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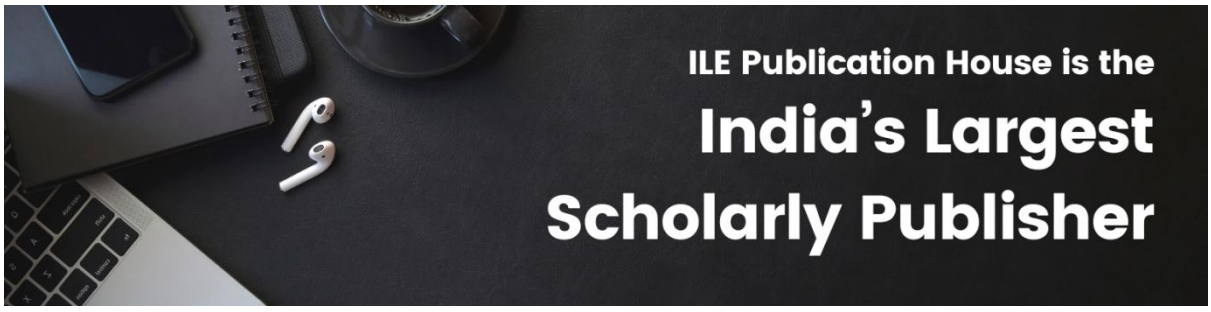

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CRIMES AGAINST HUMANITY: DEVELOPMENT, INTERPRETATION, AND CHALLENGES IN PROSECUTION UNDER THE ICC STATUTE

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LIST OF ABBREVIATIONS

Abbreviation	Full Form
AC	Appeals Chamber
AU	African Union
CAH	Crimes Against Humanity
CAR	Central African Republic
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
HRC	Human Rights Council
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
NGO	Non-Governmental Organisation
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
R2P	Responsibility to Protect
SCSL	Special Court for Sierra Leone
TC	Trial Chamber

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Abbreviation	Full Form
TWAIL	Third World Approaches to International Law
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

ABSTRACT

Crimes against humanity are among the gravest of international crimes. This category encompasses acts of unfathomable cruelty. Such acts must be committed as part of a widespread or systematic attack against a civilian population. Crimes against humanity have undergone a significant evolution from the invocation of the laws of humanity in the Martens Clause of the Hague Convention of 1907, through their formal codification in Article 6(c) of the Nuremberg Charter of 1945, to their most comprehensive modern definition in Article 7 of the Rome Statute of the International Criminal Court of 1998. This evolution reflects both the development of international criminal law and the changing nature of mass atrocity.

This dissertation aims to critically analyse the law relating to crimes against humanity as defined, interpreted and prosecuted under the Rome Statute. It tracks the evolution of the concept from its pre-Nuremberg origins through the ad hoc tribunals for the former Yugoslavia and Rwanda, culminating in the ICC's evolving jurisprudence. The: it examines critically the main features of the Article 7 definition including the widespread or systematic attack requirement, the civilian population requirement, the policy element and mens rea as interpreted by the Pre-Trial Chambers, Trial Chambers and Appeals Chamber of ICC. It examines the main obstacles faced in prosecution at the ICC and responds to state non-cooperation, jurisdictional limitations, political selectivity and evidentiary problems. The focus of this article is the assessment of the ILC's Draft Articles of 2019 on the Prevention and Punishment of Crimes Against Humanity.

The study employs a doctrinal legal research methodology, supplemented by historical data, comparisons of international criminal law, and institutional analysis. A cohesive theoretical framework based on natural law theory, positive international law theory, cosmopolitan justice theory, responsibility to protect doctrine, and Third World Approaches to International Law.

The principal findings show that although article 7 represents a significant advance in codification, the prosecution record of the ICC reveals interpretive ambiguities, jurisdictional gaps and institutional limitations that constrain its effectiveness. A dozen policy recommendations serve as evidence of developing an international legal framework as well as the ICC's effectiveness.

Keywords: Crimes Against Humanity, Rome Statute, International Criminal Court, Prosecution Challenges, State Cooperation, Widespread Attack, Systematic Attack, Policy Element, Impunity, ILC Draft Articles

CHAPTER 1: INTRODUCTION

1.1 Background of the Study

The crimes against humanity are a unique and very important category in the structure of international criminal law. The most ambitious attempt by the international legal community to define and criminalize a range of brutal acts not just as individual crimes against particular victims but as aspects of larger-scale mass violence against civilian populations as such.

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The principle now recognizes – through the agonizing experiences of two world wars, the Holocaust, colonial crimes, and the mass crimes against humanity in the twentieth century – that not all grievous acts are merely the concern of the states where they take place or the individuals they are directed against. Rather, some acts are so against human dignity that they are a violation of the community of nations as a whole.

The term's historical origins can be traced back to the 19th century. There, a growing corpus of international humanitarian law began to articulate limits on the conduct of warfare grounded not merely in reciprocal obligations of the belligerent states but more fundamentally in the dictates of humanity. The Hague Convention of 1899contained a provision which is now known as the Martens Clause. This Clause states that belligerents and inhabitants remain under the protection and rule of the principles of the law of nations. These principles are the result of usages established among civilised peoples, from the laws of humanity, and from the dictates of public conscience. The Clause was maintained in the Hague Convention of 1907. The invocation of the laws of humanity as a source of international legal obligation provided the conceptual foundation upon which crimes against humanity would be developed. According to Cassese, the Martens Clause is the first express recognition in international law that humanity-based principles governing the conduct of states and individuals must be considered, even when not specifically provided for in a particular treaty (Cassese, 2008:36).[1069]

The Nuremberg Charter and Crimes against Humanity

The first formal entry of crimes against humanity into positive international criminal law can be traced to the Article 6(c) of the Charter of International Military Tribunal ("Nuremberg Charter") which was established by the Allied Forces in 1945. Article 6(c) defined the term crimes against humanity as "murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political , racial or religious grounds. This definition marked a significant development as it established individual criminal responsibility for systematic acts of mass violence. It was however limited by the necessity for establishing a nexus to war. This political limitation owed to the reluctance of the Allied powers to create a legal category for the violence perpetrated by states against their own populations in peace time. As Bassiouni has noted, this restriction was informed by political prudence no less than by legal principle, as the humanitarian rationale underlying the crimes against humanity category also applied equally to peacetime crimes (Bassiouni, 2011, p .144).[1070]

Despite the limitations set out by Nuremberg Tribunal, its use of the term "crimes against humanity" to refer to the systemic persecution and murder of the European Jewry and other groups by the Nazis constituted a major innovation. The Tribunal's dismissal of the act of state defence and the superior orders defence established a fundamental principle of personal criminal responsibility under international law for acts that, however lawful domestic, violate basic principles of humanity under international law regardless of whether the perpetrator is acting in an official capacity. As Schabas points out, this principle underpins the entire subsequent edifice of international criminal law (Schabas, 2016, p. 154).[1071]

Over time, the establishment of the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda led to the gradual release of crimes against humanity from the armed conflict nexus. The decision of the ICTY in Prosecutor v. Tadić established that a connection to an international armed conflict

[1069] Kai Ambos, *Treatise on International Criminal Law*, Vol II (Oxford University Press 2013).

[1070] M Cherif Bassiouni, *Crimes Against Humanity* (Cambridge University Press 2011).

[1071] David Bosco, *Rough Justice* (Oxford University Press 2014).

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was unnecessary for the establishment of that a crime against humanity. The Statute of the ICTR, however, made the category explicitly applicable in the context of an internal armed conflict or absence of armed conflict entirely. The developments paved the way for the most extensive codification of crimes against humanity in the Rome Statute of the International Criminal Court adopted in 1998 and coming into force on 1 July 2002. Article 7 of the Rome Statute contains the most detailed definition of crimes against humanity to date in International Criminal law. There are several heinous acts that the law prohibits. Some of them include murder, extermination, enslavement, rape and serious sexual violence. Moreover, this also includes persecution, enforced disappearance and other inhuman acts. Further, it highlights that these acts should be committed as part of a widespread or systematic civilian population. The definition does away with the link to armed conflict totally and incorporates an element of policy that requires the attack to be pursuant to or in furtherance of a state or organizational policy which has become one of the most controversial features of the definition in later ICC jurisprudence.[1072]

Since 2002, the ICC has been operational as a permanent international criminal court on the statute of Rome. It has gained information that will aid the court on the interpretation of Article 7. This ICJ jurisprudence will have been produced on cases on the same subject matter. Where cases were filed because of the situations in... a) the DRC, b) Uganda, c) Sudan, d) Central African Republic, e) Kenya, f) Libya, g) Ivory Coast, h) Bangladesh/Myanmar, i) Afghanistan, j) Venezuela, k) Palestine, etc. It has illuminated the meaning of key elements of the definition of crime against humanity. At the same time revealing important interpretive ambiguities and institutional challenges constraining the court's effectiveness.

The ICC is at a crucial juncture in 2024. The court has indicted over 40 persons, completed the hearings against a relatively small number, and many high-profile prosecutions collapsed due to interference with witnesses, evidence problems, and lack of cooperation by the State. The international legal community has been debating whether the ILC's 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity should be transformed into a binding treaty that would create obligations of prevention and prosecution for actors beyond the parties to the Rome Statute. It is in this backdrop that a comprehensive critical legal analysis is undertaken in this dissertation.[1073]

1.2 Research Problem

The present dissertation's research problem results from a gap between the normative ambitions of the framework of crimes against humanity in the Rome Statute. And the record of actual prosecutions at the ICC. Notwithstanding the comprehensiveness of the Article 7 definition and near-universal recognition of the importance to end impunity for crimes against humanity, the ICC's prosecution record reveals significant structural challenges preventing the court from executing its mandate as effectively as its architects contemplated.

This is focused on the interpretive ambiguities which continue to afflict the Article 7 definition, despite 20 years of ICC case law. The fundamental elements the widespread or systematic attack requirement, the civilian population requirement, the policy element and the mens rea standard are identified as particularly controversial, with Pre-Trial Chambers, Trial Chambers and the Appeals Chamber occasionally reaching divergent conclusions on significant definitional issues. The matter of Kenya starkly illustrates these difficulties: the finding of Pre-Trial Chamber II that the post-election violence during 2007 to 2008 met the threshold requirements of crimes against humanity ultimately collapsed with the

[1072] Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008).

[1073] Charter of the International Military Tribunal (Nuremberg Charter) (1945).

prosecution case against Uhuru Kenyatta and William Ruto, raising grave issues as to whether the authorisation of investigations had applied the elements of article 7 with sufficient rigour or whether the collapse testified to failures in evidence and co-operation. Ambiguities create legal uncertainty, complicating their prosecution and rendering the workings of the law less predictable.[1074]

The second dimension has to do with state cooperation deficit. The ICC has no capacity to enforce on its own and relies on states to arrest suspects, transfer them to The Hague, and supply evidence and assistance. The prosecution has been fundamentally undermined due to the repeated non-compliance by states, including Rome Statute parties, with the court's requests. The most dramatic illustration may very well be the failure by more than forty states parties to arrest and surrender Omar Al-Bashir of Sudan, not withstanding two outstanding arrest warrants issued in 2009 and 2010. Al-Bashir has travelled freely to states parties including Kenya, Chad, Nigeria, South Africa and Uganda without arrest. South Africa did not arrest him on his visit to Johannesburg in 2015, leading to formal ICC proceedings against it that resulted in no effective consequence in reality. This example shows the difference between legal obligations and political success.[1075]

Jurisdictional restrictions leading to substantial gaps in the ICC's global reach is the third dimension. In order to establish jurisdiction, the ICC→s statute demands that either the territorial state or the state of nationality must be a party to the Rome Statute. Alternatively, the Security Council can refer the situation. Restrictions of the court exclude large-scale crimes against humanity taking place in non-states parties including China, Russia and the United States unless the Security Council refers the situation which the veto power of these states renders fortified difficult. The result is what critics have termed "a geography of impunity" that maps uncomfortably onto the global power structure that already exists.

The political dimensions of ICC prosecution are the fourth dimension. The court faces persistent allegations of political bias, as it has been accused of selectively targeting African states and leaders while failing or refusing to investigate situations involving nationals from powerful states. The persistent campaign against The ICC by the African Union including calls for African states to consider withdrawal and demands for the deferral of cases against African leaders shows a real legitimacy crisis that poses long-term dangers to the court's effectiveness and universality.

The fifth dimension deals with evidence-related challenges that are more severe than domestic criminal offences. Proving contextual elements of crimes against humanity particularly the existence of a widespread or systematic attack and the accused's knowledge requires complex evidence about organisational context and policy background that is exceptionally difficult to obtain in conflict situations where witnesses face extreme risk, documentary evidence is destroyed, and state authorities are hostile to the investigation.[1076]

1.3 Research Objectives

The college dissertation to six research objectives concerning different dimensions of the research problem.

The primary objective is to track the historical development of crimes against humanity, from its pre-Nuremberg origins to the post-war military tribunals, the ad hoc tribunals and the Rome Statute, which would sequentially reveal the progressive evolution of the definition and the widening of its scope and application of the concept.

In the second part of the paper, we will critically analyse the definition of a crime against humanity under Article 7 ICC. We will assess

[1074] Kamari Maxine Clarke, *Fictions of Justice* (Cambridge University Press 2009).
[1075] Hague Convention (IV) (1907).
[1076] International Law Commission, Draft Articles on Crimes Against Humanity UN Doc A/74/10 (2019).

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how each key element has been interpreted in the ICC's jurisprudence and what are the main interpretive ambiguities and controversies that have arisen in the jurisprudence of the Court.

The third objective of this study is to analyze the key challenges facing the prosecution of crimes against humanity before the ICC such as state non-co-operation, jurisdictional limitation, political factor, and evidentiary challenges and the structural and institutional underpinnings of these challenges.

The fourth objective is to evaluate the ILC's 2019 Draft Articles on Prevention and Punishment of Crimes Against Humanity, assessing their likely contribution to strengthening the international legal framework and the prospects for adoption as a binding convention.

The fifth objective is to conduct a comparative analysis of the prosecution of crimes against humanity by the ICTY, ICTR, SCSL, and ICC in order to learn lessons and identify best practices for reforming the ICC's approach.

Another objective consists of producing twelve evidence-based recommendations for the purpose of strengthening of the international legal framework and making the ICC a more effective and legitimate institutional mechanism to prosecute crimes against humanity.[1077]

1.4 Research Questions

The study has one primary, and five secondary research questions that guide the performance.

1. Is the current international legal framework for the definition and prosecution of crimes against humanity under the Rome Statute capable of fulfilling the normative commitment to ending impunity for mass atrocity, and if not, what reforms are needed to remedy its main deficiencies?
2. How has the concept of crimes against humanity evolved from its historical origins to its codification in Article 7 of the Rome Statute? What are the main continuities and discontinuities in this evolution? This is the gist of the first secondary research question.
3. How have the ICC's judicial chambers interpreted the key elements of the Article 7 definition particularly the widespread or systematic attack requirement, the civilian population requirement, the policy element, and the mens rea standard and what interpretive ambiguities and inconsistencies have emerged?
4. The ICC faces broader sociocultural and economypolitical challenges To what extent is the incapacity of the ICC normative the third secondary research question asks What are the main structural and institutional impediments to ICCs prosecution of crimes against humanity and how susceptible legal and institutional reform are these that have impeded the ICCs prosecution of crimes against humanity
5. What contribution can the ILC's 2019 Draft Articles make to the strengthening of the international legal framework, and what are the realistic prospects of their adoption as a binding international convention?
6. What is the effect of the selectivity of ICC prosecution on the legitimacy and effectiveness of the court, and what types of structural reforms could usefully address this selectivity?

1.5 Brief Overview of Literature

Extensive and Methodologically Varied Literature Literature on the ICC and Crimes Against Humanity Within Chapter 2, a comprehensive discussion takes place. This section provides a brief orientation to the main bodies of literature.

The original work of Bassiouni on crimes against humanity is the most comprehensive historical

[1077] Sarah Nouwen and Wouter Werner, 'Doing Justice to the Political' (2011) 21(4) EJIL 941.

and legal scholarship on the subject. It is the first best work and the most comprehensive work covering the definition from pre-Nuremberg to the present ICC framework. An analysis of Schabas' commentary on the Rome Statute and its definition of Article 7. Ambos' multi-volume work offers the most thorough comparison of the contents of crimes against humanity. Sands's "East West Street" discover the biographical and intellectual origins of both crimes against humanity and genocide as legal concepts through the parallel lives of Hersch Lauterpacht and Raphael Lemkin.

ACritical literature around the ICC's performance is capped off by two important contributions: Bosco, who examines the political dimensions of ICC prosecution in his "Rough Justice," and Clarke, whose "Fictions of Justice" provides a thorough TWAIL critique of the ICC's African focus. The strains of cooperation in Uganda and the Sudan have been analysed importantly by Nouwen and Werner in terms of the peace versus justice dilemma that shapes the court's most difficult cooperation challenges. Sadat's scholarship as the leader of the Crimes Against Humanity Initiative has been particularly influential on the ILC Draft Articles and in advocating for a convention on this issue.

1.6 Scope of the Study

The subject matter of this dissertation is restricted to those acts which are said to constitute crimes against humanity as defined in Article 7 of the Rome Statute. There is no comprehensive treatment of the related crimes of genocide, war crimes and the crime of aggression, save where relevant these intersect with the analysis of crimes against humanity. Crimes against humanity are dealt with herein because of their unique position as the broadest of the international crimes because they can be committed not only in wartime but also in peacetime and cover the widest range of acts amounting to atrocity.

In terms of timing, the thesis will study the development of crimes against humanity from the nineteenth century when the idea first appeared to the year 2024. It will pay special attention to the years starting in 2002 when the ICC started operation. In its geographical scope, the dissertation examines the global framework without geographical restriction but draws on particular ICC situations (especially Darfur, Kenya, DRC, Bangladesh/Myanmar, and Venezuela) for illustrative and analytical purposes. The research used only secondary data, international primary law, international judicial decisions of international criminal tribunals, International law commission reports and peer-reviewed scholarly literature.

1.7 Hypothesis

The primary thesis asserts that the Rome Statute, Article 7 definition is the most nuanced codification of crimes against humanity in the history of international criminal law. Yet the prosecution record of the ICC reveals fundamental structural problems such as the state cooperation deficit and jurisdictional gaps, and political selectivity that cannot be remedied any further with interpretative evolution alone, and require a combination of institutional reform of the ICC and the development of complementary instruments, particularly a standalone crimes against humanity convention.

The first subsidiary hypothesis asserts that, requiring the attack to be "pursuant to or in furtherance of a state or organisational policy", the policy element requirement unfairly restricts the definition of crimes against humanity (CAH) and excludes large-scale events that lack formal organisational planning, while it also allegedly points out that the ICC's jurisprudence has been inconsistent in its interpretation of the element.

The second sub-hypothesis states that the cooperation deficit of the states is the most severe structural impediment to the effective prosecution of crimes against humanity before the ICC. This relies on an essential tension between the sovereignty-based international

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order and the supranational ambition of international criminal justice.

The third subsidiary hypothesis is provided by the ILC's 2019 Draft Articles. If these are adopted as a treaty, those obligations will extend to state parties beyond just the Rome Statute, and this would offer a much stronger framework for domestic prosecution through aut dedere aut judicare.

1.8 Research Methodology

The methodology of the dissertation which is employed mainly is doctrinal international legal research, The methodology which is employed as the supplement includes a historical analysis, a comparative international criminal law analysis and an institutional analysis of the ICC. In this approach, the primary sources of law related to the substance of crimes against humanity are examined systematically in order to identify, interpret and critically assess the legal rules governing it. The Rome Statute, ICC's Elements of Crimes, ICC's Rules of Procedure and Evidence, Statutes of the ad hoc tribunals and judgments of ICC and other international criminal tribunals are all subject matter of this approach.

This historical analysis considers the evolution of the crimes against humanity concept from its origins until today. Primary historical sources will be relied upon, including the Nuremberg Charter and judgment, Allied Control Council Law No. 10, the Statutes and key judgments of the ICTY and ICTR, the 1996 Draft Code of the ILC as well as the travaux préparatoires of the Rome Statute. The study of the prosecution of crimes against humanity in various international criminal tribunals was carried out with the objective to seek similarities and differences not only in the development of the law itself but also in the institutions and procedures of the tribunals and to highlight the determinative effects they have on the final prosecution decision. The institutional analysis of the ICC investigates the features of the organisation's design that facilitate or obstruct effective prosecution. [1078]

The dissertation employs as its data base exclusively secondary sources, namely primary international legal instruments, judicial decisions, reports of the ILC and peer reviewed academic literature. There has been no collection of primary empirical data.

1.9 Chapterisation Scheme

The dissertation has a total of six chapters. The background, research problem, objective, questions, hypothesis as well as methodology has been explained in Chapter 1. Chapter 2 is a critical account of the relevant academic literature which is thematically organised by the author and concludes with a research gap. Chapter 3 of the analysis has developed the integrated theoretical framework which draws on five complementary theoretical traditions which then synthesised into evaluative criteria. It's these evaluative that applied throughout the analysis. Chapter 4 traces the historical evolution and definition of crimes against humanity from pre-Nuremberg origins to the Rome Statute. The core critical analysis of the Article 7 interpretation in ICC jurisprudence and of the main practical and political challenges of prosecution is undertaken in Chapter 5. Chapter 6 outlines the main findings, proposes 12 evidence-based policy recommendations, and identifies future research directions. The section further discusses limitations and the overall conclusion.

CHAPTER 2: LITERATURE REVIEW

2.1 Introduction

There is a significant body of academic literature on crimes against humanity and the International Criminal Court, covering a wide variety of perspectives and methodological approaches. International criminal law is a genuinely interdisciplinary field, drawing on public international law, criminal law, human rights law, political science, sociology, and

[1078] *Prosecutor v Tadić* (1995) IT-94-1-AR72.

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history. The goal of this chapter is to provide a comprehensive critical survey of the major literature relevant to our research questions. This is done in a thematic manner with a view to highlight the major conceptual, historical, doctrinal and critical literature that forms the background to our analysis in this dissertation.[1079]

Examination of eight principal bodies of literature. Section 2.2 reflects on the historical and conceptual literature on the development of the crimes. Section 2.3 looks closely at the doctrinal literature regarding the definition and interpretation of Article 7. Section 2.4 examines the institutional literature relating to the performance and design of the ICC and the problems it faces. Section 2.5 explores important literature regarding international criminal justice and its politics, selectivity, and legitimacy. In section 2.6, we examine the literature specific to state cooperation and the enforcement deficit. The ILC's draft articles of 2019 has relevant literature which is examined in this section. Section 2.8 conducts an assessment of the new literature on mass atrocities. section 29 points out the research gap that the present dissertation is addressing[1080]

The conclusion reached in the chapter is that although there exists a vast literature on the topic, no existing literature offers a sufficiently comprehensive, integrated and up to date critical legal analysis which simultaneously and systematically addresses the historical evolution, interpretive challenges, institutional limitations and reform possibilities of the regime of crimes against humanity within one unified analytical framework.

2.2 Historical Development of Crimes Against Humanity

The foundation for the historical literature on crimes against humanity is provided by a small number of very comprehensive, authoritative works that mark the origins and development of the concept.

Bassiouni's "Crimes Against Humanity: Historical Evolution and Contemporary Application" (2011) is still the only huge and most authoritative work dealing with the historical evolution of the concept from the 19th century until the Rome Statute and early ICC jurisprudence. In his recent investigation of the origins of crimes against humanity, Professor Bassiouni reveals a far richer and more complex intellectual and practical past than commonly recognized. Bassiouni traces the concept through three principal developmental phases: the pre-Nuremberg phase in which invocations of the laws of humanity provided a philosophical foundation without creating formal individual criminal responsibility; the Nuremberg phase in which crimes against humanity were first codified in positive international law; and the post-Nuremberg phase in which the concept was progressively developed through the ILC, the ad hoc tribunals, and ultimately the Rome Conference of 1998. Bassiouni's analysis is particularly valuable for its exhaustive attention to primary sources including the travaux préparatoires of relevant legal instruments and judgments of relevant tribunals. Many reviewers have observed that there is a tendency to write teleologically about the development of crimes against humanity as one of progressive linear evolution, underplaying the degree to which this development has been politically contested, and marked by substantial discontinuity (Sadat, 2013, p. 338).[1081]

A different kind of historical contribution may be found in Sands's East West Street (2016): a compelling narrative intellectual history tracing the evolution of the two crimes through the biographical stories of Hersch Lauterpacht and Raphael Lemkin. Sands is a real scholar. His work not only provides an account of the historical and legal development of these concepts that is rigorous but also readable. It also tackles the fundamental tension between

[1079] *Prosecutor v Al-Bashir* (2009) ICC-02/05-01/09.
[1080] Dapo Akande, 'Security Council Referrals and ICC' (2009) 7(2) JICJ 333.
[1081] Kai Ambos, *Treatise on International Criminal Law*, Vol II (2013).

the Lauterpacht vision of individual rights protection and the Lemkin vision of group protection. This tension is still very much at the forefront of scholarly and policy debate around the inter-relationship between crimes against humanity and genocide as legal categories.

Historical scholarship on the Nuremberg Tribunal includes Marrus' "The Nuremberg War Crimes Trial 1945-46: A Documentary History" (1997) and Heller's "The Nuremberg Military Tribunals and the Origins of International Criminal Law" (2011). Marrus' book is an important primary source collection. Meanwhile, Heller's book provides the most complete scholarly analysis of the subsequent Nuremberg proceedings under Allied Control Council Law No. 10. Heller's book convincingly shows that the subsequent Nuremberg proceedings generated key doctrinal elements that were important to subsequent jurisprudence on crimes against humanity in ways insufficiently credited by accounts focused solely on the IMT judgment.[1082]

There is a considerable body of historical literature relating to the evolution of crimes against humanity which is evident from the ad hoc tribunals. Schabas's "The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone" (2006) is the most comprehensive comparative legal analysis of the contributions of all three ad hoc tribunals to international criminal law. In significant reflective scholarly articles, former ICTY judge Patricia Wald has analysed the tribunal's jurisdictional decision in Tadić and the development of the doctrine of crimes against humanity more broadly. Many have explored the contributions of the ICTR, particularly the Akayesu judgment and its groundbreaking treatment of sexual violence as crimes against humanity. Most notably, in her article in the Columbia Law Review, van Schaack provides the most rigorous legal analysis of the customary international law status of crimes against humanity based on a comprehensive review of state practice and opinio juris across successive international tribunals.

Meron's scholarship on humanisation of international law is a good theoretical framework for understanding the emergence of crimes against humanity as part of the growing process through which international law has come to know and respect individual human beings rather than merely to regulate relations among states. According to Meron, one of the most important instances of this humanisation process is the gradual erosion of the armed conflict nexus to crimes against humanity, which shows a steadily growing consensus that the most fundamental human rights norms transcend the war/peace divide.[1083]

2.3 Doctrinal Literature on the Article 7 Definition and Its Interpretation

The most relevant doctrinal literature relating to the definition in article 7 has increased considerably in volume and sophistication since the ICC produced a series of decisions on the interpretation of the provision. This literature is at the analytical core of the dissertation.

Schabas's commentary is the most comprehensive and authoritative doctrinal treatment of Article 7 of the Rome Statute. It critically examines each element of Article 7 in light of the travaux préparatoires, the potentiality of the full range of ICC case law, and all the academic literature. Schabas refers to a number of earlier key documents such as the Nuremberg Charter and the International Law Commission Draft Code to highlight what was perceived to be the contribution of the ICC Statute. The court's over fifteen years of jurisprudence has benefitted the second edition and provided a substantially more complete doctrinal account than possible in the first edition.

The comparative and doctrinal analysis of the elements of crimes against humanity offered by Ambos in volume II (2013) is extensive and technical, drawing on a wide array of

[1082] Antony Anghie, *Imperialism and International Law* (2005).

[1083] M Cherif Bassiouni, *Crimes Against Humanity* (2011).

scholarship in various languages and legal cultures. The treatment of the mens rea requirements , that is, the general mental element under Article 30 and the specific knowledge requirement of Article 7, of Ambos is particularly valuable owing to his comparative reflection on these concepts in civil and common law – specifically in respect of the crimes against humanity context.

Article 7 has generated large numbers of journal articles devoted to specific interpretive controversies. Scholarly attention has especially focused on the policy element. Sadat discusses the origins of the policy element in the negotiations leading to the Rome Statute of the International Criminal Court and its interpretations in the early jurisprudence of the ICC. In light of the above, Sadat argues that the Pre-Trial Chamber's interpretation in the Kenya situations which relaxed the requirement to near irrelevance contradicts the text of Article 7 and the clear intention of the negotiating states. Sadat's analysis of the impact of the policy element on the customary international law status of the treaty whether it reflects existing custom or creates a new narrowing treaty obligation has been most influential in subsequent literature.[1084]

Kress has offered important doctrinal analyses of many of the Article 7 elements. Most notably, in his article "On the Outer Limits of Crimes Against Humanity: The Concept of Organisation Within the Policy Requirement" (Leiden Journal of International Law, 2010), Kressexamines what kinds of non-state actors are capable of formulating the kind of organisational policy which Article 7 requires. Kress submits that the organisational policy requirement should extend to non-state armed groups which have sufficient capacity to implement a coherent policy of attack against a civilian population; but should not cover, for example, mob violence which lacks any policy element in a meaningful sense. This difference has great practical significance for the ICC's power to prosecute crimes against humanity committed by non-state armed groups which are responsible for mass atrocity increasingly in current conflicts.

DeGuzman's scholarship on the widespread or systematic attack requirement considers the interaction between those two alternative criteria and the gravity threshold that they constitute. She argues that if one requires widespread or systematic attack but not both, then the gravity threshold can be set at a level that is lower than that which is appropriate for a category that warrants international prosecution.

Robinson's detailed examination of the drafting history of Article 7 and its subsequent interpretation investigates how the chapeau element of an attack directed against a civilian population serves as an essential contextual threshold that differentiates crimes against humanity from serious ordinary domestic crimes.[1085]

Crimes against humanity have been increasingly studied regarding their sexual violence dimensions. Oosterveld's work addressing the gendered nature of crimes against humanity examines the way in which the law evolved from Nuremberg, which completely failed to prosecute rape and other sexual violence despite the widespread occurrence of such crimes, through the Akayesu verdict, and the inclusion in the Rome Statute of a non-exhaustive list of acts of sexual violence within Article 7 as specific prohibited acts. Chinkin's analysis of the structural barriers and challenges to effective prosecution of sexual violence as crimes against humanity raises interesting questions about whether the structure and culture of the ICC have been sufficiently changed in order to fulfil the promise of the gender provisions in the Rome Statute.

2.4 Institutional Literature on the ICC: Performance, Design, and Challenges

[1084] David Bosco, *Rough Justice* (2014).

[1085] Hilary Charlesworth and Christine Chinkin, *Feminist Analysis of International Law* (2000).

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The institutional literature on the ICC looks at the court as an institution and political actor, trying to understand its design and performance, and applying various legal, political science and sociological lenses to see how these structural factors shape ICC prosecution beyond doctrinal constraints.

The most detailed account of the political dimensions of ICC prosecution is presented by Bosco (2014) in his Rough Justice: The International Criminal Court in a World of Power Politics, which examines how the ICC's relationship with the Security Council, its major state funders, and the states most directly affected by its investigations shapes the exercise of jurisdiction in ways a purely legal analysis cannot capture. According to Bosco, the ICC is not and cannot be a purely technical legal institution; drawing from extensive interviews conducted by the author with ICC officials and diplomats as well as other actors. The scholar highlighted important aspects of ICC, particularly its structural dependence, on Security Council for a variety of actions. These include any Chapter VII referrals, enforcement assistance, as well as political legitimation. Such points clarify the incapacity of ICC in developing a sufficient response to state non-cooperation.[1086]

Glasius's work "The International Criminal Court: A Global Civil Society Achievement" (2006) offers an institutional perspective that contrasts the scholarly insights previously discussed by stressing the role of civil society organisations and NGO coalitions in the creation and development of the ICC. The ICC is a product of transnational civil society activism that continues to shape, in important ways, the development, budget and priorities of the Court since its establishment, as Glasius demonstrates by analysing Rome Conference negotiations. It is important to understand the democratic legitimacy dimension of the operation of the court.

The most detailed academic assessment of how the ICC operates in practice in all respects – investigations, prosecutions, outreach, reparations, the Security Council, state parties, etc. – is found in Stahn's edited volume (2015) entitled The Law and Practice of the International Criminal Court. The combination of doctrine provided by academics and empirical analysis offered by ICC practitioners is priceless.

Al Zeidy's detailed monograph, entitled "The Principle of Complementarity in International Criminal Law" (2008), contains the most detailed legal analysis of the complementarity principle and its application within the ICC's admissibility jurisprudence. Clark examines the working of complementarity in practice in various situations including its potentially pernicious incentive structure, which may encourage states to initiate sham prosecutions merely to defeat ICC jurisdiction. He looks at post-genocide justice in Rwanda, looking at the interplay between international and domestic prosecution.[1087]

2.5 Critical Literature: Politics, Selectivity, and Legitimacy

The existing literature on the politics and legitimacy of international criminal justice has so far played an important role in providing a counterpoint to the doctrinal and institutional literature that dominates the field. We must engage seriously with the structural bias, selective application and legitimacy deficit questions in any overall assessment of the court's prosecution of crimes against humanity.

The most influential form of critical scholarship relates to Third World Approaches to International Law. Anghie's foundational TWAIL work "Imperialism, Sovereignty and the Making of International Law" (2005), equips the reader with important theoretical tools to understand the interplay of international criminal law and the structures of imperialism and unequal

[1086] Kamari Clarke, *Fictions of Justice* (2009).

[1087] Phil Clark, *Gacaca Courts* (2010).

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power, which it both reflects, and sometimes reproduces.[1088]

The post Drawing upon TWAIL origins first appeared on RDLaw. Anghie argues that international law's historical definitions of sovereignty and legality continue to reflect and privilege European and other Western values. This can provide a theoretical underpinning for TWAIL critiques of the ICC.

According to Clarke's Fictions of Justice (2009), the most comprehensive TWAIL analysis of the ICC specifically roams the ICC's relationship with African communities, governments, and civil society actors. It employs a mix of legal analysis, critical theory and ethnographic research.

As Clarke observes, the International Criminal Court's (ICC) operation is built around a set of legal fictions, including the fiction that the court applies universal standards of justice neutrally and equally. These "legal fictions" obscure the political and structural dimensions of selective prosecution. Clarke's critique is nuanced in that it calls for a more self-critical, pluralist approach to international criminal justice, and it does not simply label the ICC as a neo-colonial instrument.

Mutua's highly regarded "Savages, Victims, and Saviours: The Metaphor of Human Rights" (Harvard International Law Journal, 2001) provides an excellent framework for analysing the ideological dimensions of the crimes against humanity and the ICC's operation. According to Mutua, in this dominant discourse, powerful Western states are saviours, weaker non-Western states are savages, and civilian populations are passive victims. More than merely invoking universal values, it reproduces colonial power relations. So, it encodes a particular civilisational narrative of human rights and international criminal law.[1089]

Megret argues that the ICC's responses to political pressure have, at times, eroded the court's legitimacy rather than strengthening it. The article on representational practices by Kendall and Nouwen at the ICC raises important critical questions about whose conception of justice is served by the court as they elaborate on the reconstructions of victimhood, perpetration and justice.

Jalloh's detailed investigation of the legal and political aspects of the African Union's repudiation of the ICC looks at both the legal arguments being made by African states in substance, not least on the immunity issue, as well as the political causes of the AU's sustained offensive. Jalloh makes a careful distinction between aspects of this critique which raise genuine legal questions and deserve serious engagement, and aspects which mostly reflect the interests of political elites threatened by ICC prosecution. The contributions of Tladi's on the immunity question from the perspective of South African international law similarly provide for a technically rigorous engagement with the legal substance of the arguments by African states on the Rome Statute immunity provisions and the customary international law on head-of-state immunity.[1090]

2.6 Literature on State Cooperation and the Enforcement Deficit

The literature on state cooperation with the ICC is a high-quality and focused type of literature that is pertinent to the dissertation's consideration of the state cooperation deficit as the most serious structural impediment to effective prosecution.

According to Nouwen's seminal study "Complementarity in the Line of Fire" (2013) is the most detailed and empirical study of the ICC's engagement with Uganda and Sudan. The study in particular reveals how the ICC's relationship with governments possessing complex and ambivalent relationships with the ICC has shaped state cooperation. Nouwen shows how the ICC depends on states for evidence gathering and surrender of suspects.

[1088] Margaret deGuzman, 'Crimes Against Humanity' in Schabas (ed) (2011).
[1089] Mohamed El Zeidy, *Complementarity Principle* (2008).
[1090] Paola Gaeta, 'Al-Bashir Immunity' (2009) JICJ 315.

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This causes a tension with the ICC mandate to prosecute even when states are complicit in the crimes under investigation. Legal mechanisms alone will not resolve this tension.[1091]

According to Murdoch, the ICC's cooperation framework under Part 9 of the Rome Statute creates specific legal obligations. He walks through the procedures available to the ICC when states fail to cooperate, and the practical limitations of the formal non-cooperation mechanisms. These mechanisms depend ultimately on referral to the Assembly of States Parties or the Security Council bodies that have generally been unwilling to take effective action against non-cooperating states. Murdoch's examination of the Al-Bashir non-cooperation failure is particularly instructive. Indeed, the lack of any enforcement mechanism with meaningful coercive power leads to the non-cooperation regime being largely symbolic.

The particular literature concerning the Al-Bashir cooperation failure contains valuable contributions on the question of immunity by Akande and on the legal effects of the Security Council referral on immunity by Gaeta. The Appeals Chamber's 2019 findings regarding Jordan's failure to arrest al-Bashir which held that Jordan violated its obligations under the Rome Statute, but declined to refer the matter to the Assembly of States Parties has itself been subject to important critical analysis, assessing what this has meant for the Court's cooperation regime, and the question of immunity.[1092]

2.7 Literature on the ILC Draft Articles

The scholarship on the ILC's 2019 Draft Articles is still taking shape, reflecting the relative newness of this instrument. Nevertheless, there are already several noteworthy contributions that engage with this fourth research question.

The publication of Sadat's paper comes at a particularly opportune moment, when the potential of the establishment of a new International Law Commission (ILC) crimes against humanity convention is being more seriously considered. The need for a convention establishing crimes against humanity is arguably now greater than ever before. Sadat identifies gaps in international law, including the absence of an instrument akin to the Genocide Convention or the Torture Convention which would impose universal obligations on all states. This aspect essentially provides the main normative justification for the proposed convention and has directly influenced the ILC's work.

The reports of the ILC Special Rapporteur Sean Murphy to the ILC from 2015 to 2019 on crimes against humanity, which form the basis of the Draft Articles, are the most authoritative exposition of the customary international law foundations of the Draft Articles as well as the relationship of the proposed convention with the Rome Statute and its system. The Draft Articles' commentary in the ILC's Report of the Seventy-First Session clarifies every Draft Article's content, legal basis, and relation with other international instruments, and is useful in ascertaining the Draft Articles' scope. Robinson analyzes the relationship between the Draft Articles' definition of crimes against humanity and the Rome Statute definition to see whether the proposed convention could unwittingly create definitional inconsistencies, complicating the task of states wishing to comply with both instruments at the same time.[1093]

2.8 Emerging Challenges in the Literature

The most recent strand of the literature addresses the application of the crimes against humanity framework to new forms of mass atrocity and systematic harm not contemplated in the drafting of the Rome Statute. This developing literature is important for assessing how future-oriented, flexible and adaptable the concept of crimes against humanity is.

[1091] Marlies Glasius, *ICC as Global Civil Society* (2006).
[1092] Kevin Heller, *Nuremberg Tribunals* (2011).
[1093] Charles Jalloh, 'Africa and ICC' (2011).

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The crime of ecocide i.e. the large-scale destruction of the natural environment has gained scholarly and policy attention. In 2021, there was a meeting of independent experts who proposed a definition of the term ecocide as a potential fifth crime in the Rome Statute. The scholarly literature which assesses whether large-scale environmental destruction can constitute crimes against humanity within the existing framework of Article 7 considers whether environmental destruction causing great suffering or serious injury to health of members of a civilian population could be an "other inhumane act" under Article 7(1)(k). As proof of the serious human health effects of industrial pollution, deforestation, and resource extraction in populated areas has been accumulating, the question has become more urgent.[1094]

The use of international criminal law in the context of cyberattacks raises truly novel questions about whether cyberattacks that cause widespread civilian harm, such as attacks on critical infrastructure, health care or food supply systems, could satisfy the contextual elements of crimes against humanity if intentionally directed at civilian populations. Tony Schmitt's contributions to the Tallinn Manual have initiated the process of mapping existing international humanitarian law principles onto cyber operations. However, the precise application of the crimes against humanity framework to cyber operations remains a relatively early stage of scholarly development.

O'Flaherty and Fisher argue that the systematic targeting by state authorities of individuals on the basis of their sexual orientation or gender identity may constitute persecution as a crime against humanity under Article 7(1)(h) of the Rome Statute. Such arguments are important for the developing jurisprudence of the court. The paper also raises important questions about the universality of the crimes against humanity framework and the application to forms of systematic discrimination that have attracted relatively little attention within international criminal law.[1095]

2.9 Research Gap

The detailed examination of academic literature on crimes against humanity and the ICC shows richness of available literature despite existing significant gaps which present dissertation seeks to fill, according to the foregoing passage.

The first gap refers to the lack of an integrated analysis that is sufficiently comprehensive in its scope, that addresses simultaneously and systematically the historical development, the interpretational issues, the institutional obstacles and the reform and improvement proposals of the framework of crimes against humanity within a single analysis. While individual bodies of scholarship provide excellent coverage of particular dimensions Bassiouni on history, Schabas on doctrine, Bosco on political dimensions, Clarke on critical perspectives no single work provides the fully integrated analysis the complexity of the research problem requires.

The second gap relates to the absence of a substantial critical legal examination of the 2019 Draft Articles of the ILC regarding what contribution they may offer to the problem of prosecuting crimes against humanity before the ICC. Although Sadat and Murphy carry out a valuable foundational analysis, no systematic critical analysis has taken place of the potential and limitations of the Draft Articles in the specific context of the ICC prosecution problems.

The third gap is that we need analysis that systematically integrates the literature on emerging challenges relating to environmental crimes, digital warfare, and persecution of LGBTQ people, with the established doctrinal and institutional analysis of crimes against humanity, assessing what the new challenges reveal about the adaptability and limitations of the existing Article 7.

[1094] Kendall and Nouwen, 'Representational Practices' (2014).

[1095] Claus Kress, 'Limits of Crimes Against Humanity' (2010).

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The dissertation attempts to fill these three gaps in an integrated way using a comprehensive critical legal analysis that draws on all 8 bodies of literature reviewed above within a unified theoretical and analytical framework developed in Chapter 3, applied in a systematic way in Chapters 4 and 5, and synthesised in the findings and recommendations of Chapter 6.

CHAPTER 3: THEORETICAL FRAMEWORK

3.1 Introduction

The development of a theoretical framework is a precondition to the critical legal analysis of crimes against humanity as enshrined in the Rome Statute. The theoretical framework offers the analytic lens through which we examine and evaluate the historical evolution of the concept, the interpretative challenges posed by the Article 7 definition, and the institutional challenges of ICC prosecution. Failing to provide such a diagnostic framework will likely result in an analysis that is merely descriptive of legal rules and institutional arrangements, rather than one that is really critical and able to produce useful insights and recommendations for reform.

The five main theoretical traditions examined in this chapter together form the integrated analytical framework of the dissertation. Section 3.2 looks at natural law theory and how this assists philosophy underpinning crimes against humanity. In Section 3.3, we address positive international law theory and its account of the legal authority of international criminal norms. The cosmopolitan justice theory in section 3.4 and its normative conception for global criminal accountability. Section 3.5 evaluates the doctrine of responsibility to protect and how it fits within the crimes against humanity. Third World Approaches to International Law offers a critique of selective international criminal justice. See Section 3.6. In Section 3.7 of this dissertation, I present a synthesis of the theoretical perspectives into a coherent and integrated framework which generates the evaluative criteria applied throughout the substantive analysis.[1096]

3.2 Natural Law Theory and the Foundations of Crimes Against Humanity

The philosophical foundations of crimes against humanity can be most naturally understood through the perspective of natural law theory. It recognizes that at least some of the principles of justice and human dignity are universal, that is, they belong to every human being by virtue of being human. Such a philosophy suggests that a state's positive law and even international law are insufficient to justify the commission of behaviour that violates them. The philosophical foundation for claim that certain acts are so violative of human dignity that they are international crimes with or without prohibition in the domestic law of the state in which they occur lies in natural law tradition which runs from Grotius and Vattel through Kant and into contemporary human rights theory.

Grotius's foundational contribution to international law, "De Jure Belli ac Pacis" (1625), articulated the concept of crimes so serious that they justify intervention by any member of the international community–an early formulation of what would later become the concept of universal jurisdiction for crimes against humanity. The argument of Grotius that princes who treat their subjects with excessive cruelty violate the law of nations and are punishable by other sovereigns gives backing to the rejection by Nuremberg Tribunal of the argument that the acts of the defendants are protected as acts of state sovereignty.[1097]

The Nuremberg Tribunal's express repudiation of the act of state defence and superior orders defence derives explicitly from natural law reasoning. The tribunal affirms that states and individuals are not free to flaunt norms of human dignity and justice even if they are not expressed in the positive law. The assertion in question provides strong support for a natural

[1096] Kai Ambos (2013).
[1097] Antony Anghie (2005).

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law understanding of the presence of a universal standard of justice which underlies the entire framework of crimes against humanity.

The contemporary natural law scholarship of Finnis and Moore offers an important philosophical framework. This framework overcomes the purely positivist account of international criminal norms. According to the positivist account, international criminal norms are simply those norms states have agreed to create through treaty or that have achieved customary international law status. According to the natural law perspective, crimes against humanity, far from being mere agreements among states to make certain acts crimes, are true international crimes because their commission or omission contravenes the natural law itself, which is universal. For the present dissertation, natural law theory provides the normative foundation for weighing whether the Article 7 definition sufficiently captures the full range of acts prohibited under a natural law reading of international law and weighs whether the ICC's interpretative choices have been true to the normative injunction to end impunity for mass atrocity.[1098]

3.3 Positive International Law Theory and the Legal Authority of International Criminal Norms

When natural law lays down the philosophical foundations of crimes against humanity, the positive international lawyers' theory gives place to a particular analytical framework concerning the legal authority and binding character of the specific rules under the Rome statute and customary international law. The positivist approach considers international legal norms to derive their validity from the express or tacit consent of states. States can express this consent through treaty or tacitly evidence it through practice and opinio juries in the making of customary international law.

The author of the positivist definition of crimes against humanity considers whether Article 7 (the definition of crimes against humanity in the Rome Statute) is a codification of customary international law that was already in existence. In the alternative, Article 7 is a new treaty which creates obligations which only bind parties to the Rome Statute. This question has important practical consequences concerning the jurisdiction of the ICC and the extent to which non-states parties may be bound by the norms of the Rome Statute. The ICC's Appeals Chamber has addressed elements of this question in several decisions. They have ruled that some of the elements of the definition of crimes against humanity reflect customary international law, while others are the result of treaty obligations found in the Rome Statute.

The ILC's work on 'crimes against humanity,' as represented in the 2019 Draft Articles, constitutes an important addition to the positive international law framework. The Draft Articles seek to codify customary international law obligations of states with respect to prevention as well as punishment of crimes against humanity. The text is not limited to the parties to the Rome Statute. The ILC examines state practice and opinio juris in instruments of a broadly definitional and normative character, including of course, domestic criminal law systems. What is significant is that this 'methodology' gives the positivist basis for the assertion that a rule whose breach represents a crime against humanity has attained the character of a jus cogens norm. A jus cogens norm is a peremptory norm of international law from which no derogation is permitted. For the current thesis, positive international law theory is used to analyse whether the main parts of Article 7 in particular the controversial policy element is already customary international law or introduces new and potentially restrictive treaty-specific requirements.[1099]

[1098] M Cherif Bassiouni (2011).

[1099] Kamari Clarke (2009).

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3.4 Cosmopolitan Justice Theory and the Normative Vision of Global Criminal Accountability

Cosmopolitan justice, espoused by Kant, Rawls and more recently David Held and Thomas Pogge, provides the normative vision of global criminal responsibility that underwrites the ICC project. According to the cosmopolitan view, people are moral agents not only of the states of which they are citizens but also of the world as a whole, and they have rights and duties as members of the world community that go beyond citizenship in particular states.

According to cosmopolitan theory, states must be empowered by permanent international institutions to exercise jurisdiction over the most serious international crimes, independently of the consent of the state or government on whose territory the crimes are committed and by whom particular individual perpetrator liability may be imposed regardless of the official position of the perpetrator. Held published a book titled Democracy & Global Order. The book shelters a cosmopolitan vision for regime-global governance, as well as the international institution. Also, his cosmopolitan vision assigns the ICC a crucial role. And this part of the work of the international institution or the ICC is to ensure accountability. Furthermore, accountability entails a breach of universal human rights norms. In other words, the cosmopolitan vision provides the normative basis for the claims of the Rome Statute, which establishes ICC jurisdiction as a matter of global public order, not just a delegation of jurisdiction of consenting states.[1100]

International criminal justice is cosmopolitan in nature, but the selective application of international criminal law creates tension with its universalist aspiration. The ICC not being able to prosecute nationals from non-states parties, the Security Council's veto power and the disproportionate focus of ICC investigations on African situations are large deviations from the cosmopolitan ideal of universal and equivalent accountability. Cosmopolitan justice theory serves as both the normative standard against which the performance of the ICC is assessed and the analytical framework for identifying the structural departures from universality that are damaging to the legitimacy of the court.

3.5 The Responsibility to Protect Doctrine

The concepts of R to r which articulates the International Commission on Intervention and State Sovereignty Report, 2001 and 2005 World Summit Outcome Document of Un General Assembly adds an important perspective to state sovereignty and international accountability for crimes against humanity. Their Basis for doctrines to protect human beings when such crimes occur is also incorporated in the UN Charter and its supporting documents. R2P states that a nation or state's sovereignty implies a responsibility to protect their population from mass atrocities like genocide, war crimes, ethnic cleansing etc. When there are grave concerns and the nation refuses to act, the international community must step in and protect the group at harm.

The Relationship Between R2P and the ICC is Complex. The ICC's crime against humanity mandate is complementary to R2P because both attempt to address impunity for mass atrocity and the protection of civilian populations. Regardless of the ICC's judicial mandate to prosecute for past crimes, the R2P's protective mandate to protect people from ongoing crimes and to prevent crimes and protect vulnerable populations are completely two different things which can operate against each other. In other words, ICC indictments can halt, in other words, the peace process in cases where an armed conflict is ongoing.

The Libya situation of 2011 represents the most significant intersection to date between the use of force with both authorisation by the Security Council under the R2P principles and the referral of the situation to the ICC. Evans's extensive scholarship on R2P provides relevant analysis of the development and operation of the doctrine

[1100] Gareth Evans, *Responsibility to Protect* (2008).

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directly relevant to the dissertation's examination of the ICC's institutional context and the relationship between criminal accountability and mass atrocity prevention.[1101]

3.6 Third World Approaches to International Law

The Third World Approaches to International Law offers a fundamental critical counterpoint to the influential theoretical frameworks by analysing international criminal law from the perspective of states and peoples in the Global South systematically marginalised in the development and application of international legal norms. Scholars associated with TWAIL assert the argument of international law international criminal law as colonialism and neo-colonialism. They refer to the construction of a legal system that embeds powerful western state interest and norms universal to but in important respect particular.[1102]

The TWAIL (Third World Approaches to International Law) scholarship poses important questions regarding the selective application of international criminal justice, namely the International Criminal Court (ICC) which appears to focus on the crimes against humanity framework and but more importantly, targets leaders from Africa or from developing countries while granting de facto immunity to the nationals of other powerful states which are either not party to the Rome Statute or benefitting from Security Council veto power. The TWAIL critique alleges the cosmopolitan narrative of the ICC as a neutral institution of global justice. The claim argues the Captured ICC's selective jurisdiction and operation reflects existing global power asymmetries and growing inequalities rather than transcending it.

It is important to highlight that the TWAIL critique does not mean that we should abandon the international criminal law or the ICC. According to Clarke, developing international criminal law should not be confined to the scrutiny of only Western actors or institutions. Rather, it must call for a more critically self-aware approach to international norms development and application that takes seriously Global South community perspectives and acts upon structural inequalities undermining the legitimacy and universality of the norms. In summary, Clarke makes clear that any hopes for an easier application of the norm with or without the International Criminal Court are unwise and counterproductive. TWAIL offers the necessary critical lens for the current dissertation to detect and evaluate the structural inequalities and selective application that delegitimize crimes against humanity under the Rome Statute.[1103]

3.7 Synthesis: An Integrated Theoretical Framework

The five theoretical traditions reviewed in this chapter provide different key analytical perspectives for examining the different facets of the research problem of this dissertation. The theory of natural law provides the philosophical justification for the universality of crimes against humanity, irrespective of the law positive. The theory of positive international law provides the analytic framework to understand both the legal status of the Rome Statute and the relationship between treaties and customary international law. The theory of cosmopolitan justice is the normative vision against which the performance of the ICC can be assessed. The R2P doctrine is the link between individual accountability and the international responsibility of protecting civilian populations. TWAIL offers critical standpoint to detect and examine structural inequalities and selective application that have undermined the legitimacy of international criminal justice.

The cumulative approaches formulate a set of five evaluative criteria to critically assess the crimes against humanity framework of the Rome Statute, which are applied consistently throughout substantive analysis in Chapters 4, 5 and 6. The first of the five criteria is legal coherence and interpretive consistency in

[1101] Hugo Grotius, *De Jure Belli ac Pacis* (1625/1925).
[1102] David Held, *Global Order* (1995).
[1103] Immanuel Kant, *Perpetual Peace* (1795/1970).

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applying Article 7. The second evaluative criterion relates to universality and equal application of crimes against humanity prosecution irrespective of geographic or political context. The third criterion in effecting the end of impunity for mass atrocity. The fourth criterion is democratic legitimacy and participation in the development and application of international criminal norms. Finally, the fifth evaluative criterion is sensitivity to the views and needs of affected communities in the Global South.[1104]

CHAPTER 4: HISTORICAL DEVELOPMENT AND DEFINITION OF CRIMES AGAINST HUMANITY

4.1 Introduction

The notion of crimes against humanity was not the immediate product of the discussions of the Nuremberg Tribunal in 1945. Nothing of the sort; it came about through a complex and complicated historical process. Throughout history, international law has slowly but steadily been coming to recognize that certain acts of extreme mass violence that are perpetrated against civilian populations constitute an assault against the international community as a whole. The chapter identify the historical process, starting from the earliest days of the nineteenth century to the comprehensive codification of Article 7 in the Rome Statute and focuses on the major developments which have taken place in this time frame which go along the concept of the grievous crimes. [1105]

The laws of humanity and the Martens Clause give a pre-Nuremberg origin to the concept, as noted in 4.2. Section 4.3 looks at the Nuremberg Charter and judgment as the official entry point of crimes against humanities into positive international criminal law. The post-Nuremberg codification which included Allied Control Council Law No. 10 and International Law Commission work, is examined in section 4.4 The ad hoc tribunals for the former Yugoslavia and Rwanda have made important contributions to the crime of crimes against humanity. Section 4.5 will elaborate on these contributions. Section 4.6 examines article 7 of the Rome Statute which is the extensively elaborated codification of the concept and analyses on the principal elements of the definition and the interpretative questions which arise from them. Section 4.7 presents a conclusion which summarises the main findings of the historical and definitional analysis.[1106]

4.2 Pre-Nuremberg Origins: The Laws of Humanity and the Martens Clause

The principles underlying crimes against humanity had existed for decades before their articulation in the Nuremberg Charter. The international legal discourse of the late nineteenth and early twentieth centuries articulated, in ever more explicit terms and with reference to important case studies, that certain acts of extreme violence against civilian populations violate humanity principles binding on states and individuals and cannot be justified under domestic law.

The Martens Clause finds its origin from the Russian jurist Friedrich von Martens who proposed it. The Clause was included first in 1899 in the preamble of Hague Convention (II) with the Respect to the Laws and Customs of War on Land. In addition, it was reproduced in Hague Convention (IV) of 1907. The Clause states that in the case of something not being covered by the specific rules of the Convention, then civilians and combatant shall remain under the protection and the rule of the principles of law of nations. Further, these principles result from the usages established among civilised peoples. Moreover, the principle also refers to the laws of humanity. Finally, it further refers to the dictate of the public conscience. According to some experts, the invocation of the laws of humanity as a source of binding international legal obligation was, in itself, a philosophically rich statement. To many, this meant that there are certain principles of humanity which must constrain the behaviour of states as well as individuals and in a way that

[1104] UNGA World Summit Outcome (2005).
[1105] Allied Control Council Law No 10 (1945).
[1106] Kai Ambos (2013).

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is beyond both the specific rules of the text of any particular treaty and also the domestic law of any particular state.

The practical application of this idea toward mass atrocity situations occurred for the first time in the context of the Armenian massacres by the Ottoman authorities during the First World War. In May 1915, the governments of France, Great Britain, and Russia issued a joint declaration condemning the actions of the Ottoman authorities against the Armenian population. The statement called such acts a crime against humanity or civilised nations and that all members of the Ottoman Government will remain personally responsible. The phrase crimes against humanity was first explicitly used in the 1996 declaration of a United Nations conference. It, however, did not create any legal mechanism for prosecution and the promises of accountability contained in the declaration were ultimately not implemented (Bassiouni, 2011, p. 84).[1107]

The 1920 Peace Treaty of Sèvres (never ratified) planned to prosecute the perpetrators of the Armenian massacres. However, this provision was dropped from the 1923 Treaty of Lausanne, which granted amnesty to the perpetrators. The first genocide of the twentieth century was the Armenian massacres. The direct and acknowledged impact of the failure to prosecute the perpetrators of this on Raphael Lemkin's determination to formulate genocide as a legally recognized international crime. Just as the failure to articulate a comprehensive conception of individual criminal responsibility for the perpetration of systematic atrocities impacted Hersch Lauterpacht's work on crimes against humanity and the international protection of human rights.

Including provisions for the trial of Kaiser Wilhelm II for violations of the laws and customs of war and others not implemented for a trial of Kaiser Wilhelm II and others for treaty of versailles, crimes against humanity was in the relevant provision not a category. The Versailles Conference established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. It proposed that acts committed against the laws and customs of war and the laws of humanity would be prosecuted. However, the United States and several other states raised objections. They argued that the idea of laws of humanity was too vague. Moreover, they believed that it was unlikely called upon to positive law and therefore insufficient as a basis of prosecution. The criticism that the notion of crimes against humanity did not have the legal precision and grounding in positive law essential for legitimate criminal prosecution would be raised in various forms throughout the subsequent development of the concept.

4.3 The Nuremberg Charter and Judgment: Formal Codification and Its Limitations

In August 1945, Article 6 (c) of the Charter of the International Military Tribunal established at Nuremberg set out the formal entry of crimes against humanity into positive international criminal law. According to the Nuremberg Charter, crimes against humanity meant murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or, persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.

There are several aspects of definition that require careful interest. Firstly, the definition referred to a closed list of specific underlying acts murder, extermination, enslavement, deportation and other inhumane acts together with an alternative category of persecution on enumerated grounds. The structure of these prohibitive acts inserted in a list, and a more general prohibition has been retained in all subsequent definitions of crimes against humanity including Article 7 of the Rome Statute. Paragraph 2 states that the definition

[1107] M Cherif Bassiouni (2011).

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includes the key phrase whether or not in violation of the domestic law of the country where perpetrated. It is to this that international criminal responsibility for crimes against humanity is in all respects entirely independent of domestic legality. It was a principle which the Nuremberg defendants argued should protect them from prosecution, it should not. The third and crucial aspect of the definition required that the acts be committed 'in execution of' or 'in connection with' any crime within the jurisdiction of the Tribunal, that is, crimes against peace or war crimes. This was to be a linking factor to war that would constrain the crimes against humanity category for the next fifty years.

Essentially, in its judgment, the Nuremberg Tribunal applied a definition of crimes against humanity that was more restrictive than the definition in the Charter required. The tribunal refused to find crimes against humanity with regard to acts committed before the outbreak of the war in September 1939 on the ground that it had not been established that acts were committed in execution of or in connection with crimes within its jurisdiction. According to the tribunal, the systematic persecution of Jews and others that took place between 1933 and 1939, including the infamous Nuremberg Laws of 1935 and the Kristallnacht pogrom of 1938, were not found to be crimes against humanity. This has left many commentators puzzled, particularly given the Charter's wording and the basic idea of the crimes against humanity concept (Schabas, 2016, p. 156).[1108]

Nevertheless, Nuremberg judgment established many fundamental principles of lasting significance. The explicit repudiation of both the act of state defence and the superior orders defence by the Tribunal insists that individuals have personal criminal responsibility in law irrespective of official capacity which set up the fundamental principle of individual criminal responsibility on which all subsequent international criminal law is founded. The Tribunal's ruling stated that the crimes against humanity are offences of international law irrespective of their criminality in domestic law establishing the principle of international criminal norms' superiority over domestic legality in this context. The Tribunal's demonstration that civilian populations can be the victims of international crimes not merely collateral casualties of war between states established that the concept of crimes against humanity has a fundamentally humanitarian orientation.[1109]

4.4 Post-Nuremberg Codification: Allied Control Council Law No. 10 and the ILC

The end of the Nuremberg trials saw, throughout the post-war years, the two important developments which contributed to the continuing codification and development of the crime against humanity.

In December 1945, the four Allied Powers adopted Allied Control Council Law No. 10. Hence, this decision providing a uniform legal basis for the prosecution of war criminals in the occupation zones of Germany. Moreover, this law provides a definition of crimes against humanity which is somewhat broader than that of the Nuremberg Charter. Above all, Allied Control Council Law No 10 dropped the nexus requirement entirely, defining the crime without any requirement of connection to war crime or crime against peace. This wider definition then provided the legal basis for the subsequent Nuremberg Military Tribunals by American authorities, addressing a broader range of defendants like industrialists, lawyers, doctors and SS officers than the IMT. Although Allied Control Council Law No. 10 may be considered an occupation law and not a general international legal instrument, its definition of crimes against humanity as including non-armed conflict events is an important step towards the final removal of the nexus requirement in the Rome Statute.[1110]

[1108] Nuremberg Charter (1945).

[1109] Hague Convention (1907).
[1110] Kevin Heller (2011).

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According to the UN General Assembly, the International Law Commission was responsible for the codification and progressive development of international law. It engaged with crimes against humanity in a number of important projects after World War II. The Nuremberg Tribunal principles of international law as incorporated in the UN Charter and the judgment of the Tribunal were accepted and adopted in response to a request from the General Assembly. On the other hand, and without having any substantive effect on the definition of the terms, crimes against humanity are a matter of international criminal responsibility.

The ILC's Draft Code of Offences Against the Peace and Security of Mankind underwent many versions over decades before arriving at the 1996 version. This code includes crimes against humanity among the crimes in the code. To a significant extent, the Lieutenant Colonel's (1996) definition of crimes against humanity did not necessitate a nexus to armed conflict. This demonstrates a departure from the Nuremberg limitation in the effort of post-war codification.[1111]

4.5 The Ad Hoc Tribunals: Liberation from the Armed Conflict Nexus

Subsequent to Nuremberg, the most important developments in crimes against humanity as a legal concept occurred through the work of the two ad hoc International Criminal Tribunals set up by the the United Nations Security Council in the 1990s: the International Criminal Tribunal for the Former Yugoslavia set up in 1993 and the International Criminal Tribunal for Rwanda set up 1994.

The ICTY Statute defined crimes against humanity as act committed in armed conflict irrespective of whether it had international or internal character and which was aimed at any civilian population.

The addition of internal armed conflict as a sufficient context for crimes against humanity were a significant expansion of the scope of the idea which had previously only applied to international armed conflict as per the Nuremberg Charter. Despite that, an armed conflict nexus was retained in the ICTY Statute, which required the acts to be committed in armed conflict. The ICTY's Appeals Chamber jurisdictional ruling in Prosecutor v. Tadić considered this requirement and noted that in customary international law, a crime against humanity does not have a connection to armed conflict and the nexus requirement in the ICTY Statute is a treaty-specific limitation, not reflecting the state of customary international law. The importance of the finding cannot be overstated, as it was a pronouncement of the Court which brings with itself the authority of a judicial pronouncement which proper crimes against humanity under customary international law can be committed in peace time also in war time. [1112]

The ICTR Statute went further still, defining crimes against humanity without any armed conflict nexus at all, making the category explicitly applicable to systematic atrocities committed in the context of the Rwandan genocide regardless of whether they occurred in the context of armed conflict. The landmark ruling of the ICTR in Prosecutor v. Akayesu made important contributions to the development of crimes against humanity doctrine. Initially, the Tribunal examined the contextual element of the widespread or systematic attack in depth, confirming that these are to threshold requirements alternative and not cumulative requirements. The second landmark finding in Akayesu concerned sexual violence as a crime against humanity. The Akayesu judgment held for the first time that rape and sexual violence can constitute genocide and a crime against humanity when committed as part of a widespread or systematic attack against a civilian population.

[1111] ILC Draft Code (1996).

[1112] Theodor Meron (2006).

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[1113]For more than two decades, the ICTY has developed an extensive jurisprudence on crimes against humanity and the Tribunal has explored the interpretation of specific underlying acts including persecution, extermination, and deportation, but also the doctrine of joint criminal enterprise as a mode of liability which applies to crimes against humanity. The Tribunal's decisions in the cases of senior political and military leaders such as Radovan Karadžić and Ratko Mladić, convicted of crimes against humanity and genocide in 2016 and 2017, respectively, demonstrated the real-world ability of international criminal tribunals to hold the most senior political and military leaders accountable for systematic mass atrocity.

The Special Court for Sierra Leone was set up in 2002 as a hybrid tribunal with jurisdiction over the most serious violations of international humanitarian law and Sierra Leonean law committed in the context of the Sierra Leone conflict since 1996. Furthermore, the Court also contributed to the doctrine on crimes against humanity with important rulings, especially regarding the prosecution of sexual violence and recruitment of child soldiers. In 2012, the special court for Sierra Leone (SCSL) convicted former Liberian president Charles Taylor for aiding and abetting the crimes against humanity and war crimes committed by the Revolutionary United Front (RUF) in Sierra Leone. The SCSL's conviction of Charles Taylor was, therefore, a landmark in the prosecution of anyone with the status of a sitting or former head of state for international crimes.

4.6 The Rome Statute and Article 7: The Comprehensive Definition

The most comprehensive and technical definition of crimes against humanity in the annals of international criminal law may be found in the Rome Statute of the International Criminal Court ("Rome Statute"), which was adopted at the Rome Conference from 15 June – 17 July 1998 and entered into force on 1 July 2002. Article 7 of the Rome Statute is the end product of the historical development traced in this chapter. In particular, it is a definition that draws on the Nuremberg legacy, incorporates the progressive development of the concept of crimes against humanity by the ad hoc tribunals, and adds several new elements that reflect the negotiating dynamics at the Rome Conference.[1114]

Crimes against humanity are defined in Article 7(1) as those acts of violence which are committed as part of a wide spread or systematic attack directed against any civilian population with knowledge of deprivation of the justice. Article 7(1) lists eleven categories of underlying acts. They are: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds universally recognised as impermissible under international law; enforced disappearance of persons; apartheid; and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health.

The definition of attack under Article 7(2)(a) is an attack directed against any civilian population. It means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a state or organisational policy to commit such attack. The term of attack must be "pursuant to or in furtherance of" a policy of a state or organisation. It was not present in any prior international definition of crimes against humanity and has been one of the most

[1113] *Prosecutor v Tadić* (1995).

[1114] Rome Statute (1998).

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controversial features of the Rome Statute definition.[1115]

In several essential respects beyond policy inclusion, the Rome Statute definition differs from earlier definitions. The current list of acts underlying it was significantly expanded in comparison to earlier definitions, most importantly in the field of sexual violence where the Rome Statute specifically lists as underlying acts rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence of comparable gravity, and in the inclusion of enforced disappearance of persons and apartheid as specific and underlying acts. An expansion in the grounds of persecution occurs and gender is a new ground in the acts of persecution in addition to political, racial, national, ethnic, cultural and religious identity. Article 7(2) of the Rome Statute contains more detailed definitions of specific underlying acts. These include extermination, enslavement, deportation or forcible transfer, torture, forced pregnancy, and persecution, among others.[1116]

The terminological jurisprudence of the ad hoc tribunals drew upon the law applicable in armed conflicts, particularly in relation to the conduct of hostilities. It will be recalled that the 1991 decision of the International Criminal Tribunal for the former Yugoslavia (ICTY), Tadic, highlighted how belligerents benefit from serious violations of law and customs. Furthermore, the Tadic Appeals Chamber noted how international criminal law abuses the laws of war in its regulation of relations between opponents. Consequently, it follows that it would flout customary international law if Dragan Tadic escapes punishment because he is fashionable – or due – for conceptualisation. To put it another way, punishing him would breach applicable anti-impunity norms. Crimes against humanity as defined in the Rome Statute may be committed in time of peace as well as in war. This makes it the most universally applicable international crime within the court's jurisdiction.[1117]

4.7 Conclusion

The laws of humanity were invoked in the famous Martens Clause. Thereafter, the incorporation of these laws within a complete definition at Article 7 of the Rome Statute was certainly a significant development in international law regarding widespread or mass atrocity crimes. This evolution comprises three main trajectories.

The first trajectory is the gradual widening of the concept, from its initial restriction to acts committed in connection with war crimes or crimes against the peace, through the gradual removal of the armed conflict nexus in the Allied Control Council Law No. 10, the ICTR Statute, and ultimately the Rome Statute, to a concept applicable to systematic atrocities committed in any context. The second trajectory refers to the gradual expansion and specification of the underlying acts constituting crimes against humanity, from the relatively brief list per the Nuremberg Charter to the comprehensive and detailed list in Article 7 of the Rome Statute, notably in the domain of sexual violence and persecution. According to the Rome Statute, the third trajectory held technical sophistication. It provides far more detailed definitions of key terms and elements than any predecessor instrument. However, this technical sophistication has itself generated new interpretive controversies, particularly in relation to the policy element.

The three trajectories of the International Criminal Court ultimately contribute to the main hypothesis that the Article 7 of Rome Statute is the most extensive codification of crimes against humanity so far in the history of international criminal law. Nonetheless, they also show that this comprehensiveness has complicated the law in some respects, particularly the contested policy element, which has created serious interpretative issues in the

[1115] William Schabas (2006; 2016).
[1116] ICTR Statute (1994).
[1117] Treaty of Versailles (1919).

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subsequent ICC jurisprudence. The discussion in Chapter 5 will address difficulties that arise from the prosecution of the law.

CHAPTER 5: INTERPRETATION AND PROSECUTION CHALLENGES UNDER THE ROME STATUTE

5.1 Introduction

The broad definition of crimes against humanity adopted in Article 7 of the Rome Statute, which has been developed through its historical evolution in Chapter 4, has spawned a rich and continuing jurisprudential literature of the ICC through its Pre-Trial Chambers, Trial Chambers and Appeals Chamber. This jurisprudence has clarified the meaning of certain major aspects of the definition, and has at the same time identified major interpretive ambiguities, inconsistencies in doctrine and practical difficulties which have limited the effectiveness of the court in trying crimes against humanity to a large extent. In addition to the purely interpretive aspect, the prosecution history of the ICC has been influenced by structural and institutional issues such as the lack of state cooperation, jurisdictional constraints, the political aspects of prosecution, and evidentiary problems that cannot be addressed by interpreting evolution but only by making fundamental changes in the international legal system.[1118]

This chapter critically examines the interpretive as well as the institutional aspect of crimes against humanity prosecution as set out in the Rome Statute. In section 5.2, the meaning of the widespread or systematic attack requirement is considered. Section 5.3 takes into account the civilian population requirement. Section 5.4 examines the policy aspect as the most controversial aspect of the Article 7 definition. The section 5.5 will discuss the mens rea requirements. Section 5.6 deals with the issue of the state non-cooperation. In Section 5.7 we discuss jurisdictional constraints of the Rome Statute. The political aspects of ICC prosecution are examined in Section 5.8. Section 5.9 addresses evidentiary issues. Section 5.10 looks at the immunity issue concerning incumbent heads of state. The 2019 Draft Articles of ILC are assessed in section 5.11. Section 5.12 is a conclusion that summarises the key findings of the chapter.[1119]

5.2 The Widespread or Systematic Attack Requirement

The contextual factor that makes crimes against humanity and regular domestic crimes different is the necessity of the criminal actions to be carried out as a part of a large-scale or a systematized assault against any civilian population. This requirement serves a crucial gatekeeping role, in that it only criminal acts of mass violence that meet the standard of seriousness to be subject to criminal prosecution by international tribunals, as opposed to isolated or individual acts of violence, however serious in themselves, they may be.

The terms widespread and systematic appear in Article 7 as alternative requirements but not cumulative an attack must be either widespread or systematic to meet the contextual element but not both. This disjunctive formulation was validated in the jurisprudence of the ICC and indicates the practice adopted in the ad hoc tribunals, which also saw the two criteria as alternatives. ICTY Appeals Chamber in Tadić established that the widespread criterion means the large scale of the attack and the number of victims whereas systematic criterion means the organised nature of the acts of violence and the likelihood that they would not occur randomly. These definitions have been significantly incorporated in the jurisprudence of ICC.

In the Situation in the Republic of Kenya, Pre-Trial Chamber II determined that the post-election violence of 2007 to 2008 in which some 1,133 people were killed and more than 600,000 displaced satisfied the widespread criterion

[1118] Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and Its Impact on Al-Bashir's Immunities' (2009) 7(2) *Journal of International Criminal Justice* 333–352.

[1119] Kai Ambos, *Treatise on International Criminal Law*, Vol II (Oxford University Press 2013).

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since the violence was widespread and the number of victims was very high in several parts of Kenya. In the scholarly commentary, this discovery has not been a subject of much controversy, as the violence was of such magnitude. More disputed has been the use of the systematic criterion in situations of less obviously large-scale violence, where the issue of whether the acts were sufficiently organised and non-random to be a systematic attack has created great interpretive ambiguity.

The connection between the ubiquitous or systemic attack requirement and the policy element which is separately introduced in Article 7(2)(a) has also brought about interpretive complexity. When the attack has to be pursuant to or in furtherance of a state or organisational policy, is this requirement in effect the systematic requirement, as any attack that is carried out pursuant to any policy will virtually be systematic? This question has not been resolved fully by the jurisprudence of the ICC, and various chambers have approached this relationship between the two elements, in slightly different ways. This overlap indicates that there is some redundancy in the Article 7 definition that brings about an unwarranted interpretive complexity without introducing any additional legal content (deGuzman, 2011, p. 127).[1120]

Attack as defined in Article 7(2) (a) is a course of conduct where there is the repeated commission of acts that are identified in paragraph 1 against civilian population. This definition of attack as one that involves a repeated occurrence of acts underlying it is significant in proving that a solitary act, as severe as it may be, can not alone form the attack necessary to fulfill the contextual aspect of crimes against humanity. The act a single murder, a single act of torture should be included in a larger pattern of acts before it becomes a crime against humanity. This multiplicity requirement also confirms that crimes against humanity are essentially collective crimes in that they involve a wider context of mass violence that makes individual crimes a component of a pattern which should be criminally sanctioned internationally.[1121]

5.3 The Civilian Population Requirement

The fact that the attack should be aimed at any civilian population is a key component of the definition of crimes against humanity that fulfills several significant purposes. It identifies the human objects of attack civilian populations as such and not combatants or legitimate military targets and thus associates crimes against humanity to the overarching principle of distinction between civilians and combatants in humanitarian law. It further confirms that crimes against humanity are not just acts of assault of a group of people but acts of assault of populations in groups, of the collective aspect of the evil that makes crimes against humanity a harm of a different order, compared to even the gravest acts of ordinary crimes.

The jurisprudence of the ICC has helped to elucidate some significant issues relating to the civilian population requirement. The Katanga case affirmed that the civilian population would not necessarily be the only target of the attack the fact that non-civilians were among the targets did not preclude the conclusion that the attack was against the civilian population but that it would definitely have to be the primary target of the attack. This explanation is significant in the situations of conflicts where civilians and combatants are mixed together, and the requirement of the civilian population should not be an unattainable criterion which could not have been met in the circumstances of the modern armed conflict.[1122]

The meaning of directed against has been discussed in a number of ICC decisions. The jurisprudence confirms that this aspect demands that civilian population is the main

[1120] M Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (Cambridge University Press 2011).

[1121] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press 2014).

[1122] Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press 2009).

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not incidental target of the attack. Even an attack on combatants, resulting in a large number of civilian deaths as collateral damage, and possibly a war crime in itself, would not meet the directed against criterion of crimes against humanity. The distinction plays a significant role in ensuring that the requirement of the integrity of the civilian population is maintained as a significant threshold condition and not as a mere formality that is met by any mass violence that involves civilian victims.

The jurisprudence has also addressed the question of whether members of discriminated groups who are victims of persecution still have their civilian status when it comes to the definition of crimes against humanity on the conditions that some members of the targeted group may be conducting resistance efforts. The strategy of the ad hoc tribunals as well as the ICC has been to consider populations as civilian in case they have some combatants or resistance fighters but the population in general continues to be of civilian nature. This solution is an expression of the humanitarian intent of the civilian population requirement and circumvents the perverse outcome of letting perpetrators trump the allegation of crimes against humanity by citing the existence of a small group of armed resisters, among an otherwise non-combatant population.[1123]

5.4 The Policy Element: Controversy, Interpretation, and Critique

The most controversial and doctrinal ambiguous aspect of the definition of crimes against humanity in the Rome Statute is the policy element the necessity that the attack be pursuant to or in furtherance of a state or organisational policy in order to commit such an attack as required by Article 7(2)(a) of the Rome Statute. It was not found in any previous international definition of crimes against humanity, such as the ICTY and ICTR Statutes, and its addition at the Rome Conference has raised a sustained scholarly discussion on whether it is a valid threshold requirement or an unwarranted reduction of the crimes against humanity concept below the customary international law level.

The negotiating history of the policy element shows that the element was not introduced very early in the negotiations of the Rome Conference at the insistence of a number of delegations who held the view that the wide-ranging or systematic attack requirement was not enough to draw a distinction between crimes against humanity and serious domestic crimes and that an explicit policy element was required to ensure that the ICC would concentrate on the most serious instances of state-sponsored or organised mass atroc The creation of the policy element was however, controversial when it was adopted, as other delegations believed that the policy was not in keeping with the traditional international law and would create an unwarranted loophole in ICC jurisdiction (Lee, 1999, p. 94).[1124]

Jurisprudence of the policy aspect of the ICC has been marked by a great lack of consistency that in itself has become a major cause of concern in the scholarly commentary. In the Kenya case, the policy element was construed in a very broad and accommodating way by Pre-Trial Chamber II which held that it was met by the mere fact of the existence of informal networks of politicians and businessmen who supposedly orchestrated the post-election violence without the existence of a formal state or organisational policy in the more traditional sense. The Chamber believed that the policy did not have to be formalised or stated written and that it could be deduced based on the totality of the circumstance including how the attacks were conducted. It was welcome by those who held that the strict policy requirement would deprive the ICC of a whole host of real cases of crimes against humanity, but was criticised by others as amounting to an attempt to read the

[1123] Margaret M deGuzman, 'Crimes Against Humanity' in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 121–138.

[1124] Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press 2008).

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policy element out of the Article 7 definition (Sadat, 2013, p. 356).

The issue of the type of organisations that can draft the organisational policy needed by Article 7(2)(a) has also been the matter of a considerable judicial and scholarly controversy. Kress has suggested convincingly that organisational policy requirement is to be construed to encompass non-state armed forces with the capacity and form to carry out a coherent policy of assault on a civilian population, but not to loosely organised groups or mob attacks without a discernible policy aspect. The Pre-Trial Chambers of the ICC have typically taken the organisational requirement in a broad sense, in that the organisational entities must not possess the traits of a state and must not be able to conduct state-like action, but provided that they can execute attacks against a civilian population under a policy.[1125]

The Katanga case posed some significant questions concerning the policy aspect of the situation in which an armed group which was not a state the Forces de Résistance Patriotique en Ituri attacked the village of Bogoro in the DRC. The Pre-Trial Chamber concluded that the attack met the policy element relying on evidence of planning and organization by the leadership of the armed group, despite a lack of evidence of a written policy document. Such a means of deriving the presence of a policy based on the indicators of planning and coordination has been much followed in later decisions of the ICC and offers a practical criterion to determine the policy aspect in the more common situation of crimes against humanity perpetrated by non-state armed forces.

Nevertheless, the most basic objection to the policy element is not the way in which it is construed but the existence of the requirement of the crimes against humanity definition. Opponents such as Sadat contend that the policy aspect introduces an unwarranted jurisdictional gap in the jurisdiction of the ICC that would allow prosecution of large-scale atrocities that satisfy the widespread or systematic attack element but do not involve a formal or informal organisational policy, as stipulated in Article 7(2)(a). The worry is that a number of the most severe instances of mass atrocity such as the ones where the violence is widespread and comparatively spontaneous, necessitating popular participation in the discrimination and violence on a mass scale as opposed to being planned by a particular group may not be covered by the ICC in case the policy aspect is implemented with any reasonable rigour. The underlying conflict in this criticism is that the Rome Statute seeks to create a jurisdictional level that is meaningful and the humanitarian imperative of making sure that no real instance of crimes against humanity is not brought to account by the international criminal justice system.[1126]

5.5 The Mens Rea Requirements for Crimes Against Humanity

The mental element requirements of crimes against humanity under the Rome Statute have two levels: the general mental element requirements of Article 30, which apply to all crimes under the jurisdiction of the ICC, unless the jurisdiction is otherwise specified; and the specific knowledge requirement under Article 7(1), which stipulates that the accused commit the underlying act with knowledge of the attack.

Article 30 of the Rome Statute states that unless otherwise stated, an individual will be criminally liable and prosecutable of a crime in the jurisdiction of the court only when the material elements are committed intentionally and knowingly. Intention can be defined as an intention in regard to conduct the intention is to perform the conduct and in regard to a consequence the intention is to bring about that consequence or is conscious that it will happen in the ordinary course of things. The definition of

[1125] Paola Gaeta, 'Does President Al-Bashir Enjoy Immunity from Arrest?' (2009) 7(2) *Journal of International Criminal Justice* 315–332.

[1126] International Law Commission, *Draft Articles on Prevention and Punishment of Crimes Against Humanity with Commentaries* UN Doc A/74/10 (2019).

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knowledge is the awareness that a situation is present or that an outcome is going to happen as part of the natural flow of events.

As applied to crimes against humanity, Article 30 entails that the accused possess intent and knowledge with respect to the underlying act whether it is murder, torture, the accused must possess intent to kill; or torture, the accused must possess intent to inflict severe physical or mental suffering and knowledge of the contextual element, i.e., knowledge that the act is a part of a widespread or systematic attack that is against a civilian population.[1127]

The knowledge element of Article 7(1) that the underlying act must be executed with knowledge of the attack has been construed in the jurisprudence of the ICC to mean that the accused need not know the exact nature of the attack or even concur with the motive of the perpetrators of the attack. Instead, the knowledge requirement is met when the accused knew that there was an ongoing widespread or systematic attack against a civilian population and that his or her act was one that was a part of the attack. The comparatively low level of knowledge indicates the necessity to prove mens rea to the level that is adequate to cases of crimes, which by its very nature are committed by a group of more than two culprits acting in various capacities as part of a larger organisational structure.

The ICC Elements of Crimes provide a further explanation of knowledge requirement, stating that the final element knowledge of the attack cannot be taken to imply that the attacker must have known every feature of the attack or the exact details of the plan or policy of the state or organisation. This exposition substantiates the comparatively low knowledge requirement and evades the insurmountable evidential criteria that each particular perpetrator had knowledge of the extent and character of the larger assault.

One of the key questions of the ICC jurisprudence has been the presence or absence of dolus specialis a particular discriminatory intent in any of acts that constitute the crimes against humanity. In the particular underlying act of persecution, Article 7(1)(h) clearly states that the act must be committed on discriminatory grounds political, racial, national, ethnic, cultural, religious, gender or otherwise universally accepted as impermissible under international law. As regards the other underlying acts, the jurisprudence of the ad hoc tribunals, and the ICC, has generally held that no particular discriminatory intent is necessary other than the general knowledge of the attack needed by Article 7(1), contrary to a previous view that crimes against humanity as a category needed a discriminatory intent.[1128]

5.6 State Non-Cooperation: The Structural Enforcement Deficit

The single most important structural challenge to effective prosecution of crimes against humanity in the ICC is the state cooperation deficit, and its implications on the capacity of the court to provide accountability in the face of mass atrocity are both far-reaching and well-documented. The ICC is completely reliant on the collaboration of the states: the court lacks a police force of its own, a method of enforcement and the ability to oblige the suspects to appear, collect evidence, and administer punishment without the cooperation of the states. It is this reliance that is inherent in the Rome Statute system and that is the political reality that states were only ready to establish a permanent international criminal court under conditions that did not endanger their fundamental sovereignty and authority over their territory and their own nationals.

Part 9 of Rome Statute defines the legal framework in which cooperation between the ICC and states is to be received, which sets

[1127] Charles C Jalloh, 'Africa and the International Criminal Court: Collision Course or Cooperation?' (2011) 34(2) *North Carolina Central Law Review* 203–228.

[1128] Claus Kress, 'On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement' (2010) 23(4) *Leiden Journal of International Law* 855–873.

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general requirements to states parties to cooperate fully with the court in its investigation and prosecution of crimes under the jurisdiction of the court. Article 86 gives that states parties shall cooperate with the requests of the court to give assistance with regard to investigations or prosecutions. Article 89 obliges states parties to comply with the arrest and surrender requests of persons. But even with these transparent legal requirements, the ICC has been ineffective in eliciting cooperation of states parties in its most significant cases.[1129]

The case of Al-Bashir is the most dramatic and momentous failure of state cooperation in the history of the ICC. In 2009 and 2010, Pre-Trial Chamber I issued arrest warrants against Omar Al-Bashir on charges of committing genocide, crimes against humanity and war crimes, allegedly committed in Darfur, yet he did not arrive at the court nor was he arrested, and travelled to many other states who are parties to the Rome Statute. In the years 2010, 2010, 2011, 2015, and so on, his visits to Kenya, Chad, and Djibouti and South Africa did not result in arrest despite the outstanding warrants, and the legal responsibilities of the host states under the Rome Statute. The ICC determined that a number of these states had defaulted on their duties in relation to the Rome Statute, but could not take any significant action in response to those defaults other than to refer the issue to the Assembly of States Parties a body which in its turn did not take any effective action.

The case of South Africa is worthy of special consideration since it led to some significant legal actions within the framework of the very mechanisms of the ICC. In June 2015, South African courts petitioned to arrest Al-Bashir when he went to the African Union summit in Johannesburg. Al-Bashir left the South African High Court before it could implement a court order which found that he should not be allowed to leave the country until a final decision was reached on his status. The South African government claimed that Al-Bashir had the immunity of head-of-state, which did not allow his arrest, and that the requirement to consult the ICC prior to releasing Al-Bashir was met. In its turn, the ICC Pre-Trial Chamber found that South Africa did not meet its commitment under the Rome Statute and did not refer the issue to the Assembly of States Parties, a move that, in turn, has sparked a fair amount of scholarly criticism due to its lack of a significant repercussion in the face of non-adherence.[1130]

Kenya situation gives another example of the deficit of cooperation, but in a different aspect. In the Kenya cases, the main problem was not the inability to arrest and turn over suspects Kenyatta and Ruto voluntarily showed up in court but the organized interference in witnesses and the inability of the Kenyan government to give documentary and other evidence demanded by the Prosecution. The ultimate dismissal of the Kenyatta case by the Trial Chamber on the basis of the lack of sufficient evidence at the request of the Prosecution to stay the proceedings was indicative of a failure in evidence-collection that could be at least partially explained by the Kenyan government refusing to cooperate with the investigation. The fact that the Prosecution withdrew charges against Ruto also indicated evidentiary challenges that could be explained in large part by the recantation and interference of witnesses which the court could not have prevented or effectively addressed.[1131]

The systemic nature of the cooperation gap indicates a number of structural factors that support it. To begin with, the use of states as the agents of the Rome Statute creates a conflict of interest in itself since the state is the accused in crimes against humanity or when the political partners or trading partners of the state are the accused. Second, the Assembly of States Parties, the body charged with a responsibility of responding to a non-cooperation, is a

[1129] Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute* (Kluwer Law International 1999).

[1130] Sean D Murphy, 'Third Report on Crimes Against Humanity' UN Doc A/CN.4/704 (2018).

[1131] Sarah M H Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press 2013).

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political organization of states with various and sometimes antagonistic interests and thus it is very hard to attain a political compromise that would allow imposing any meaningful consequences on non-cooperating states. Third, the Security Council, which formally holds the power to take enforcement action against non-cooperating states under Chapter VII of the UN Charter, has not been eager to exercise this power to enforce ICC cooperation obligations, based on the different interests of its permanent members.

The cooperation deficit needs to be tackled, not only within the framework of the formal legal provisions of Part 9 of the Rome Statute. Some scholars have suggested the introduction of a more efficient non-cooperation response mechanism into the Assembly of States Parties such as automatic consequences in case of non-cooperation instead of a political consensus on each case, which is a partial solution. This may also raise the reputational cost of non-compliance by developing a more proactive role of civil society organisations and UN human rights mechanisms in monitoring and publicising non-compliance. Nevertheless, as long as the basic structure of the Rome Statute system relies completely on state cooperation to enforce the rules, the cooperation deficit will continue to pose the greatest structural challenge to successful prosecution of crimes against humanity.[1132]

5.7 Jurisdictional Limitations of the Rome Statute

The limitations imposed on the jurisdiction of the ICC in crimes against humanity are considerable and leave a considerable gap on the court to handle the entire gamut of crimes against humanity taking place in the world. These restrictions are based on the political concessions that are required to obtain the widespread state acquiescence in the Rome Statute, and they are an inherent characteristic of the jurisdictional structure of the court that cannot be changed without changing the Statute itself.

The main jurisdictional constraint is the need to have a nexus of the situation and either a Rome Statute state party or a Security Council referral. Article 12 of the Rome Statute provides that the court can exercise its jurisdiction when the state in which the conduct in question took place or the state the accused is a citizen of is a party to the Rome Statute or the Security Council referred the situation to the court in Chapter VII of the UN Charter. This is a condition that the ICC lacks any jurisdiction over crimes against humanity that occur on the territory of non-states parties against the nationals of non-states parties unless the situation is referred to by the Security Council.

The real-life implications of this constraint are clear cut. Massive crimes against humanity carried out in or against nationals of any of the three of the five permanent members of the Security Council (China, Russia and the United States) are virtually outside the jurisdiction of the ICC unless such states make Article 12(3) declarations of accepting jurisdiction or unless the situation is referred by the Security Council. The chances of the Security Council bringing to the fore situations that involve its own permanent member nationals is slim, considering the vetoing capability of the permanent members. This poses a structural disparity in the jurisdictional scope of the ICC that essentially discredits the universality of the norm of crimes against humanity.

Only two instances of the referral power of the Security Council have occurred: the Darfur situation in Sudan referred in 2005 under Resolution 1593, and the Libya situation referred in 2011 under Resolution 1970. Both referrals took place in fairly bizarre political situations in which the permanent members could come to an agreement or at least avoid the veto of the referral. Referrals to the Security Council in connection with Syria, where widespread use of crimes against humanity has been reported, have since been vetoed by Russia and China, as

[1132] *Prosecutor v Duško Tadić* (Appeals Chamber Decision on Jurisdiction) IT-94-1-A (15 July 1999) ICTY.

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an example of the effect of the referral mechanism in putting permanent members in a position to veto the responsibility of their allies.[1133]

Although the complementarity principle was developed to promote domestic prosecution, as opposed to merely restricting the ICC jurisdiction, it does pose risks of jurisdiction gaps when the states that lack the good will or capability to prosecute crimes against humanity are nevertheless found to have initiated proceedings that will be sufficient to prove inadmissible before the ICC. The danger that the principle of complementarity may be misused by states to protect perpetrators by faking or insufficient domestic justice a kind of strategic complementarity - is a serious challenge to the effectiveness of the court that needs not only greater vigilance in admissibility allegations but also greater capacity-building assistance to real domestic prosecution.

One significant recent development that has dealt creatively with the territorial jurisdiction limitation is the situation involving Bangladesh/Myanmar, in which Pre-Trial Chamber III ruled in 2019 that the alleged deportation of Rohingya people in Myanmar to Bangladesh is subject to the jurisdiction of the court since part of the action namely the arrival of the deportees in Bangladesh occurred on the territory of a Rome Statute party, This ingenuous application of the territorial jurisdiction criterion which was upheld by the Appeals Chamber later provides significant opportunities to the prosecution of cross-border based crimes against humanity despite the non-membership of the state of principal conduct in the Rome Statute. But it also shows the shortcomings of creative jurisdictional interpretation as an alternative to wholesale jurisdictional reform.[1134]

5.8 Political Dimensions of ICC Prosecution: Referrals, Investigations, and Selectivity

The ICC cannot and is not a purely technical legal body that is not bound to the workings of the international system of which it is a part. The political aspects of ICC prosecution as can be seen in the trends of situation selection, UNSC referral dynamics and the association between the court and the influential states have far-reaching implications on the capacity of the court to prosecute crimes against humanity in an effective and fair manner and on its legitimacy in the eyes of the international community it serves.

The most enduring and impactful political criticism of the ICC has been an accusation of African selectivity the fact that most ICC inquiries and prosecutions have concerned situations in African states, whereas the situation involving crimes against humanity involving nationals of strong non-African states have been spared the attention of the court. Out of the three plus or so cases that are under investigation or even at preliminary examination by the ICC, most of those are in Africa, and the vast majority of the suspects whose cases have been indicted by the court have been Africans. Although those who support the ICC have pointed out that most of these African cases were self-referred by African governments themselves and that the court has no option but to investigate where it has jurisdiction, critics have asserted that the pattern of selective prosecution is indicative of structural aspects of the Rome Statute regime such as the Security Council referral mechanism and the constraints of proprio motu investigation that selectively focus prosecutorial attention on Africa and protect

The African Union reaction to what it considers as selective ICC persecution has been long-lasting and of political importance. The AU has also taken up the statements which demand the postponement of the Al-Bashir case claiming that the investigation of the current African President is a threat to sovereignty and

[1133] Leila Nadya Sadat, 'Crimes Against Humanity in the Modern Age' (2013) 107(2) *American Journal of International Law* 334–377.

[1134] William A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2016).

stability in the region. In the same way, the AU has urged African states to contemplate collective withdrawal of the Rome Statute, and although no formal collective withdrawal has taken place, Burundi withdrew the Rome Statute in 2017 following the initiation of a preliminary examination into the situation in the latter country. Although some of the criticisms of the AU are a self-justified response of political elites to accountability, others are legitimate concern of structural inequalities in the ICC jurisdictional architecture and deserve serious consideration rather than being swept away.[1135]

Of particular interest is the interrelation between the proprio motu investigation authority of the ICC Prosecutor and the politics of situation choice. The fact that the Prosecutor opened a preliminary examination of the situation in Colombia in 2016, the authorisation of an investigation of the situation in Afghanistan in 2019, and the current preliminary examinations of situations involving potential crimes against humanity by the nationals of powerful states such as the Philippines and Venezuela all indicate that the court can extend its reach beyond the African continent. But these developments have brought about political opposition of their own the imposition of sanctions on the officials of ICC by the United States in reaction to the Afghanistan inquiry proves the high political price the court has to pay when it attempts to assert jurisdiction over the citizens of the mighty states.

Another significant political aspect of ICC prosecution is the peace versus justice dilemma the conflict between the ICC and its mandate to prosecute the perpetrators of crimes against humanity and the diplomatic and political mechanisms to terminate ongoing conflicts. When Al-Bashir was indicted in 2009, with the international community simultaneously trying to negotiate a peace settlement in Darfur, there was a lot of discussion as to whether ICC prosecution can serve to weaken or complicate peace negotiations by eliminating the incentive of immunity of the perpetrators to lay down weapons. The case of Uganda also created an issue that the ICC was acting against peace talks between the LRA and the Ugandan government when it went to get the leaders of the Lord Resistance Army. These strains are indicative of a real and irreconcilable dilemma at the core of the ICC mandate, as the quest of criminal responsibility and the quest of negotiated peace settlements may at times pull in opposite directions.

5.9 Evidentiary Challenges in Establishing Contextual Elements

Prosecution of Crimes Against Humanity before the ICC: The challenges that the prosecutor of ICC faces as far as the evidence is concerned are distinctively different from and much more challenging than those faced by a domestic criminal prosecutor. Also, in the case of the ICC evidence of Crime Against Humanity presents more challenges than domestic crime prosecution. A Crime Against Humanity is considered a collective crime. This is mainly due to the occurrence of these crimes in the context of mass violence and political instability. The challenges operate at various levels, including the effective gathering of evidence in hostile and inaccessible environments, protection of witnesses from interference and retaliation, and the successful presentation of complex contextual evidence – regarding the attack, whether it was widespread or systematic, and the knowledge of the accused – to a tribunal applying the high standard of proof beyond reasonable doubt.

Evidence-gathering in respect of ICC situations presents exceptional difficulties that are not seen in ordinary domestic criminal proceedings. ICC investigations generally occur in the context of ongoing or recently ended armed conflict where the physical environment is dangerous, state authorities hostile or uncooperative, witnesses deterred from coming forward or have been dispersed by displacement and

[1135] Darryl Tladi, 'The African Union and the International Criminal Court' (2015) 37 *South African Yearbook of International Law* 57–75.

conflict, documentary evidence may have already been destroyed or removed, and where the Court's investigators enjoy limited access and no coercive powers of their own.

The Office of the Prosecutor of the Court has repeatedly indicated that one of the most important operational problems facing the Court is the difficulty of evidence-gathering in hostile environments, and that evidence-gathered under these circumstances has led to the collapse or weakening of a number of major prosecution cases.

The prosecution of crimes against humanity is most severely challenged by witness protection, which is perhaps the greatest operational challenge facing the ICC. People that are typically in the affected community witness the mass atrocity and stay in the same geographical and social environment as the perpetrators and their supporters. Therefore, they would face serious danger and threats of deprivation and physical harm if they cooperate in the ICC process. The ICC witness protection programme was widely considered to be ineffective, and lacked adequate resources and capacity to afford any real protection to the witnesses whose testimony is necessary for successful prosecution. The Kenya cases occurred due to systematic witness interference, where witnesses withdrew their statements under circumstances strongly suggesting intimidation. Furthermore, it illustrates how the failure of witness protection can be fatal to the prosecution of crimes against humanity, due to the strong evidence being rendered ineffective and useless as a result.

The necessity of proving contextual elements i.e. proving the existence of a widespread or systematic attack and the accused's knowledge of the attack has its own evidentiary challenges that are different from those relating to proving the underlying acts. In order for something to be classified as a crime against humanity, it is not enough to show the evidence that a victim was subject to inhumane treatment. There must also be evidence as to the context in which that happened. In essence, a similar pattern of violence must be established. In particular, the scale of the attack must be established. How wide reaching it was geographically and the organizational structure through which it was executed must be shown. There must be evidence to show the policy or plan underlying that attack. Finally, the position which the accused had in that organizational structure and the knowledge which they had of the character of that attack must also be shown. The disclosure of this type of systemic evidence is pretty complex and larger in volume. They are also hard to authenticate.The evidentiary problems on which we are focusing are very well illustrated by the Bemba case.

In 2016, Trial Chamber III convicted Jean-Pierre Bemba for crimes against humanity and war crimes perpetrated by troops under his command in Central Africa. In 2018, however, the Appeals Chamber overturned the conviction, finding that the Trial Chamber had applied the wrong legal standard for command responsibility and that the Trial Chamber had wrongly substituted its own assessment of the evidence for that of the Trial Chamber below. Following its legal rather than evidentiary reversal, the Appeals Chamber's case illustrates how the complex legal standards that are applicable to crimes against humanity – particularly the mode of liability of command responsibility – pose risks of reversal on appeal even where the underlying facts of mass atrocity are not significantly disputed.

5.10 The Immunity Question: Heads of State and ICC Jurisdiction

Qualitatively different and more difficult than the evidentiary issues that the prosecution of crimes against humanity faces in domestic criminal prosecutions are the peculiarities of the crimes against humanity as collective crimes that are committed in the environment of mass violence and political instability. These issues are addressed on a variety of levels: how the evidence is collected in hostile or inaccessible

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settings, how the witnesses are kept off and offended, how the contextual evidence of the nature of the attack, its prevalence or systemic nature, and the knowledge of the accused can be presented to a tribunal that follows the high standard of proof beyond reasonable doubt.

The evidence-gathering in ICC situations poses extraordinary challenges, which do not have a parallel in common domestic criminal investigations. The ICC investigations are commonly conducted in the case of a current or a newly terminated armed conflict, when the physical setting is hazardous, the state authorities are unfriendly or unhelpful, witnesses fear to speak out or have been displaced and dispersed due to the war, documentary material might be destroyed or moved, and the investigators of the court do not have access to it and have no methods of coercion of their own. The Office of the Prosecutor at the court has numerous times cited the challenge of evidence-collection in unfriendly settings as one of the major operational problems of the court, and the insufficiency of evidence obtained in such circumstances has led to the failure or weakening of a number of significant prosecution cases.

Witness protection is, perhaps, the most severe possible operation issue of the ICC in the process of prosecuting crimes against humanity. The witnesses to mass atrocity are normally people belonging to the impacted communities and they are left within the same geographical and social locality as the individuals who committed the atrocities and their supporters, thus they are very susceptible to intimidation, threats, and physical attacks whenever they collaborate with ICC proceedings. The witness protection programme of the ICC has come under heavy criticism as being ineffective with lack of resources and ability to offer substantial protection to the witnesses who were the main determinant of a winning prosecution. The systematic witness interference that led to the fall of the cases in Kenya where the witnesses recanted their statements in conditions which strongly indicated the presence of intimidation is graphical in the sense that the failure of the witness protection can be fatal in prosecuting the crimes against humanity notwithstanding the might of the underlying evidence.

The problem of establishing contextual factors especially whether there was a widespread or a systematic attack and the knowledge of the accused about the attack poses unique evidentiary problems beyond those of establishing the underlying acts. To establish the contextual element of crimes against humanity, it is necessary to have evidence not only of what has happened to the individual victims but also of the wider organisational context and pattern of violence the scale of the attack, its geographical distribution, the organisational structures by which it was carried out, the policy or plan behind it, and the place of the accused in the organisational structure and its awareness of its nature. Such systemic evidence is generally complicated, large-volume and hard to verify and this poses a serious difficulty in investigation and presentation in adversarial cases.

The Bemba case sets a great example of these evidentiary problems. In 2016, Trial Chamber III found Jean-Pierre Bemba guilty of crimes against humanity and war crimes perpetrated by his forces in the Central African Republic. But in 2018 the Appeals Chamber overturned this conviction, concluding that the Trial Chamber had not applied the right legal test to the command responsibility and that it had inappropriately replaced its own evaluation of the evidence with that of the Trial Chamber below. Although the reversal of the Appeals Chamber was premised on legal as opposed to evidentiary grounds, the case demonstrates that the intricacy of the legal provisions that apply to crimes against humanity such as the mode of liability of command responsibility pose a high risk of appellate reversal even

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where the underlying facts of mass atrocity are not actively contested.[1136]

5.11 The ILC 2019 Draft Articles: Assessment and Prospects

Whether or not sitting heads of state should be immunized under the jurisdiction of the ICC has been one of the most litigious and politically impactful matters in ICC jurisprudence that directly impacts the capacity of the court to bring the highest political personalities to book over crimes against humanity. The case has mainly been about Al-Bashir cases but is a wider issue on how the immunity provisions under the Rome Statute and the customary international law on head-of-state immunity interrelate which are yet to be conclusively determined.

Article 27 of the Rome Statute states that the Statute has the same effect on all persons, and that there shall be no distinction based on official capacity; and that immunity or special procedural rules that may be attaching to the official capacity of an individual, whether by national or international law, shall not hinder the court in exercising its jurisdiction over an individual. This waiver explicitly covers the waiver of immunity to ICC jurisdiction of all individuals including sitting heads of state and is explicitly applicable to all states parties to the Rome Statute who have accepted the provisions of the Rome Statute including that of Article 27.

This however, is more complicated when it comes to non-state parties. In the instance whereby Security Council referred the situation in Darfur to the ICC through Resolution 1593, Sudan a non-state party was placed under the jurisdiction of the ICC with regards to the situation in Darfur. It was questioned whether the non-party status of Sudan implied that Omar Al-Bashir, the head of state of Sudan, retained the head-of-state immunity under the customary international law which Article 27 had waived against states parties. The 2009 decision of Pre-Trial Chamber I on arrest warrants did not directly rule on this issue of immunity. In 2011, Pre-Trial Chamber II then determined that the Security Council referral implicated Sudan in a similar situation to that of a state party regarding the Darfur referral, and thus waived Al-Bashir immunity. This analysis was however disputed and in succeeding decisions on non-cooperating states different Pre-Trial Chambers came to slightly different conclusions on the elements of the immunity question.

The ICC Appeals Chamber dealt directly with the question of immunity in its 2019 ruling in the Jordan referral proceedings, saying that Jordan had not met its duty under the Rome Statute by not arresting Al-Bashir when he visited Amman in 2017. The Appeals Chamber determined that the heads of state do not have immunity against arrest and surrender to the ICC under the Rome Statute even when they are citizens of non-states parties as the referral by the Security Council subjected Sudan to the Rome Statute regime and thus stripped Al-Bashir of his customary international law immunity. The decision was viewed with approval by those who contend that head-of-state immunity cannot be invoked to evade the applicability of ICC jurisdiction against those who have committed crimes against humanity, but has been criticised by others such as Gaeta and Tladi who consider that the analysis by the Appeals Chamber distorts the relationship between Security Council referrals and customary international law immunity.

The wider importance of the question of immunity is not confined to the particular situation in the Al-Bashir case. Whether sitting heads of state of non-states parties are immune to ICC jurisdiction and whether Security Council referrals can strive to eradicate immunity has far-reaching consequences on the universality of the crimes against humanity norm and whether the most powerful figures of political authority can be brought to justice by the ICC in the event of mass-atrocity. Until this issue is decisively settled either by an

[1136] *Situation in the Republic of Kenya* (Decision Pursuant to Article 15) ICC-01/09 (31 March 2010) ICC Pre-Trial Chamber II.

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authoritative judicial ruling or by amendment of the Rome Statute, it will still serve as a legal justification however controversial to states to reject cooperation with ICC arrest warrants targeting incumbent heads of state.[1137]

5.12 Conclusion

The investigation that is carried out in this chapter validates the main hypothesis and all the three auxiliary hypotheses that were put forward in Chapter 1. The history of prosecutions by the ICC indicates structural flaws in the crimes against humanity provisions within the Rome Statute that cannot be sufficiently addressed by the interpretive evolution principle.

The interpretive analysis substantiates that there are still unresolved ambiguities in the main aspects of the Article 7 definition, and in particular, the aspect of policy element of the definition, once introduced into the definition, has been a source of scholarly debate and uneven judicial enforcement, which have weakened the consistency and predictability of the legal framework. The state cooperation analysis is that the cooperation deficit is the most important structural barrier to successful prosecution of crimes against humanity, a given tension between the sovereignty-based international order and the supranationalism of international criminal justice which cannot be reconciled by legal reform itself. The jurisdictional analysis establishes that the jurisdictional constraints of the Rome Statute leave significant and systematic uncertainties in the jurisdiction of the court to deal with crimes against humanity worldwide, which is especially focused on the failure to prosecute nationals of strong non-state parties. The political discussion establishes that the prosecution history of the ICC has been greatly influenced by political factors such as the dynamics of Security Council referrals, the Africa selectivity issue and the peace versus justice dilemma which are not the failures of particular actors but structural aspects of the Rome Statute system. And the evaluation of the ILC Draft Articles attests to their potential to play a major role in the reinforcement of the international legal framework, should the major political hurdles to their adoption in the form of a binding convention be overcome.

CHAPTER 6: FINDINGS, POLICY RECOMMENDATIONS, AND CONCLUSION

6.1 Introduction

This concluding chapter summarises the key findings of the dissertation, proposes twelve evidence-based policy recommendations to enhance the international legal framework of the prosecution of crimes against humanity, and make the ICC more effective and legitimate, makes important directions of future academic research, accepts the limitations of the study, and gives the overall conclusion. The chapter uses the integrated theoretical framework presented in Chapter 3 that relies on natural law theory, positive international law theory, cosmopolitan justice theory, the R2P doctrine, and TWAIL and the five evaluative criteria that will be derived based on the integrated theoretical framework to evaluate the overall adequacy of the crimes against humanity framework under the Rome Statute and the likelihood of successful reform.

6.2 Principal Findings

The dissertation propagates eight major conclusions based on the discussion in Chapters 4 and 5.

Finding One: Article 7 of the Rome Statute is a more detailed codification of crimes against humanity than any other international criminal law, yet its technical comprehensiveness has spawned new interpretation issues that have somewhat rendered it an ineffective tool of law. The extensive enumeration of underlying acts, the definitional elaboration of Article 7(2) and the elimination of the armed conflict nexus are all great steps towards codification of crimes against humanity. But the addition of the policy component that was not found in any other

[1137] *Situation in Bangladesh/Myanmar* (Decision on Jurisdiction) ICC-01/19 (14 November 2019) ICC Pre-Trial Chamber III.

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international definition has caused a long-standing scholarly debate and lack of judicial consistency in its application that erodes the consistency and predictability of the law. The conflict between the need to set up a meaningful jurisdictional limit and the humanitarian objective of not letting a real instance of crime against humanity go unprosecuted has never been adequately addressed in the present construct.

Finding Two: The most doctrinally ambiguous and practically problematic aspect of Article 7 definition is the policy element, to which the ICC has not used with sufficient consistency to give it the legal clarity it needs to allow effective and predictable prosecution. The Pre-Trial Chambers inclination to read the policy element as broad in the context of nearly redundancy in situations such as Kenya is inconsistent with a more restrictive reading of Article 7(2)(a) that a textual interpretation would imply, which leaves the future of the application of this element uncertain. Such inconsistency compromises the predictability of the legal system as well as the credibility of the judicial institution as a legal applying body and not a discretionary political ruling body.

Finding Three: The deepest structural barrier to effective crime against humanity prosecution in the ICC is the cooperation deficit of states; that is, it is a structural conflict between the sovereignty-based international order and supranational aspirations of international criminal justice that cannot be resolved by mere legal means. The Al-Bashir and Kenya cases show that even when the court has overt jurisdiction and has issued arrest warrants or demanded evidence, states including those that are parties to the Rome Statute often do not pay due to their cooperation obligations without any real consequences. The non-cooperation systems provided in the Rome Statute are insufficient to fill this gap and a more radical revision of the cooperation framework is needed.

Finding Four: The jurisdictional restrictions of the Rome Statute establish a geography of impunity that is drawn on the current global power system at an uncomfortable level, effectively exempting the nationals of powerful non-state parties ICC prosecution. The incapacity of the ICC to exercise jurisdiction of crimes against humanity that have occurred in China, Russia, the United States and other very strong non-states parties unless the situation is referred by the Security Council which is the veto capability of these states in most instances, is a fundamental departure of the cosmopolitan ideal of universal and equal responsibility which the concept of crimes against humanity encompasses.

Finding Five: ICC prosecution politics not only the Africa selectivity problem, the peace versus justice dilemma, and the nature of Security Council referrals, but structural properties of the Rome Statute system and not failure on the part of individual actors, do indeed need structural rather than institutional remedy. This imbalanced prosecution of African cases by ICC is indicative of how the trigger mechanisms of the Rome Statute especially the complementarity principle and the Security Council referral mechanism operates in the realities of the geopolitical power structures present. To deal with this structural selectivity, the jurisdictional architecture needs to be restructured to give the court more power to seek out cases in and concerning the nationals of powerful states.

Finding Six: The evidentiary issues that ICC prosecution of crimes against humanity has faced especially in the fields of witness protection and evidence-gathering in hostile environments are serious and have helped to cause a number of high-profile prosecution failures. The Kenya cases debacle, the overturning of the Bemba conviction on appeal, and the difficulties with evidence in several other cases in the ICC all indicate the extraordinary challenge of assembling and presenting the multidimensional contextual evidence that is necessary to prove crimes

against humanity beyond reasonable doubt and to convict the defendant through the adversarial mechanism of an international tribunal. To overcome these challenges, it is necessary to dedicate more resources to investigations and enhance witness protection measures.

Finding Seven: The ILC 2019 Draft Articles on Prevention and Punishment of Crimes against humanity are a potentially valuable contribution to the reinforcement of the international legal system, though their becoming a binding convention is fraught with significant political obstacles that need a long-term international advocacy campaign to address. The aut dedere aut judicare obligations imposed in the Draft Articles of all states not simply Rome Statute parties and their structure of international cooperation in home prosecution of crimes against humanity would be significant improvements in the international legal system should they be adopted. Nevertheless, the present geopolitical context, in which there is increasing great power rivalry and diminished multilateral cooperation, poses a likelihood of early adoption without sustained and coherent international advocacy.

Finding Eight: The new challenges of environmental crimes, digital warfare, and the persecution of LGBTQ communities indicate significant constraints in the existing Article 7 framework and demand long-term academic and policy interest to make sure that crimes against humanity concept still suffices to respond to emerging types of mass atrocity. Whether mass environmental devastation, systematic cyber assaults on civilian populations or state-sponsored persecution of LGBTQ persons can be considered as crimes against humanity under the current Article 7 framework remains an open question and is in need of both a more well-developed jurisprudence by the ICC and a more specialized academic focus than it has so far been given.

6.3 Policy Recommendations

Based on the findings identified above, the dissertation proposes the following twelve evidence-based policy recommendations to states, the Assembly of States Parties of the ICC, the UN Security Council, and even the organs of the ICC.

Recommendation One: States that are signatories to the Rome Statute must negotiate and adopt an Amendment to Article 7 that eliminates the policy component of the definition of crimes against humanity or alternatively, explain it by a binding interpretive declaration adopted by the Assembly of States Parties. The policy element has caused greater interpretive controversy and legal ambiguity than any other aspect of the Article 7 definition and its deletion or clarification would go a long way in enhancing the consistency and predictability of the crimes against humanity framework. In the event that removal is politically inadvisable, an authoritative interpretive statement that the policy component only entails a minimum demonstration to organisational coordination in line with the broad interpretation that is followed in the more reasoned judgments made by the ICC would be a major improvement on the status quo of uncertainty.

Recommendation Two: Assembly of States Parties ought to develop a non-cooperation response mechanism automatic, which implies a pre-determined consequence such as suspension of voting rights, a cut in ICC services, and a referral to the Security Council to states parties that do not respond to ICC cooperation requests. The existing ad hoc response to non-cooperation that necessitates a political agreement that is hardly feasible has been shown to be utterly ineffective to respond to systematic non-cooperation that has defined the Al-Bashir and Kenya cases. There would be a higher price of non-cooperation, and the rule-of-law nature of the cooperation regime would be reinforced by an automatic response mechanism.

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Recommendation Three: The UN Security Council is urged to issue a standing resolution that would provide a general duty upon all the UN member states to cooperate with ICC arrest warrants issued under Security Council referrals, and to provide automatic sanctions against states not complying with such warrants. The inability of states to arrest and surrender Al-Bashir despite the Darfur referral and outstanding arrest warrants indicate that a Security Council arrest warrants does not alone create a positive effect on the state cooperation with ICC arrest warrants. An standing resolution that would create enforcement obligations with regard to all ICC arrest warrants issued on the basis of referrals by the Security Council would go a long way in reinforcing the enforcement regime of the most serious cases.

Recommendation Four: The Assembly of States Parties ought to substantially decrease the resources assigned to the Office of the Prosecutor of the ICC to collect evidence in hostile circumstances, such as by having a special rapid-deployment evidence-gathering unit that can be deployed at any time to circumstances where evidence is in danger of being destroyed. This lack of evidence in hostile operational areas has helped lead to the failure of prosecution in various key cases. Enhanced spending on evidence-collection capacity such as satellite imagery, digital forensics, and other secure witness communication technologies would greatly improve the quality and reliability of evidence that can be prosecuted.

Recommendation Five: ICC should have a considerably improved witness protection programme with specific resources, a safe relocation capacity in other third states, and specialised assistance to culturally diverse witnesses. The systematic witness intimidation that led to the failure of the Kenya cases shows that the current witness protection measures by the ICC are insufficient in protecting witnesses in high-profile cases against powerful defendants. To ensure that the same evidentiary failures are avoided going forward, a significantly increased witness protection programme based on the most effective domestic programmes but adjusted to the international environment is needed.

Recommendation Six: The states that are signatories to the Rome Statute are suggested to negotiate an amendment to the Rome Statute under Article 12 that will broaden the territorial jurisdiction of the court to all cases in which any element of the crime was committed on the territory of a state party irrespective of the location of the principal conduct. The innovative interpretation of jurisdiction in the Bangladesh/Myanmar scenario illustrates how territorial jurisdiction can be applied to expand the court/court jurisdiction beyond the territory of the states parties in situations where there is a cross-border aspect to the case. A formalisation of this practice by formally amending Article 12 would give a more solid and concrete legal foundation to ICC jurisdiction expansion in cross-border cases.

Recommendation Seven: The UN General Assembly ought to hold a diplomatic conference to discuss and adopt a binding convention on the prevention and punishment of crimes against humanity using the 2019 Draft Articles of the ILC, and making necessary adjustments in light of the concerns of the prospective state parties. An independent crimes against humanity convention would augment the responsibilities of prevention and prosecution beyond the existing Rome Statute parties, establish a domestic prosecution system that would be applicable to all states, and could, perhaps, first-ever bring major non-state parties such as the United States into the international crimes against humanity regime. This objective must be vigorously pursued by the international legal community by continuing to advocate the same in the General Assembly and by regional and bilateral diplomacy.

Recommendation Eight: The Office of the Prosecutor of the ICC must design and issue a very clear situation selection policy that clearly covers the issue of Africa selectivity and provides a clear set of rules used to exercise

powers of proprio motu investigation in every region. Increased disclosure of the selection decisions of the Prosecutor with regard to situations in which possible crimes against humanity have not been brought to bear including a clear consultation with the grounds why some situations involving possible crimes against humanity have not been formally investigated would enhance the legitimacy of the court and contribute to the perception of political selectivity that has undermined the credibility of the court especially among the African states.

Recommendation Nine: The Assembly of States Parties ought to pass a resolution urging the UN Security Council to revise its referral and deferral policies in relation to the ICC, such as by pledging to refer cases of crime against humanity to court where the evidence used fulfills the necessary standard, irrespective of the nationality of the suspected offenders. Security Council reform including reform of the veto in the event of mass atrocity is a long-standing goal of international law reform initiatives that is strongly opposed by politics. Nevertheless, a less broad obligation to consistent referral of cases which satisfy the crimes against humanity standard would be a significant move toward more equal use of international criminal justice.

Recommendation Ten: The ICC must create a more extensive and coherent strategy to the criminalization of sexual violence as crimes against humanity, such as through specialized training of investigators and prosecutors, greater use of victim advocates in sexual violence-related proceedings, and greater assistance to the victims of sexual violence in ICC proceedings. Although the Rome Statute has greatly provided on sexual violence as crimes against humanity, the ICC prosecution track record regarding sexual violence crimes has been varied with a number of cases showing substantial failures to effectively investigate and submit evidence on sexual violence crimes. Investigation and prosecution of sexual violence should be more systematically attended to enhance the effectiveness and the legitimacy of ICC proceedings in this critical field.

Recommendation Eleven: The Assembly of States Parties to the ICC ought to have an independent expert study of how the principle of complementarity works in practice, and in particular whether strategic or inefficient domestic trials have been employed to overturn the admissibility of an ICC proceeding, and whether more stringent criteria could be established to evaluate admissibility. Complementarity principle is a key characteristic of the ICC jurisdictional structure and its practical functioning has invited questions on whether it can be abused by use of sham domestic proceedings. Stricter and better adherence of the admissibility criteria such as the genuine investigation and prosecution criteria would help in lowering the chances of complementarity being put into practice to protect the culprits.

Recommendation Twelve: The global legal community must embark on a serious scholarly and policy review of the sufficiency of the Article 7 framework to counter emerging forms of mass atrocity such as massive environmental annihilation, systematic, cyberbased attacks on civilian populations, and state-perpetrated persecution of LGBTQ communities, and, where warranted, it should offer authoritative interpretive guidance or recommend appropriate amendments to the Rome Stat The new issues found in Chapter 2 of this dissertation environmental crimes, digital warfare, and LGBTQ persecution are all possible gaps in the existing framework of crimes against humanity that should be actively scholarly and policy-focused in the long run, provided the notion can continue to be relevant in addressing the entire spectrum of mass atrocity in the twenty-first century.

6.4 Directions for Future Scholarly Inquiry

In the current analysis, the present dissertation has established some important avenues of

future academic research that are beyond the present analysis.

The former orientation is the use of the crimes against humanity framework to mass-scale environmental devastation and the new idea of ecocide. The academic and policy discussion on whether to classify ecocide as an international crime be it by amending the Rome Statute or by establishing a separate convention is in its infancy and is rapidly evolving, and there is a strong urgency to conduct more rigorous doctrinal analysis of how far the current crimes against humanity provisions can be applied to cover the most severe instances of environmental degradation of civilian populations.

The second orientation relates to the implementation of the international criminal law in the case of cyberattacks and digital warfare. The possibility of applying the crimes against humanity framework to mass cyberattacks targeting civilian populations, such as attacks on healthcare systems, food distribution systems, and democratic processes, poses truly new legal challenges which have not been given the necessary deep-seated doctrinal consideration.

The third direction is related to systematic research on domestic prosecution of crimes against humanity based on the principle of complementarity, and the research on the quality and effectiveness of domestic prosecution in various jurisdictions and on the circumstances under which domestic prosecution is a real alternative to ICC prosecution and not a tool to protect offenders.

The fourth direction is the feminist and gender-based analysis of the crimes against humanity prosecution which looks at the substantive sufficiency of the Article 7 framework to deal with gender-based violence and the institutional aspects in the ICC that influence the practice of investigating and prosecuting gender-based violence.

6.5 Limitations of the Study

There are a number of weaknesses of the current dissertation that should be admitted in the name of academic integrity.

The first limitation is its time currency of analysis. The jurisprudence of the ICC and the international legal system of crimes against humanity are progressing at a high rate, and new processes that are going to take place after the dissertation is published in 2024 might influence some of the findings and recommendations proceeded with.

The second weakness is the purely doctrinal and analytical approach of the dissertation that does not involve any empirical study on the experience of victims of crimes against humanity, the perception of ICC officials and practitioners, and the opinion of communities affected. Further studies that take into account such empirical dimensions would give a more detailed account of the functioning of the ICC and the human impact of the prosecution difficulties that are determined in the present dissertation.

The third weakness relates to the scope of the analysis which by necessity addresses certain issues such as certain underlying acts of crimes against humanity and the specific practice of certain ICC situations at a level of generality that fails to represent all the legal and factual nuance. The future studies concentrated on the specific underlying acts or specific situations would be able to give more detailed and comprehensive analysis of the specific issues that occur in those situations.

6.6 Conclusion

The current dissertation has provided a critical legal examination of crimes against humanity as defined, interpreted, and charged under the Rome Statute of the International Criminal Court, followed by the historical development of the concept, tracing the concept of the concept of crimes against humanity to its pre-Nuremberg incarnations, through its most detailed modern codification in Article 7, an

examination of the interpretive issues that the major constituents of the definition of crimes against humanity

The discussion confirms the main hypothesis that Article 7 of the Rome Statute is the most detailed codification of the crimes against humanity in the history of international criminal law, and that the ICC prosecution practice suggests some fundamental structural constraints the lack of cooperation on the part of the state, gaps in jurisdiction, political selectivity, and evidentiary difficulty, which cannot be overcome solely by interpretive evolution but must be addressed by institutional reform of the ICC,

The concept of crimes against humanity has a long history, since it was first invoked in the wake of the Armenian massacres of 1915, during the Nuremberg trials, during the evolution of the concept in the jurisprudence of ICTY and ICTR, and in the ultimate form of the concept, in the Rome Statute, Article 7. The concept is today the fullest and technologically advanced formulation of the principle that some acts of mass violence against civilian populations are offences against the whole of humanity, and are to be prosecuted at the individual level, irrespective of the official competence of the offenders, the nationality of their deeds or the geographical location of the crime.

However, there is a deep divide between this normative ideal and the real situation of ICC prosecution. Millions of victims of crimes against humanity worldwide in Darfur, in Myanmar, in Yemen, in Syria and in many other cases await justice which in structural terms, as analysed throughout this dissertation, has been beyond the capacity of the international criminal justice system to provide. Sealing this gap does not only need technical law reforms but a new political determination of the international community towards the principle that no perpetrator of crimes against humanity however powerful, however well-connected, however strategic to the great powers should be allowed to escape the accountability of the most serious crimes against the human dignity that we all possess.

The dissertation has progressed the twelve policy recommendations towards this goal. They will not individually or collectively address all of the structural issues of the ICC or close the divide between the normative ideal of prosecuting crimes against humanity and its actual existence. But they are evidence-based, realistic, and more legitimate steps to a more efficient, more global, and more legitimate international criminal justice system steps that the international community, should it be serious about the pledge to end impunity of mass atrocity, is willing and indeed bound to take..

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