals Chamber Judgment), para. 95, and in *Blaškić* (Appeals Chamber Judgment), para. 105.

⁸⁶ See *Tadić* (Trial Chamber Judgment), para. 644: ‘the emphasis is not on the individual victim but rather on the collective’. See also, *Schwelb* (1946) 23 Brit.Y.B. IL 178, 191; also Ambos and Wirth (2002) 1 CLF 13, 21 with further references; Werle, *Voölkerstrafrecht* (2012) mn 862; König, *Die völkerrechtliche Legitimation der Strafgewalt internationaler Strafjustiz* (2003) 260-1; Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), p. 165

requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.⁸⁷

It is important to note that the “civilian population” need not be targeted in an attack “because of their membership in a certain group”⁸⁸ as the “discriminatory intent” requirement to commit the attack is no more applicable to the ‘contextual threshold’ of crimes against humanity.⁸⁹ Most commentators of the ICC Statute says that the ‘population’ requirement qualifies the victims as “civilians”.⁹⁰ However, it does not mean that “population” should be fully “civilian”, instead it should be “predominantly civilian in nature”, albeit the presence of non-civilian population as well.⁹¹ Surprisingly, the French case law shows that military personnel can be included to the scope of the “civilian population” within the context of crimes against humanity.⁹²

Article 50 of Additional Protocol I to the Geneva Conventions can be regarded as a reference point for defining the ‘civilian’ term in crimes against humanity as it somehow reflects customary international law.⁹³ Despite its broad application to international humanitarian

⁸⁷ See *Kunarac* (Appeals Chamber Judgment), para. 91; *Blaskić* (Appeals Chamber Judgment), para. 105 (citing *Kunarac*); *Lukić and Lukić* (Trial Chamber Judgment), para. 874; *Prosecutor v. D. Milošević*, No. IT-98-29/1-A, Judgment, Appeals Chamber, 12 November 2009 (PURL: <http://www.legal-tools.org/doc/44327f/>), para. 58; *Popović and others*, (Trial Chamber Judgment), para. 753; *Tolimir* (Trial Chamber Judgment), para. 696; *Stanisic and Simatovic* (Trial Chamber Judgment), para. 964; *Semanza* (Trial Chamber Judgment), para. 330; concurring *Prosecutor v. Fofana and others*, No. SCSL-04-14-A, Judgment, Appeals Chamber, 28 May 2008 (PURL: <http://www.legal-tools.org/doc/b31512/>), para. 299; *Bemba* (Confirmation Decision), para. 77; *Situation in Kenya* (Authorisation Decision), para. 82; *Katanga* (Trial Chamber Judgment), para. 1104.

⁸⁸ Clotilde Pégorier, *Ethnic Cleansing: A Legal Qualification* (Routledge), (2013), p. 118

⁸⁹ *William Schabas*, supra 1, p. 153.

⁹⁰ See Margaret M. deGuzman, *The Road From Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335. (2000) cited in *Barthe, Triffterer and Ambos*, supra 3, p. 173

⁹¹ See *Kordić* (Appeals Chamber Judgment), para. 180

⁹² See *Prosecutor v. Kupreskic and others*, para 568

⁹³ See *Blaskić* (Trial Chamber Judgment), para. 206

law, *ad hoc* tribunals also used the definition provided therein to determine “whether a person or a population is civilian for the purpose of deciding whether crimes against humanity in other circumstances have occurred”.⁹⁴ Paragraph 1 of the mentioned article expresses the term of “civilian” as follows:

any person who does not belong to one of the categories of persons referred to in article 4 (A) (1),(2), (3) and (6) of the Third Convention and in article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.⁹⁵

In the second part of this article, it defines the “civilian population” as covering “all persons who are civilians”.⁹⁶ The ICTY and ICTR Trial Chambers, however, narrowed the definition to common article 3 of the Geneva Conventions including all persons:

who have not taken active part in hostilities, or are no longer doing so, including members of armed forces who laid down their arms and persons placed hors de combat by sickness, wounds, detention or any other reason.⁹⁷

Turning out to the meaning of the word “any” with regards to the “civilian population” term, it refers to “persons of any nationality” - including of the same nationality as the accused - and “stateless persons”.⁹⁸ The essential point for any court charging crimes against humanity here is to take into account “the specific situation of the victim at the moment the crimes were

⁹⁴ *Barthe, Triffterer and Ambos*, supra 3, p. 173

⁹⁵ Add. Prot. I to the Geneva Conventions, article 50 para. 1. See *Blaškić* (Appeals Chamber Judgment), paras. 110 et seq. (113). For a detailed discussion thereof cf. *Mrksić* (Trial Chamber Judgment), paras. 443 et seq. (463); *Popović and others* (Trial Chamber Judgment), para. 755; *Dungel* (2009) 22 *LeidenJIL* 727, 738. In this formal understanding see *Bemba* (Confirmation Decision), para. 78; *Situation in Kenya* (Authorisation Decision), para. 82; *Katanga* (Trial Chamber Judgment), para. 1102

⁹⁶ Add. Prot. I to the Geneva Conventions, article 50 para. 2.

⁹⁷ This definition is based upon the categories of persons protected by common article 3 of the Geneva Conventions cited in *Barthe, Triffterer and Ambos*, supra 3, p. 174.

⁹⁸ See *Tadić* (Trial Chamber Judgment), para. 635; *Kunarac* (Trial Chamber Judgment), para. 423; *Katanga* (Trial Chamber Judgment), para. 1103; cf. also Ambos and Wirth (2002) 1 *CLF* 13, 22 with further references; Mettraux (2002) 43 *HarvILJ* 237, 254, 256, 299–300.; id., *International Crimes and the Ad Hoc Tribunals* (2005), p. 164-5.; Cassese and Gaeta, *Cassese's International Criminal Law* (2013) 101 et seq.; also Meseke, *Der Tatbestand der Verbrechen gegen die Menschlichkeit nach dem römischen Statut des Internationalen Strafgerichtshofes: Eine völkerstrafrechtliche Analyse* (2004) 149, p. 51; Robinson, in: Cryer, Friman, Robinson and Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2014), p. 229, 240; Pe'gorier, *Ethnic Cleansing: A Legal Qualification* (2013), p. 115 cited in *Barthe, Triffterer and Ambos*, supra 3, p. 174.

committed, rather than his status”.⁹⁹ Therefore, the concept of “civilian population” should include anyone except “an active combatant of a hostile armed force”, everyone else is “in a ‘specific situation’ requiring protection”.¹⁰⁰ The scope covers a quite large spectrum than one can imagine, including, but not limited to soldiers, or police officers “who are in the need of protection”.¹⁰¹ All of these provisions proved crimes against humanity be much more comprehensive compared to victims of war crimes in terms of their position as well as status.¹⁰²

Because of the character of war crimes, it could only be committed against “persons linked to the adversary”.¹⁰³ With regards to crimes against humanity, on the other hand, it is not necessary “to demonstrate that the victims are linked to any particular side in the attack against the civilian population, even if this occurs during armed conflict”.¹⁰⁴

⁹⁹ See *Muvunyi* (Trial Chamber Judgment), para. 513 citing *Bagilishema* (Trial Chamber Judgment), para. 79, and *Blaškić* (Trial Chamber Judgment), para. 214.

¹⁰⁰ *Barthe, Triffterer and Ambos*, supra 3, p. 174.

¹⁰¹ Kolb and Scalia (eds.), *Droit International Pénal: Précis* (2012) 1, p. 102

¹⁰² *Barthe, Triffterer and Ambos*, supra 3, p. 175

¹⁰³ See *Delalić* (Čelebići Trial Chamber Judgment), paras. 193–198.

¹⁰⁴ *Barthe, Triffterer and Ambos*, supra 3, p. 175

2. Chapter 2. Concept of crimes against humanity in criminal law of the Republic of Azerbaijan

This part will discuss the conceptualization of crimes against humanity in national criminal law, its main development and most importantly, main shortcomings. In doing so, it will analyze the missing “internationalizing components” of such crimes by comparing the notion provided in Azerbaijani criminal legislation in force with the existing concept of crimes against humanity in international criminal law. The part will largely focus on the landmark case of *Mkrtchyan and Khosrovyan* over which Baku Military Court held its decision in 2021 and established some questions with regards to missing elements of crimes against humanity for national scholarly debate.

2.1. The development of the concept in criminal law of the Republic of Azerbaijan

It has been already discussed that crimes against humanity are extremely odious offences to the most serious crimes of concern to the international community. It is for this reason that virtually all governments around the world bear the main responsibility to protect its public and ensure accountability for these serious crimes. International criminal law thereby requires any state to promptly investigate reports of such crimes and prosecute and punish perpetrators in due regard. This *erga omnes* obligation on states is clearly defined in the relevant international legal documents and as a reflection of customary international law has been repeatedly reaffirmed by the General Assembly and the Security Council of the United

Nations.¹⁰⁵ In the context of the fulfillment of this obligation, states must reflect crimes against humanity in their criminal law and provide the relevant sanctions that commensurate with the nature of such crimes.¹⁰⁶

To meet this obligation, the prohibition of crimes against humanity has already received a status of international crime in criminal law of the Republic of Azerbaijan.¹⁰⁷ It first appeared in the section VII of the Criminal Code, which entered into force on September 1, 2000, dealing with the acts (slavery, extermination of the population, deportation, sexual violence, persecution, violent extermination, racial discrimination (apartheid), international deprivation of liberty in violation of the law and so forth) that amounts to crimes against humanity. Then version of the Criminal Code of the Republic of Azerbaijan manifested these crimes under the heading of “crimes against peace and security of mankind”, but it then replaced the word “mankind” with “humanity”.¹⁰⁸ It also covered genocide within the category of crimes against humanity which has been removed later due to its certain characteristics. The section thereafter attributed other crimes such as war crimes and

¹⁰⁵ Statement by Mr. Tofiq F. Musayev Deputy Permanent Representative of the Republic of Azerbaijan at the Sixth Committee of the seventy-sixth session of the United Nations General Assembly under agenda item 83: "Crimes against humanity" 15 October 2021, https://www.un.org/en/ga/sixth/76/pdfs/statements/cah/09mtg_azerbaijan.pdf

¹⁰⁶ See Alovzat Allahverdiyev, *‘Beynəlxalq hüquqda insanlıq əleyhinə cinayətlər’*, (Science and Education Press), (2017), p. 211 <http://anl.az/el/Kitab/2018/02/cd/2017-1752.pdf>

¹⁰⁷ Article 14 (1) of the Criminal Code deals with the concept of a ‘crime’ in criminal law of the Republic of Azerbaijan. It defines the notion as follows: "A socially dangerous act committed guiltily which is prohibited by the present Code under threat of punishment shall be deemed to be a crime". Only actions that are committed guiltily (i.e. with either intent or negligence) may constitute a crime. Furthermore, a mere declaration that a particular action constitutes an offence is insufficient without any accompanying prescription of punishment for such an offence. Thus, Section 14(1) articulates that the socially dangerous act must be "prohibited. . . under the threat of punishment." Crimes against humanity hereby are criminal offences that was included in VII section of CC in 2000. see Article 14 (1) of *Criminal Code of the Republic of Azerbaijan*, <http://e-qanun.az/framework/46947>

¹⁰⁸ Law of the Republic of Azerbaijan. *On Additions and Amendments to Some Legislative Acts of the Republic of Azerbaijan*. No. 172-IIQD of July 2, 2001 (Collection of Legislation of the Republic of Azerbaijan, 2001, № 7, Article 455) in the name of Section VII the word has been replaced by the word "humanity", as the heading could not reflect the essence of these crimes, arguably since it had a wide range of subjects covering.

genocide, implying that these crimes pose an enormous threat to “the international community as a whole” as much as crimes against humanity.¹⁰⁹

As mentioned above, the explanatory note of article 105 of the Criminal Code requires the acts “committed with direct intention as a part of a widespread or systematic attack against any civilian population either in peacetime or in time of war” to constitute crimes against humanity. These requirements appear in a number of international documents such as the International Criminal Court’s “Elements of Crimes” under the Rome Statute, the case-law of the International Criminal Court and other international criminal courts and tribunals, and increasingly national courts. The text remains uncertain for many, however, because there is a lack of clarity concerning what this wording entails in criminal law of the Republic of Azerbaijan and its scholarly literature. It therefore needs to determine for what each component stands; otherwise lack of the precise definition of ‘threshold context’ would lead to false charges over crimes against humanity.

The ‘threshold context’, that is to say, “widespread or systematic attack” within the concept of crimes against humanity, is almost verbatim the text of article 7 (1) of the ICC Statute with some missing “internationalizing elements”. The note of article 105 of the CC is a “without prejudice” clause which indicates that this provision only covers crimes against humanity yet leaves a room for the broader interpretation of the terms therein.

Since the “widespread or systematic attack” requirement within the context of crimes against humanity has been widely discussed above,¹¹⁰ this part will focus on the missing

¹⁰⁹ See *Allahverdiyev*, supra 106, p. 212

¹¹⁰ See *Chapter 1.3*, above

“internationalizing elements” of crimes against humanity in national criminal law from the comparative approach.

2.2. Missing “internationalizing elements”

Most of the national criminal legislation has reflected only the threshold in article 7 (1) of the ICC Statute, but not an explanation of the context of crimes against humanity. Criminal law of the Republic of Azerbaijan is not an exception in this regard as it also lacks some 'common elements' defining crimes against humanity and “differentiating such crimes from ordinary criminality”.¹¹¹

2.2.1. Missing ‘policy’ element

Arguably, the first and foremost setback of national criminal law is that it lacks a rigorous requirement of policy or plan within the ‘threshold context’ of crimes against humanity as widely accepted in customary international law. Unlike ongoing scholarly debates in international criminal law, it seems that none of the criminal law of the Republic of Azerbaijan scholars undertook to explain the conceptual framework for that context either.

¹¹² The concept provided by the criminal law of the Republic of Azerbaijan then fails to reflect the ‘common elements’ in question, and the precise contours of crimes against humanity have not been elaborated.

¹¹¹ Barthe, *Triffterer and Ambos*, supra 3, p. 164.

¹¹²See Alovzat Allahverdiyev, ‘*Beynəlxalq hüquqda insanlıq əleyhinə cinayətlər*’, (Science and Education Press), (2017) <http://anl.az/el/Kitab/2018/02/cd/2017-1752.pdf>; Rahim Mammadov ‘*Beynəlxalq cinayət hüququ və Azərbaycan Respublikasının cinayət qanunvericiliyi*’, (Law Press) (2012) <http://anl.az/dissertasiya/el/X/X91.html>; Firudin Samandarov ‘*Azərbaycan Respublikasının Cinayət Məcəlləsinin Kommentariyası*’ (Law Press) (2018) <https://seymurhuseynov.home.blog/2019/12/23/cinay%C9%99t-m%C9%99c%C9%99l%C9%99sinin-xususi-hiss%C9%99sinin-komentariyasi-pdf/>; Isfandiyar Agayev ‘*Cinayət Hüququ – Xüsusi hissə*’ (‘Nurlar’ Press) (2018) <http://agayev.az/2018/10/07/cinay%C9%99t-huququ-xususi-hiss%C9%99/>

The controversy with respect to the ‘policy’ element has also been a matter of discussion among international criminal law scholars. The element first appeared in a Bureau Discussion Paper released at the end of the Rome Diplomatic Conference.¹¹³ Article 7 (2) of the Statute of International Criminal Court (ICC) and ‘Elements of Crimes’ require that crimes against humanity be committed pursuant to “State or organizational policy”.¹¹⁴ Although the other core elements of crimes against humanity in accordance with the Statute are noncontroversial, the policy element has been a question for both the international case-law and scholarly debate over the years.¹¹⁵

Controversy in international criminal law derives its origin from over the wording “policy” as the content of the element is not much clear.¹¹⁶ Some authorities argue that the policy element should be a rigorous requirement of crimes against humanity as the random occurrence of such crimes cannot constitute “a systematic attack”.¹¹⁷ Otherwise, it would potentially make such crimes appertain to a great magnitude of acts.¹¹⁸

The explanatory note of Article 105 of the Criminal Code, which refers to articles 105-113 does not contain a requirement of the “State or organizational policy” element for the acts to amount to crimes against humanity. It is only the crime of enforced disappearance of persons

¹¹³ The element was initially adopted as “a necessary element” of crimes against humanity, but later was reversed in the International Criminal Tribunal for former Yugoslavia and Rwanda, see Leila Nadya Sadat, *Crimes against Humanity in the Modern Age*, 107 AM. J. INT’L L. 334, p. 348 (2013) <https://sites.law.wustl.edu/docs/scholarshipspotlight/sadat-AJIL.pdf>

¹¹⁴ Article 7(2) (a) reads as follows: “Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph I against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack...” *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 UNTS 90 International Criminal Court (ICC), *Elements of Crimes*, 2011, ISBN No. 92-9227-232-2 <https://www.refworld.org/docid/4ff5dd7d2.html>

¹¹⁵ Other elements include (1) the commission of the crime as part of a “widespread or systematic attack;” (2) against a civilian population; See *ibid.*

¹¹⁶ Barthe, *Triffterer and Ambos*, supra 3, p. 246

¹¹⁷ *Cryer*, supra 8, p. 240

¹¹⁸ William Schabas. *State policy as an element of international crimes*. (Journal of Criminal Law and Criminology), 98(3), 953-982 (2008), p. 960

(article 110) in which the text of the crime puts the contours of policy element as a requirement. The disposition of this crime reads as follows:

Arrest, detention or abduction of persons by, or with authorization, support or with the acquiescence of the state or political organization, followed by a refusal to acknowledge the deprivation of liberty or to provide information concerning that person's fate or whereabouts, with the intention of depriving them of the protection of law for a prolonged period of time.

The special feature of this crime in criminal law of the Republic of Azerbaijan - "state-sponsored nature" -differentiate it from other types of crimes against humanity and "adds to its gravity"¹¹⁹ derives its origin from the ILC Draft Code in 1996. Whereas the crime of enforced disappearance of persons was later included in the ICC Statute, its definition involved a "considerable controversy" in international criminal law.¹²⁰ It is mainly due to the expansion of the term to the "political organizations" which is also expressed in article 110 of the Criminal Code. Thus, there has been a consistent approach among scholars with "the fundamental proposition that crimes against humanity may be committed by non-State actors",¹²¹ and criminal law of the Republic of Azerbaijan has adjusted the definition to the accepted threshold of this specific crime.

As for other components of the crime of enforced disappearance of persons, Azerbaijani scholars more or less attempted to define the disposition of article 110. Samandarov, for example, argues that "authorization of the state or political organization" manifested in article 110 of the CC directly refers to the requirement of the acts of "arrest, detention or abduction

¹¹⁹ *Barthe, Triffterer and Ambos* supra 3, p. 227

¹²⁰ *Ibid*, p. 229

¹²¹ *Cryer*, supra 8, p. 263

of persons”.¹²² According to his approach, the “support... of the state or political organization” might be interpreted as provision of the tools such as “financial resources, vehicles, technical instruments, guns, clothes” to commit the crime.¹²³ The “acquiescence of the state or political organization” in committing the crime of enforced disappearance of persons expresses “giving a positive response to the perpetrator who intends to deprive the victim of personal liberty”.¹²⁴ These definitions in criminal law of the Republic of Azerbaijan are more likely to be the same with those accepted in international criminal law. The essence of these crimes, however, lies at the fact that “the friends and families of the victims do not know whether the persons concerned are alive or dead”.¹²⁵

The need to reflect “State or organizational policy” as a requirement in other types of crimes against humanity has not been discussed in Azerbaijani scholarly literature. A vast majority of authors in this field only paraphrased what already exists in the Criminal Code even without elaborating the definition therein. The answers of interview respondents (one prosecutor and two professors) varied from each other; it turned out that the “policy” element need not be a part of the contextual threshold of crimes against humanity. One of the interviewees said that:

The scope of crimes against humanity will be limited in case the policy element is to be included in the Criminal Code.The most important point here is the motive of the crimes, not the elements. The motive to commit such crimes would be anything else except for personal motive and hooliganism. So, in my opinion, there is no need to add this kind of element to the note of article 105 [explanatory note of crimes against humanity].¹²⁶

¹²² Firudin Samandarov ‘*Azərbaycan Respublikasının Cinayət Məcəlləsinin Kommentariyası*’ (Law Press) (2018), p. 361

¹²³ *Ibid*, p. 361

¹²⁴ *Ibid*, p. 361

¹²⁵ Cryer, supra 8, p. 264

¹²⁶ Interview with A. B. Prof in Law (20 April 2022) phone recording, Baku, Azerbaijan.

Those who are against the policy element being a part of crimes against humanity also argue that these crimes are committed by men, not by legal persons or abstract entities.¹²⁷ This opinion coincides with the oft-cited expression from then the judgement of International Military Tribunal. However, it is important to note that a lot had changed in international criminal law since this approach first appeared. As Schabas states in his article concerning the policy element:

The Nuremberg judgment was correct to insist that crimes are committed by individuals and not by abstract entities, but individual crimes committed in isolation from abstract entities are of little or no interest at the international level. Indeed, the existence of a State policy may be the best criterion in distinguishing between individual crimes that belong to national justice systems, and international crimes with their special rules and principles concerning jurisdiction, immunities, statutory limitations, and defences.¹²⁸

The scholarly literature in international criminal law shows that the “policy” element should be a rigorous requirement of the act to constitute a crime against humanity to differentiate such crimes from the crimes in national criminal law. Then the questions arise for criminal law of the Republic of Azerbaijan and scholars: What is the main difference between crimes against humanity and other crimes which fall under the national jurisdiction?

When asking about this difference, two interviewees highlighted the object of such crimes, which is “public relations with respect to the security of peace and mankind” and “non-existence of the personal motives”.¹²⁹ Although the object of crimes plays a crucial role for

¹²⁷ *Schabas*, supra 118, p. 982 The phrase reads as follows: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”

¹²⁸ *Ibid*, p. 982

¹²⁹ Zoom interview with A. A. Prosecutor (07 April 2022) phone recording; Interview with A. B. Prof in Law (20 April 2022) phone recording, Baku, Azerbaijan. See also *Samandarov*, supra note 128, p. 351

distinguishing crimes from each other, this character may not be applied to virtually all crimes. The “personal motive” also seems as an irrelevant statement for international crimes since the commentary of the Criminal Code expresses that “the motive of the crime [a crime against humanity] does not affect the interpretation of the act”.¹³⁰ Additionally, it leads the topic to another direction – mental element of crimes against humanity – which will be widely discussed below.¹³¹

On the other hand, another interviewee finds the definition of crimes against humanity “not autochthonous to criminal law of the Republic of Azerbaijan”, arguing that “crimes against humanity are state backed and state sponsored criminality”.¹³² Divergence over the subject of these crimes also arose with regards to the argument whether crimes against humanity may be committed by one or more perpetrators. One of the interviewees argued that Article 34 of the Criminal Code establishes the common grounds for the commission of any crime “by a group of persons, a group of persons with prior conspiracy, an organized group or a criminal association (criminal organization)” constitutes “an aggravating circumstance”.¹³³ According to the interviewee:

article 32 of the Criminal Code distinguishes four modes of liability that is “(direct) perpetrator, organizer, instigator and accomplice”. The first two seem closer to principal liability in international criminal law, while the other two are close to accomplice liability. Article 34 covers joint perpetration, and article 35 includes “the excess of the perpetrator”. I think these articles are sufficiently flexible in applying to crimes against humanity.¹³⁴

¹³⁰ *Samandarov*, supra 122, p. 351

¹³¹ See page 33 below

¹³² Written interview via email with A. C., Professor of Law (04 June 2022)

¹³³ *Ibid*

¹³⁴ *Ibid*

However, the subject needs to be precisely manifested in the explanatory note of crimes against humanity as it leaves an open room for a broader interpretation. While the first two interviewees see the possibility of acts to be committed even by an individual based on the motive of hatred or hostility,¹³⁵ the last interviewee says that “crimes against humanity require the involvement of a multiplicity of perpetrators” except for “murder” and “torture”.¹³⁶

Strong division among the indicators of customary international law is also growing as to the “State or organizational policy” element of crimes against humanity.¹³⁷ On the one hand, the element appears as “a modest threshold” that excludes random or isolated action from the list of these crimes.¹³⁸ This approach emanating from the ICC Statute, arises in most national jurisprudence and takes the form of *opinio juris*.¹³⁹ On the other hand, Tribunal jurisprudence, namely the jurisprudence of the ICTY, ICTR and SCSL tribunals,¹⁴⁰ rejects the policy element. Nevertheless, the omission of this element both in international criminal tribunals and national criminal law does not imply that it cannot “be derived from the requirement of the attack, at least in its systematic form”.¹⁴¹

Albeit many controversies, the common contemporary approach of international criminal law with respect to the “policy” element is that: a lack or rejection of the 'policy' element results

¹³⁵ Zoom interview with A. A. Prosecutor (07 April 2022) phone recording; Interview with A. B. Prof in Law (20 April 2022) phone recording, Baku, Azerbaijan.

¹³⁶ Written interview via email with A. C., Professor of Law (04 June 2022)

¹³⁷ *Cryer*, supra 8, p. 26

¹³⁸ See *deGuzman*, supra 90, p. 335–403

¹³⁹ *Cryer*, supra 8, p. 239.

¹⁴⁰ ICTY stands for the International Criminal Tribunal for former Yugoslavia, ICTR - International Criminal Tribunal for Rwanda and SCSL for Special Court for Sierra Leone.

¹⁴¹ *Barthe, Triffterer and Ambos*, supra 3, p. 245

in the "failure to describe the crime accurately, or else a loss of the basic conceptual foundation for crimes against humanity".¹⁴²

2.2.2. Missing *mens rea* element

Second, another missing element appears to be the insufficiency of the *mens rea* requirements in national criminal law, which should require the perpetrator to act with "the knowledge of the attack". Indeed, the elaboration of these components based on the comparative approach below is essential for the completeness of the national legal and conceptual framework concerning crimes against humanity.

In order to distinguish crimes against humanity from other crimes, the 'mental' element, that is to say, *mens rea* requirement on the part of the accused, plays an irreplaceable role. With this in mind, article 7 of the ICC Statute explicitly expresses that the accused should have "the knowledge of the attack".¹⁴³ The Elements of Crimes has also set up the requirement as a "second contextual element" of crimes against humanity which in turn requires that "[t]he 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". The requirement is also consistent with the jurisprudence of *ad hoc* tribunals and constitutes "an additional mental element to be distinguished from the general *mens rea* requirement of article 30 [of the ICC Statute]".¹⁴⁴ It is therefore important to distinguish the rigorous requirements regarding the attack from those with respect to acts of the accused.

¹⁴² Robertson, supra 11, p. 311. See also Luban supra 34, p. 85

¹⁴³ See supra 14

¹⁴⁴ See Ambos, *Treatise on ICL II* (2014) cited in Barthe, Triffterer and Ambos, supra 3, p. 175

One should differ “the knowledge of the acts” from “the knowledge of the attack” within the context of crimes against humanity. The term of ‘knowledge’ is clearly reflected in article 30 of the ICC Statute meaning that “awareness that a circumstance exists or a consequence will occur in the ordinary course of events”. Case-law even goes beyond article 30, extending the scope of the term in the following way:

knowledge also includes the conduct ‘of a person taking a deliberate risk in the hope that the risk does not cause injury’. This approach extends knowledge from ‘full’ or ‘positive’ or ‘actual’ knowledge well into the field of recklessness, and, the ‘constructive knowledge’ which exists when the perpetrator is aware of the risk that his conduct can be objectively construed as part of the broader attack.¹⁴⁵

As seen from the case text, ‘knowledge’ does not carry out the exact same meaning with the ‘intent, and it should therefore be different from of what ‘the intent’ comprises in national criminal law. The approach of criminal law of the Republic of Azerbaijan and that of international criminal law in relation to the ‘knowledge’ and ‘intent’ requirements will be compared below.

Criminal law of the Republic of Azerbaijan omits the ‘knowledge’ term, leading to confusion relating to the terms of ‘intent’ and ‘knowledge’ even among scholars. Article 25 of the Criminal Code distinguishes two forms of ‘intent’, one as direct and another indirect. The commentary of the Criminal Code states that crimes against humanity are committed “with direct intent”.¹⁴⁶ The criminal law of the Republic of Azerbaijan considers the acts committed with “direct intent” provided that “the person realized the public danger of his/her acts (action

¹⁴⁵ See *Tadic* (Trial Chamber Judgment), para. 659; and *Finta*, para. 701

¹⁴⁶ *Samandarov*, supra 122, p. 351

or inaction), foresaw their publicly dangerous consequences and wished these consequences”.¹⁴⁷

It is important to note that the direct intention requirement refers to the acts of the accused, not “the attack directed against any civilian population”. Thus, only “the attack”, not the individual’s acts “must be widespread or systematic” within the meaning of crimes against humanity.¹⁴⁸ Criminal law of the Republic of Azerbaijan then should reflect the additional mental element which requires that “the accused must be aware of the broader context in which his actions occur”.¹⁴⁹ This refers to “the necessary connection ... by means of the perpetrator’s mindset and ensures that single, isolated acts, which only happen to have been carried out contemporaneously with an overall attack”.¹⁵⁰

It has been controversial to what extent the accused must aware of “the attack”. This question raised a significant debate among scholars of international criminal law. Standard mental element for the specific crimes extends to the degree that the accused should also have the ‘intent’ and the knowledge of “the attack targeted against a civilian population”.¹⁵¹ While criminal law of the Republic of Azerbaijan and literature omits the ‘mental’ element, nearly all commentators of the ICC Statute discuss that element of each type of crimes against humanity.¹⁵²

In addition to what has been mentioned above, the perpetrator does not have to know the details of the attack, as outlined in “Elements of Crimes”. It states that the accused need not

¹⁴⁷ See Article 25 of *Criminal Code of the Republic of Azerbaijan*, <http://e-qanun.az/framework/46947>

¹⁴⁸ See *Kunarac* (Trial Chamber Judgment), para. 96; and *Blaskic*, para. 101

¹⁴⁹ See *Tadic* (Trial Chamber Judgment), para. 248

¹⁵⁰ *Barthe, Triffterer and Ambos*, supra 3, p. 176

¹⁵¹ *Cryer*, supra 8, p. 244

¹⁵² See *Schabas; Triffterer; Klamberg*, supra 1; 2; 42.

have “knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization”, but it seems sufficient that he is “aware of the existence of the attack in general”.¹⁵³ It is also worth noting that knowing of the features of his actions is not a necessary component for the accused who needs to be aware of the facts in relation to “the attack which increased the dangerousness of his [accused’s] conduct for the victims or turned this conduct into a contribution to the crimes of others”.¹⁵⁴

Furthermore, customary international law, from *Tadic* case to the Secretary General Report on the establishment of the ICTY to article 3 of the ICTR Statute, required ‘discriminatory intent’ from the perpetrator to commit crimes against humanity. However, this position met extreme criticism, limiting the intent to only charging of the crime of persecution. On the contrary to the perceptions of Azerbaijani criminal lawyers, case law in recent years avoided this requirement. It proved that “the accused’s motive to participating in the attack is legally irrelevant”, meaning that the accused can commit crimes against humanity “for purely personal reasons”¹⁵⁵ and he can be subject to convictions “even if his personal motive differed from the purposes underscoring the attack”.¹⁵⁶

Apart from that, the accused need not share “the purpose or goal behind the attack”.¹⁵⁷ It suffices to meet the requirement of this mental element that the perpetrator should only be

¹⁵³ See Fernandez and Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire article par article* (2012) 417, 476-8; *Katanga and Ngudjolo* (Confirmation Decision), para. 401.

¹⁵⁴ See Ambos and Wirth (2002) 1 CLF 13, 41 cited in *Barthe, Triffterer and Ambos*, supra 3, p. 176

¹⁵⁵ See *Kunarac* (Appeals Chamber Judgment), para. 103 (fn. omitted). See also *Kordic* (Appeals Chamber Judgment), para. 99 (quoting *Kunarac*); *Blaškić* (Appeals Chamber Judgment), para. 124. ICTR: *Prosecutor v. Semanza*, No. ICTR-97-20-A, Judgment, Appeals Chamber, 20 May 2005 (PURL: <http://www.legal-tools.org/doc/a686fd/>), paras. 268–269; *Prosecutor v. Simba*, No. ICTR-01-76-T, Judgment, Trial Chamber, 13 December 2005 (PURL: <http://www.legal-tools.org/doc/373ff0/>), para. 421 (‘A perpetrator must have acted with knowledge of the broader context and knowledge that his acts formed part of the attack, but he need not share the purpose or goals behind the broader attack’)

¹⁵⁶ Mettraux, G., *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda* (2002) 43 Harvard International Law Journal, p. 262

¹⁵⁷ See *supra* 153

aware that “his acts are part of the attack” within the context of crimes against humanity. In any case, the recent prevailing view suggests that “knowledge may be inferred from the relevant facts and circumstances”.¹⁵⁸

¹⁵⁸ *ICC Elements*, General Introduction, para 3.

3. Chapter 3. Difficulties over national prosecution case in Azerbaijani court

The lack of precise definition of crimes against humanity in criminal law of the Republic of Azerbaijan not only constitutes the main limitation in bringing the perpetrators to the justice but leads to the wrong interpretation by national authorities. However, the absence of the “internationalizing elements” of such crimes from criminal law of the Republic of Azerbaijan is not surprising because it has not been a significant concern for national lawmakers and scholarly literature in the last thirty years. It is mainly because that crimes against humanity had not been charged by the national courts until 2021.¹⁵⁹ It was the first time in the practice of the national court when it convicted two Armenian nationals - *Mkrtchyan and Khosrovyan* - who were later found guilty of torturing Azerbaijani war of prisoners during the first Karabakh war in the early 1990s.

3.1. Controversial views regarding the scope of domestic criminal law

Before delving into the case of *Mkrtchyan and Khosrovyan*, it is important to address some controversial issues with regards to the national criminal law. As mentioned above, the prohibition of crimes against humanity acquired the status of international crime in the Criminal Code of the Republic of Azerbaijan when the current Code was adopted. First prosecution case of crimes against humanity since the offence was introduced into the Criminal Code, however, raised several questions in relation to its ‘credibility’ due to the absence of the essential elements of such crimes in criminal law of the Republic of

¹⁵⁹ Zoom interview with A. A. Prosecutor (07 April 2022) phone recording

Azerbaijan. The legal challenges became apparent with regards to the prosecution of these crimes as criminal law of the Republic of Azerbaijan only comprises of the Criminal Code and that characteristic makes it completely restricted to the provisions therein:

The criminality of an act, and also the punishability thereof and other criminal law consequences, shall be determined only by the present Code.¹⁶⁰

Another considerable provision is related to the definition of ‘crime’ which is provided in article 14 (1) of the Criminal Code.¹⁶¹ This article implies the need to exclusively rely on the provisions of the Criminal Code while determining the extent of the responsibility even within the context of international crimes such as crimes against humanity and war crimes. The issue opened a room for the discussion of the question of incorporation of universally-recognized international legal norms into criminal law of the Republic of Azerbaijan. Below the reverse views in national scholarly literature within the meaning of the Criminal Code will appear.

On the one hand, one can argue that the only source of national criminal law is encompassed by the Criminal Code referring to the articles mentioned above and article 1 (1) of the Criminal Code.¹⁶² Nevertheless, article 1 (2) of the Criminal Code raises some doubts on this approach:

The present Code is based on the Constitution of the Republic of Azerbaijan and the generally recognized principles and norms of international law.¹⁶³

¹⁶⁰ See article 5 of *Criminal Code of the Republic of Azerbaijan*

¹⁶¹ See *supra* note 108

¹⁶² The article 1 (1) reads as follows: “The criminal law of the Republic of Azerbaijan consists of the present Code”.

¹⁶³ See article 1 of *Criminal Code of the Republic of Azerbaijan*

It is therefore important to take into account what the supreme law - the Constitution - says in this regard. Article 148 of the Constitution considers international agreements of the Republic of Azerbaijan “a component part of its legal system” and article 151 of the Constitution recognizes the supremacy of international agreements over domestic legal provisions.¹⁶⁴ However, it is silent when it comes to the exact question of generally recognized principles and norms of international law.

As seen from the provision, criminal law of the Republic of Azerbaijan covers the universally-recognized principles and norms of international law in the Criminal Code. However, it is controversial as to in which way the interpretation of this provision was perceived by the national scholars as well as practitioners.

From the scholarly viewpoint, the commentary and the research pieces referring to or rephrasing the Criminal Code merely underline the importance of incorporating the generally recognized principles and norms of international law without any further clarification.¹⁶⁵ In the interview with the prosecutor, the issue has also been a focus point when asking about the existence of ‘policy’ element of crimes against humanity in national criminal law:

A person can be convicted under a certain crime if his or her actions contain all of the features of the offence which are prescribed in the Criminal Code of the Republic of Azerbaijan. Unlike other fields of law, criminal law is a field to which even the norms of international agreements that Azerbaijan has already ratified shall not directly be applied, not to mention the generally recognized principles and norms of international law. In any case, the relevant norms should be incorporated into the Criminal Code; otherwise prosecution of the offences

¹⁶⁴ See articles 148 and 151 of the Constitution of the Republic of Azerbaijan

¹⁶⁵ See *supra* note 103

will rely on the Criminal Code. It is therefore a must to incorporate international legal norms by way of amendments to the Code.¹⁶⁶

The missing “internationalizing elements” of crimes against humanity in national criminal law would need to be added to the Criminal Code. Domestic law makes it clear that direct application of the generally recognized principles and norms of international law dealing with crimes against humanity or any crimes seems impossible. In this sense, article 1 (3) of the Criminal Code is worth noting provision:

Laws defining criminal responsibility and punishment of the person who committed a crime can be applied only after being included in this Code.

This characteristic of domestic criminal law would potentially pose tremendous difficulties in prosecuting individuals for crimes against humanity due to the absence of certain components in the Code. Several challenges appeared concerning how the concept was defined in criminal law of the Republic of Azerbaijan and how evidence was collected in the case of *Mkrtichyan and Khosrovyan* which will be widely discussed below.

3.2. Overview of national prosecution of international crimes

It is essential to strengthen the national justice systems of the countries in order to national prosecution of international crimes be conducted thoroughly. Countries such as Germany, Bosnia, Argentina, and Colombia have already established their national mechanisms to try the perpetrators of war crimes and crimes against humanity.¹⁶⁷ The report of the World Bank also states the need for national prosecutions of international crimes pointing out that its

¹⁶⁶ Zoom interview with A. A. Prosecutor (07 April 2022) phone recording.

¹⁶⁷ David Kaye & Council on Foreign Relations, *Justice Beyond the Hague: Supporting the Prosecution of International Crimes in National Courts* (Council on Foreign Relations) (2011), p. 6

contribution to “legitimate institutions and governance” which are “crucial to break cycles of violence”.¹⁶⁸ Nevertheless, national courts might face several challenges in terms of collecting evidence and thereby conducting an independent investigation, protecting witnesses, and interpreting some provisions of the Criminal Code while prosecuting such crimes. This part will examine existing national mechanism in criminal law of the Republic of Azerbaijan, and secondly will show what legal reforms are crucial to serve the needs of international justice.

Baku Military Court held a first trial on the criminal *case against Ludwig Mkrtichyan and Alyosha Khosrovyan*, who tortured Azerbaijani prisoners of war and committed other crimes during the first Karabakh war. The acts of these two Armenian nationals have thus been interpreted under the section of crimes against peace and humanity of the Criminal Code. In light of the conceptualization of crimes against humanity in criminal law of the Republic of Azerbaijan, it is therefore crucial to look briefly at the facts of the case, and analyze the shortcomings of the prosecution.

3.2.1. Facts in a nutshell

Ludwig Mkrtichyan, a 53-years old Armenian national, participated in the hostilities between Armenia and Azerbaijan in the early 1990s. The accused detained an Azerbaijani hostage in the Ballyja Forest near Khojaly for nearly 17 days on July 12, 1991. Mkrtichyan tortured an Azerbaijani civilian when he acted as a translator during the interrogation by the Armenian special services in 1999. Moreover, the investigation revealed that he tortured 11 more

¹⁶⁸ World Development Report 2011: Conflict, Security and Development, a report of the World Bank (2011), p. 2 <https://openknowledge.worldbank.org/handle/10986/4389>

Azerbaijani civilian hostages at various times and also shot a service member of the military unit of the Ministry of Defense.¹⁶⁹

According to the investigation, another accused - Khosrovyan - tortured five Azerbaijanis in captivity in 1993-1994 and subjected a serviceman of one of the military units of the Ministry of Defense of Azerbaijan, who was taken as a prisoner, to cruel inhuman treatment. During the illegal detention of the serviceman in a private house in the Khojavand district of the Nagorno Karabakh region, Khosrovyan forced him to work on the construction of the house of the then so-called Minister of Defense of the Nagorno-Karabakh region.¹⁷⁰ In addition, the investigation revealed that both accused were members of Yerkrapa Terrorist Organization which is a semi-militarist organization, comprising of Armenian volunteers who took part in the hostilities during the First Karabakh War and regularly involving children.¹⁷¹

Ludwig Mkrtichyan and Alyosha Khosrovyan were detained by the servicemen of the Armed Forces of Azerbaijan during an attempt to carry out “acts of reconnaissance” in the territory of Azerbaijan on October 2020. Both were charged under articles 113 (“torture”), 115.2 (“violation of the laws and customs of war”), 279.1 (“illegal establishment of armed formations or groups”) and other articles of the Criminal Code of the Republic of Azerbaijan.¹⁷² In August 2021, Baku Military Court held a decision to sentence each to 20-year imprisonment based on the mentioned facts and evidence.

¹⁶⁹ See *Trial over Armenian criminals who tortured Azerbaijani prisoners of war begins* [PHOTO], 2021

¹⁷⁰ See *ibid*

¹⁷¹ Zoom interview with A. A. Prosecutor (07 April 2022) phone recording.

¹⁷² Zoom interview with A. A. Prosecutor (07 April 2022) phone recording.

3.3. Potential problems regarding the prosecution

Taking into account the omission of some components of crimes against humanity in criminal law of the Republic of Azerbaijan, the need to analyze the prosecution of these crimes emerges. Firstly, it is worth noting that the requirements of the explanatory note of article 105 do not seem to be met mainly in terms of “widespread or systematic attack”, and the verdict does not entail any provision or fact relating to the “attack” requirement. Nor has the prosecutor talked about this “threshold element” of crimes against humanity in international criminal law during the interview. Therefore, it is unclear on which grounds torture could constitute a crime against humanity as defined in article 113 of the Criminal Code in the aftermath of the events, even without meeting the basic requirement of such crimes.

Secondly, according to the prosecutor, there has been no need to examine the requirement of the “policy” element in crimes against humanity. The case materials, however, revealed that both perpetrators were members of the Yerkrapa Terrorist Organization funded by the Armenian government, and they committed such crimes “pursuant to or in furtherance of a State or organizational policy”. Nonetheless, it merely served as a fact, and the element was not considered as a requirement while bringing the perpetrators to international justice.

Thirdly, the *mens rea* element, namely the requirement of the “knowledge of the attack” in crimes against humanity, has not been investigated in this case. It only met the requirement of “direct intent” existing in domestic criminal law that referred to the “acts of the accused” instead of “the attack” of which the acts of the perpetrator form a part.¹⁷³ The case thus again

¹⁷³ See page 33 above

proved certain components of crimes against humanity be omitted in national criminal law, grabbing significant attention from the international community.

Conclusion

By omitting the certain elements and overall definition of “widespread or systematic attack”, criminal law of the Republic of Azerbaijan does not adequately capture the notion of crimes against humanity as widely accepted by international criminal law. The concept provided by the domestic criminal law, in turn, fails to reflect the common elements in question. These elements - the ‘state policy’ and additional *mens rea* elements - distinguish crimes against humanity from any other crimes that otherwise could fall under the category of ordinary criminality.¹⁷⁴ It is also important to note that omitting internationalizing elements in crimes against humanity miss out the significance of international crimes to a certain extent.

Scholarly literature in international criminal law certainly sets out the general requirements for crimes against humanity, although various definitions provided in *ad hoc* tribunals and ICC Statute.¹⁷⁵ These most general requirements include ‘widespread or systematic attack directed against any civilian population’ and ‘the appropriate *mens rea* on the part of the accused’.¹⁷⁶ The paper thereby discussed the ‘threshold context’ and certain *mens rea* elements of crimes against humanity that also cover the latter feature of these crimes.

¹⁷⁴ Cryer, supra 8, p. 230

¹⁷⁵ Orlova, supra 22, p. 48

¹⁷⁶ The list can be enlarged by splitting the requirements such as “an attack”, “a nexus between the acts of the accused and the attack”; “an attack directed against any civilian population”; “an attack that is widespread or systematic”; and “the appropriate *mens rea* on the part of the accused” see *ibid*, p. 48

The research shows that the "widespread or systematic attack" constitutes an "accepted formulation for threshold context" of crimes against humanity.¹⁷⁷ Most legal scholars argue that essence of these offences lies very much at this element contributing to understanding the *rationale* of such crimes.¹⁷⁸ Nonetheless, the divergence on the issue of the 'threshold context' arose when the Preparatory Committee of Rome Statute discussed as to whether the concept of widespread or systematic had to be disjunctive or conjunctive.¹⁷⁹ The test has already been accepted to be "either widespread or systematic" namely 'disjunctive'.

Another point with regard to the *chapeau* of article 7 is that some commentators of the ICC Statute remark on the importance of the evidence to prove 'threshold context' to indicate "the scale and magnitude of the offences" while bringing any case before the ICC.¹⁸⁰ Although the commentary of the CC does not touch on this issue, it is clear from the text of definition that "widespread or systematic attack" is a must in crimes against humanity in criminal law of the Republic of Azerbaijan either.¹⁸¹ However, other common elements within the threshold context seem more critical to other commentators.¹⁸² These common elements are 'policy' and 'mental' elements of crimes against humanity which were omitted in whole or in part in criminal law of the Republic of Azerbaijan.¹⁸³

Regarding the 'policy' element of crimes against humanity, Article 7 (2) of the ICC Statute and Elements of Crimes acknowledge the role of 'policy element' in the context of

¹⁷⁷ Cryer, *supra* 8, p. 230

¹⁷⁸ *Ibid*, 236. See also Barthe, Triffterer and Ambos, *supra* 3, p. 155

¹⁷⁹ Cryer argues the French version of the ICTR Statute referred to the requirements conjunctively ('généralisée et systématique') "to be a simple error", see Cryer, *supra* 8, p. 236

¹⁸⁰ Mark Klamberg, *Commentary on the law of International Criminal Court*. (Torkel Opsahl Academic E-publisher) (2017), p.32 cited in Barthe, Triffterer and Ambos, *supra* 3, p. 177

¹⁸¹ See Samandarov, *supra* 122, p. 350-367

¹⁸² See Schabas, *supra* 1, p. 147

¹⁸³ See Allahverdiyev, *supra* 105, p. 221

“prosecutions for crimes against humanity”.¹⁸⁴ The requirement, however, reveals some controversy between scholars. Most think that it derives from the different understandings of 'policy' element.¹⁸⁵ Thus, some see the requirement of this element as unnecessary, while other scholars argue that "the fundamental essence of crimes against humanity" lies in the hands of policy element.¹⁸⁶ Nevertheless, the text of the definition provided by the Criminal Code does not contain an explicit requirement of 'policy' concerning the crimes against humanity.¹⁸⁷ Nor have Azerbaijani criminal literature discussed this essential element; it merely repeats the definition of crimes against humanity provided in the legislation.¹⁸⁸ Although there arises a significant controversy between scholarly literature, recent case law and customary international law tend to opt for the relevance of the element of “State or organizational policy”.¹⁸⁹

To sum up the approach in international criminal law to crimes against humanity, there appear to be two components to establish *actus reus* and *mens rea* in such crimes.¹⁹⁰ One of them is, as discussed above, the existence of a ‘policy element’ without which it seems complicated to distinguish these crimes from ordinary criminality.¹⁹¹ Another component arises as to

¹⁸⁴ See supra 9

¹⁸⁵ Simon Chesterman, *An altogether different order: Defining the elements of crimes against humanity*. (Duke Journal of Comparative & International Law) (2000), p. 316, see also Yoram Dinstein, *Case analysis: crimes against humanity after Tadić*. (Leiden Journal of International Law) (2000), p. 389

¹⁸⁶ *Luban* supra 36, p. 90 See *Schabas*, supra 118, p. 953

¹⁸⁷ Whereas the CC does not require ‘policy element’, Samandarov emphasizes the existence of this requirement in the ILC Draft Articles on crimes against peace and security, “that’s why one cannot commit this crime by oneself”. It seems he agrees that random criminality of individuals does not amount to “the attack” within the meaning of crimes against humanity see *Samandarov* supra note 19, p. 351

¹⁸⁸ See supra note 19

¹⁸⁹ *Robertson*, supra 11, p. 311. See also *Luban* supra 34, p. 85 cited in *Cryer* supra 8, p. 241

¹⁹⁰ *Schabas*, supra 118, p. 981

¹⁹¹ Policy element clarifies “the reality of this special form of criminality and facilitates its distinction”. see *Schabas* supra 118, p. 982

whether the perpetrator should know of “the attack” and act with the intent to further proceed with committing such crimes.¹⁹²

By and large, despite recent developments in international criminal literature, Azerbaijani legal scholars have not covered the elements of crimes against humanity, leading to the gap in the national criminal fora. This research, therefore, assists in clarifying the concept of crimes against humanity in criminal law of the Republic of Azerbaijan, identifying its shortcomings, and showing further development directions. It will contribute to criminal law of the Republic of Azerbaijan to a greater extent as in the appendix to the paper relevant amendments will be proposed to the Criminal Code. Students and practitioners can also use this paper as one of the sources for their international law and criminal law courses. The thesis may imply new research questions for further studies, such as "what is the intent requirement of crimes against humanity?", "what does the policy element mean as a part of crimes against humanity?" or "how to translate the approach of international tribunals regarding crimes against humanity into the practice of Azerbaijani national courts?".

¹⁹² *Schabas*, supra 118, p. 981

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