

1.2.2. Assessing crimes against humanity

Rulings by the ICC have expanded the assessment framework for classifying acts as crimes against humanity. As in the case of war crimes and all other exclusion grounds, the standard of proof for excluding an applicant from international protection is lower than the standard of proof required under criminal law. Nevertheless, the frequent citing of ICC rulings in asylum case law which assessed crimes against humanity demonstrates how the standards of criminal law provide guidance, even in the context of asylum.

Two key rulings by the ICC, often referred to by national courts, include *The Prosecutor* v *Germain Katanga* (7 March 2014) and *The Prosecutor* v *Jean-Pierre Bemba Gombo* (21 March 2016).

In Katanga, the ICC Trial Chamber ruled that the contextual elements of a crime against humanity require three stages of reasoning.

- The first stage concerns an analysis of the existence of an ‘attack directed against any civilian population’, which denotes “a course of conduct or an operation involving the multiple commission of acts”, that falls within the ambit of Article 7 of the Rome Statute and which must be executed pursuant to or in furtherance of a State or organisational policy.

- The second stage is characterisation, i.e. ascertaining whether the attack was widespread or systematic. In this regard, it notes that “the adjective ‘widespread’ adverts to the large-scale nature of the attack, whereas the adjective ‘systematic’ reflects the organised nature of the acts of violence”.

- The final stage includes a determination of the existence of a nexus between the widespread or systematic attack and the act within the ambit of Article 7, and the knowledge of that nexus by the perpetrator of the act.

When the contextual elements of Article 7 of the Rome Statute are satisfied, individual responsibility for a crime against humanity may be incurred by a single underlying act. For example, as stated by the ICC Pre-Trial Chamber in Bemba, a single act of murder by a perpetrator may constitute a crime against humanity if the legal requirements for the contextual element of crimes against humanity, including the nexus element, are met.

The following sub-sections examine how courts have interpreted this assessment framework in the context of asylum, including how attacks against civilians are characterised, the determination of the attack as widespread and systematic, the establishment of the nexus criteria, as well as additional national case law which illustrate crimes against humanity in different contexts, including genocide, political or religious persecution, and the implementation of state policies.

An attack directed against any civilian population

It is clear from the relevant international legal provisions, and the subsequent assessment framework developed by the ICC in its jurisprudence, that crimes against humanity must be directed against a civilian population. In the context of an armed conflict, the term 'civilians' refers to persons not taking part in hostilities. However, as crimes against humanity may take place even in times of peace, even members of armed forces may be considered to be civilians if there are no ongoing hostilities. This has been established by national case law within the context of national military service in Eritrea.

Several courts have regarded the enforcement of mandatory military service by the Eritrean authorities as a crime against humanity. This is illustrated by jurisprudence from the Dutch District Court of the Hague in *Applicant* v *The Minister for Asylum and Migration* (21 December 2020) and the Belgian CALL in *X* v *CGRS* (12 July 2024). Both courts excluded Eritrean nationals from international protection for their crimes committed while serving in the military in their home country. In the former case, the actions of the applicant included tying up people using the 'otto' torture method and the long-term arbitrary imprisonment of conscripts in zinc plate cells under extreme temperatures. In the latter case, the applicant had worked in the National Service in Eritrea for 30 years and held a position of power, as he was responsible for a unit of 50 soldiers.

In both cases, the courts considered that their activities were linked to the widespread and systematic abuse committed by the Eritrean authorities, in relation to the forced recruitment of individuals into the army, and the conditions within the army and the training, which include inhumane disciplinary punishment equated with torture. Both courts highlighted that punishments for violations are severe, including torture, re-education in designated camps, forced labour and years of imprisonment under life-threatening detention conditions, as attested by various international organisations. The Dutch court noted that the oppression of the population was large scale, with permanent staff of such camps, including trainers, guards and managers, having contributed significantly to the current situation in Eritrea. CALL similarly observed that Eritrean officials have been involved in widespread and systematic attacks against the civilian population since 1991, committing acts of slavery, imprisonment, enforced disappearance, torture, other inhumane acts, persecution, rape and murder, which the court linked to the objective of supressing independent and critical thinking, and spreading fear among the population.

CALL held that military conscripts could be considered members of the civilian population within the meaning of crimes against humanity, since there was no armed conflict as defined under international law, with the exception of the periods from May 1998 to June 2000 and from 10 to 12 June 2008. Therefore, the distinction between combatants, non-combatants and civilians

used in that context does not apply.

CALL also established suspected terrorists may be considered as civilians for the purpose of applying this exclusion ground. In *Applicant* v *CGRS* (10 July 2024), CALL excluded an Iraqi national from international protection as he was formerly a police officer in the Kurdish Autonomous region. CALL established that the Iraqi Kurdish police systematically engaged in arbitrary arrests, forced confessions, ill treatment and acts of torture against civilians, including political opponents and journalists, findings that aligned with the applicant's statements. Hence, CALL found that it could be reasonably established that the Iraqi police authorities, including in the autonomous Kurdish region, committed crimes against humanity.

CALL recognised that while information on torture and ill treatment practices did not specifically refer to the SWAT unit the applicant belonged to, it remained relevant as it concerned the general situation within the entire police force in the Iraqi Kurdistan region, including in Dohuk. Although the applicant argued that the torture mentioned was mainly directed against Daesh members, who he claimed were not considered to be 'citizens' in principle, CALL considered that, even when torture is directed against people suspected of terrorism, they remained 'civilians' within the meaning of Article 7 of the Rome Statute, since at that stage they are only suspected of terrorism or of links to terrorism. In view of the administrative and procedural files submitted by the CGRS, CALL believed that such acts of torture were systematically carried out by the Iraqi Kurdish police forces at the time the applicant was a member.

Widespread and systematic attacks

Courts ascertain whether an attack against a civilian population is widespread and systematic based on case specific country of origin information. For example, when it has been established that a state authority has carried out crimes against humanity, attention must be paid to the specific authority with whom the applicant worked or even with which specific unit. Crimes against humanity therefore cannot be generalised to all related authorities.

The Dutch District Court of the Hague reinforced this in *Applicants* v *The Minister for Asylum and Migration* (26 March 2021) within the context of crimes against humanity carried out by the Syrian Security Forces under the former Assad regime, including the military and police. It noted however, based on COI, that the same conclusion could not be drawn for the Syrian civilian police.

Nexus

To establish a nexus between the act committed and the widespread/systematic attack, as well as the applicant's knowledge of that nexus, a number of factors are taken into account *(see Section 1.2.3)*. This may include the applicant's personal statements, including whether they had heard about the crimes taking place or had personally witnessed them.

Additionally, the applicant's knowledge may be assumed in certain cases on the basis of the applicant's position within an organisation and his role, as well as the frequency with which he committed the crimes. Some crimes, such as genocide, would require an additional specific intent. The concept of 'knowledge and intent' is explored further in Section 6.

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