

***MENS REA* ELEMENTS OF CRIME AGAINST HUMANITY
IN THE JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL
TRIBUNAL FOR THE FORMER YUGOSLAVIA**

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1. INTRODUCTION

The International Criminal Tribunal for the Former Yugoslavia¹ (ICTY) is a prevailing authority over national courts, since it applies international law and was established by United Nations Security Council Resolution, which the Member States of the United Nations are supposed to comply with according to Chapter 7 of the United Nations Charter². UN Security Council decided to establish *the international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace*, as the Security Council was being confronted with “continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the Former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of “ethnic cleansing”,

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¹ The term “Former Yugoslavia” refers to the territory of six currently independent States: Bosnia and Herzegovina, Croatia, Montenegro, Macedonia, Serbia and Slovenia. Additionally, it also refers to two autonomous provinces: Kosovo (recognized as State by 108 United Nations Member States) and Vojvodina.

² A. G. Karibi-Whyte, *The Twin Ad Hoc Tribunals and Primacy over National Courts*, “Criminal Law Forum” 1999, vol. 9, p. 59.

including for the acquisition and the holding of territory”³. As a consequence, it may be stated that the establishment of the Tribunal was to some extent a response to increasing need in a firm solution from international community, while the fact whether the establishment of the Tribunal was a firm solution to a rising level of human rights and humanitarian law violations still remains an open issue⁴.

Definition of “crime against humanity” included in the Statute of ICTY⁵ may be considered as one of the earliest definitions of this particular international crime⁶. According to the ICTY Statute the *Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts*⁷. As it may be noticed, *mens rea* element is not directly determined as a premise for being criminally responsible, as it was determined for instance in the Rome Statute

³ United Nations Security Council Resolution 827, U.N. Doc. S/RES/827, 1993. The date on which the Tribunal ceases to exercise its jurisdiction and perform its functions has never been precisely determined.

⁴ As an example some indicate the fact that the conflict was formally ended only on December 14, 1995 by signing the Dayton Agreement (General Framework Agreement for Peace in Bosnia and Herzegovina, 1995, see: www.ohr.int/dpa/default.asp?content_id=379 [30.12.2012]), therefore two years after the establishment of the Tribunal. Three years after negotiating the Dayton Agreement the conflict in Kosovo broke out. Not to mention the fact that after establishing the Tribunal, in July 1995, Srebrenica Genocide occurred in which around 8 000 of Bosnian men and boys were killed.

⁵ Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, annex to United Nations Security Council Resolution 827, U.N. Doc. S/RES/827, 1993 (ICTY Statute).

⁶ Before the adoption of the ICTY Statute crime against humanity was defined in the Charter of the International Military Tribunal (Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 82 United Nations Treaty Collection 280, 1945) and in the Charter of the International Military Tribunal for the Far East (Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, T.I.A.S. no. 1589, 1946). Both definitions, apart from having some particular legal deficiencies, are considered to be the basis for currently binding definitions of crime against humanity.

⁷ Article 5 of ICTY Statute.

of International Criminal Court (ICC)⁸. However, ICTY referred to this matter while deciding particular cases. For instance, in *Prosecutor v. Delalic*, the case in which the Tribunal considered the issue of complicity, it was stated that in order to bear criminal responsibility for complicity in committing a crime that falls within the jurisdiction of ICTY, which does not constitute a direct realization of particular acts, the material as well as psychological elements must be proved⁹. In the case *Prosecutor v. Tadic* it was provided that the rule of personal guilt is the basis for bearing criminal responsibility¹⁰, which is directly related with the perpetrator's psyche. *Mens rea* relates therefore to the psychological or moral aspect of committing the crime against humanity, which in literal translation means "guilty mind"¹¹. As a consequence, the accused person has to have: 1) an intent to commit an act or acts; 2) consciousness of the attack against civilian population; 3) consciousness that his act constitutes a part of that attack¹². It has to be emphasized that this is the *mens rea* element of crime against humanity that actually transforms a common crime in a crime of an international character¹³. It is generally held that an accused person, in order to be held criminally responsible for committing a crime against humanity, had to be conscious of all the facts and circumstances accompanying the act¹⁴. For instance, murder is a crime that is prosecuted in every sovereign state, however only when committed at the time of an international or internal armed conflict against civilian population, a circumstance which

⁸ Rome Statute of International Criminal Court, 2187 U.N.T.S. 90, 1998 (ICC Statute). In Article 30 of the Rome Statute it is provided that *a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.*

⁹ *Prosecutor v. Delalic et al.*, ICTY, Case No. IT-96-21-T, 1998, para. 326.

¹⁰ *Prosecutor v. Tadic*, ICTY, Case No. IT-94-1-A, 1999, para. 186.

¹¹ W. A. Schabas, *Mens Rea and The International Criminal Tribunal for the Former Yugoslavia*, "New England Law Review" 2003, vol. 37, p. 1015.

¹² *Prosecutor v. Blaskic*, ICTY, Case No. IT-95-14-A, 2004, para. 124; *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, para. 99, 102.

¹³ Y. Aksar, *Implementing International Humanitarian Law – From the Ad Hoc Tribunals to a Permanent International Criminal Court*, London 2004, p. 254.

¹⁴ A. Cassese, *The Oxford Companion to International Criminal Justice*, Oxford 2009, p. 674.

the perpetrator has to be conscious of¹⁵, this murder becomes a crime against humanity within the wording of the ICTY Statute. The Tribunal further clarifies the definition included in Article 5 of its Statute by adding a premise of committing the act within the widespread or systematic attack against civilian population, which the perpetrator has to be conscious of. The fact of the attack against civilian population and existence of the conflict creates the context of the crime and forms so called *chapeau* elements of crime against humanity¹⁶. Therefore, *mens rea* of crime against humanity does not limit to intent and knowledge, but includes the fact of existence of an armed conflict and the fact that the act was perpetrated within the attack against civilian population as well. Consequently, all of these aspects fall within the scope of *mens rea* elements and therefore are subject of the analysis conducted in this article.

Nonetheless, the analysis of *mens rea* elements is supposed to not only explain and discuss their essence and character on the example of ICTY jurisprudence, but to some extent present the circumstances in which such acts are committed. Recent atrocities committed all over the world, such as forced disappearances in Latin American States, attacks on civilian population conducted by both Israeli and Hamas forces during the Israel/Palestine conflict, widespread violence and abuses in the Russian Federation – mainly in the Republic of Chechnya and Dagestan, cases of apartheid in South Africa, attacks of Boko Haram on civilian population in Nigeria, killings of civilians committed by the forces of Islamic State of Iraq and the Levant, widespread violence towards civilians in Syrian conflict and violence as a result of the Russian aggression on Ukraine, show the great need of commonly agreed definition of crimes against humanity, that may guarantee a wider, more permanent and more universal protection to victims of atrocities that fall within the scope of its definition¹⁷.

¹⁵ M. Płachta, *Międzynarodowy Trybunał Karny*, t. 1, Kraków 2004, p. 436-437.

¹⁶ M. Cupido, *The Policy underlying crimes against humanity: practical reflections on a theoretical debate*, "Criminal Law Forum" 2011, vol. 22, p. 276, 278-279.

¹⁷ L. N. Sadat, *Crimes Against Humanity in the Modern Age*, "American Journal of International Law" 2013, vol. 107, p. 338-340; M. C. Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, "Columbia Journal of Transnational Law" 1994, vol. 31.

The purpose of the research whose results were presented in the following article should be therefore perceived from two different perspectives – the implementation of ICTY completion strategy and recent works of International Law Commission on common definition and possible Convention on Crimes Against Humanity, urged by the current events. In November 2014 the President of ICTY Theodor Meron submitted to the UN Security Council a report concerning among others the implementation of the completion strategy, which provides that currently there are 4 trial proceedings (involving 4 defendants) and 5 cases before the Appeals Chamber (involving 16 defendants), however there is a significant advance in completion of Tribunal's work¹⁸. The article explores the *mens rea* elements in terms of ICTY judgments in order to summarize the Tribunal's interpretation of particular *mens rea* elements, including *chapeau* elements. The importance of ICTY jurisprudence and its interpretation of particular *mens rea* elements in terms of the development of international criminal law is reflected by the fact that it had served as the basis for drafting the definition of crimes against humanity included in ICC Statute and the preparatory works oscillated mostly around ICTY's functioning and the manner in which Tribunal's Trial and Appeals Chambers interpreted certain elements of international crimes.

Nevertheless, recently the issue of crimes against humanity has become of significant importance to international community not only because of implementing completion strategies of the first *ad hoc* International Criminal Tribunal, but also due to the fact that in 2014 the issue of crimes against humanity entered the agenda of International Law Commission (ILC), initiating an active preparatory works on its definition and possible Convention¹⁹. Undoubtedly, ILC's works focus mainly on the interpretation of international tribunals and ICC, out of which ICTY and its jurisdiction is of crucial meaning for the further works over the issue of

¹⁸ *Assessment and report of the Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the UN Security Council, covering the period of 17 of May to 15 of November 2014*, Annex I to the United Nations Security Council Resolution 827, U.N. Doc. S/RES/2014/827, 2014, p. 3-4.

¹⁹ M. Bergsmo, S. Tianying, *A Crimes Against Humanity Convention After the Establishment of the International Criminal Court*, [in:] M. Bergsmo, S. Tianying (ed.), *On the Proposed Crimes Against Humanity Convention*, Brussels 2014, p. 2.

international crimes. As a consequence, the definition of crimes against humanity included in ICTY Statute requires a greater discussion, particularly its *mens rea* elements, including *chapeau*, that must to be proven in case of every particular act which may constitute a crime against humanity, together with its *actus reus* elements, which however differ depending on each act²⁰.

2. INTENT

Intent is not an element directly enumerated in the definition of crime against humanity included in Article 5 of the ICTY Statute. In a situation when there is a lack of such clarification in the definition, the issue of the perpetrator's intent to commit a crime against humanity was left for judges's interpretation. In its first judgment, *Prosecutor v. Tadic*, the Trial Chamber acknowledged that the cause why crimes against humanity so deeply shock the consciousness and guarantee the intervention of international community is that they do not constitute isolated and random acts of an individual, but rather result from intentional attempt of an attack on civilian population²¹. It was therefore underlined that this particular crime is characterized by the intent of committing it against civilian population. The fact that the intent of the accused has to be proved was confirmed in the Report of the Preparatory Committee on the Establishment of the ICC, in which it was recognized that an individual may be held criminally responsible for committing the crime that falls within the jurisdiction of the ICC only when the act was perpetrated with the intent or (and) knowledge²². The case law of ICTY describes different types of intent regard-

²⁰ Regardless of the type of act that may constitute a crime against humanity (whether it is *enslavement* or *torture*), the Prosecution is always required to prove that the perpetrator acted with knowledge, along with the intent to commit the act, and the act itself constituted a part an widespread or systematic attack against civilian population during the armed conflict.

²¹ *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, para. 653.

²² Report of the Preparatory Committee on the Establishment of an International criminal Court, vol. II, Compilation of Proposals, U.N. Doc. A/50/22, Supp. No. 22, 1996.

ing distinct international crimes. As a result, while discussing the issue of crime against humanity there may be distinguished the following types: direct intent (*dolus directus*) and indirect intent (*dolus eventualis*)²³. There exists also the view that an individual may have an intent regarding the “action” and the “result”. The intent of particular “action” means that an individual has a will to engage in commission of the act, while the intent of causing a specific “result” means that an individual wants to cause a particular result or knows that this result will be caused as a consequence of the normal course of events²⁴.

Additionally there exists also the *intent to discriminate*, that is a constituent element of the crime of persecution on political, racial and religious grounds²⁵. In order for an individual to be held criminally responsible for this particular crime against humanity both intents have to be proved – the intent of committing the act and the *intent to discriminate* on political, racial or religious grounds, wherein both intents have to be fulfilled cumulatively²⁶. For instance, in the case *Prosecutor v. Banovic* the Trial Chamber provided that the crime was committed within the widespread and systematic attack on civilian population with the intent of its discrimination, wherein the intent to discriminate was manifested by the fact that people of non Serbian origin were imprisoned and held in degrading and inhuman conditions due to their ethnicity²⁷. As a result, it should be emphasized that the *intent to discriminate* is manifested by the fact that the particular act is directed against the group of people which may be distinguished and identified on the basis of its political, racial or religious affiliation. In the case *Prosecutor v. Bralo* the intent of Miroslav Bralo was proved by the fact that in order to discriminate and humiliate Muslim

²³ M. E. Badar, *Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, “International Criminal Law Review” 2006, vol. 6, p. 315.

²⁴ R. S. Clark, *The Mental Element in International Criminal Law: the Rome Statute of the International Criminal Court and the Elements of Offences*, “Criminal Law Forum” 2001, vol. 12, p. 302.

²⁵ *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-T, 2003, para. 737-738.

²⁶ *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-T, 2003, para. 737-738.

²⁷ *Prosecutor v. Banovic*, ICTY, Case No. IT-02-65/1-S, 2003, para. 39.

prisoners he forced them to perform catholic religious rituals before starting forced labor²⁸.

In the case *Prosecutor v. Cestic* the perpetrator threatening his victims with a gun forced two Muslim brothers, who were held in Luka camp, to perform sexual intercourse, whereby Ranko Cestic acted with intent, since he personally admitted that he was conscious that it happened without the consent of his victims²⁹. The situation mentioned above confirms the view that the intent of the perpetrator is based on his consciousness about the circumstances of the act³⁰. Nevertheless, the intent and consciousness these are two distinct *mens rea* elements of crime against humanity.

From the complicity perspective, there should be cited the interpretation of the issue of intent carried out in the case *Prosecutor v. Furundzija*. It is held that the sole presence at the site of the crime is not sufficient in order to be held criminally responsible for that crime, since this presence does not have to be voluntary, which means that it must be proved that the accused knew that his presence will have a direct influence on the effect of the act³¹. Consequently, the accomplice in order to be held criminally responsible for the crime against humanity has to have the intent of contributing to its commission³². In the case *Prosecutor v. Galic* the Tribunal decided over charges of committing a crime against humanity in form of inhumane act. The Trial Chamber stated that the intent to inflict other inhumane act is satisfied when the perpetrator, at the time of the act or omission, had intent to cause serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim³³. In the judgment of the case *Prosecutor v. Cestic* the Trial Chamber distinguished two stages of the intent to murder – murder committed with the intent to kill and murder committed with the intent to cause serious bodily harm which the perpetrator should have known that the act cause death³⁴.

²⁸ *Prosecutor v. Bralo*, ICTY, Case No. IT-95-17-S, 2005, para. 35.

²⁹ *Prosecutor v. Cestic*, ICTY, Case No. IT-95-10/1-S, 2004, para. 16.

³⁰ K. Ambos, *Estudios de Derecho Penal Internacional*, Caracas 2004, p. 160.

³¹ *Prosecutor v. Furundzija*, ICTY, Case No. IT-95-17/1-T, 1998, para. 42.

³² *Prosecutor v. Furundzija*, ICTY, Case No. IT-95-17/1-T, 1998, para. 42.

³³ *Prosecutor v. Galic*, ICTY, Case No. IT-98-29-T, 2003, para. 154.

³⁴ *Prosecutor v. Cestic*, ICTY, Case No. IT-95-10/1-S, 2004, para. 34. Ranko Cestic confessed that he committed that act with the intent to kill the victim.

Worth mentioning are also considerations of the chambers concerning perpetrator's intent while committing the act of deportation of civilian population. In the case *Prosecutor v. Stakic* ICTY noted that while committing the act of deportation the perpetrator acts with the intent of permanent removal of people from particular territory³⁵. However, the Appeals Chamber, basing on the provisions of Geneva Convention from 1949³⁶, in the same case provided, that the act of deportation does not require from the perpetrator to have the intent of permanent removal of people from particular territory, correcting in this manner the "error" of the Trial Chamber³⁷. In the case of *Prosecutor v. Krajisnik* the Trial Chamber was considering among others the issue of murdering around 3 000 of Muslims and Croats³⁸. The intent of committing this act was manifested in the fact that the majority of villages, in which victims resided, were disarmed prior to the attack of Serbian forces on the villages, ensuring that no defense would be possible³⁹. Another evidence confirming that the perpetrator had the intent to kill is that during the attack there was used the type of weapon which is supposed to cause possibly the highest number of victims, as well as the fact that threats were directed towards the people that were hiding in the near forest⁴⁰. In the judgment of the case *Prosecutor v. Krnojelac* the Trial Chamber analyzed the issue of the perpetrator's intent at the time of committing the crime of torture, noting that tortures are to obtain a particular result or purpose and that it must be committed deliberately⁴¹. In this particular case the Chamber stated that the *mens rea* premise has been satisfied as the majority of applied tortures were sup-

³⁵ *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-T, 2003, para. 687.

³⁶ According to Article 49 of the Geneva Convention relative to the protection of civilian persons in time of war (12 August 1949, 75 U.N.T.S. 287) *individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.*

³⁷ *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-A, 2006, para. 304-307. The Appeals Chamber regarded to the previous statement of the Trial Chamber on the perpetrator's intent as an "error", which eventually however did not have an effect on the final judgment.

³⁸ *Prosecutor v. Krajisnik*, ICTY, Case No. IT-00-39-T, 2006, para. 793.

³⁹ *Prosecutor v. Krajisnik*, ICTY, Case No. IT-00-39-T, 2006, para. 793.

⁴⁰ *Prosecutor v. Krajisnik*, ICTY, Case No. IT-00-39-T, 2006, para. 793.

⁴¹ *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, para. 180, 184.

posed to obtain information from the persons held in captivity concerning the escape and whereabouts of another person⁴².

Nonetheless, the intent cannot be identified with the perpetrator's motive. The Trial Chamber in the case *Prosecutor v. Milutinovic* provided that crime against humanity may be committed for "purely personal" reasons⁴³. Thus, the perpetrator's motive does not matter in terms of qualifying the act as the crime against humanity. Taking into account that crime against humanity is one of the most serious international crimes, it can be committed only when the perpetrator, having the intent, is conscious of the circumstances of the act, what practically means that crime against humanity cannot be committed as a result of recklessness⁴⁴.

Undisputable is the fact that in order for an individual to be held criminally responsible for committing crime against humanity, the Prosecutor has to prove that the accused acted with the intent, being in the same time conscious of the circumstances of the act. Despite that intent and knowledge are distinct *mens rea* elements of crime against humanity, these two elements are closely related.

3. KNOWLEDGE

The second *mens rea* element of crime against humanity is knowledge, which is strictly related with the intent. The intent is based on the knowledge of the circumstances in which the act is committed, especially knowledge over the attack directed against any civilian population and the fact that a particular act constitutes part of this attack⁴⁵. However, knowledge

⁴² *Prosecutor v. Krnojelac*, ICTY, Case No. IT-97-25-T, 2002, para. 234.

⁴³ *Prosecutor v. Milutinovic et al.*, ICTY, Case No. IT-05-87-T, 2009, para. 158.

⁴⁴ A. Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, "The European Journal of International Law" 1999, vol. 10, no. 1, p. 153-154.

⁴⁵ Cassese A., Acquaviva G., Fan M., Whiting A., *International Criminal Law – cases and commentary*, Oxford 2011, p. 168; *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, para. 434. Despite that the premise of committing the act *within widespread or systematic, conscious attack directed against civilian population* is not enumerated in the definition included in the ICTY Statute (as it is provided in the ICC Statute), the Tribunal additionally clarifies that aspect in its case law and therefore recog-

of the details of the attack is not required⁴⁶. In order to be held individually responsible for committing a particular crime against humanity the perpetrator has to consciously engage in the decision of violating international law⁴⁷. For this particular reason the knowledge means a consciousness that particular circumstance exists or the effect is going to occur in the normal course of events⁴⁸. Moreover, knowledge criteria are also fulfilled in situation when the perpetrator is conscious of the risk that the attack exists and the risk that particular circumstances of the attack cause that his conduct poses a greater threat than in the situation where the attack does not exist⁴⁹.

While committing the crime against humanity in the form of murder and extermination the knowledge means consciousness that the particular act of the perpetrator or his omission is possible to cause death (what concerns the crime of extermination the consciousness regards to the possibility of causing death of a great number of people)⁵⁰. In the case *Prosecutor v. Blagojevic and Jokic* the Tribunal provided that both defendants were conscious of the existence of a widespread attack on civilian population, since they participated in an organized, inhumane and usually aggressive process of separation of men from the rest of the population⁵¹. This forced displacement of men did not constitute isolated and random acts, but were supposed to carry out particular policy and formed a part of a widespread attack against civilian population, what enabled the Trial Chamber to qualify them as other inhumane acts⁵². What concerns the crime of extermination, in order to be held criminally responsible for that

nizes the knowledge about the attack as a requirement that has to be fulfilled in order for an accused to be held criminally responsible for committing crime against humanity in the wording of Article 5 of the ICTY Statute.

⁴⁶ *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, para. 102.

⁴⁷ Królikowski M., *Odpowiedzialność karna jednostki za sprawstwo zbrodni międzynarodowej*, Warszawa 2011, p. 42.

⁴⁸ M. Płachta, *Międzynarodowy Trybunał Karny*, t. 2, Kraków 2004, p. 436-438.

⁴⁹ N. Theodorakis, D. P. Farrington, *Emerging Challenges for Criminology: Drawing the Margins of Crimes against Humanity*, "International Journal of Criminology and Sociological Theory" 2013, vol. 6, no. 2, p. 1156.

⁵⁰ *Prosecutor v. Blagojevic & Jokic*, ICTY, Case No. IT-02-60-T, 2005, para. 556, 572.

⁵¹ *Prosecutor v. Blagojevic & Jokic*, ICTY, Case No. IT-02-60-T, 2005, para. 617.

⁵² *Prosecutor v. Blagojevic & Jokic*, ICTY, Case No. IT-02-60-T, 2005, para. 617.

act, the perpetrator has to be conscious that his act (or acts) leads to the annihilation a large number of people. In the judgment of *Prosecutor v. Stakic* judges of the Trial Chamber decided that the defendant, due to his political position and role in enforcing the plan of creating municipality that consists exclusively of Serbian population, knew the details and the advance of the devastation process directed at populations other than Serbian, being at the same time conscious of the murders that were occurring on the large scale⁵³.

A particular emphasis should be put on the knowledge element while committing crimes of a sexual nature. According to the case law of the Tribunal this is perpetrator's behavior that usually proves the fact that he was conscious of the existence of widespread or systematic attack against civilian population. In the case *Prosecutor v. Zelenovic* acts that the defendant confessed to have committed formed part of the general plan of sexual assault on many people, that lasted a couple of months, in several different locations⁵⁴. This durability and repetition of Dragan Zelenovic acts, therefore multiple rapes on women of a particular origin that were held in detention facilities⁵⁵, makes these acts to constitute the crime against humanity. In the judgment of the case *Prosecutor v. Kunarac* the Tribunal provided that the knowledge at the time of committing the crime of rape is proved by the fact that perpetrator was conscious that he acts without the victim's consent⁵⁶.

In accordance with Article 7 of the ICTY Statute criminally responsible may be also held an individual *who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime against humanity*. In the case *Prosecutor v. Brdanin* the Trial Chamber clarified *mens rea* element for an individual indirectly related with a particular act that constitutes a crime against humanity⁵⁷. Judges

⁵³ *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-T, 2003, para. 661.

⁵⁴ *Prosecutor v. Zelenovic*, ICTY, Case No. IT-96-23/2-S, 2007, para. 38.

⁵⁵ *Prosecutor v. Zelenovic*, ICTY, Case No. IT-96-23/2-S, 2007, para. 38.

⁵⁶ *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-T and IT-96-23/1-T, 2001, para. 460.

⁵⁷ *Prosecutor v. Brdanin*, ICTY, Case No. IT-99-36-T, 2004, para. 272. Knowledge element was similarly defined in the case *Prosecutor v. Blaskic* (ICTY, Case No. IT-95-14-A, 2004, para. 49) and *Prosecutor v. Vasiljevic* (ICTY, Case No. IT-98-32-A, 2004, para. 102).

decided that the knowledge element at the time of aiding or instigating committing the crime means that perpetrator was conscious that his act facilitates commission of the crime by the main perpetrator, wherein aider or inciter is not required to know details of the main crime⁵⁸.

Committing crimes against humanity on the territory of the Former Yugoslavia usually resulted from an order of the superior which the subordinate had an obligation to comply with. This requires defining the knowledge element for committing the crime against humanity as a result of complying with an order. In the case *Prosecutor v. Kordic and Cerkez* the Trial Chamber distinguished two situations: 1) the superior has the knowledge that his subordinates are committing or are about to commit a crime; 2) the superior “has a reason to know” that his subordinates are committing or are about to commit a crime⁵⁹. The first situation refers to possessing direct evidence or circumstantial evidence⁶⁰, while the second situation concerns having information or data that suggest conducting an additional investigation in order to determine whether subordinates are committing a crime⁶¹.

It should be underlined that the knowledge, which is a consciousness of the perpetrator about the circumstances of the act, along with the intent constitutes a requirement that has to be fulfilled in order for an individual to be held criminally responsible for committing the crime against humanity, in accordance with the wording of Article 5 of the ICTY Statute.

3. INTERNATIONAL OR INTERNAL ARMED CONFLICT

According to Article 5 of the ICTY Statute the existence of an armed conflict, of an international or internal character, is another element of the definition of crime against humanity, which forms the context for the committed act and therefore constitutes a *chapeau* element of its defini-

⁵⁸ *Prosecutor v. Brdanin*, ICTY, Case No. IT-99-36-T, 2004, para. 272.

⁵⁹ *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-T, 2001, para. 425. It is similarly defined in Article 7 of the ICTY Statute.

⁶⁰ *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-T, 2001, para. 426.

⁶¹ *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-T, 2001, para. 429.

tion. However, at the beginning there is a need to clarify the definition of an armed conflict and explaining its types.

The Trial Chamber of ICTY referred to the issue of the armed conflict in the case *Prosecutor v. Tadić*, providing that the armed conflict emerges at the moment when the parties to the conflict begin to apply armed forces or similar actions⁶². According to the II Additional Protocol to Geneva Conventions of 1949 non-international conflict occurs *in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations*⁶³. Hence, an armed conflict that is taking place in the territory of a High Contracting Party has an internal character when at least one of the parties to the conflict has a non-governmental character⁶⁴. In order to distinguish internal armed conflict from civil unrest there should be taking into account such aspects as extent of the armed violence and the level of organization of the parties involved⁶⁵. Nonetheless, the armed conflict has an international character when it initiates between two or more States⁶⁶. Wherein, the armed conflict of an international character must involve an attack of one State on another, motivated by the intention to harm the enemy State⁶⁷. Apart from the types of the conflict mentioned above, in the international law there exists also the term of “internationalized armed conflict”. This type of an armed conflict concerns the conflict that exists between two fractions or internal groupings which are supported by other States⁶⁸, or a situation when an

⁶² *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, para. 70.

⁶³ Article 1 of II Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609.

⁶⁴ S. Vite, *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*, “International Review of the Red Cross” 2009, no. 873, p. 75.

⁶⁵ *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, para. 561-568; *Prosecutor v. Mucic et al.*, ICTY, Case No. IT-96-21-T, 1998, para. 184.

⁶⁶ Article 2 of the I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31.

⁶⁷ S. Vite, *Typology of armed conflicts ...*, p. 72-73.

⁶⁸ D. Schindler, *International humanitarian law and internationalized internal armed conflicts*, “International Review of the Red Cross” 1982, no. 230, p. 255.

armed intervention of the third State into an internal armed conflict takes place⁶⁹. Within an intervention there may be distinguished a case of intervention carried out by a third State in order to support particular party to the conflict and intervention of multinational forces conducted as a peace-keeping operation⁷⁰. As an example of internationalized conflict there may be brought the NATO intervention in 1999 in the armed conflict between the Federal Republic of Yugoslavia and Kosovo Liberation Army⁷¹. What concerns the conflict on the territory of the Former Yugoslavia in years 1992-1995 it should be underlined that it was an armed conflict of an international character, what among others results from the wording of the UN Security Council Resolution, in which it was stated that Parties to the conflict are obliged to comply with international humanitarian law, particularly with provisions of Geneva Conventions of 1949⁷². In accordance with the common Article 2 of Geneva Conventions *are applied in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties*, therefore in the case of international armed conflict⁷³. The conflict in the Former Yugoslavia is similarly classified in the doctrine of international law⁷⁴.

According to the wording of Article 5 of the ICTY Statute, in order to exercise jurisdiction by the Tribunal and for the perpetrator to be held criminally responsible for committing crime against humanity, it remains irrelevant whether the armed conflict had an international or internal char-

⁶⁹ H. Gasser, *Internationalized non-international armed conflicts: Case studies of Afghanistan, Kampuchea and Lebanon*, "The American University Law Review" 1983, vol. 33, p. 145-146.

⁷⁰ S. Vite, *Typology of armed conflicts ...*, p. 85.

⁷¹ S. Egorov, *The Kosovo crisis and the law of armed conflicts*, "International Review of the Red Cross" 2000, no. 837, p. 183.

⁷² United Nations Security Council Res. 764, U.N. Doc. S/RES/764, 1992.

⁷³ Additionally, according to the report of Secretary-General (Report of Secretary-General Pursuant to Security Council Resolution 808 (1993), U.N. Doc. S/25704, 1993) Geneva Conventions contain rules of international humanitarian law and the basis of customary international law that has to be applied at the time of an international armed conflict.

⁷⁴ C. Greenwood, *International Humanitarian Law and Tadic Case*, "The European Journal of International Law" 1996, vol. 7, no. 2, p. 269-272.

acter⁷⁵. In the case *Prosecutor v. Brdanin* the Trial Chamber provided that the existence of a conflict is the criterion which serves only for determining if the Tribunal has jurisdiction over the particular act⁷⁶. Furthermore, in the case *Prosecutor v. Kunarac* the Appeals Chamber identifies the fact of existence of the conflict as a preliminary condition, which is fulfilled by proving that the armed conflict took place and the perpetrator's act was geographically and temporally connected with this conflict⁷⁷. It may be therefore deduced that crime against humanity is related to an armed conflict if it was committed in the actual time of its existence and on the territory where the fighting between parties to the conflict occurred. Nevertheless, this does not mean that the act must be committed at the actual place of the fighting, but it is sufficient for the act to be related to the armed activities⁷⁸. For instance, the above mentioned situation concerns the case of torturing a civilian, in the location being remote from the fighting area, in order to obtain information from the victim⁷⁹.

It is nonetheless important to underline that committing the crime against humanity at the time of the armed conflict is not a requirement derived from customary international law⁸⁰. In the case *Prosecutor v. Tadic* the Appeals Chamber confirmed that in accordance with customary international law the crime against humanity does not have to be committed in relation to international armed conflict or any other type of conflict⁸¹. The requirement of existence of the conflict, having a procedural character, appears only in the definition provided in the ICTY Statute. Consequently, according to the customary international law crime against humanity may be committed at the time of peace as well⁸².

⁷⁵ *Prosecutor v. Tadic*, ICTY, Case No. IT-94-1, Decision on the Defense Motion on Jurisdiction, 1995, para. 75-82.

⁷⁶ *Prosecutor v. Brdanin*, ICTY, Case No. IT-99-36-T, 2004, para. 133.

⁷⁷ *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, para. 83.

⁷⁸ *Prosecutor v. Tadic*, ICTY, Case No. IT-94-1-T, 1997, para. 626.

⁷⁹ A. Szpak, *Kontrola przestrzegania międzynarodowego prawa humanitarnego w orzecznictwie międzynarodowych trybunałów karnych ad hoc*, Toruń 2011, p. 344.

⁸⁰ *Prosecutor v. Martić*, ICTY, Case No. IT-95-11-T, 2007, para. 56.

⁸¹ *Prosecutor v. Tadic*, ICTY, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 141.

⁸² A. Szpak, *Kontrola przestrzegania ...*, p. 348.

In various cases before the ICTY defense attorneys challenged the *chapeau* elements of the crime against humanity in order to prove that the Tribunal has no jurisdiction over particular acts. This situation occurred for instance in the case *Prosecutor v. Lukic* in which the defense challenged the existence of the armed conflict while committing the acts that were included in the indictment⁸³. The Trial Chamber in order to prove the existence of the conflict had to consider the criterion of the intensity of the fighting and the organizational level of the parties concerned. As a result, the Chamber decided that the conflict on the territory of Bosnia and Herzegovina in years 1992-1995 occurred, since its parties from the very beginning conducted offensive as well as defensive activities, what indicates their engagement in planning and forming tactics that were supposed to gain military goals, especially establishing control over particular territory⁸⁴. What concerns the organizational level of the parties involved, the Chamber stated that establishment of local armed troops, conducting recruitment procedures and forming military units that belonged to Serbian army constitute the proof for a sufficient organizational level of the parties to the conflict⁸⁵. Additionally, an aspect that serves as a sufficient proof of organizational level is the fact of being subjected to particular superiors and receiving orders from them⁸⁶.

Existence of the conflict is therefore another element that forms the context of the committed act. The Tribunal in order to prove its existence has to consider its relation with the acts concerned. In some cases, apart from the geographical or time criterion, there should be also taken into account such aspects as relations between the committed act and the causes of the conflict, intensity of the fighting or organizational level of the parties involved. Only after having considered all those aspects, the Tribunal has enough reasons to decide whether the armed conflict existed, regardless of the fact whether it had international or internal character.

⁸³ *Prosecutor v. Lukic & Lukić*, ICTY, Case No. IT-98-32/1-T, 2009, para. 879-880.

⁸⁴ *Prosecutor v. Lukic & Lukić*, ICTY, Case No. IT-98-32/1-T, 2009, para. 879-880.

⁸⁵ *Prosecutor v. Lukic & Lukić*, ICTY, Case No. IT-98-32/1-T, 2009, para. 883.

⁸⁶ *Prosecutor v. Lukic & Lukić*, ICTY, Case No. IT-98-32/1-T, 2009, para. 882.

4. ATTACK AGAINST CIVILIAN POPULATION

In order to analyze the premise of the attack against civilian population, which constitutes another *chapeau* element of the definition, the issue of the character of the attack, therefore whether it was a widespread or systematic attack, should be discussed. Despite of the fact that the premise of widespread or systematic attack is not provided in the definition of the ICTY Statute, the Tribunal clarified this issue in its case law.

In the case *Prosecutor v. Blaskic* the Trial Chamber provided that the phrase *directed against civilian population* already includes the form of the *attack* and causes that the qualification of the act as a crime against humanity depends on it⁸⁷. In this manner, the Trial Chamber confirmed the fact that the attack directed against civilian population, within which the crime against humanity was committed, constitutes an integral part of its definition and therefore forms the context of the crime⁸⁸. Additionally, the Tribunal in the case *Prosecutor v. Limaj* provided that in order to qualify the act committed by the accused as a crime against humanity it should constitute a part of widespread or systematic attack directed against any civilian population⁸⁹. As a consequence of adding by the Trial Chamber the premise of a widespread or systematic attack, the case law of the Tribunal distinguishes the following general elements of the crime against humanity, wherein the attack remains its crucial aspect: 1) the attack has to take place; 2) the act of the perpetrator constitutes a part of that attack; 3) the attack must be directed against civilian population; 4) the attack has to be widespread or systematic; 5) the perpetrator has to be conscious that his act constitutes a part of the widespread or systematic attack⁹⁰.

⁸⁷ *Prosecutor v. Blaskic*, ICTY, Case No. IT-95-14-T, 2000, para. 202.

⁸⁸ M. C. Bassiouni, *International Criminal Law – International Enforcement*, The Hague 2008, p. 82-84; L. May, *Crimes Against Humanity – A Normative Account*, Cambridge 2005, p. 119-120; J. C. Velazquez Elizarraras, *El derecho internacional penal y la justicia penal internacional en el tercer milenio*, “Anuario Mexicano de Derecho Internacional” 2001, vol. 1, p. 412.

⁸⁹ *Prosecutor v. Limaj et al.*, ICTY, Case No. IT-03-66-T, 2005, para. 181.

⁹⁰ *Prosecutor v. Blagojevic & Jokic*, ICTY, Case No. IT-02-60-T, 2005, para. 540; *Prosecutor v. Brdanin*, ICTY, Case No. IT-99-36-T, 2004, para. 130; *Prosecutor v. Stakic*, ICTY, Case No. IT-97-24-T, 2003, para. 621.

The attack directed against civilian population is related to the element of policy and planning⁹¹. The Tribunal decided that due to structural and organizational factors, as well as military possibilities the attack against civilian population almost always is conducted on the order of state's authorities⁹². What concerns the extensiveness and regularity, it should be emphasized that the first criterion refers to the scale of the attack, which usually is portrayed by the number of victims, while the second criterion regards to not random repetition of criminal acts⁹³. Worth mentioning is the fact that extensiveness and regularity of the attack relates to the manner in which it is conducted⁹⁴. The premise of the attack's regularity has been added in order for the Tribunal to embrace with it jurisdiction acts committed within the attack, whose scale was not sufficient for considering it as widespread attack, however it was characterized by the previously established plan, organization and regular scheme of actions⁹⁵. Moreover, the Trial Chamber of ICTY recognized that, in accordance with the wording of definition of the crime against humanity included in the ICC Statute, the requirement of regularity or extensive scale of the attack has an alternative character, therefore it is sufficient for the attack to fulfill only one from the above mentioned requirements⁹⁶. In order to prove that the attack fulfills the criteria of extensiveness and regularity there should be considered the following elements: 1) results of the attack; 2) the number of victims; 3) character of the acts; 4) participation of States authorities or officials; 5) possibility of identifying a particular scheme, according to which the acts were committed⁹⁷. The requirement of the widespread and

⁹¹ B. A. Boczek, *International Law: A Dictionary*, Lanham 2005, p. 155.

⁹² *Prosecutor v. Limaj et al.*, ICTY, Case No. IT-03-66-T, 2005, para. 191.

⁹³ *Prosecutor v. Lukic & Lukić*, ICTY, Case No. IT-98-32/1-T, 2009, para. 875; *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, para. 94; *Prosecutor v. Blaskic*, ICTY, Case No. IT-95-14-A, 2004, para. 101.

⁹⁴ M. C. Bassiouni, *Crimes against ...*, p. 267.

⁹⁵ M. M. de Guzman, *Crimes against humanity*, [in:] W. A. Schabas, N. Bernaz (ed.), *Routledge Handbook of International Criminal Law*, Oxford 2011, p. 130.

⁹⁶ *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, para. 646-648.

⁹⁷ *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, para. 95.

systematic attack was introduced in order to exclude, from the scope of crime against humanity, randomly committed and isolated criminal acts⁹⁸.

Undoubtedly, the widespread and systematic attack is directed against civilian population, what causes that this is a common element for all acts that fall within the scope of crime against humanity. In Article 5 of the ICTY Statute there exists is a phrase – *against any civilian population*, which makes civilian population being the main target of the attack⁹⁹. Adding the term *any* is supposed to protect not only the civilians, being the nationals of the third State, but any civilian population, including civilians of the same nationality as the perpetrator¹⁰⁰. As a consequence, in contrast to crime of genocide, nationality, ethnicity or race of civilian population is irrelevant for qualification of particular act as crime against humanity. In the case of *Prosecutor v. Erdemovic* Tribunal stated that crime against humanity is a serious act of violence that strikes in the most essential values for human beings as life, liberty, physical welfare, health and dignity; but its extent and gravity goes beyond the international borders, what makes that apart from an individual, this is the whole humanity who becomes its victim¹⁰¹. As a result, it should be proved that the attack was directed against civilian “population”, and not against random individuals¹⁰².

According to the I Additional Protocol to the Geneva Conventions the term “civilian population” includes any person, who is defined by excluding from that category prisoners of war and members of armed forces, assuming that in case of doubt, an individual should be considered as a civilian¹⁰³. In the case *Prosecutor v. Tadic* the Trial Chamber provided that the term “civilian” includes all persons who do not possess the sta-

⁹⁸ S. Chesterman, *An altogether different order: defining the elements of crimes against humanity*, “Duke Journal of Comparative and International Law” 2000, vol. 10, p. 315.

⁹⁹ *Prosecutor v. Dragomir Milosevic*, ICTY, Case No. IT-98-29/1-T, 2007, para. 921.

¹⁰⁰ N. Theodorakis, D. P. Farrington, *Emerging Challenges ...*, p. 1156.

¹⁰¹ *Prosecutor v. Erdemovic*, ICTY, Case No. IT-96-22-T, 1996, para. 27-28.

¹⁰² *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, para. 90.

¹⁰³ Article 50 of the I Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3.

tus of combatant¹⁰⁴. For instance, the presence of soldiers within civilian population does not deprive this population of its civilian character. The Tribunal recognized that civilian population usually consists of civilians, however the presence of individuals, who do not have this status, does not deprive the whole group of its character¹⁰⁵. Accordingly, it is sufficient for a population to be predominantly civilian¹⁰⁶. In the case *Prosecutor v. Limaj* the Trial Chamber defined civilian population as the term that includes both people who show resistance as well as persons *hors de combat*¹⁰⁷. It is held that the term *population* indicates at the same time a greater group of people, what gives a particular act a collective character¹⁰⁸. This is the reason why it is maintained that the term *population* as a group, against which the attack was directed, proves its widespread or systematic character. What concerns the premise of existence of the conflict, the Tribunal provided that there does not exist the requirement that victims, therefore civilian population, where somehow related or connected with a particular party to the conflict¹⁰⁹.

In order to determine whether the attack was directed indeed against civilian population there should be considered the following aspects: 1) means and methods applied at the time of the attack; 2) status and number of victims; 3) discriminatory character of the attack; 4) the character of the acts committed during the attack; 5) resistance towards the attackers¹¹⁰. The above mentioned aspects of the attack may be referred to the case *Prosecutor v. Blagojevic and Jokic*, where the Chamber recognized as a civilian population the group of refugees of Bosnian nationality, who

¹⁰⁴ *Prosecutor v. Tadić*, ICTY, Case No. IT-94-1-T, 1997, para. 637.

¹⁰⁵ *Prosecutor v. Kordic & Cerkez*, ICTY, Case No. IT-95-14/2-A, 2004, para. 50; *Prosecutor v. Galic*, ICTY, Case No. IT-98-29-A, 2006, para. 144.

¹⁰⁶ *Prosecutor v. Jelisić*, ICTY, Case No. IT-95-10-T, 1999, para. 54; *Prosecutor v. Naletilic & Martinovic*, ICTY, Case No. IT-98-34-T, 2003, para. 235; *Prosecutor v. Mrksic et al.*, ICTY, Case No. IT-95-13/1-T, 2007, para. 442, 458.

¹⁰⁷ *Prosecutor v. Limaj et al.*, ICTY, Case No. IT-03-66-T, 2005, para. 186. The phrase *hors de combat* literally means *beyond the battlefield*.

¹⁰⁸ F. Z. Ntouband, *Amnesty for Crimes against Humanity under International Law*, Leiden 2007, p. 62.

¹⁰⁹ *Prosecutor v. Limaj et al.*, ICTY, Case No. IT-03-66-T, 2005, para. 186.

¹¹⁰ *Prosecutor v. Kunarac et al.*, ICTY, Case No. IT-96-23-A and IT-96-23/1-A, 2002, para. 91.

while trying to take shelter in the city of Srebrenica, became the target of the shelling¹¹¹. Tribunal qualified this act as the crime of persecution of civilian population with the intent of provoking fear and panic, and finally forcing Bosnian population to leave the city¹¹².

Committing the act within the attack directed against civilian population constitutes the most significant condition, which, if fulfilled, enables the Tribunal to qualify the act as the crime against humanity. The extensiveness and regularity of the attack these are the aspects of the attack which the perpetrator has to be conscious of while committing the act.

5. CONCLUSION

It is clearly visible that the sole wording of Article 5 of the ICTY Statute, therefore the fact that the crime against humanity is defined as *one of the following crimes, committed in armed conflict, whether international or internal in character, and directed against any civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts*, has a lot of aspects that have to be interpreted by the entity that applies this particular definition – the International Criminal Tribunal for the Former Yugoslavia. There are two basic elements that this definition includes – *mens rea* and *actus reus* element – which may be explained only when the law is confronted with the factual circumstances of particular act.

In this particular manner the judges of ICTY chambers were able to clarify and differentiate such *mens rea* aspects of crime against humanity as intent and knowledge, which presenting the psychological side of committing the crime against humanity, manifest the perpetrator's consciousness about the circumstances of committed act and its possible results, motive – the will to commit the act or contribute to its commission, as well as the will to obtain a particular result. Apart from *mens rea* aspects, the definition of crime against humanity, in accordance with the wording of Article 5 of the ICTY Statute, includes also so called *chapeau* elements,

¹¹¹ *Prosecutor v. Blagojevic & Jokic*, ICTY, Case No. IT-02-60-T, 2005, para. 611.

¹¹² *Prosecutor v. Blagojevic & Jokic*, ICTY, Case No. IT-02-60-T, 2005, para. 611.

therefore the existence of the armed conflict and the fact that the act was directed against civilian population. *Chapeau* elements are the elements which, when proved by the Prosecutor, transform for instance a regular rape into crime against humanity, according to the definition included in Article 5 of the ICTY Statute.

Nonetheless, it should be underlined that *mens rea* of the crime against humanity, the intent and knowledge, together with the so called *chapeau* elements, therefore the existence of the armed conflict, regardless of its character, and the attack directed against civilian population, must be proved cumulatively, since if the Prosecutor proves that perpetrator had the intent to commit the act and knowledge about the circumstances, however does not prove that the act constituted a part of widespread or systematic attack directed against civilian population, the individual can not be held criminally responsible for committing the crime against humanity. As a consequence, the *chapeau* elements form the context of the committed act that constitutes the crime against humanity in accordance with the wording of the ICTY Statute.

Taking into consideration the fact that the object of International Law Commission concerning the issue of crimes against humanity is to draft articles which eventually would become a Convention on the Prevention and Punishment of Crimes Against Humanity¹¹³ it is still doubtful whether that Convention will prevent indeed the State authorities from committing an act that may fall within the scope of the definition of crime against humanity included in that Convention. This is due to the fact that despite the Convention on the Prevention and Punishment of the Crime of Genocide¹¹⁴ is in force for more than sixty years, the atrocities that may fall within the scope of its definition have been occurring all over the world and not all of the perpetrators have been held criminally responsible for committing, ordering to commit, inciting or attempting to commit such crime.

¹¹³ Annex to the Report of the International Law Commission adopted at sixty-eight session of the United Nations General Assembly, Supplement No. 10 (A/68/10), 2013, p. 141.

¹¹⁴ Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, U.N.T.S. vol. 78, p. 277.

SUMMARY

The article focuses on the importance of jurisprudence of the International Criminal Tribunal for the Former Yugoslavia in terms of crime against humanity. First of all, since it was the first international criminal tribunal, despite of its *ad hoc* character, that was applying the definition of crime against humanity since the Nuremberg and Tokyo Tribunals. Secondly, since the judges of the Tribunal faced a great number of interpretational issues, as a result of the fact, that the majority of elements included in the definition of the crime against humanity were not clear and therefore not easy to apply in particular cases. The first judgment of the Tribunal in the case of *Prosecutor v. Tadic* included a lot of interpretational explanations, which served as the basis for adjudication in further trials before the Tribunal. As a consequence, the analysis of the *mens rea* elements of the definition of the crime against humanity on the basis of ICTY case law not only improved the understanding of that international crime but also presented many interpretational issues that judges of ICTY had to confront while applying this definition to particular acts that were committed on the territory of the Former Yugoslavia, during the period which till now is considered to be the greatest armed conflict in Europe since the end of World War II.