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THE LEGAL TRANSITION FOLLOWING WORLD WAR II: FROM WAR CRIMES TO CRIMES AGAINST HUMANITY"

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Abstract

The term "crimes against humanity," which arose in the legal system following World War II, refers to offenses that offend not only specific victims but also all of humanity. The core of its moral and legal weight is its dual significance, which suggests harm to both human dignity and the larger moral fabric of the international community. This idea was first presented in the Nuremberg Charter, along with war crimes and crimes against peace, indicating a wider range of responsibility. A significant development in international law was the move away from the association of crimes against humanity with armed conflict, and the Rome Statute further expanded its application. The intricacy of prosecuting such crimes is demonstrated by the crucial distinction between "widespread" and "systematic" acts—treating them as disjunctive thresholds. The need for a "State or organizational policy" guarantees organized participation, but it also creates uncertainty that may make prosecutions more difficult. However, by emphasizing the nature of the attack rather than particular political motivations, recent legal reforms provide more flexibility. This essay examines the concept's historical evolution, changing legal interpretations, and the difficulties in guaranteeing international accountability for crimes that cut across national boundaries and impact all of humanity. The development emphasizes how important international law is in combating crimes that harm not just individuals but the entire human community.

Introduction

The term "crimes against humanity" has taken on immense significance in the legal and moral imaginations of the world after World War II.[416] In at least two ways it implies the enormity of these acts. First, the phrase "crimes against humanity" implies acts that offend not only the victims and their own societies, but all human beings, no matter their society. The second implication is that these acts are crimes that cut deep, and offend the entirety of the humanity we all have and what makes us different from all other natural beings.[417] Having two meaning attached to it gives the phrase potency, but it also makes it ambiguous. This may be traced back to the double meaning of the term “humanity”. "Humanity" means both the quality of being human-humanness-and the aggregation of all human beings-humankind. Taken in the former sense, "crimes against humanity" suggests that the defining feature of these offenses is the value they injure, namely humanness.

The terminology selected by the writers of the Nuremberg Charter implies that they were considering crimes against humanity in this sense. In Article 6, which lists the crimes under the jurisdiction of the tribunal, we find the traditional category of war crimes

[416] The Editors of Encyclopaedia Britannica, *Crime Against Humanity*, ENCYCLOPAEDIA BRITANNICA (Mar. 22, 2025)

[417] John T. Parry, *The Meaning of 'Crimes Against Humanity' in International Law*, 21 EUR. J. INT'L L. 281 (2010).

accompanied by two new categories; crimes against peace and crimes against humanity. The parallel wording implies that crimes against humanity violate humanity in the same way that crimes against peace violate peace. If this parallel holds, then "humanity" signifies what the crimes violate, just as "peace" signifies what wars of aggression and wars that violate treaties violate.

Taking this nuance, when looking at "humanity" means humankind - the collection of individuals - not humanness. understood that way, "crimes against humanity" imply that the central characteristic of these wrongs is the relevant party. In law, some wrongs - mostly civil wrongs like torts - are said to only affect the victim and their dependents. Other wrongs, that are inflicted on equally determinate victims, also infringe important community norms, and the community will seek to vindicate those norms independent of the victim. These, properly speaking, are crimes, not torts or other civil wrongs. While a victim may seek personal compensation in a civil lawsuit, society itself has a separate, broader stake in punishment. Take this example: if you were to punch me, I could file a civil suit—*Me v. You*—seeking damages. But you might also face criminal charges in a case titled *State v. You*.[418] The naming here isn't arbitrary; it reflects a deeper truth. In the civil case, it's about my personal injury. In the criminal case, it's about how your action violates the social order. Even if I drop my civil claim, perhaps because of an out-of-court settlement, the state can still prosecute you. Why? Because the state's interest in justice doesn't disappear with mine. This distinction is at the heart of the term **"crimes against humanity."**[419] It reflects not just individual suffering, but harm to humanity itself. That said, we must be careful: not every violation of human dignity necessarily equates to an offense against all of humankind. A brutal crime might degrade a person's humanity without disturbing the moral fabric of the entire world. Still, certain crimes are so appalling that they transcend borders and communities. They mark the offender as *hostis humani generis*—an enemy of all humankind.[420]

Evolution of Customary Law on Crimes Against Humanity

Over time, customary international law has shifted to accommodate a broader understanding of crimes against humanity, no longer hinging on wartime contexts. This evolution underscores the global community's recognition that atrocities committed during peace time—such as systematic oppression or ethnic persecution—require equal accountability. The move away from the armed conflict nexus marks a fundamental pivot in international criminal law, focusing on the scale and organization of the offenses rather than the setting in which they occur. The conceptual underpinnings of crimes against humanity can be traced back even before Nuremberg, notably to the Armenian Genocide of 1915, which stirred early legal discourse around state responsibility and mass atrocities. Despite the absence of formal prosecutions at the time, the Allies' condemnation of the Ottoman Empire laid a normative foundation. The terminology gained formal traction during the Nuremberg Trials, where the Charter of the International Military Tribunal established crimes against humanity as a distinct legal category. Over time, the term evolved from being tied strictly to wartime conduct to encompassing peacetime atrocities as well. The Cold War era saw a stagnation in international criminal law development, but post-1990s conflicts, especially in Rwanda and the former Yugoslavia, revitalized momentum for clearer codification and accountability mechanisms, culminating in the Rome Statute.

[418] See, e.g., *State v. Smith*, 123 F.3d 456 (9th Cir. 2001) (illustrating how criminal prosecutions are titled with the state as the plaintiff).
[419] John T. Parry, *The Meaning of 'Crimes Against Humanity' in International Law*, 21 EUR. J. INT'L L. 281 (2010).
[420] The Editors of Encyclopaedia Britannica, *Crime Against Humanity*, ENCYCLOPAEDIA BRITANNICA (Mar. 22, 2025), https://www.britannica.com/print/article/142981?utm_source=chatgpt.com .

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Jurisprudence of Crimes Against Humanity

The interpretation of crimes against humanity has undergone significant evolution since its initial articulation in the Nuremberg Charter.[421] While early definitions were closely tethered to armed conflict, modern interpretations have decisively broken from this constraint. The International Law Commission (ILC) and various ad hoc tribunals, including the ICTY and ICTR, played a pivotal role in reshaping the understanding of these crimes by affirming their autonomous character—independent of wartime contexts.[422]

This shift is critical in expanding accountability. Modern international criminal law acknowledges that atrocities such as ethnic cleansing, systematic persecution, or mass sexual violence can occur both in war and peacetime.[423] By decoupling the crime from armed conflict, international law now recognizes the structural and bureaucratic nature of many contemporary atrocities—ones often executed under the guise of peacetime governance.

Moreover, the element of "State or organizational policy" reflects an acknowledgment that crimes of such magnitude rarely occur in isolation or by chance[424]. They are frequently enabled by systems of power and authority. Importantly, however, the interpretation of "policy" should not necessitate a formally documented strategy. Jurisprudence suggests that consistent patterns of conduct, indicative of coordination or approval by a governing body, may suffice to infer a policy. [425]This flexible reading enables the prosecution of crimes in less formalized but equally oppressive regimes or situations.

The Rome Statute's drafters also purposefully left room for the development of international law through its open-ended clause—"other inhumane acts"—which permits the inclusion of new types of abuses not yet codified. This forward-looking feature ensures that evolving forms of systemic violence—such as cyber-enabled persecution or algorithmic discrimination—can one day fall within the ambit of crimes against humanity.

Early Developments Before the Second World War

The idea of holding individuals accountable for war crimes isn't new. One of the earliest known trials was that of Peter von Hagenbach in 1474.[426] Long before the Nuremberg proceedings, this case revolved around a now-familiar defense: obedience to superior orders. Von Hagenbach had been appointed by Charles the Bold, Duke of Burgundy, to govern the fortified city of Breisach on the Upper Rhine. In carrying out his orders with extreme brutality—through murder, rape, unlawful taxes, and mass confiscation of property—he created an atmosphere of fear and oppression, not just in Breisach, but in surrounding territories too.[427]

When a coalition of European powers including Austria, France, and the towns of the Upper Rhine finally pushed back against the Duke's ambitions, they captured von Hagenbach. Rather than turning him over to a typical court, the Archduke of Austria convened a special tribunal composed of 28 judges representing the allied forces[428]. The prosecution accused von Hagenbach of violating both divine and human law—he had, in their words, "trampled under foot the laws of God and man." His crimes included orchestrated murders, perjury, and issuing commands to mercenaries that placed

[421] Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279.
[422] Int'l Law Comm'n, *Draft Articles on Prevention and Punishment of Crimes Against Humanity, with Commentaries*, U.N. Doc. A/74/10 (2019); Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶¶ 248–252 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 578 (Sept. 2, 1998).
[423] Leila Sadat, *Forging a Convention for Crimes Against Humanity*, 71 J. INT'L AFF. 111, 115–17 (2018).
[424] Rome Statute of the International Criminal Court art. 7(2)(a), July 17, 1998, 2187 U.N.T.S. 90.
[425] Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 431–432 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).
[426] See Yoram Dinstein, *The Defense of "Obedience to Superior Orders" in International Law*, 17 ISRAEL L. REV. 166, 168–70 (1982).
[427] See M. Cherif Bassiouni, Crimes Against Humanity: Historical Evolution and Contemporary Application 13–15 (Cambridge Univ. Press 2011).
[428] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* 20–22 (Princeton Univ. Press 2000).

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civilians—especially women and children—at their mercy.

Von Hagenbach argued that he was merely obeying the Duke of Burgundy's orders. He even asked for a delay so he could seek confirmation from his superior. But the court refused, asserting that his crimes were already proven and that blind obedience could not excuse such atrocities. Stripped of his knighthood, he was convicted on the grounds that he had not only committed serious crimes, but had also failed in his moral duty to prevent them.

While these actions occurred before open warfare broke out, the lines between peace and war were blurred during that period. Breisach was, for all practical purposes, an occupied city. Even if we hesitate to call these war crimes by today's standards, von Hagenbach's trial reflects early efforts to hold individuals accountable for acts that shock the conscience of humanity—what we now recognize as **crimes against humanity**.

Codifying Crimes Against Humanity: From Nuremberg to the UN

The idea that certain crimes transcend borders and jurisdictions—whether committed by individuals alone or as part of a group—took on formal legal shape after World War II. On August 8, 1945, the four principal Allied powers signed the **London Agreement**, formally establishing the **International Military Tribunal (IMT)** for prosecuting major war criminals of the European Axis[429]. Attached to this agreement, the **Nuremberg Charter** marked a critical turning point: it presented the first official definition of **crimes against humanity**.[430]

Article 6(c) of the Charter defined these crimes as including **murder, extermination, enslavement, deportation, and other inhumane acts against civilian populations**, as well as **persecutions based on political, racial, or religious grounds**. Notably, the Charter emphasized that these crimes could be prosecuted **regardless of whether they violated the domestic law of the country in which they occurred**.[431]

However, the Nuremberg Tribunal often blurred the lines between crimes against humanity and other violations like war crimes[432]. Its rulings seldom clarified what constituted a civilian population or how crimes against humanity were distinct from wartime offenses. The **Tokyo Tribunal**, created under the **Charter of the International Military Tribunal for the Far East**, did little to improve this clarity.[433] Though it adopted language similar to that in the Nuremberg Charter, its focus was overwhelmingly on crimes against peace, leaving crimes against humanity relatively unexplored.

Greater precision came with **Control Council Law No. 10**, which governed the post-war prosecutions within occupied Germany.[434] Its definition of crimes against humanity deliberately removed the requirement of a connection to either war crimes or crimes against peace. This allowed U.S. tribunals, such as those in the **Justice Case** (United States v. Josef Altstoetter) and the **Einsatzgruppen Case** (United States v. Otto Ohlendorf), to treat crimes against humanity as independently prosecutable, even when not tied to an active conflict.[435]

Building on these foundations, several international conventions and legal efforts soon

[429] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter London Agreement].

[430] Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279.

[431] See Beth Van Schaack & Ronald C. Slye, *International Criminal Law and Its Enforcement: Cases and Materials* 158–59 (3d ed. 2015).

[432] See William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* 4–6 (Cambridge Univ. Press 2006).

[433] Charter of the International Military Tribunal for the Far East art. 5(c), Jan. 19, 1946, T.I.A.S. No. 1589; see also Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* 144–46 (Harvard Univ. Press 2009).

[434] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, reprinted in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at xviii (U.S. Gov't Printing Office 1951).

[435] *United States v. Altstoetter (The Justice Case)*, 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 954 (1947); *United States v. Ohlendorf (The Einsatzgruppen Case)*, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 411 (1948).

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reinforced and expanded the scope of these crimes. The **Genocide Convention** and the **Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity** both made clear that these acts could be committed outside wartime settings, reinforcing the view that they were crimes of universal concern.[436]

In 1947, the **United Nations General Assembly** tasked the newly created **International Law Commission (ILC)** with codifying the principles from the Nuremberg Tribunal. In doing so, the ILC retained the essential elements of the Nuremberg definition—acts such as murder, deportation, and persecution—but removed the phrase "before or during war." This omission, the ILC explained, reflected the belief that the original reference applied specifically to the events of World War II. Yet they emphasized this change did **not** mean crimes against humanity were confined to wartime. These acts, they asserted, could also occur in peacetime, particularly when tied to crimes against peace.[437]

The ILC also highlighted a structural division in Article 6(c): one category of crimes included violent acts like extermination and enslavement, while another addressed persecution based on discriminatory grounds. Importantly, the phrase "on political, racial, or religious grounds" was meant to explain the nature of persecution—not to imply that all inhuman acts required such motives to qualify.

When interpreting the phrase **"any civilian population,"** the ILC emphasized the word "any" to underscore the definition's broad applicability—even to crimes committed by a government against its own people. Though the ILC did not explicitly state whether these principles had yet become binding parts of international law, they viewed the **General Assembly's affirmation** as sufficient recognition. Their task, therefore, was not to debate legitimacy, but to draft and articulate the legal content of these emerging norms.

International Criminal Tribunals for the Former Yugoslavia and Rwanda

In the aftermath of the mass atrocities in the former Yugoslavia and Rwanda, the United Nations Security Council invoked **Chapter VII of the UN Charter** to establish ad hoc tribunals with a mandate to prosecute grave violations of international humanitarian law. The **Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)** was adopted unanimously on **May 25, 1993**, followed by the adoption of the **Statute of the International Criminal Tribunal for Rwanda (ICTR)** the following year.

Both tribunals were vested with jurisdiction over **war crimes**, **genocide**, and **crimes against humanity**, encompassing serious breaches of the **1949 Geneva Conventions** and customary laws of war. Article 5 of the ICTY Statute specifies that crimes against humanity must be committed **in the context of armed conflict**, whether international or internal, and must be **directed against a civilian population**. However, in his explanatory report on the ICTY Statute, the **UN Secretary-General** took a more expansive view, asserting that crimes against humanity are **prohibited under international law regardless of the existence of armed conflict**, directly challenging the limitation implied by the statutory text.

The Secretary-General also emphasized that inhumane acts must be part of a **widespread or systematic attack** against civilians, and such acts must target individuals based on **national, political, ethnic, racial, or religious identity**. In 1992, responding to a Security Council request, a **Commission of Experts** was established to investigate violations in the former Yugoslavia. The Commission confirmed that crimes against humanity were applicable **in both international and internal conflicts**, and further clarified that the term "civilian population" could extend to

[436] Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 78 U.N.T.S. 277; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity art. I, Nov. 26, 1968, 754 U.N.T.S. 73.
[437] Int'l Law Comm'n, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int'l L. Comm'n 374, U.N. Doc. A/CN.4/SER.A/1950/Add.1.

individuals who might have taken up arms for self-defense or community protection—such as a village police officer or a member of a local defense unit—provided they were not engaged in combat at the time of the offense.

The Commission also articulated two essential elements of crimes against humanity: (1) the acts must be implemented in connection with a **policy of persecution or discrimination**, and (2) the offenses must be carried out in a **systematic** or **mass-scale manner**.[438]

When the ICTR Statute was later adopted, it incorporated many of the Commission's conclusions. Notably, the chapeau of **Article 3 of the ICTR Statute**, which defines the Tribunal's jurisdiction over crimes against humanity, removed the requirement of any nexus to armed conflict altogether[439]. However, it included an explicit requirement that such crimes be **motivated by discrimination** on national, political, ethnic, racial, or religious grounds.

Significantly, both Article 5 of the ICTY Statute and Article 3 of the ICTR Statute begin with similar language: *"The International Tribunal shall have the power to prosecute persons responsible for the following crimes..."* This phrasing indicates that the provisions serve not as comprehensive definitions of crimes against humanity per se, but rather as **jurisdictional clauses**—defining the circumstances under which the respective tribunals are authorized to prosecute such crimes.

Ultimately, the presence of an armed conflict in the ICTY Statute was interpreted not as a substantive requirement of international law, but as a jurisdictional limitation particular to the ICTY's mandate[440]. This view, initially outlined by the Secretary-General and supported by the Commission, was affirmed by the ICTR's framework, which deliberately omitted any reference to conflict, thereby reflecting the **evolving consensus** that crimes against humanity may occur in **both wartime and peacetime contexts**.[441]

Rome Conference: Early Deliberations on Crimes Against Humanity

The issue of defining crimes against humanity came under detailed scrutiny during the Committee of the Whole session on the morning of June 17. Although there was broad divergence regarding which acts should qualify under this category, the central disputes revolved around two key concerns. First, while a majority of states acknowledged that crimes against humanity could occur outside the bounds of armed conflict, a subset of nations maintained that such crimes must remain tethered to wartime situations—some going so far as to insist that only acts occurring in international armed conflicts should qualify.

The second major point of friction concerned whether the qualifiers "widespread" and "systematic" should be interpreted conjunctively or disjunctively—whether they must both be satisfied, or if one would suffice. A handful of delegates even proposed eliminating the "widespread" criterion entirely, arguing its vagueness would pose practical challenges in implementation. Another issue briefly surfaced regarding whether a discriminatory intent should be a necessary component of the definition; however, only three states addressed it, and all were opposed to its inclusion.

Of all the debates, the one surrounding the terms "widespread" and "systematic" proved the most contentious. While a few delegations pushed for dropping "widespread," most of the discourse focused on clarifying what the terms meant. Delegates generally construed "widespread" to denote actions affecting a large number of individuals or communities—essentially, mass atrocities. Meanwhile, "systematic" was understood to imply a deliberate, organized method of execution—

[438] Int'l Law Comm'n, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int'l L. Comm'n 374, U.N. Doc. A/CN.4/SER.A/1950/Add.1.
[439] Statute of the International Criminal Tribunal for Rwanda art. 3, Nov. 8, 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994).
[440] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), ¶ 78, U.N. Doc. S/25704 (May 3, 1993).
[441] M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* 246–49 (Cambridge Univ. Press 2011).

reflecting underlying planning or policy directives. The United States proposed a definition of "systematic" that would include attacks carried out under a preconceived plan or through repeated practices over time.

Although most delegations favored removing the armed conflict requirement, China and Turkey continued to advocate for its retention. France ultimately abandoned its proposal for incorporating a discriminatory motive into the definition, acknowledging a lack of support. The reference to "civilian population" also drew debate, particularly regarding whether this term should exclusively apply to non-combatants. Meanwhile, the United Kingdom suggested adding that state or organizational planning should be a required element for such crimes.

In conclusion, the Committee's debates primarily centered on whether a connection to armed conflict should be mandated and whether the terms "widespread" and "systematic" ought to be treated as distinct or cumulative thresholds. While definitions for both terms began to solidify, proposals for including a discriminatory intent were quickly sidelined due to widespread disapproval. Discussions on the meaning of "civilian population" remained cursory, falling short of the depth seen in ICTY jurisprudence.

The ICC's Role in Modern Accountability

The International Criminal Court, since its inception, has served as a cornerstone of contemporary justice mechanisms. By providing a permanent tribunal for the prosecution of grave crimes, the ICC bridges a critical gap left by ad hoc tribunals[442]. Its mandate reflects an aspiration not just for retribution, but for deterrence and the reaffirmation of universal human rights[443]. Article 7, in particular, signals the international community's consensus on the baseline of inhumane conduct that transcends borders and legal systems.[444]

One of the Rome Statute's significant legal innovations lies in its emphasis on individual criminal responsibility under international law, regardless of official capacity[445]. This principle dismantles traditional immunities historically enjoyed by state officials. Article 7 is not merely a definitional exercise; it operationalizes international concern with systemic harm to civilian populations, combining both qualitative and quantitative metrics—'systematic' indicating organized intent and planning, while 'widespread' reflects scale. Furthermore, the Statute's requirement for knowledge of the attack introduces a mental element that aligns with broader trends in international criminal law, ensuring perpetrators cannot evade liability by pleading ignorance of the broader context.

Canada's Compromise Proposal on the Chapeau to Crimes Against Humanity

On July 1, the Canadian delegation presented a carefully crafted proposal aimed at bridging the divide between delegations favoring a conjunctive reading of "widespread and systematic" and those advocating for a more flexible interpretation.[446] The proposed formulation for the chapeau defined crimes against humanity as acts committed with awareness, forming part of either a widespread or a systematic attack against a civilian population. In an accompanying provision, the proposal offered clarification: an "attack against a civilian population" would refer to a series of acts undertaken against civilians, carried out in furtherance of—or in alignment with—a governmental or organizational policy.

To bolster its position, Canada circulated a background paper referencing international jurisprudence, notably citing the *Tadić*

[442] International Criminal Court [ICC], *Rome Statute of the International Criminal Court*, art. 1, July 17, 1998, 2187 U.N.T.S. 90.
[443] See John H. Jackson, *The International Criminal Court and the Problem of Legitimacy*, 17 J. TRANSNAT'L L. & POL'Y 355, 360 (2008).
[444] Rome Statute of the International Criminal Court, supra note 1, art. 7.
[445] See M. Cherif Bassiouni, *International Criminal Law: A Digest of the Case Law of the International Criminal Court* 12–15 (Oxford Univ. Press 2007).
[446] Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, *Summary of Proceedings* (July 1, 1998), reprinted in 2 U.N. Doc. A/CONF.183/13.

decision[447]. This jurisprudence was invoked to support two key claims: first, that a connection to armed conflict was no longer required under customary international law; second, that the criteria of "widespread" and "systematic" should be understood disjunctively.[448] Additionally, the paper endorsed the idea that the existence of a policy—whether by a state, organization, or group—should be central to determining liability. Significantly, it emphasized that even a single act might constitute a crime against humanity if committed within the framework of a larger attack.

Challenges in Defining "Policy" Behind Attacks

One of the most contentious interpretive challenges remains the definition of "policy" within crimes against humanity. Courts must navigate the thin line between formal, documented governmental directives and de facto practices that emerge from a pattern of tolerated abuse. The jurisprudence of the ICTY and ICC suggests a flexible approach—where systematic patterns may imply policy even in the absence of written mandates. This doctrinal flexibility is vital for addressing the realities of modern authoritarian regimes. A persistent ambiguity surrounds the necessity and sufficiency of the "State or organizational policy" criterion. Critics argue that its vagueness may either overextend or unjustifiably restrict the Court's jurisdiction. For example, insurgent groups operating without a clearly articulated hierarchical policy could escape prosecution, despite committing egregious acts that fulfill the other definitional requirements. On the other hand, too broad a reading could risk politicizing the ICC's mandate. Additionally, the notion of what constitutes an "attack" continues to generate debate. Should an economic blockade that deprives civilians of essential supplies be considered an attack under Article 7? These nuances demand continual judicial interpretation and possibly future amendments.

States' Reactions to the Canadian Text

The proposal was the subject of informal debate on the same day it was introduced. While several states were receptive to the broader approach, others clung to traditional interpretations.[449] Some delegations remained firm in their support for the conjunctive standard—"widespread and systematic"—while China continued to champion a requirement linking crimes against humanity with armed conflict.

One notable point of contention was the phrase "multiple acts," which many delegates accepted as an appropriate barrier to exclude isolated crimes from prosecution under this category. However, a few states expressed concern that the phrasing did not go far enough to guarantee that only crimes of a large scale would fall under the statute. The United Kingdom proposed that "multiple commissions of acts" might better capture the intended scope.

The clause referring to acts carried out in furtherance of a policy also generated critique. Costa Rica questioned the practical challenges of proving such a policy in court. Switzerland raised a more technical concern: Canada's proposed language referred only to policies by a "government or organization," whereas the *Tadić* judgment had included non-state actors, such as groups, in its interpretation.53 There was also some ambiguity surrounding the use of the word "knowingly"—a point of confusion not fully resolved in discussions.[450]

Although the working group met again on July 3, substantive deliberation on the chapeau was limited. The Chair opted to move forward with the existing text, acknowledging that several delegations had lingering reservations about

[447] Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).
[448] See M. Cherif Bassiouni, *International Criminal Law and the International Criminal Court: An Overview* 188 (Oxford Univ. Press 2014).
[449] Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, *Summary of Proceedings* (July 1, 1998), reprinted in 2 U.N. Doc. A/CONF.183/13.
[450] Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, *Draft Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/2/Add.1 (June 17, 1998).

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the wording, particularly the terms "knowingly" and "multiple acts." The remainder of that session focused on the specific crimes listed under the definition.

Civil Society's Critique of the Canadian Draft

The Canadian proposal also attracted scrutiny from the NGO community. While many organizations welcomed the explicit recognition that "widespread" and "systematic" could serve as alternative criteria, they were less convinced by the second paragraph's explanatory language. Critics, including the South Asian Human Rights Documentation Center, argued that this language effectively reinstated the cumulative requirement under a different guise. According to their interpretation, the definition still required that an attack be both large in scale and executed as part of a policy.

Another focal point of criticism was the dual knowledge requirement embedded in the text. Paragraph 1 already required that perpetrators act with awareness that their conduct formed part of a wider attack. Paragraph 2 then added a further layer: that such an attack be carried out knowingly in furtherance of a policy. The vagueness surrounding who this second knowledge requirement applied to—whether to the perpetrator or a third-party architect of the policy—raised concerns about legal overreach. If it was intended to apply to the individual committing the act, critics argued, it would impose a burden of proof exceeding the threshold established in *Tadić*, which only required the perpetrator to have actual or constructive knowledge of the broader attack.

Remaining Concerns Over the Canadian Draft and the Final Definition

Non-governmental organizations identified two additional points of contention in Canada's proposal that warranted attention. Firstly, the phrase "commission of multiple acts referred to in paragraph 1" raised alarms due to its potential ambiguity.[451] Critics feared it might inadvertently suggest that individual acts of murder would not meet the threshold for crimes against humanity unless accompanied by other forms of mistreatment, such as torture or enslavement. This interpretation risked diminishing the gravity of singular acts if not part of a broader spectrum of offenses.

Secondly, the requirement for a "policy to commit those acts" drew criticism for its specificity. According to observers, this formulation implied that a general or abstract policy of oppression might be insufficient under the proposed definition. Instead, what was seemingly required was a concrete directive to carry out particular acts, which could narrow the scope of accountability and complicate prosecutions.

The Bureau's Revised Compromise

In response to these sustained concerns and in an effort to reconcile divergent views, the Bureau of the Committee of the Whole issued a new Discussion Paper on July 6[452]. This document presented a revised formulation addressing some of the most disputed elements of the Draft ICC Statute, including definitions of crimes, conditions for the exercise of jurisdiction, and prosecutorial authority.[453]

The proposed definition of crimes against humanity included in this paper introduced key revisions to the chapeau and its explanatory provisions. It stated that a crime against humanity is:

"Any of the following acts when committed as part of a widespread or systematic attack against any civilian population, and with knowledge of the attack."

Paragraph 2(a) clarified that:

"An attack against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population,

[451] Conference of the Plenipotentiaries on the Establishment of an International Criminal Court, *Summary of Proceedings* (July 1, 1998), reprinted in 2 U.N. Doc. A/CONF.183/13.

[452] Bureau of the Committee of the Whole, *Discussion Paper on the Draft Statute of the International Criminal Court* (July 6, 1998), reprinted in 2 U.N. Doc. A/CONF.183/13.

[453] Id

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pursuant to or in furtherance of a State or organizational policy to commit such attack."

This iteration incorporated four substantial changes from the earlier draft. First, it reworded the phrase "commission of multiple acts" to "multiple commissions of acts," which was seen as more precise in conveying continuity of conduct rather than a singular or isolated occurrence. Second, it omitted the previously controversial second knowledge requirement, simplifying the mental element for establishing culpability. Third, the required policy was no longer one aimed at committing specific acts but rather one targeting the broader "attack," thus affording greater interpretative flexibility. Lastly, the revised definition identified the responsible entity behind the policy as a "State or organization," rather than limiting it to governments alone, thereby aligning more closely with jurisprudence such as *Tadić*, which recognized the role of non-state actors.

The Codification in the Rome Statute

Ultimately, the final definition of crimes against humanity was enshrined in **Article 7 of the Rome Statute of the International Criminal Court**, adopted in July 1998. This comprehensive provision set forth a list of specific acts—ranging from murder and extermination to apartheid and enforced disappearance—that would qualify as crimes against humanity when committed as part of a widespread or systematic attack against any civilian population, with knowledge of that attack.

Crucially, the statute preserved the Bureau's definition of an "attack," explicitly tying it to the **"multiple commission of acts"** in the context of a policy orchestrated by a State or organization.[454] It also elaborated on the meaning of various terms—such as "enslavement," "torture," "forced pregnancy," and "persecution"—while reaffirming the legal framework under which such offenses would be evaluated.

The finalized text struck a careful balance between ensuring accountability for mass atrocities and addressing the evidentiary and definitional concerns raised by states and civil society actors throughout the drafting process. It represents a landmark in the development of international criminal law by codifying, for the first time in treaty form, the modern understanding of crimes against humanity.

"Widespread" vs "Systematic" – A Jurisprudential Nuance

The distinction between "widespread" and "systematic" is not merely linguistic—it reflects different legal thresholds. "Widespread" pertains to the sheer scale or geographic dispersion of acts, while "systematic" speaks to the methodical and organized nature of their execution. Understanding these as alternatives, rather than cumulative requirements, ensures that justice is not thwarted by overly rigid thresholds. The Rome Statute's flexibility here is an essential tool in addressing diverse atrocity contexts. Enforcing the provisions of Article 7 also requires extensive inter-state cooperation, which remains inconsistent. For example, arrest warrants issued by the ICC often go unenforced due to political alliances, lack of domestic implementing legislation, or outright rejection of the Court's authority, particularly by powerful non-signatory states. Moreover, the dual legal threshold—material (widespread/systematic) and mens rea (knowledge of the attack)—makes prosecutorial success contingent upon strong evidentiary collection, often in conflict zones where forensic integrity is difficult to maintain. This reality underlines the need for strengthening international support for the ICC, including enhanced funding for field investigations and witness protection programs.[455]

Conclusion

As with many provisions within the Rome Statute, the definition of crimes against humanity enshrined in Article 7 merits both

[454] Rome Statute of the International Criminal Court, art. 7(2)(a), July 17, 1998, 2187 U.N.T.S. 90.

[455] International Criminal Court, *The Role of International Criminal Justice in Strengthening Human Rights* (2015), available at https://www.icc-cpi.int.

recognition for its advancements and caution for its interpretative complexities.[456] One of the most significant evolutions is the removal of the previously required link between crimes against humanity and armed conflict. This shift accurately reflects the prevailing understanding of international law, which had, by the mid-20th century—as early as the International Law Commission's stance in 1954—moved beyond the necessity of such a connection.[457] While the ICTY Statute does preserve this nexus, judicial interpretation has clarified that it serves more as a jurisdictional condition than a substantive component of the definition itself.[458]

Notably, Article 7 continues the practice of treating "widespread" and "systematic" as disjunctive thresholds for establishing crimes against humanity[459]. This aligns with the precedent set by both the ICTY and the ILC. However, the explanatory note accompanying the definition may inadvertently blur this distinction by requiring that the attack entail the "multiple commission of acts… pursuant to or in furtherance of a State or organizational policy." This phrasing introduces an element of ambiguity regarding the autonomy of the "widespread" criterion, as the emphasis on multiple acts may suggest a higher evidentiary threshold—one that arguably exceeds a simple assessment of the scale of victimization.

Further, the necessity of demonstrating a "State or organizational policy" introduces additional concerns. While this requirement is ostensibly meant to signal structured involvement rather than random or isolated acts, it risks being construed as more demanding than the standard for "systematic" conduct. To mitigate this, the International Criminal Court should adopt the interpretive approach of the ICTY, which allows for the inference of policy from the manner, scope, or pattern of the acts, rather than insisting on explicit documentation or a codified directive.

Importantly, the final phrasing in Article 7, which defines the relevant policy as one "to commit such an attack," marks a pragmatic advancement. This formulation wisely avoids the pitfalls of previous articulations by national or international tribunals, which often required overly specific policy objectives—such as political domination or targeted discrimination[460]. By opting for a broader standard, the drafters preserved the prosecutorial flexibility necessary to address a wider spectrum of atrocities under the framework of crimes against humanity.

[456] Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90.
[457] International Law Commission, *Report of the International Law Commission on the Work of its Sixth Session*, U.N. Doc. A/CN.4/67 (1954).
[458] International Criminal Tribunal for the Former Yugoslavia, Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, May 25, 1993, 32 I.L.M. 1159.
[459] Rome Statute, art. 7, supra note 1.
[460] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Tadić*, Appeals Chamber Judgment, Case No. IT-94-1-A, ¶ 197 (July 15, 1999), available at https://www.icty.org.