Chapter 8

Evolution of the Definition of Crimes against Humanity under International Criminal Law

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Abstract

The evolution of the definition of crimes against humanity under international criminal law reflects a significant shift in the treatment of civilian populations by states, transitioning from a domain reserved for state discretion to one governed by international law. This chapter traces the historical development of the concept, beginning with 19th-century articulations of the principle of humanity, through its codification in the Nuremberg Charter post-World War II, to its current status under the Rome Statute of the International Criminal Court (ICC).

Initially, the principle of humanity was invoked in the context of war and humanitarian law. However, it wasn't until the atrocities of World War I, particularly against Armenians, that the term "crimes against humanity" emerged, leading to the first international legal accountability efforts.

The Nuremberg Trials marked a pivotal moment, defining crimes against humanity as acts committed against civilian populations in connection with war crimes. This definition initially required a nexus to armed conflict, a requirement that has evolved over time. Subsequent tribunals, such as the ICTY and ICTR, expanded the scope of these crimes, allowing for prosecution in peacetime and clarifying the contextual elements necessary for establishing such crimes.

The Rome Statute further codified these developments, defining crimes against humanity as acts committed as part of a widespread or systematic

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attack against civilians, without necessitating a link to armed conflict. Despite this progress, ambiguities remain regarding the interpretation of "other inhumane acts" and the necessity of state or organizational policy. The ongoing discourse around these issues highlights the dynamic nature of international criminal law and its capacity to adapt to emerging global challenges, underscoring the importance of crimes against humanity in addressing future injustices.

Keywords: Crimes against humanity, Martens Clause, Nuremberg Tribunal, ICC, ICTY

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1. Introduction

Crimes against humanity, similar to other international crimes, have a relatively recent provenance. While often overshadowed by genocide, it is a revolutionary concept that, for the first time in history, declared that state discretion over the treatment of civilian populations, which was traditionally in the *domaine réservé* of states, should be limited by international law.

In this chapter, I first introduce the genealogy of crimes against humanity from the 19th-century invocations of the principle of humanity to its first codification in the Charter of the International Military Tribunal and its resurgence in the 1990s. Subsequently, I focus on the most important contextual elements of this crime category, and conclude by identifying certain unspecified aspects of crimes against humanity.

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2. The Regulation of Crimes against Humanity in International Law

2.1 Legal Development before the Second World War

Since the 19th century, the international community has repeatedly declared the principle of humanity to be one of the fundamental attributes of civilisation and has publicly condemned its violation. The Declaration on the Prohibition of the Slave Trade adopted at the Congress of Vienna in 1815 by the European Great Powers, for example, stressed that the slave trade 'has been regarded by enlightened men of all

ages as repugnant to the principles of humanity and universal morality... and finally, the public voice in all civilised countries calls aloud for its prompt suppression'.[1]

Although the standard of "civilisation" was a highly exclusionary and racist concept employed against non-Western states,[2] it was also closely linked to basic ethical standards and employed as a rhetorical argument to limit violence during wars. The St Petersburg Declaration of 1868, which prohibited the use of explosive projectiles of less than 400 grams, stressed that 'the necessity of war must be subordinated to the requirements of humanity' since 'the progress of civilisation should limit as far as possible the hardships of war'.[3] The principle of humanity finally became entrenched in the laws of war with the adoption of the 1899 Hague Convention (II) with Respect to the Laws and Customs of War on Land. The Convention pronounced in its preamble:

> *Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.*[4]

This formulation has since become one of the defining formulas of international humanitarian law, known as the Martens Clause.[5] The Martens Clause was reiterated in the preface to Convention IV on the Laws and Customs of War, adopted at the Second Hague Peace Conference in 1907, stressing that 'to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization' was of paramount importance.[6] This wording, in a slightly modified version, also

1 *Déclaration du Congrès de Vienne en date du 8 fevrier 1815 au sujet de l'abolition de la traité des nègres d'Afrique*. The renowned French philosopher, Denis Diderot, even referred to humanity as 'the only truly inalienable right'. However, Zagor points out that the reference to international public opinion in the Declaration primarily referred to the internal British political polity and that it is unclear how much the idea of humanity actually permeated international relations. Zagor, 2011.

2 See further Obregón, 2013.; Hoffmann, 2015.

3 *Déclaration à l'effet d'interdire l'usage de certains projectiles en temps de guerre.* Saint Petersbourg, 11 December 1868.

4 Preamble, *Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, 29 July 1899.

5 One of the leading international lawyers of the era, Fyodor Fyodorovich Martens, served as head of the Russian delegation that convened the Peace Conference. Martens tried to break a diplomatic deadlock between Germany and Belgium over a debate concerning the issue of "levée en masse", that is, the direct participation of civilians in hostilities during an invasion. While the proposed compromise did not explicitly espouse the Belgian position, it allowed it to be considered in future applications of the Convention by appealing to customary law and international public opinion. See Cassese, A. 2000.; Giladi, 2014.

6 Preamble, *Hague Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land*. The Hague, 18 October 1907.

appeared in Additional Protocol I to the Geneva Conventions of 1949,[7] and in various forms in several other international treaties regulating the means and methods of warfare.[8]

From early on, the notion of humanity was ambiguous: it could refer to "humanness", that is, the quality of the individual as a human being, as well as to "humankind" as the collective human race.[9] Thus, condemning an atrocity as a violation of the principle of humanity could be understood to express its particularly heinous nature but also the idea that it is an affront to the entire human race, and as such, it requires international prosecution. However, the codification of the principle of humanity at the beginning of the 20th century did not create individual criminal responsibility. Since classical international law, starting from the doctrine of unlimited internal jurisdiction, did not consider the individual as a subject of international law and considered the regulation of their status essentially a sovereign monopoly of the state, even the most serious inhumane acts committed by a state against its own civilian population did not violate international law. The first attempt to change this arose in the wake of the deportation and killing of hundreds of thousands of Armenians in the Ottoman Empire during the First World War.[10]

On 24 May 1915, France, Great Britain, and Russia issued a joint declaration calling the events "crimes against humanity and civilisation",[11] the perpetrators

7 Article 1(2) of Additional Protocol I provides that

> *In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.*

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, UNTS Vol. 1125, 3.

The preamble of Additional Protocol II similarly emphasises "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience". Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-international Armed Conflicts, UNTS Vol. 1125, 609.

8 For instance, the preamble of the Second Additional Protocol to the 1954 Hague Convention states that 'the rules governing the protection of cultural property in the event of armed conflict should reflect developments in international law'. Second Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999. UNTS Vol. 2253, 172. In the same vein, the 1998 Ottawa Convention stresses 'the role of public conscience in furthering the principles of humanity as evidenced by the call for a total ban of anti-personnel mines…' Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997. UNTS Vol. 2056, 211.

9 Macleod, 2010.

10 In the spring of 1915, a series of pogroms were carried out against the Christian Armenian population in the Ottoman Empire, who were considered allies of the Entente. The survivors were subjected to deportation, with further sacrifices and their property confiscated. The atrocities resulted in hundreds of thousands of deaths -- some estimates put the death toll at as many as 1,500,000. For more details, see Dadrian, 1995.

11 The original draft referred to "crimes against Christianity and civilization"; however, it was changed because Great Britain and France were concerned that an overt reference to Christianity might alienate their Muslim subjects and affirm the Turkish narrative. See Matiossian, 2022.

of which would be held "personally responsible".[12] Later, the Western occupying powers in Turkey indeed conducted several prosecutions before special court martials against some of the alleged culprits between 1919 and 1920.[13] It was precisely because of the atrocities committed against the Armenians that the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties established by the Entente Powers proposed that, in addition to violations of the law of war, violations of the "elementary laws of humanity" should also be prosecuted before an International Criminal Tribunal set up for that purpose, and explicitly invoked the Martens Clause as the applicable law.[14] The Commission argued that the rules of war to protect the civilian population of an enemy country should be extended to cover its own population and that violations of those rules should also be prosecuted.[15] However, this proposal ultimately failed, as the US and Japanese representatives took the view that criminalising violations of the law of war would constitute *ex post facto* legislation; in other words, it would violate the principle of *nullum crimen sine lege*.[16]

However, Article 230 of the Sèvres Peace Treaty stipulated that

> *The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914.*

However, this treaty never entered into force, and the Lausanne Peace Treaty concluded between Turkey and the Entente Powers no longer contained any reference to accountability.

2.2. Legal Developments after the Second World War

The horrors of the Second World War showed once again that the basic regulatory framework of the laws of war based on the traditional notion of exclusive domestic jurisdiction, which only considers the population of the enemy state as protected persons, is inadequate. The Third Reich committed mass inhumane acts against its own citizens and those of its allies for political, racial, or religious reasons, and the United Nations War Crimes Commission recommended as early as 1943 that the scope of criminal prosecution should be extended beyond war crimes.[17] On 8 August

12 United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War (His Majesty's Stationery Office, 1948) 35.
13 See Balint, 2013.
14 "Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties -- Report Presented to the Preliminary Peace Conference" (1920)
15 See Boot, 2002.
16 "Commission on the Responsibilities", 141-144.
17 See more in detail von Lingen, 2014.

1945, the four major powers occupying Germany (the United States, the Soviet Union, Great Britain and France) established the Nuremberg International Military Tribunal (IMT), whose sole task was to hold accountable the 24 military, political, and economic leaders most responsible for German war crimes.[18] For the first time in history, an international criminal forum was created to prosecute international crimes.[19]

Even though the British Foreign Office vehemently opposed the idea of investigations of 'atrocities committed on racial, political or religious grounds' until May 1945,[20] the Statute of the Nuremberg IMT explicitly included a new category of crimes committed against the civilian population within its jurisdiction.[21] Crimes against humanity were defined in Article 6(c) of the IMT Statute as:

> *murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, 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.*

This definition links the commission of crimes against humanity to war, that is, an international armed conflict (*nexus* requirement) and, thus, treats them as an extended version of war crimes, on the basis that aggressive war is the most serious international crime.[22] However, it should be added that there were also political reasons for the war nexus requirement, as the Allies were concerned that abuses in democratic regimes, such as racial discrimination and colonial exploitation, might qualify as crimes against humanity. This motive was laid bare in a correspondence between Telford Taylor, one of the drafters of the Nuremberg Tribunal Statute and US Military Advocate General from 1946 to Howard Petersen, US Assistant Secretary of War. In February 1947, Taylor stated,

18 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 1945.

19 In addition to the prosecution of the main Nazi criminals, the International Military Tribunal for the Far East (IMTFE) was set up in 1946 by order of General Douglas McArthur, the Allied Commander-in-Chief in the Far East, on the model of the Nuremberg Tribunal, with its seat in Tokyo, to try the 28 main Japanese war criminals with the same subject-matter jurisdiction as the IMT. On the IMTFE see Cohan and Totani, 2018.

20 Kochevi, 1995.

21 The term "crimes against humanity" was proposed by the renowned international lawyer Hersch Lauterpacht to Robert Jackson, who was the US representative and later the Chief Prosecutor of the Tribunal. See Koskenniemi, 2004., Lauterpacht, 2010.

22 In its judgement, the Tribunal stresses:
> *"War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."*

Nuremberg Trial Proceedings, Monday, 30 September 1946.

> *My own view is that departures from democratic systems as may exist in some countries and discrimination, even quite aggravated such as may exist against neg...s in certain countries, should not even, in these enlightened times, constitute crimes at international law.*[23]

However, during the subsequent Nuremberg proceedings, Taylor charged the defendants with crimes against humanity committed in peacetime.[24]

It should be noted that Council Law No. 10, adopted by the Allied Control Commission, which defined the substantive law applicable by occupying Military Tribunals, did not provide for a war nexus; that is, technically, crimes against civilians committed before the outbreak of the Second World War could also be considered crimes against humanity. Nevertheless, the US Military Tribunals were sharply divided on the issue: the judgements in the Justice[25] and *Einsatzgruppen*[26] trials ruled, in principle, that there was no need for a war nexus; however, in the Pohl,[27] Flick,[28] and Ministries[29] cases, they took the opposite view.

Based on the above, it seems that the war nexus was generally regarded as the indispensable element of crimes against humanity, but international criminal law gradually recognised that crimes against humanity can also be committed in peacetime.[30] However, it is not clear when this requirement ceased to apply. In the Korbély case, the European Court of Human Rights stated that the war nexus 'may no longer have been relevant in 1956';[31] however, many legal scholars argue that this development only occurred at a later stage.[32]

With the creation of the category of crimes against humanity, a new international crime emerged, which penalised acts against civilians that were contrary to fundamental human values. This was undoubtedly a revolutionary innovation in the emerging field of international criminal law; however, it had an uncertain material scope of application. The Statute did not provide a close enumeration of all

23 Quoted in Heller, 2011.

24 Ibid.

25 The Tribunal concluded,

> *The statute is limited by construction to the type of criminal activity which prior to 1939 was and still is a matter of international concern. Whether or not such atrocities constitute technical violations of laws and customs of war, they were acts of such scope and malevolence, and they so clearly imperiled the peace of the world that they must be deemed to have become violations of international law.*

Altstoetter and Others (Justice), TWC, Vol. III., 974.

26 Einsatzgruppen, TWC, Vol. IV., 499.

27 Pohl, TWC, Vol. V., 991-2.

28 Flick, TWC, Vol. VI., 1212-3.

29 Ministries, Order Dismissing Count Four, TWC, Vol. XIII., 115-117.

30 Ratner, Abrams and Bischoff, 2009.

31 Korbély v. Hungary, ECHR, Grand Chamber, Application No. 9174/02, 19 September 2008, para. 82.

32 According to Ford, the end of the war nexus may have occurred sometime between 1968 and 1984. Ford, 2007. Abrams, and Bischoff 2009, 323 argue that it had certainly occurred by 1975 but admit that this claim is "certainly debatable".

prohibited acts, as it referred to "other inhumane acts" allowing for future expansion through customary development. The drafters also failed to define the contextual elements of crimes against humanity; that is, the circumstances in which inhuman acts committed would constitute an international crime. Furthermore, it had a residual quality, as the Tribunal applied it almost exclusively in a complementary manner to crimes against peace and war crimes. In only two cases, Streicher and von Schirach, did the Nuremberg Tribunal find the defendants solely guilty of crimes against humanity. However, even here, the Nuremberg Tribunal did not elaborate on the precise elements of the definition of an attack against a civilian population. One possible reason for this restraint was the principle of legality. Since crimes against humanity had never been applied before, criticisms of the *nullum crimen sine lege* principle were more easily refuted by being almost exclusively prosecuted in conjunction with war crimes, an already established international crime category.[33]

The US Military Tribunals attempted to fill the gaps in the normative regulation. Most notably in the Justice case, the Tribunal required 'proof of conscious participation in systematic government organised or approved procedures' and thus excluded 'isolated cases of atrocity or persecution'.[34] Ambos points out that this was the 'beginning of a tendency in national and international practice to attempt to distinguish crimes against humanity from ordinary crimes by requiring – instead of the war nexus – a link to some kind of authority'.[35]

Nevertheless, almost overnight, crimes against humanity became an established category of international criminal law. On 11 December 1946, the United Nations General Assembly unanimously reaffirmed the principles enshrined in the Statute and Judgment of the Nuremberg Tribunal as part of the *corpus* of international law, including the crime against humanity, in its Resolution 95 (I).[36] The requirement of accountability for crimes against humanity was also included in the peace treaties concluded with all defeated states.[37]

33 However, the Nuremberg Tribunal did not consider the *nullum crimen sine* lege principle to be either a rule of common law or a general principle of law. The IMT stressed that *nullum crimen sine* lege is a principle of justice, which allows for the prosecution of acts not prohibited by law at the time they were committed, where it would have unjust consequences if such acts were to go unpunished. Nuremberg Trial Proceedings (30th vol.) 219. For more details on the prohibition of retroactivity, see Gallant, 2009.

34 Altstoetter and Others (Justice), TWC, Vol. III., 982.

35 Ambos, 2014.

36 See UN Doc. A/RES/1/95 (1946). The International Law Commission has also defined the so-called Nuremberg Principles in detail. See Principles of International Law recognised in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal Yearbook of the International Law Commission Vol. II. 1950. 374-378. A/CN.4/L.2. The category of crimes against humanity was later included in the 1951 Draft Code of Offenses against the Peace and Security of Mankind and in the 1954 Draft Code of Offenses against the Peace and Security of Mankind. Yearbook of the International Law Commission, Vol. II. (1951), 134; Yearbook of the International Law Commission, Vol. II. (1954), 151.

37 Hungary, for example, accepted this obligation in the Paris Peace Treaty.

"Hungary shall take all necessary steps to ensure the apprehension and surrender for trial of:

In 1948, the crime of genocide, which had been hitherto a part of crimes against humanity, became officially a separate international crime with the adoption of the Genocide Convention,[38] and in 1973, a specific crime against humanity, apartheid, was codified in a separate treaty.[39] In addition, there have been several criminal proceedings before national courts for crimes against humanity, in which the courts have attempted to clarify various elements of the offence on the basis of international law.[40] However, these trials were limited to crimes committed by nationals of the defeated states during the Second World War, so that, until the 1990s, the emergence of international criminal law seemed to be only an interlude in the development of international law.

Even though the International Law Commission (ILC) resumed international criminal law codificatory work in the early 1990s,[41] it was the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY)[42] and the International Criminal Tribunal for Rwanda (ICTR)[43] that have breathed new life into international criminal law, and their jurisprudence have clarified some of the obscure elements of crimes against humanity. Article 5 of the ICTY Statute provides:

> *The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:*
> *(a) murder;*
> *(b) extermination;*
> *(c) enslavement;*
> *(d) deportation;*
> *(e) imprisonment;*
> *(f) torture;*
> *(g) rape;*
> *(h) persecutions on political, racial and religious grounds;*
> *(i) other inhumane acts.*

(a) Persons accused of having committed, ordered or abetted war crimes and crimes against peace or humanity"

Act XVIII of 1947 on the ratification of the Peace Treaty signed in Paris on 10 February 1947.

38 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UNTS, vol. 78, 277. However, already in 1946, the UN General Assembly recognised that 'genocide is a crime under international law'. UN General Assembly, The Crime of Genocide, 11 December 1946, UN Doc. A/RES/96.

39 *International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, UNTS, vol. 1015, 243.*

40 The most famous of these trials was the Eichmann case in 1961. See, for example, Schabas, W. A. 2013. For an account of national proceedings after World War II, see Bassiouni, M. C. 2011.

41 Draft Codes of Crimes against the Peace and Security of Mankind, Yearbook of the International Law Commission, Vol. II/2. (1991) 94.

42 UN Security Council, 25 May 1993, UN Doc. S/RES/827.

43 UN Security Council, 8 November 1994, UN Doc. S/RES/955.

Somewhat surprisingly, the ICTY Statute retained the armed conflict nexus inherited from the Nuremberg Statute, although it expanded its scope by encompassing non-international armed conflicts as well[44] and failed to elaborate the context of the commission of such acts. However, while Article 3 of the Statute of the Rwanda Tribunal lists the same prohibited acts, it defines the circumstances of the commission of crimes against humanity as 'committed in the course of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds' and also removes the armed conflict nexus requirement.[45]

Overall, the jurisprudence of the two Tribunals have had a significant influence on the drafting of the Rome Statute establishing the International Criminal Court (ICC), and the Rome Statute's definition of crimes against humanity has become the normative benchmark accepted by an overwhelming majority of the international community.[46]

3. The Regulation of Crimes against Humanity in the Rome Statute of the International Criminal Court

The Rome Statute largely codified the judicial innovations of the jurisprudence of the *ad hoc* Tribunals, although, in certain respects, they departed from it and added the new underlying offences of the crime of apartheid and enforced disappearance of persons. Article 7(1) of the Statute provides:

> *For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:*

44 Nevertheless, in the Tadić case, the ICTY Appeals Chamber stated:
"It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict… customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law."
Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995. para. 141.

45 However, notwithstanding the different crime definitions in the ICTY and ICTR statutes, the two Tribunals have sought to interpret crimes against humanity in a uniform manner in their jurisprudence.

46 There are currently 125 States Parties to the Rome Statute; however, the wide acceptance of the definition of crimes against humanity enshrined therein is demonstrated by the fact that even the Statute of the Special Court for Iraq, established with the assistance of the United States, adopted this definition. See Coalition Provisional Authority Order No. 48, CPA/ORD/9 Dec. 2003/48, "Statute of the Iraqi Special Tribunal Art 38". International Legal Materials 2003. 231.

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

The listed offences are further clarified in Article 7(2) and the *Elements of Crimes* that assist the ICC in interpreting the offences.[47]

The Statute confirms that the concept of a crime against humanity is objectively defined as the commission of specific inhumane acts 'as part of a widespread or systematic attack against a civilian population'. It follows that a crime against humanity can only be committed if the perpetrator's serious violation is part of a broader series of acts. The term "widespread", on the one hand, refers to the quantitative aspect of crimes against humanity, that is, it refers to a large number of inhumane acts,[48] although, in theory, it could be achieved by an event of outstanding gravity and with

47 The Elements of the Statute of Crimes is a document adopted by the ICC Assembly of States Parties by a two-thirds majority vote, and is an authentic interpretation of the provisions of the Statute. See Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002 (United Nations Publication, Sales No. E.03.V.2 and corrigendum), Part II.B. The original document was amended by the States Parties at the Kampala Review Conference. See Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May–11 June 2010. International Criminal Court Publication, RC/11. See Statute, Article 9.

48 The ICC in the Bemba case stressed that the term "widespread" essentially refers to an attack that is 'massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims'. However, this cannot be established solely on the basis of quantitative or geographical criteria, but only on the basis of a consideration of the individual facts. See Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo (Judgment) ICC, Trial Chamber III, Case No. ICC-01/05-01/08, 21 March 2016. para. 163. Cassese convincingly argues that although the early codifications of the crime against humanity did not include this clause, the concept was always based on the implicit assumption that it penalises an attack with grave consequences against a civilian population. Cassese et al. 2011.

many victims.[49] "Systematic", on the other hand, is a qualitative adjective, requiring a high level of organisation of the commission of each act of violence, taking into account factors such as the continuous, repeated commission of crimes, planning, use of resources, or political motivation.[50]

Based on a narrow reading, even the actions of serial killers could potentially fall into this category. However, this approach runs counter to the original concept of the intention of the Allied Powers, which clearly required some form of state intent behind international crimes.[51] This is confirmed, inter alia, by the Justice case, in which the US Military Tribunal ruled that isolated atrocities, whether committed by a private individual or a governmental entity, must be excluded in the interpretation of crimes against humanity, since such crimes can only be committed within a framework systematically organised or approved by the government.[52] In the Korbély case, the European Court of Human Rights also considered it important to examine whether the acts committed by the applicant in 1956 were part of state policy, as this constituted an element of the crime against humanity at the critical date.[53]

The drafters of the Rome Statute took a similar position, thus Article 7(2)(a) states:

> *"Attack directed against any civilian population" 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 organizational policy to commit such attack.*

However, the jurisprudence of the ICTY and ICTR has gone in the opposite direction. Since the Kunarac judgement, both *ad hoc* Tribunals have repeatedly rejected the notion that customary international law requires the existence of a state or organisational policy as an essential element of a crime against humanity.[54] However, there is general agreement that 'the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have known that his acts fit into such a pattern'.[55]

49 Prosecutor v. Blaškić (Judgment) ICTY, Trial Chamber I, Case No IT-94-15-T, 3 March 2000. para. 206; Prosecutor v. Kordić (Judgment) ICTR, Trial Chamber I, Case No IT-95-14/2-T, 26 February 2001. para. 176.

50 Cryer, 2010.

51 See Bassiouni, 2005.

52 Altstoetter and Others (Justice), TWC, Vol. III., 982.

53 Korbély case, para. 84.

54 Prosecutor v. Kunarac (Judgment) ICTY, Appeals Chamber, Case No IT-96-23&IT-96-23/1-A, 12 June 2002. See also, Prosecutor v. Krstic (Judgement) ICTY, Appeals Chamber, Case No IT-98-33-A, 19 April 2004. para. 225; Prosecutor v. Semanza (Judgement) ICTR, Appeals Chamber, Case No ICTR-97-20-A, 20 May 2005. para. 269; and the Cambodian Special Chambers, see Prosecutor v. Eav (Judgment) EECC, Trial Chamber, Case No. 001/18-07-2007/ECCC/TC, 26 July 2010. para. 412.

55 Prosecutor v. Tadić (Judgement) ICTY, Appeals Chamber, Case No IT-94-1-A, 15 July 1999. para. 248.

Moreover, even if it is accepted that customary international law does not require a state or organisational policy to be followed,[56] it is undeniable that the ICC requires its existence as a jurisdictional requirement, so that it is certainly applicable in States Parties to the Statute.

The Statute does not precisely define the term "organisational policy", that is, the organisation of actions coordinated by a non-state actor. The emerging jurisprudence of the ICC has not yet settled this question. However, the Pre-Trial Chamber has identified several guiding criteria in its decision on the assessment of the post-election unrest in Kenya. According to the Council, it is necessary to take into account the hierarchical structure of the group, whether it has a responsible leader; whether it is actually capable of carrying out an attack of sufficient gravity; whether it has control over a large area; whether its primary purpose is to carry out attacks against the civilian population; whether the group expresses its intention to carry out attacks against the civilian population; and whether the group is part of a larger group with the above characteristics.[57] The Chamber adopted a broad interpretation and found that the riots raised suspicions of crimes against humanity.[58]

Despite the crime against humanity being an "attack against a civilian population", international criminal law no longer requires as an element of the crime to be linked to an armed conflict, international or not. The term "attack" in the definition does not necessarily mean armed violence – although this is undoubtedly the case in the majority of cases – but 'the commission of a series of prohibited acts against a civilian population' within the meaning of Article 7(2) of the Statute that constitute severe human rights violations.[59] An inhumane act can be carried out without the use of armed force, such as the enactment of legislation that severely discriminates against certain ethnic or social groups.[60]

56 There is considerable disagreement among legal scholars on this issue. See, for example, Schabas, 2008. Kress rightly points out that the presence of state and organisational policy in the Rome Statute may in itself be evidence that states regard it as a customary law requirement. Kress, 2010.

57 Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation Into the Situation in the Republic of Kenya, ICC, Decision on the Confirmation of Charges, 31 March 2010, para. 90; The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute, ICC, 23 January 2012.

58 Some authors support this approach, as it allows prosecuting criminal organisations such as transnational terrorist groups that may not be dealt with at the state level. See Di Filippo, 2008.; Halling, 2010.

59 Accordingly, the Elements of Crimes clearly state, 'The acts need not constitute a military attack'. Elements of Crimes, Article 7.

60 The Akayesu judgment stated,

> *An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.*

The Prosecutor v Jean-Paul Akayesu (Judgment), ICTR, Case No. ICTR-96-4-T, para. 581.

The ICC Statute also defined the concept of "other inhumane acts" more precisely than previous criminal fora. While the Yugoslavia Tribunal acknowledged that 'there is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal',[61] Article 7(1)(k) of the Statute provided that other inhumane acts are 'acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.

Finally, it is important to stress that this category of offences only criminalises inhumane acts against civilians. Of course, if an attack against a civilian population also involves persons directly involved in an armed conflict, this does not change the qualification of the offence, provided that the attack is predominantly directed against the civilian population.[62] The Yugoslavia and Rwanda Tribunals have previously interpreted the concept of a civilian population more broadly, finding in several decisions that it applies to anyone not actively participating in the armed conflict, including wounded, incapacitated, or captured combatants.[63] However, the ICTY later held in the Martić[64] and Mrškić[65] cases that where the victims are captured persons specifically selected on the basis of their combatant status, the acts constitute war crimes. Although this interpretation has been criticised in the literature,[66] it appears to be more in line with the original regulatory concept of crimes against humanity than the earlier expansive interpretation.

However, conduct committed in the presence of contextual elements can only lead to the accused being held liable if the act was committed intentionally and with knowledge of the context of the crime against humanity. However, is not necessary to commit the offence with any discriminatory motive, except in the case of persecution, which may be committed solely on the basis of 'political, racial, national, ethnic, cultural, religious, gender… or other grounds that are universally recognized as impermissible under international law'.[67]

61 Prosecutor v. Kupreškić et al. (Judgment) ICTY, Trial Chamber, Case No. IT-95-16-T, para. 563

62 ICTY case law recognises that 'it is clear that the targeted population must be of a predominantly civilian nature. The presence of certain non-civilians in their midst does not change the character of the population'. See Tadić, Trial Chamber, 1997, para. 638; Kordić, Trial Chamber, 2001, para. 180.

63 See, inter alia, Akayesu, para. 582; Tadić, Trial Chamber 1997, para. 643; Prosecutor v. Kordić and Čerkez (Judgment) ICTY, Appeals Chamber, Case No. IT-95-14/2-A, 17 December 2004.

64 Prosecutor v. Martić (Judgment) ICTY, Trial Chamber, Case No. IT-95-11-T, 12 June 2007.

65 Prosecutor v. Mrškić (Judgment) ICTY, Trial Chamber, Case No. IT-95-13/1-T, 27 September 2007. para. 476–480.

66 Singh, 2009.

67 Rome Statute, Article 7(1)(h).

4. Conclusion

The category of crimes against humanity emerged as a revolutionary innovation after the Second World War, but it quickly became a fundamental part of international criminal law; however, it is still not adequately codified, which raises questions about its practical application, particularly in domestic legal systems. Even though the Rome Statute of the ICC provides a regulation of crimes against humanity, the international community has failed to adopt a comprehensive convention and apart from the Apartheid Convention; only the convention on the crime of enforced disappearance was adopted.[68]

In 2010, a convention on crimes against humanity was drafted on the initiative of the international criminal law profession, with the participation of nearly 250 international criminal law experts; however, it was not adopted by the international community.[69] Recently, in 2019, the International Law Commission adopted the Draft Articles on Prevention and Punishment of Crimes Against Humanity,[70] which were approved by the Sixth Committee of the UN General Assembly in 22 November 2024.[71] In the same year, The Ljubljana–The Hague Convention was opened for signature to enhance international cooperation concerning the investigation and prosecution of genocide, crimes against humanity, war crimes, and other international crimes.[72] Since both the ILC Draft Articles and the Hague-Ljubljana Convention reproduced the definition codified in the ICC Statute, it seems that the Rome Statute's definition of crimes against humanity is slowly being accepted universally.[73]

Even so, some unresolved issues remain concerning the interpretation and application of this category of international crimes. There is still uncertainty about the existence of a state or organisational policy requirement. Furthermore, there are still debates about whether the civilian population requirement should be retained. Most importantly, the question, 'What is the potential scope of "other inhumane acts"?' still requires an answer. The latter seems to be a particularly important issue as invoking the general principle of humanity could potentially justify a very broad interpretation. For instance, some authors suggest that even the crime of aggression could be prosecuted as "other inhumane act", since an illegal use of force inevitably causes suffering to the civilian population, and this interpretation could help circumvent

68 International Convention for the Protection of All Persons from Enforced Disappearance, UNTS. vol. 2716, 3., opened for signature 6 February 2007, entry into force 23 December 2010.

69 For details, see Sadat, 2011.

70 UN Doc. A/74/10 (2019). Yearbook of the International Law Commission, 2019, Vol. II., Part Two.

71 UN Doc. GA/L/3738 (2024).

72 2023. The Ljubljana – The Hague Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and other International Crimes, Ljubljana, 26 May 2023.

73 It should be noted that the Iraqi High Tribunal – also translated as Supreme Iraqi Criminal Tribunal, Iraqi Higher Criminal Court, or Iraqi Special Tribunal – that was created under the guidance of the United States, also adopted the Rome Statute definition. Art. 12, Law No. (10) 2005 on the Supreme Iraqi Criminal Tribunal.

the jurisdictional constraints of the Rome Statute; thus remedying the accountability gap. Correspondingly, Benjamin Ferencz has argued that 'national leaders suspected of planning or committing the crime of aggression may simultaneously be charged with Crimes against Humanity and War Crimes – which carry the same maximum sentence as aggression'.[74] While there is no sign that this interpretation enjoys significant state support, it shows the transformative potential of this category.

Overall, the concept of crimes against humanity has undergone a remarkable evolution over the last 100 years. From its early invocation as a protest against mass atrocities, it has become one of the cornerstones of the normative framework of international criminal justice and by preserving its fundamental characteristic to appeal to our moral sensitivities, it is capable of addressing future injustices.

74 Ferencz, 2009.; Mégret, 2023.

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