AN APPRAISAL OF THE DEVELOPMENT OF LEGAL FOUNDATION ON THE CONCEPT OF CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW

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DISSERTATION PRESENTED IN THE FACULTY OF LAW, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILLMENT FOR THE AWARD OF MASTER OF PHILOSOPHY OF LAWS-MPHIL

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OCTOBER, 2015

DECLARATION

I hereby declare that the work in this dissertation entitled **"An Appraisal of the Development of Legal Foundation on the Concept of Crimes Against Humanity in International Law"** is written by me; and it is a record of my research work in the Department of Public Law, Faculty of Law, Ahmadu Bello University, Zaria under the supervisions of Dr. I.F. Akande and Dr. A.M. Madaki. This work has not been presented in any previous application for a higher degree or diploma in any institution. The information and materials used in this work, including quotations, have been specifically acknowledged by way of references provided in the footnotes and bibliography.

Halima Ikuji, ALFA **Date**

CERTIFICATION

This dissertation entitled **"An Appraisal of the Development of Legal Foundation on the Concept of Crimes Against Humanity in International Law"** by Halima Ikuji ALFA meets the regulations governing the award of the Degree of Philosophy in Law-Mphil, Ahmadu Bello University, Zaria; and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to my parents.

ACKNOWLEDGMENTS

My immeasurable gratitude goes to the Almighty Allah for making this thesis a success. I really thank Almighty Allah for his mercy.

Further I appreciate my unrelenting supervisors in persons of Dr. I.F. Akande, (Chairman, Supervisory Committee) and Dr. A.M. Madaki (Member, Supervisory Committee) whose objective contributions made this work a success.

My gratitude also goes to the Dean of Law, Prof. Y.Y. Bambale and Dr. I.U. Shehu for their useful advice in the course of this research.

I acknowledge with great gratitude the untiring guidance and tremendous contribution of Prof. M.T. Ladan in making this work a success. Sir, may the Almighty Allah continue to guide and protect you (Ameen).

I also extend my sincere appreciation to Dr. I. Ameh (Faculty Officer) for your support in the course of pursuing this programme. Thank you sir, you are highly appreciated.

My heartfelt appreciation also goes to my mother and my children whose unflinching support, encouragement, prayers, care, love throughout this work is immeasurable. Thank you all may Almighty God bless you (Ameen).

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ABSTRACT

This dissertation entitled "An Appraisal of the Development of Legal Foundation on the Concept of Crimes against Humanity in International Law" aimed at examining the various constitutive legal instruments on the field of crimes against humanity in international law vis-à-vis the obligation of states to take practical measures to endure respect for the performance of such obligations under the various constitutive legal instruments. However, the justification for this research is that despite the fact that the term "crimes against humanity" has acquired enormous resonance in the legal and moral imaginations of the post-World War II which suggested that crimes against humanity are offences that aggrieved not only the victims and their own communities, but all human beings regardless of the community because such violate the very essence of the existence of humanity. Yet while the law limped lamely, the crime against humanity flourishes as if there is no law in existence, particularly of recent where there is an increase in violence at both local and international levels. For example, according to some estimates, nearly 170 million civilians have been subjected to genocide, war crimes and Crimes Against Humanity in the 21st century. In view of these events therefore the objective of this research is to identify the factors responsible for the prevalence of such crimes and to proffer solutions to the lapses identified (if any). In conclusion, it is recommended (among others) that there is the need for a specific international treaty on crimes against humanity which will provide a comprehensive definition of crimes against humanity; and by so doing it will harmonized constitutive elements of each of the crimes against humanity and promote greater certainty and uniformity in the development of the jurisprudence of the law of crimes against humanity. The sources of information relied upon here are relevant text materials, international instruments, domestic instruments, judicial authorities and internet materials

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Study

The first forty years after the Nuremberg Trial was a period of slow progress in developing international criminal law. There is no doubt that international criminal law has developed as a distinct field of study in recent years. Indeed if international criminal law is defined as the prosecution of individuals for 'international crimes' such as war crimes or Crimes Against Humanity then there was no such law for most of the twentieth century. On the eve of the twentieth century attempts to regulate warfare in The Hague Conference of 1899, and again in 1907, were constrained by notions of State sovereignty. As the Nuremberg judges pointed out the following in 1946, 'The Hague Convention nowhere designates such practices (methods of waging war) as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders.'[1]

The Nuremberg trials established that all of humanity would be guarded by an international legal shield and that even a Head of State would be held criminally responsible and punished for aggression and Crimes Against Humanity. The right of humanitarian intervention to put a stop to Crimes Against Humanity – even by a sovereign against his own citizens-gradually emerged from the Nuremberg principles affirmed by the United Nations.

[1]Cited by Andres, C. (2003) In From Nuremberg to The Hague: The Future of International Criminal Justice, Philippe Sands, Cambridge University Press, p. 31

The awareness of the inadequacy of the law and the willingness to do something to enforce such new principles was slow in coming. The failure of the international community to develop binding norms of international criminal law was glaringly illustrated by the slow pace of various UN committees charged in 1946 with drafting both a code of crimes against the peace and security of mankind and the statutes for an international criminal court.

While the law limped lamely along, international crimes flourished. The horrors of the twentieth century are many. Acts of mass violence have taken place in so many countries and on so many occasions it is hard to comprehend. According to some estimates, nearly 170 million civilians have been subjected to genocide, war crimes and Crimes Against Humanity during the past century.[2] The World Wars led the world community to pledge that "never again" would anything similar occur. But the shocking acts of the Nazis were not isolated incidents, which we have since consigned to history. Hundreds of thousands and in some cases millions of people have been murdered in, among others, Russia, Cambodia, Vietnam, Sierra Leone, Chile, the Philippines, the Congo, Bangladesh, Uganda, Iraq, Indonesia, East Timor, El Salvador, Burundi, Argentina, Somalia, Chad, Yugoslavia and Rwanda in the second half of the past century.[3] But what is possibly even sadder is that the International Community have witnessed these massacres passively without been proactive. The result is that in almost every case in history, the person responsible for carrying out these atrocities is not

[2] Ibid, p.33
[3] White, Jamison G. (1998): *Nowhere to run, Nowhere to hide: Augusto Pinochet*, Universal Jurisdiction, the ICC, and a Wake-up Call for the Former Heads of State, 1999 and Scharf, Michael P., (1998) Results of the Rome Conference for an International Court, p.34

punished despite the existence of the constitutive international instruments and the judicial institutions (such as International Criminal Court) and ad hoc tribunals such as the International Tribunal for Former Yugoslavia and International Tribunal for Rwanda.

Not until the world was shocked by the ethnic cleansing in the former Yugoslavia and the genocide in Rwanda could the UN, no longer paralyzed by the Cold War, take action. Nations that had been unwilling to intervene to block the carnage now recognized that some action was essential. For the first time since Nuremberg, a new international criminal tribunal was quickly put in place on an ad hoc basis by the UN Security Council. Under the impetus of shocked public demand, it became possible for the UN Secretariat to draft the statutes for the International Criminal Tribunal for Yugoslavia in about 8 weeks – the same time it had taken to agree upon the Charter to the International Military Tribunal at Nuremberg. The ICTY began functioning in 1994. It led to the speedy creation of a similar ad hoc tribunal to deal with genocide and Crimes Against Humanity in Rwanda.

Up until the present the international community has been very reluctant to enforce international criminal law. It has only been done a couple of times in history, without doubt due to the specific circumstances and the political climate at the time. The idea of establishing a permanent international criminal court is not new though. Attempts in that direction were taken as nearly as the end of World War I, but the international community never reached agreement on the matter.

The ICC's predecessors are primarily the Nuremberg and the Tokyo Tribunals created by the victorious Allies after World War II. These tribunals have been accused of

being unfair and merely institutions for "victor's justice," but nevertheless they did lay the groundwork for modern international criminal law. They were the first tribunals where violators of international law were held responsible for their crimes. They also recognized individual accountability and rejected historically used defenses based on state sovereignty. These principles of international law recognized in the Nuremberg Charter and Judgments were later affirmed in a resolution by the UN General Assembly.

The International Law Commission (ILC), a body of distinguished legal experts acting at the request of the General Assembly, completed its draft statute for a permanent international criminal court in 1994. In 1996, the ILC finally completed its draft code of crimes against the peace and security of mankind. This new momentum reflected widespread agreement that an international criminal court, with fair trial for the accused, should be created as an essential component of a just world order under law.

After years of work and struggle, the promise of an International Criminal Court with jurisdiction to try genocide, war crimes and Crimes Against Humanity has become a reality. In 1998, the statute of the Court was approved in Rome and it entered into force on the first of July of 2002, after achieving 60 ratifications[4]. Now, only a few years after ratifications/accessions has risen from 60 to 120.[5] The Court holds a promise of putting an end to the impunity that reigns today for human rights violators and bringing us a more just and more humane world.

[4] http://www.google-encylopedia.pdf accessed on 14 September, 2015
[5] Ibid, the 120th accession by Vanuatu on 4 December 2011.

No record exists of how the term "crimes against humanity" came to be chosen by the framers of the Nuremberg Charter. The term was selected by Justice Robert Jackson of the US Supreme Court, Chief Prosecutor at Nuremberg and the Head of the American delegation to the London Conference of US (the three constituting those that frame the Charter).

In 1915, the French, British, and Russian governments had denounced Turkey's Armenian genocide as 'crimes against civilization and humanity', and the same phrase appeared in a 1919 proposal to conduct trials of the Turkish perpetrators. But the United States objected at that time that the so-called "laws of humanity" had no specific content, and the proposal to try the Turks was scuttled. The phrase "crimes against humanity" has acquired enormous resonance in the legal and moral imaginations of the post-World War II. It suggests, in at least two distinct ways, the enormity of these offences. First, the phrase "crimes against humanity" suggests offences that aggrieve not only the victims and their own communities, but all human beings, regardless of their community. Second, the phrase suggests that these offences cut deep, violating the core humanity that we all share and that distinguishes us from other natural being[6].

The term "crimes against humanity first appeared in positive international law in Article 6(c) of the Charter of the International Military Tribunal (IMT), in 1946, which defined crimes against humanity as a constellation of prohibited acts committed against a civilian population. The Charter further defined crimes against humanity as "murder,

[6]Richard Vemon (2005), *What is a Crime Against Humanity?,* 10 Journal of Political Philosophy, pp.231, 242-45

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 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. The category of crimes against humanity was added to the Charter because it was feared that under the traditional formulation of war crimes, many of the defining acts of the Nazis would go unpunished? The crimes against humanity count in the Nuremberg. The crimes against humanity charge confirmed that citizen's are under the protection of international law even when they are victimized by their compatriots[7].

Furthermore, the criminality of such acts "whether or not in violation of the domestic law of the country where perpetrated[8] established the supremacy of international law over municipal law[9] in this way, the prohibition of crimes against humanity at Nuremberg had the potential to irretrievably pierce the trope of sovereignty "a rule of international law which provides that no state shall intervene in the territorial and personal sphere of validity of another national legal order[10].

The definition of crimes against humanity in the Charter of the International Military Tribunal contained a curious limiting principle the Nuremberg Tribunal could assert jurisdiction only over those crimes against humanity committed 'before or during the war' and 'in execution of or in connection with any crime within the jurisdiction of

[7]Schwelb, (1946) *Altdela Pradelle,* 2 Nouvelle Rev. Droit Int'l, p.198
[8] Art. 6(c), IMT Charter, 1946, p.xi
[9] Elizabeth Zoller (1993), *La Definition des Crime L'humanite, 120J. Droit Int'l,* ("Pour la premiere fois se faisait jour l'ideequ'il y avait des actes a ce point attentatoires a la dignitehumaineque le fait qu'ilsaientetc executes conformement au droitdiunEtatetait un argument inoperant pp. 549, 552
[10] See Article 2(7), UN Charter, 1945

the Tribunal", i.e., war crimes or crimes against the peace[11]. This formulation became known as the "war nexus", and it is apparent that the Charter's drafters and the Nuremberg Tribunal itself considered the war nexus necessary to justify the extension of international jurisdiction into what would otherwise be acts within the domestic jurisdiction of a state.

Against the above backdrop, therefore, a statement of problem is hereby established in relation to the wider nature of the meaning of the phrase "Crimes against humanity" and the extents of their compatibility with various national constitution (with particular reference to Nigeria) having regard to the fact that even the definition offered by Art. 7 of the Rome Statute of the International Criminal Court (ICC Statute) contains loose concepts such as a 'widespread or systematic attack directed against any civilian population' and a 'State or organizational policy to commit such attack'. The meaning of these terms is far from clear in international law. Whilst the ad hoc Tribunals created by the Security Council (the CTY and the ICTR) have recently pronounced upon the crime's meaning in the context of their own statutory definitions and factual situations, there is no authoritative case law of the ICC assigning the offence a clear technical meaning, and the various statutes defining it – the Nuremberg Charter, the Tokyo Charter, Allied Control Council Law No. 10, the ICTY Statute, ICTR Statute, the ICC Statute, the Statutes of the hybrid Tribunals of Sierra Leone, East Timor, Kosov and Cambodia-along with the international law Commission, all define it differently. Hence, the term's 'correct

[11] Given this formation, the term "crimes against humanity" has been likened to "an accessory crime" or "a byproduct of war", designed for the protection of inhabitants of countries in aggressive wars. Schewelb, *supra* not 5, at 2006.

meaning' under international law remains elusive. This has prompted many wide and varied claims as to what amounts to a crime against humanity. For example, Kate Reynolds[12] in respect of Australia's policy of mandatory detention of asylum seekers stated that 'Our government is engaged in a continuing crime against humanity. It is indeed, this state of confusing levels of the law on one hand and its different interpretation by the tribunals and court on the other hand that generates the writers interest in this field of research with the objective of identifying the reasons for such differences in international law and also to proffer solution to the existing practice by suggesting among others that the domestication of the Rome Statute within the state national legislation will be an essential way forward as it will serve as a customary rule of uniform understanding.

1.2 Statement of the Problem

Crimes against humanity were conceived to fill the gap in international criminal law, the formation of the idea arose from the need to justify the prosecution of atrocities and end the horrific international offences in order to protect the largest number of victims. Crimes against humanity comprised of two categories of specific Punishable behaviour, the first, such as murder, extermination, enslavement, and inhumane acts, correspond generally to crimes under virtually all domestic criminal law systems, and cover such offences as killing, assault, rape, and kidnapping or forcible confinement. The second, persecutions on discriminatory grounds, run afoul of antidiscrimination laws in

[12] Kate R., News Release Democrate: *The Lone Voice for Refugees* in Duber R. (2008) *The lone voice Sydney Centre for International Law*, p. 5

many countries but fall short of criminal behaviour. What elevates these acts to crimes against humanity, as held by the courts, is their commission as part of a widespread or systematic Attack on a civilian population, although this is not stated explicitly in the Nuremberg Tribunals definitions; Atrocities and offences, including but not limited to murder, extermination, enslavement deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

On this note therefore, the statement of problem of this institution starts from the manner in which the understanding of the phrase is couched statutorily by Article 7 of the ICC. The implication of this is that the court is face with the inherent problems of adjudicating crimes against humanity, the principle of legality and individual culpability. The rationale behind the principle of legality can be defined as "the requirement of specificity and the prohibition of ambiguity in criminal legislation", noting that 'without the satisfaction of these principles no criminalization process can be accomplished and recognized'. However, the International Military Tribunal placed a higher value on substantive justice than strict legality. The London Charter asserted that "it is the expression of international law existing at the time of its creation", declaring preexisting custom, further defined in Article 38 of the Statute of the International Court of Justice on "the general principles of law recognized by civilized nations".[13]

[13] See Andres, C (2003), op. cit, p. 33.

Another worrisome issue is the practical difficulties in bringing perpetrators to trial. The problem was two-sided: "First, the collective nature of most crimes under its jurisdiction. Second, proving the responsibility of individuals for acts they had not directly committed".[14] However, the notion that an individual can be held accountable for international criminal offences grounded the Tribunal's concept of international criminal law. Accordingly, the London Charter emphasized "individual responsibility" for crimes against humanity. Under the Charter, individuals, not collective bodies like governments or militaries, were held accountable for criminal offences. Members of the International Military Tribunal in 1946, proclaimed that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. Nigeria's situation is in respect of possible war crimes in the conflicts in North Central region, particularly in Jos, Boko Haram, kidnapping and bombing that has been on the rise. Nigeria ratified the Rome Statute on 27 September 2001, but has not incorporated it into its domestic law, so as to recognize and prosecute the Statute crimes namely: Genocide, war crimes and crime against humanity.

Of all the above mention incidences, Boko Haram insurgency leads more to the commission of crime against humanity. Boko Haram is group created by Late Yusuf and it's known for its disturbance of peace throughout the nation and the world all over.[15]

[14]Ibid, p. 40.

[15] Abdullah, U.A. Insurgency in Nigeria, The Northern Nigerian Experience in papers for the emirate persons and Exports Group Meeting on Complex insurgencies in Nigeria, National Institute for Policy and Strategic Studies. Kuru, Nigeria, 2012, p.56

The group Jama'atu Ahlu-Sunnah lidda'Awati wal Jihad. Know the world over as Boko Haram, is an extremist Islamic sect in Nigeria that has created havoc across the north of the country and in the capital, Abuja.[16] As defined by U.S Institute of Peace violent attacks on government offices, the United Nations, and churches threaten to destabilize the country. A range of conflicting narratives has grown up around Boko Haram, and the group's origins, motivations and future plans remain a matter of debate. This report addresses the questions stemming from these narratives and suggests how the group can be contained. The report is based on the authors' extensive research and reporting on Boko Haram. In March 2011, he conducted an interview with a senior member of the group in the city of Maiduguri, Nigeria , the center of Boko Haram's area of influence. The report also draws on interviews with Nigeria journalists who have covered the group (and who asked to remain anonymous in this report) and on information provided to the author by other researchers working on Boko Haram.[17]

In relation to Boko Haram insurgency in Nigeria, it was rightfully observed thus:

> Undoubtedly, the Boko Haram insurgency essentially endangers public safety, security and peace; retards economic growth and development; undermines the state and democracy; constitutes crime against public order, crimes against humanity and terrorism. Above all, it violates the fundamental human rights to life, human dignity, liberty and freedom of religion, conscience and thought etc.[18]

Boko Haram insurgence is however, the major security threat facing the Nigerian government and her citizenry since 2009 to date, with the coming of the Gen.

[16] Abdullah, U.A. op.cit, p.56
[17] Ibid
[18] Ladan, M.T. (2012) "Diagnostic Review of Insurgency in Nigeria: The Legal Dimension", pp.2-3. Being a Paper Presented at the National Institute for Policy and Strategic Studies, Kuru, Jos, Plateau State, August 28th-31st 2012.

Muhammad Buhari's regime on May 29, 2015, the Nigerian populace taught Boko Haram regime was over, but rather they gained further momentum. The continued resilience of Boko Haram under the Buhari regime- at a time when the soldiers battling them are believed to be well motivated and well-equipped-call for a re-thinking of some of our earlier notions about the sect.[19]

On, the continued resilience of the terrorist sect negates some of the conspiracy theories that for long helped to undermine any concerted action against the group. For instance, among the prevailing conspiracy theories was that the group was being sponsored by eminent Northern politicians to make the country "ungovernable" for former President Jonathan because he is a Christian and from a minority ethnic group in the South. Buhari had been accused under this theory of being one of the sponsors of Boko Haram and the only evidence often adduced by the accusers was that he was 'nominated' by the sect as a negotiator when the Jonathan administration was exploring the option of dialogue with the group. If this 'theory' is correct, Buhari's victory over Jonathan in the last election would have mellowed the group. But it hasn't.[20]

The Federal Government of Nigeria in July 2014 set up a Committee on Victims Support Fund (CVSF)[21] for victims of Boko Haram atrocities throughout Nigeria under the chairmanship of Lt. Gen. Theophilus Yakubu Danjuma (Rtd). The CVSF through the help of the Nigerian government raised about N80 billion naira during a presidential fund

[19] Daily Trust Newspaper, Vol.38, No.39, Thursday, October 8, 2015.
[20] Ibid
[21] The NCICC believes that the CVSF is a presidential task force. The CVSF reports only to the President and its reports may never be made known to the public. It can only be dissolved at any time and serves at the leisure of the President. However, the SVTF envisaged under the Rome Statute Bill will be established under a law passed by the National Assembly.

raising event on Thursday 31 July 2014. The Committee through the help of the Nigerian government plans to raise $500 million dollars in the next 12 months. The National Cyber-Security and Communications Integration Center (NCICC) commends the efforts of the government in setting up the CVSF and fighting insurgency in the country as several Nigerians have become victims of the international crimes committed by Boko Haram elements in very large numbers. However, the NCICC believes that an important issue has been totally ignored by the government in setting up this committee which should be addressed as soon as possible[22].

The NCICC recalls that on 17th July 2012, the Federal Government submitted the Crimes Against Humanity, War Crimes, Genocide and Related Offences Bill, 2012 (Rome Statute Bill) that will domesticate the Rome Statute of the International Criminal Court of the National Assembly. Nigeria ratified the Rome Statute treaty in 2001 and attempted twice without success to incorporate the provisions of the treaty into our national law.[23]

The Rome Statute Bill among other things provides for the punishment of those responsible for international crimes in Nigeria and cooperation between Nigeria and the International Criminal Court to ensure the effective prosecution of criminals either in Nigeria or the Hague, Netherlands. The conflict between Nigerian forces and Boko Haram insurgents is currently a non-international armed conflict and therefore the provisions of the Rome Statute covers the crimes committed during the conflict. Most

[22] http://www.jfjustice.net/nigeria.net accessed August 10, 2015.
[23] Ibid

importantly, the Rome Statute Bill provides for a Special Victims Trust Fund (SVTF) to assist victims, families of victims and survivors of international crimes in Nigeria[24].

The NCICC believes that the Rome Statute Bill offers a holistic approach to the fight against impunity in Nigeria. It addresses crimes committed by both Boko Haram members and Nigerian security forces that may have gone beyond the established rules of engagement in their conduct during the counter insurgency activities.[25]

However, Nigeria is currently a non-permanent member of UN Security Council, and a key player in the Africa region in promoting international peace and security as well as justice. It is against this background that this research is conducted noting with concern the continuation in some parts of the world, and specifically Nigeria the persistent violations of international humanitarian law and international human rights law and; to find out whether the domestication of Rome Statute would aid the government's effort to prevent and control crimes against humanity in particular, and generally war crimes and genocide in Nigeria.

1.3 Literature Review

Several materials have been written on the crime against humanity at different stages in the development of international jurisprudence. The literature of some of these notable writers considered relevant to this field of research are considered below, starting with a conceptual discourse on the conceptual foundation of crimes against humanity.

[24] Ibid
[25] Ibid

The field of international criminal law is a continuously evolving and challenging area of study. The broader notion[26] of crimes against humanity is as old as humanity itself. However, the present status has evolved mainly throughout the twentieth century, greatly influenced by the Nuremberg Trials, which tried war crimes, crimes against humanity and genocide.[27] The latest development was the consensus in defining Crimes against Humanity during the ICC Diplomatic Conference of 1998, which can be considered as a milestone for the international community in the fight against human rights violations.[28]

Crimes against humanity encompass attacks and violations on a wide range of civilian populations, which can be committed in times of peace and do not result necessarily in the physical extermination of the victims.[29]In contrast, the term "genocide" is narrower, and "war crimes" can only be committed during an armed conflict. Currently, the most comprehensive, though ambiguous, definition of crimes against humanity can be found in the Rome Statute of the International Criminal Court. The Court restricts itself to the most serious crimes of international concern, as it declares in its articles, presenting at the same time some basic maxims of the legal science including the principles of nullumcrimen, nullapoena sine lege, the prohibition of ex

[26]Graven, J. (1950) *Les crimes contre l' humanite*, 76, Recueil des Cours
[27]Barker, C. and Grant, J., (2005).*Deskbook of International Criminal Law* 1st ed., London: Routledge-Cavendish.
[28]Mettraux, G., (2002). Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. *Harvard International Law Journal*, 43, 237.
[29]Olmo, D.M., (2006). Crimes Against Humanity. In *Forensic Anthropology and Medicine*. pp. 409-430. Available at: http://dx.doi.org/10.1007/978-1-59745-099-7_17 [Accessed April 13, 2010].

post facto criminal laws and its derivative of the non-retroactive application of criminal law.[30]

When regulating against crimes,[31] suggests that the protected value is the essential humanness, which is carried by each and every person. Even though Kant and natural theorists would perceive humanness as human dignity, a crime against humanness negates the very being in the world as a human, obliterating or attempting to greatly devalue the person qua human.[32] The crimes that could fall under international criminal law are broader than the ones regulated by the 5th Article of the ICC Statute, with those committing war crimes, crimes against humanity and genocide being sui generis criminals.

Crimes against humanity have the peculiarity also that they are mainly perceived as crimes of obedience,[33]taking place under the explicit instructions and strategic plans of the authorities involved, or otherwise under their tolerance.[34] In the aspect of jurisdiction, the *mens rea* and the existence of a widespread attack are sufficient to distinguish crimes against humanity from ordinary crimes.[35] These requirements upgrade some types of crimes to crimes against humanity, and not a crime prosecutable

[30]Sautenet, V. (2002), *'Crimes Against Humanity and the Principles of Legality: What Could the Potential Offender Expect?'* (March, 2000) 7 (1) Murdoch University Electronic Journal of Law. Available at: www.murdoch.edu.au/elaw/issues/v7n1/sautenet71nf.html;
[31]Yovel, J., (2006). How Can a Crime Be against Humanity - Philosophical Doubt's concerning a Useful Concept. *UCLA Journal of International Law and Foreign Affairs*, 11, 39.
[32]Allott, P., (2004). *The Health of Nations: Society and Law beyond the State*, Cambridge: Cambridge University Press.
[33]Paust, J.J., (2007). *Beyond the Law: The Bush Administration's Unlawful Responses in the "War" on Terror*, Cambridge: Cambridge University Press.
[34]Nollkaemper, A. and Wilt, H.V.D., (2009). *System Criminality in International Law*, Cambridge: Cambridge University Press.
[35]Combs, N.A., (2006).*Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* 1st ed., Stanford: Stanford University Press.

under domestic criminal law.[36] Thus, the expression "laws" or "principles of humanity" embodies the idea that some transcendental humanitarian principles exist beyond conventional law that are not subject to any form of violation.[37]

In addition to the International treaties dealing with the broad notion of crimes against humanity various regional treaties have contributed to the evolution of the term[38]; this facilitated the process of recognizing which crimes are international, a particularly important procedure as it symbolises their recognition as *jus cogens*. The threshold is the ergaomnes obligation of states which gives them the right to proceed against the perpetrator of these crimes.[39]

International crimes have the abnormality that they are not examined often, and their codification process is much more difficult than in national criminal systems. Usually the interpreters of crimes against humanity have been the International Tribunals and the prosecutors during recent years.[40] Crimes against humanity are therefore offences against humankind and injuries to humanness. Their gravity qualifies the perpetrators hostishumani generis, offending fundamental values not adequately defended in internal legal systems, urging international intervention.[41]

[36] Jackson, M.M., (2008). Customary International Law Duty to Prosecute Crimes against Humanity: A New Framework, The. *Tulane Journal of International and Comparative Law*, 16, 117.
[37] Ntoubandi, F.Z., (2007). *Amnesty for Crimes Against Humanity Under International Law*, Leiden, Netherlands: Brill.
[38] Gallant, K.S., (2008). *The Principle of Legality in International and Comparative Criminal Law* 1st ed., Cambridge: Cambridge University Press.
[39] Fletcher, G.P. and Ohlin, J.D., (2008). *Defending Humanity: When Force is Justified and Why*, OUP USA.
[40] Wald, P.M., (2007). Genocide and Crimes against Humanity. *Washington University Global Studies Law Review*, 6, 621.
[41] Stahn, C. and van den Herik, L.(2010) *Future Perspectives on International Criminal Justice.* The Hague, The Netherlands: T.M.C. Asser

It is sometimes stated that the term "crimes against humanity" is based upon natural law concepts.[42] Reports of forbidden forms of crimes date back to Herodotus, who mentioned certain conduct as prohibited in the fifth century BC. St. Augustine and St. Thomas Aquinas also set philosophical premises in order to distinguish a just from an unjust war.[43] Xenophon reports the earliest precedent for modern international criminal law when describing the process for treating the Athenian prisoners captured by the Spartan commander, Lysander.[44]

The very essence of "humanitas" can be traced to the landmark concept in Greek philosophy of "philanthropia" and the Roman concept of "ethos"[45]. Plato explored punitive theory with a focus on the purpose of punishment in works like Gorgias, Protagoras and Nomoi ("Laws"). The union between theory and practice was further explored by Aristotle and Theophrastus. Aristotle, for instance, proposed an international institution that would give the same amount of justice either in Rome or in Athens.[46] The philosophical approach to crime and punishment is also exemplified by Cicero, in "De Legibus" ("On the Laws") and "De Officiis" ("On Duties"), and Seneca, in "De Clementia" ("On Clemency") and "De Ira" ("On Anger").[47]

Early scholars include Grotius (with De lure Belli Ac Pacis – On the Law of war and peace),[48] Vitoria, Ayala, Belli, Gentili and Vattel who, in accordance with a

[42]Luban, D., (2004).Theory of Crimes against Humanity, A. *Yale Journal of International Law*, 29, 85.
[43]Bassiouni, M.C. (1999). *Crimes Against Humanity,* 2nd edition. Dordrecht, Netherlands: Kluwer.
[44]Cryer, R., (2005). *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge: Cambridge University Press.
[45] Bauman, R.A., (1996). *Crime and Punishment in Ancient Rome* 1st ed., London: Routledge.
[46]Bassiouni, M.C. (1999). *Crimes Against Humanity,* 2nd edition. Dordrecht, Netherlands: Kluwer.
[47] Bauman, R.A., (1996). *Crime and Punishment in Ancient Rome* 1st ed., London: Routledge.
[48]Schabas, W.A., (2005). Genocide, Crimes against Humanity, and Darfur: The Commission of

number of judicial decisions and opinions, make reference to concepts very similar to crimes against humanity. Vattel in 1757 characterised certain crimes as being a crime against humankind in general.[49] Even though these contributions are extremely important in tracing the evolution of the term, they did not refer to the present form of crimes against humanity, but more to the philosophy underlying its notion.

The first ad hoc International Criminal Court was established in 1474 to judge Peter von Hagenbach for crimes committed during the siege of the town of Breisach. These proceedings have also been extensively cited in the literature as the first international criminal trial for what nowadays could be called crimes against humanity.[50] In 1649, at the trial of Charles I in England, the Solicitor General John Cooke relied on natural law and the works of Bracton to say that a King always remains under God and the law. Also, scholars have suggested the creation of an international criminal court in the early stages of modern history, such as the proposal made by Gustav Moynier in 1872.[51]

Many claims exist concerning the coining of the phrase "crimes against humanity." The French revolutionary Maximilien Robespiere, for instance, described the deposed King Louis XVI as a criminal "envers l' humanite" (criminal against

Inquiry's Findings on Genocide.*Cardozo Law Review*, 27, 1703.

[49] Tolbert, D., (2008). International Criminal Law: Past and Future. *University of Pennsylvania Journal of International Law*, 30, 1281.

[50]Krambia- Kapardis, M. (2005) *Key Issues Internationally, a multidisciplinary approach*, Athens, Greece: Ant. Sakkoulas Publications

[51]Cryer, R., Friman, H., Robinson, S., Wilmshurst, E., (2007). *Introduction to International Criminal Law and Procedure: Principles, Procedures, institutions*, Cambridge: Cambridge University Press.

humanity).[52] Almost a century later, on September 15, 1890, a minister –George Washington Williams- wrote a letter to the US Secretary of State, characterising the actions of King Leopold of Belgium in the Congo as crimes against humanity.[53] The Unitarian minister, Theodore Parker, used the term in a flamboyant sermon rendered in his hometown of Boston in the context of abolitionist politics in 1854.[54] Crimes against humanity however emerged from expressions such as "the laws of humanity", which are traced back to the 1860s; an example is the St. Petersburg Declaration of 1868 which was proclaimed to limit the use of explosive or incendiary projectiles described as "contrary to the laws of humanity".[55]

Finally, Marten's Clause appeared in the preamble to the 1899 Hague Convention II and the 1907 Hague Convention IV and in many key international humanitarian law treaties onwards. It is considered as the earliest identifiable legal foundation for crimes against humanity. In sum, the Clause states that "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".[56]

[52] Shelton, D., (2005). *Remedies in International Human Rights Law* 2nd ed., Oxford: Oxford University Press.
[53] Boas G, Bischoff J L and Reid N L, (2008), *Elements of Crimes Under International Law, Cambridge:* Cambridge University Press
[54]Yovel, J., (2006). How Can a Crime Be against Humanity - Philosophical Doubt's concerning a Useful Concept.*UCLA Journal of International Law and Foreign Affairs*, 11, 39.
[55] Robinson, D. (1999). "Defining 'Crimes Against Humanity' at the Rome Conference." *American Journal of International Law* 93:43.
[56]Cryer, R., (2005). *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge: Cambridge University Press.

On 24 May 1915, the major winners of the World War I--Russia, French and Britain--protested against Turkey's massacres of Armenians, as "crimes against humanity" with extended responsibility to all members of the Ottoman government.[57] However, this did not conclude in a judicial enforcement of crimes against humanity, due to the obstacles raised by some countries.[58]

After World War I, the Treaty of Versailles summarized its results, with the creation of a tribunal to bring the former Emperor of Germany to trial.[59]Tallat Pasha was considered to be the architect of the Armenian Genocide, and was convicted by a domestic Turkish court for acts "against humanity and civilization".[60] This decision also signified the complete refusal of natural law and the domination of positivism, representing territoriality, sovereign immunity and non- interference in a foreign nation's affairs.

The allies tried to prosecute Turkish officials, with the accusation of "deportations and massacres" against the Armenians. Turkey did not ratify the treaty of Sevres, signed on August 10, 1920, which mentioned the obligation to surrender the perpetrators of the Armenians' persecutions, and was eventually replaced by the Treaty of Lausanne of July 24, 1923, which included amnesty for offences committed between 1914 and 1922. This decision was largely political, as the victors were worried that a

[57] Schiff, B.N., (2008). *Building the International Criminal Court* 1st ed., Cambridge: Cambridge University Press.
[58] Simon, T.W., (2007). *The Laws of Genocide: Prescriptions for a Just World*, United States: Praeger
[59]Lavrov, S., (1999). Russian Approach: The Fight against Genocide, War Crimes, and Crimes against Humanity, The.*Fordham International Law Journal*, 23, 415.
[60] Altman, A. and Wellman, C.H., (2009). *A Liberal Theory of International Justice*, Oxford: Oxford University Press

possible prosecution of criminals could rebound on their states where they systematically mistreated minorities.[61]

Olugua, B.C, in his article entitled "Domestication and Implementation of the Rome Statute of the International Criminal Court"[62] vividly examined the conceptual section of the crime against humanity in relation to its interpretation and application and obligations of state parties for the purpose of domestication under the Rome Statute of the International Criminal Court. In this regard, the work of Olugua is found to be a good literature to this dissertation as it gives a general understanding to the theme of this research thereby considered useful in the introductory aspect of the work and other aspects relating domestication by state parties.

Luban, D., in his article entitled, "A Theory of Crime against Humanity"[63] examined the development of crime against humanity in International Law through international criminal tribunals (for recalling example the Nuremberg Tribunal of 1946). In this regard, Luban also postulated the conceptualization of the crime against humanity in a similar manner like Olugua but he adopted a different theoretical approach by recalling the efforts of tribunals in the fight against humanity even before the arrival of the International Criminal Court. In the light of this therefore, Luban's work (just like the work of Olugua) is considered relevant to introduction aspect of this dissertation for the

[61] Shelton, D., (2005). *Remedies in International Human Rights Law* 2nd ed., Oxford: Oxford University Press.
[62] (2003) A Comparative Analysis of Strategies in African Dissertation, Faculty of Law, University of Cape Town, pp.1-20
[63] (2004) Yale Journal of International Law, pp.85-161

purposes of general interest ending of the crime against humanity and its development in international jurisprudence.

Roger, C., in his book entitled, "Prosecuting International Crimes: Selectivity and the International Criminal Law Regime"[64] examine the prosecution of international crimes as an obligation in international order noting the fact that crimes against international law are committed by individuals and it is only by punishing those individuals that the provisions of international law could be enforced. Further, on the basis of selectivity and the international criminal law regime, attention must be given to crimes against humanity as a serious grade of international crime to be address. In this regard therefore, the work of Roger is captivating on the pence sanctions for those who commit the crimes against humanity as one of the objectives of the Rome Statute of the International Criminal Court which is certain to this dissertation.

Ladan in his book entailed: "Materials and Cases on Public International"[65] made an overview of the Rome Statute of the International Criminal Court in relation to the obligations of state parties and issues in domestic implementation in Nigeria. On that note, generally Ladan concluded that the approach taken in Rome Statute reflects the fact that crimes against humanity are often committed against civilians in the absence of hostilities and that the seriousness of the crime is not affected by whether it is committed in peace or war time; or that the perpetrators have a discriminatory intent when committing a crime against humanity. Such crimes include enslavement, persecution,

[64] (2005) Cambridge University Press, Cambridge pp.1-165
[65] (2008) A.B.U., Press Limited, Zaria, Kaduna State, pp.218-246

enforced disappearance, genocide and war crimes. Further, Ladan, considered the obligations of member states under the Rome Statue and general issue in domestic implementation of Rome Statute in Nigeria in relation to domestication process under the 1999 CFRN as amended. On this general note therefore, Ladan's work is considered relevant as it touches several aspects of this dissertation.

Bassiouni, M.C., in his article entitled: "Crimes against Humanity in International Law"[66]discussed, the meaning, nature and development of crime against humanity and he indicated measures needed to eradicate the commission, the crime against humanity in the international order by creating obligations on states procedures for the enforcement of the decision of the ICC.

Sadat L.N., The article demonstrates the central importance of Crimes Against Humanity (CAH) prosecutions at the ad hoc international criminal tribunals and in the International Criminal Court (ICC). It represents the first comprehensive and empirical assessment of what CAH charges accomplish as a matter of observable practice. This empirical analysis informs the construction of a new theory of CAH in modern international criminal law. The Article analyzes the early jurisprudence of the ICC and challenges the conventional wisdom that CAH must be interpreted unduly restrictively, with reference to Nuremberg in mind. Instead, CAH at the world's first permanent international criminal court must emerge from the shadow of Nuremberg -- as the framers of the Statute intended it to do -- and continue to develop as a contemporary response to widespread or systematic human rights violations against civilian populations. Opinions

[66]Bassiouni M.C. (1999) *Crimes Against Humanity in International Criminal Law,* (edited), pp.17-18

in the Court’s early case law unduly restricting the scope and application of CAH or proposing a return to the Nuremberg paradigm may have the effect of limiting the effectiveness of CAH charges at the ICC. This could render CAH at the ICC, like genocide at the ICTY, impotent not only as a basis for the post hoc punishment of offenders, but in terms of prevention and deterrence. The Article critiques this jurisprudence with a view towards developing a theory of CAH at the ICC that not only respects State sovereignty, but implements its mandate to prevent and punish “unimaginable atrocities that deeply shock the conscience of humanity.”

Heller K.J., in this article, the Rome Statute of the International Criminal Court is both inspiring and frustrating. On the one hand, by providing detailed definitions of the core international crimes, the possible modes of participation in those crimes, and the permissible grounds for excluding criminal responsibility, the Statute represents the international community's most ambitious attempt to create a general and special part of international criminal law. On the other hand, most of the drafters of the Statute were diplomats who had no practical criminal law experience of any kind, much less academic expertise in international criminal law or comparative criminal law. As a result, the Rome Statute's substantive provisions are often confusing, contradictory, and of uncertain application - an "unsystematic conglomeration from a variety of legal traditions," as one scholar has memorably put it.

However, this research unlike the work of the authors considered is restrictively concerned on the measures needed for domestication in Nigeria and means of its practical

implementation vis-à-vis the adequacy or otherwise of the current constitutive instruments on the subject matter in the country.

1.4 Scope of the Study

The study seeks to cover the development of the international legal framework in combating crimes against humanity from the end of the II world war in 1945 to the coming into force and implementation of Rome Statute of International Criminal Court. The scope of this study is limited to the analysis of the international legal foundation for the crimes against humanity and a review of issues, challenges and prospects in domestic implementation of Rome Statute provisions relating to crimes against humanity in Nigeria.

1.5 Objectives of the Study

The objective of this research is to appraise the evolution of the legal foundation of the concept of crime against humanity in International law with a view to:

a. Providing a conceptual discourse and definitional analysis of the crimes against humanity.
b. Examining the nature and scope of the international and regional instruments on the concept of crime against humanity by understanding the modern contours of the term crime against humanity.
c. Identifying possible challenges in the domestic implementation of the law of crimes against humanity in Nigeria.

1.6 Significance of the Study

The significance of this study is that it serve as an additional literature to the existing ones in creating awareness for the promotion of a better understanding of the crime against humanity and thus contribute to the prevention of such crimes by bringing to justice those who commit such crimes in Nigeria. By so doing, the public will be better informed and it will in turn contribute to guaranteeing lasting respect for and the enforcement of human rights and justice in Nigeria.

In addition, this dissertation will go along way to create awareness between legislators, policy makers, the judiciary, legal practitioners, students, relevant stakeholders and the general public at large on the need for the domestication of the Rome Statute by accelerating the draft 2012 Bill on the domestication of the Rome Statute of the ICC.

1.7 Research Methodology

Doctrinal and comparative approaches are to be adopted for this research.

The doctrinal approach involve the use of library based materials, and analysis of cases and statutory provisions such as books, journals, newspapers and documents such as the ICC statute which Nigeria is a signatory.

Comparative methodology refers to an approach of comparing legal systems with a view to discovering the similarities and differences of the two or more legal regimes being compared, and to aid in better understanding of a particular national or international legal regime.[67] Comparative analysis of domestic implementation of

[67] See Kabir A. (2008): A Manual for Law Dissertations, Clear Impressions Ltd, Kano Nigeria at pp. 17-18.

international law of crimes against humanity in selected Jurisdictions like the former Yugoslavia, Rwanda and Sierra Leone.

1.8 Organizational Layout

This research work is structured into five chapters as follows:

Chapter one examines the general introduction of the dissertation. Therein, the limits of the research and other formal introductory concepts of the research are defined for example, aims and objectives, justification of the research/study, literature review and etcetera. In other word, it focuses on research questions that this study is set out to answer on the concepts of crimes against humanity, its domestication in Nigeria, possible challenges in various constitutions of nations with particular reference to Nigeria.

Chapter two deals with analysis of the development of the concept and international criminal law and justice system relating to crimes against humanity.

Chapter three examines the Analysis of Legal Framework on the Constitutive elements of Crimes against Humanity in International Law

Chapter four deals with the Domestic implementation of the international law of crimes against Humanity: Lessons from selected jurisdictions for Nigeria.

Chapter five makes an overview of the work in general by considering summary, findings on the research work and recommendations to the findings that have been made.

CHAPTER TWO

THE DEVELOPMENT OF THE CONCEPT OF CRIMES AGAINST HUMANITY

2.1 Introduction

Crimes against humanity, as defined by the Rome Statute of the International Criminal Court Explanatory Memorandum, "are particularly odious offenses in that they constitute a serious attack on human dignity or grave humiliation or a degradation of human beings."[1] They are not isolated or sporadic events, but are part either of a government policy (although the perpetrators need not identify themselves with this policy) or of a wide practice of atrocities tolerated or condoned by a government or a de facto authority. Murder; extermination; torture; rape; political, racial, or religious persecution; and other inhumane acts reach the threshold of crimes against humanity only if they are part of a widespread or systematic practice. Isolated inhumane acts of this nature may constitute grave infringements of human rights, or depending on the circumstances war crimes, but are not classified as crimes against humanity.[2]

2.2 Historical Development of the Concept of Crimes against Humanity

In 1860 the American National Republican Convention included in their electoral platform, on which Abraham Lincoln ran for President, the following statement: "... We brand the recent re-opening of the African slave trade, under the cover of our national flag, aided by perversions of judicial power, as a crime against humanity". In 1890,

[1]"Rome Statute of the International Criminal Court", United Nations Treaty Collection. United Nations. Retrieved March 22, 2013.
[2]As quoted by Guy Horton in *Dying Alive - A Legal Assessment of Human Rights Violations in Burma* April 2005, co-Funded by The Netherlands Ministry for Development Co-Operation. See section "12.52 Crimes against humanity", p 201. He references RSICC/C, Vol. 1 p. 360

George Washington Williams used the phrase to describe the treatment of Africans in the Congo Free State under King Leopold II of Belgium.[3] Another very significant early use of the phrase "crimes against humanity" came during the I World War when, on May 24, 1915, the Allies, Britain, France, and the Russian Empire, jointly issued a statement explicitly announcing, for the first time, the commission of a "crime against humanity" in response to the Armenian Genocide and warned of personal responsibility for members of the Ottoman Government and their agents.[4] At the conclusion of the war, an international war crimes commission recommended the creation of a tribunal to try "violations of the laws of humanity". However, the US representative objected to references to "law of humanity" as being imprecise and insufficiently developed at that time and the concept was not pursued.[5]

2.2.1 Nuremberg trials

In the aftermath of the II World War, the London Charter of the International Military Tribunal was the decree that set down the laws and procedures by which the post-War Nuremberg trials were to be conducted. The drafters of this document were faced with the problem of how to respond to the Holocaust and grave crimes committed by the Nazi regime. A traditional understanding of war crimes gave no provision for

[3]Hochschild, Adam (1998). *King Leopold's Ghost*. London: Pan Macmillan.
[4]1915 declaration: Affirmation of the United States Record on the Armenian Genocide Resolution 106th Congress,2nd Session, House of Representatives. Affirmation of the United States Record on the Armenian Genocide Resolution (Introduced in House of Representatives) 109th Congress, 1st Session, H.RES.316, June 14, 2005. 15 September 2005 House Committee/Subcommittee: International Relations actions. Status: Ordered to be Reported by the Yeas and Nays: 40–7. See also "Crimes Against Humanity", 23 British Yearbook of International Law (1946) p. 181; Original source of the telegram sent by the Department of State, Washington containing the French, British and Russian joint declaration
[5]Cryer, Robert; Hakan Friman; Darryl Robinson; Elizabeth Wilmshurst (2007).*An Introduction to International Criminal Law and Procedure*. Cambridge University Press. p.188.

crimes committed by a power on its own citizens. Therefore, Article 6 of the Charter was drafted to include not only traditional war crimes and crimes against peace, but in paragraph 6 (c) Crimes Against Humanity, defined 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 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.[6]

In the Judgment of the International Military Tribunal for the Trial of German Major War Criminals it was also stated:

> The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.[7]

2.2.2 Tokyo trials

The International Military Tribunal for the Far East (IMTFE), also known as the Tokyo Trial, was convened to try the leaders of the Empire of Japan for three types of crimes: "Class A" (crimes against peace), "Class B" (war crimes), and "Class C" (crimes against humanity), committed during the II World War.

[6]Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal contained in the Avalon Project archive at Yale Law School
[7]Judgement : The Law Relating to War Crimes and Crimes Against Humanity contained in the Avalon Project archive at Yale Law School

The legal basis for the trial was established by the Charter of the International Military Tribunal for the Far East (CIMTFE) that was proclaimed on 19 January 1946. The tribunal convened on May 3, 1946, and was adjourned on November 12, 1948.

A panel of eleven judges presided over the IMTFE, one each from victorious Allied powers (United States, Republic of China, Soviet Union, United Kingdom, the Netherlands, Provisional Government of the French Republic, Australia, New Zealand, Canada, British India, and the Philippines).

In the Tokyo Trial, Crimes against Humanity (Class C) was not applied for any suspect.[8] Prosecutions related to the Nanking Massacre were categorised as infringements upon the Laws of War.[9]

War crimes charges against more junior personnel were dealt with separately, in other cities throughout Far East Asia, such as the Nanjing War Crimes Tribunal and the Khabarovsk War Crimes Trials.

2.2.3 Apartheid

The systematic persecution of one racial group by another, such as occurred during the South African apartheid government, was recognized as a crime against humanity by the United Nations General Assembly in 1976.[10] The Charter of the United Nations (Article 13, 14, 15) makes actions of the General Assembly advisory to the

[8]Yoshinobu Higurashi, Tokyo Saiban(Tokyo Trial),Kodansya-Gendai-Shinsho,Kodansha Limited,2008,p.26,pp.116-119.Hirohumi Hayashi, Bckyu Senpan Saiban, Iwanami Shoten Publishers,2005,p.33.
[9]Yoshinobu Higurashi,op.cit.,pp.116-119.
[10]International Convention on the Suppression and Punishment of the Crime of Apartheid adopted and opened for signature, ratification by General Assembly resolution 3068 (XXVIII) of 30 November 1973. Entry into force 18 July 1976, in accordance with article X (10)

Security Council.[11] In regard to apartheid in particular, the UN General Assembly has not made any findings, nor have apartheid-related trials for crimes against humanity been conducted.

2.2.4 United Nations

The United Nations has been primarily responsible for the prosecution of crimes against humanity since it was chartered in 1948.[12] The International Criminal Court (ICC) was organized by the Rome Statute and the UN has delegated several crimes against humanity cases to the ICC.[13] Because these cases were referred to the ICC by the UN, the ICC has broad authority and jurisdiction for these cases. The ICC acting without a UN referral lacks the broad jurisdiction to prosecute crimes against humanity, and cannot prosecute many cases, particularly if they occur outside of ICC-member nations. The most recent 2005 UN referral to the ICC of Darfur resulted in an indictment of Sudanese President Omar al-Bashir for genocide, crimes against humanity and war crimes in 2008.[14] The first person to be handed over to the ICC was Thomas Lubanga.[15] He was convicted on 14 March 2012 and on 10 July 2012 was sentenced to 14 years imprisonment, pending appeal.[16] The ICC is still seeking Joseph Kony.[17] When the ICC President reported to the UN regarding its progress handling these crimes against

[11]"Charter of the United Nations". Un.org. Retrieved 2013-02-01.
[12]http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/044/31/IMG/NR004431.pdf?OpenElement
[13]Archived April 12, 2011 at the Wayback Machine
[14]International Criminal Court, 14 July 2008. *ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur* at the Wayback Machine (archived July 15, 2008). Accessed 14 July 2008.
[15]Staff. Q&A: International Criminal Court BBC, 20 March 2006
[16]"Rome Statute of the International Criminal Court". *United Nations Treaty Collection*. United Nations. Retrieved March 22, 2013.
[17]Staff. Q&A: International Criminal Court BBC, 20 March 2006

humanity case, Judge Phillipe Kirsch said "The Court does not have the power to arrest these persons. That is the responsibility of States and other actors. Without arrests, there can be no trials.[18] The UN has not referred any further crimes against humanity cases to the ICC since March 2005.

A report on the 2008-9 Gaza War by Richard Goldstone accused Palestinian and Israeli forces of possibly committing a crime against humanity.[19] In 2011, Goldstone said that he no longer believed that Israeli forces had targeted civilians or committed a crime against humanity.[20]

a. UN Security Council

UN Security Council Resolution 1674, adopted by the United Nations Security Council on 28 April 2006, "reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[21] The resolution commits the Council to action to protect civilians in armed conflict.

In 2008 the U.N. Security Council adopted resolution 1820, which noted that "rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide".[22]

[18]Judge Philippe Kirsch (President of the International Criminal Court) Address to the United Nations General Assembly at the Wayback Machine (archived June 6, 2007) (PDF) website ICC, 9 October 2006. P. 3
[19]"UN condemns 'war crimes' in Gaza". *BBC News*. 16 September 2009. Retrieved 30 April 2010.
[20]Goldstone, Richard (2011-04-01)."Reconsidering the Goldstone Report on Israel and War Crimes". *The Washington Post*. Retrieved 2 August 2012.
[21]Resolution 1674 (2006)
[22]"Security Council Demands Immediate and Complete halt to Acts of Sexual Violence Against Civilians in Conflict Zones, Unanimously Adopting Resolution 1820 (2008)". Un.org. Retrieved 2013-02-01.

b. International Criminal Court

In 2002, the International Criminal Court (ICC) was established in The Hague (Netherlands) and the Rome Statute provides for the ICC to have jurisdiction over genocide, crimes against humanity and war crimes. The definition of what is a "crime against humanity" for ICC proceedings has significantly broadened from its original legal definition or that used by the UN,[23] and Article 7 of the treaty stated that:

> 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:[24] (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.

2.2.5 Council of Europe

The Committee of Ministers of the Council of Europe on 30 April 2002 issued a recommendation to the member states, on the protection of women against violence. In the section "Additional measures concerning violence in conflict and post-conflict

[23] Bassiouni C., "*Crimes Against Humanity*". Retrieved 2006-07-23.
[24] Rome statute of the International Cral Court Article 7: Crimes Against Humanity.

situations", states in paragraph 69 that member states should: "penalize rape, sexual slavery, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity as an intolerable violation of human rights, as crimes against humanity and, when committed in the context of an armed conflict, as war crimes;"[25]

In the Explanatory Memorandum on this recommendation when considering paragraph 69:

> Reference should be made to the Statute of the International Criminal Tribunal adopted in Rome in July 1998. Article 7 of the Statute defines rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity, as crimes against humanity. Furthermore, Article 8 of the Statute defines rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence as a serious breach of the Geneva Conventions and as war crimes.[26]

2.3 Crimes Against Humanity under the Rome Statute of the ICC

The chapeau of Article 7, paragraph 1 of the ICC Statute confirms that, "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." The important features of this chapeau are:

1. The absence of a requirement of a nexus to armed conflict
2. The absence of a requirement of a discriminatory motive
3. The "wide- spread or systematic attack" criterion, and
4. The element of *mens rea*.

[25] Committee of Ministers of the Council of Europe: Recommendation (2002) 5 Paragraph 69
[26] Committee of Ministers of the Council of Europe: Recommendation (2002) 5 Paragraph 100a

The above are discussed as follows:

2.3.1 Nexus to Armed Conflict: A minority of delegations participating in the Rome Conference strongly felt that crimes against humanity could be committed only in the context of an armed conflict. However, the majority of delegations believed that such a limitation would have rendered crimes against humanity largely redundant, as they would have been subsumed in most cases within the definition of "war crimes." In the view of the majority, such a restriction would have been inconsistent with post-Nuremberg developments, as observed in statements of the International Law Commission (ILC), the ICTY and other commentators[27] and reflected in instruments addressing specific crimes against humanity, such as the Genocide Convention and the Apartheid Convention.

One of the most important features of the definition in the ICC statute is that it makes no reference to a nexus to armed conflict, affirming that crimes against humanity can occur not only during armed conflict but also during times of peace or civil strife. This outcome was essential to the practical effectiveness of the ICC in responding to large- scale atrocities committed by governments against their own populations.

[27] The ILC commented with respect to its 1996 draft Code of Crimes that "[t] he definition of crimes against humanity in the present article does not include the requirement that an act was committed in times of war.... The autonomy of crimes against humanity was recognized in [the instruments subsequent to the Nuremberg Charter] which did not include this requirement." 1996 ILC Report, op. cit, at 96. Although constrained by the language of the ICTY Statute (which explicitly requires a nexus to armed conflict), the ICTY appeals chamber correctly observed that the requirement of a nexus to armed conflict was peculiar to the Nuremberg Charter and does not appear in subsequent instruments. Prosecutor v. Tadic, Appeal on Jurisdiction, No. IT-94-1-AR72, paras. 140-41 (Oct. 2, 1995), reprinted in 35 ILM 32 (1996) (ICTY cases cited in this article are available at <www.un.org/icty>). See also, e.g., Theodor Meron, International C7iminalization of Internal Atrocities, 89 AJIL 553, 557 (1995); and Rikhof, supra note 6, at 242-44. The Nuremberg Charter stated that crimes against humanity could occur "before or during the war," but a nexus was indirectly introduced by the requirement that the crime be connected to war crimes or a crime against peace. This "connection" requirement appeared in the Tokyo Charter but not in the Allied Control Council Law No. 10 or in subsequent instruments. A further discussion of the connection to other crimes appears below in the context of the crime of persecution.

2.3.2 Discriminatory Motive: Another difficult issue in the negotiations was whether the definition should require a discriminatory motive, i.e., that the crime be committed on national, political, ethnic, racial or religious grounds. All participants agreed that the specific crime of *persecution* required a discriminatory motive (as discrimination is the essence of the crime of persecution), but the majority maintained that not all crimes against humanity required a discriminatory motive. While the Nuremberg Charter could be construed as requiring a discriminatory motive for all crimes against humanity, that interpretation has been generally rejected and the dominant view is that the discriminatory motive is relevant only to the crime of persecution.[28] Nevertheless, such a requirement did appear in the ICTR Statute, and, although the ICTY Statute contains no such requirement, it was also applied by the ICTY in the *Tadic* opinion and judgment because of statements by members of the Security Council and a reference in the report in which the Secretary-General submitted the ICTY Statute.[29] In adopting this approach, however, ICTY Trial Chamber II expressly observed that the requirement does not appear to be supported by the relevant international instruments, such as the Nuremberg and Tokyo Charters, the Allied Control Council Law No. 10, the Genocide Convention, the Apartheid Convention and the ILC draft Code of Crimes.[30]

[28] When the 1954 ILC draft Code of Crimes suggested that discriminatory motive was required for all crimes against humanity, it was strongly criticized for misconstruing the Nuremberg Charter in D. H. N. Johnson, Draft Code of Offenses against the Peace and Security of Mankind, 4 INT'L & COMP. L.Q. 445 (1955). Johnson's article was widely received as expressing the correct interpretation, and the subsequent ILC draft codes have reflected Johnson's approach.

[29] See Prosecutor v. Tadic, Opinion and Judgment, No. IT-94-1-T, para. 652 (May 7, 1997), excerpted in 36 ILM 908, 944 (1997).

[30] Id., paras.650-52, 36 ILM at 943-44.

The negotiations in Rome produced agreement that a discriminatory motive is not an element required for all crimes against humanity. This approach avoids the imposition of an onerous and unnecessary burden on the prosecution. Moreover, the requirement of a discriminatory motive, particularly when coupled with a closed list of prohibited grounds, could have resulted in the inadvertent exclusion of some very serious crimes against humanity.

2.3.3 Widespread or Systematic Attack: It was agreed by all participants at the Rome Conference that not every inhumane act amounts to a "crime against humanity," and that a stringent threshold test is required. Delegations readily adopted two terms familiar from Tribunal jurisprudence and other sources, namely, the qualifiers "widespread" and "systematic." The term "widespread" requires large-scale action involving a substantial number of victims, whereas the term "systematic" requires a high degree of orchestration and methodical planning.[31]

The most controversial and difficult issue in the negotiations on the definition of "crimes against humanity" was whether these qualifiers should be *disjunctive* (i.e., widespread or systematic) or *conjunctive* (i.e., widespread and systematic). During the negotiations, a contingent composed predominantly of members of the "like-minded group" argued that a disjunctive test had already been established in existing authorities.

[31] These terms are discussed in a recent ICTR decision, Prosecutor v. Akayesu, Judgement, No. ICTR-96- 4-T (Sept. 2, 1998), available at <www.un.org/ictr>, which held:
The concept of "widespread" may be defined as massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of "systematic" may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources.

For example, the ICTR Statute requires that the inhumane acts be committed "as part of a widespread or systematic attack against any civilian population."[32]

On the other hand, another sizable contingent, including some permanent members of the Security Council and many delegations from the Arab Group and the Asian Group, pointed out that, as a practical matter, a disjunctive test would be over inclusive. For example, a legitimate question was raised whether the "widespread" commission of crimes should be sufficient, since a spontaneous wave of widespread, but completely unrelated crimes does not constitute a "crime against humanity" under existing authorities.

Fortunately, a solution was found to overcome this seemingly irreconcilable divide, as it was successfully argued that the legitimate concerns about a disjunctive test were already addressed within the concept of an "attack directed against any civilian population," as will be explained in the following paragraphs. The contingent favoring the conjunctive test was willing to accept this argument but wanted the understanding spelled out in the statute. Thus was born subparagraph 2(a) of Article 7, which defines an "attack directed against any civilian population"[33] as "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." Subparagraph 2(a) draws upon various authorities to meet the legitimate concerns raised,

[32] ICTR Statute, op. cit, Art. 3 (emphasis added). Likewise, ICTY Trial Chamber II has confirmed that, in addition to the Report of the Secretary-General numerous other sources support the conclusion that widespread and systematic approach are alternatives."

[33] Some delegations would have preferred not to use the term "attack" or to refer to "civilian" populations. Rather, they favored the formulation "widespread or systematic commission of such acts." However, reliance on the term "attack directed against any civilian population" was an essential aspect of the compromise and is adequately supported by existing authorities

by affirming that an "attack directed against any civilian population" involves some degree of scale, as well as a policy element, as is discussed below.

The plain meaning of the term "attack directed against any civilian population" implies some element of scale. This understanding is confirmed by the early authorities, such as the 1948 report of the UN War Crimes Commission.[34] More recently, the ICTY held that the term "'directed against any civilian population' ensures that what is to be alleged will not be one particular act but, instead, a *course of conduct*."[35] Likewise, in the *Tadic* opinion and judgment, the ICTY held that the term "population" "is intended to imply crimes of a collective nature and thus exclude single or isolated acts."[36] This is now reflected in the requirement in subparagraph 2(a) of "a course of conduct involving the multiple commission of acts referred to in paragraph 1."[37]

Two points must be emphasized here. The first is that this test does not reintroduce the "widespread" criterion as a mandatory requirement in all cases. "Widespread" is a high- threshold test, requiring a substantial number of victims and "massive, frequent, large- scale action,"[38] whereas the term "course of conduct" and the reference to multiple acts were regarded as presenting a lower threshold.[39] The second point is that it need not

[34] The UN War Crimes Commission noted that the term "population" "appears to indicate that a larger body of victims is visualized and that single or isolated acts against individuals may be considered to fall outside the scope of the concept".
[35]Prosecutor v. Tadic, Form of the Indictment, No.IT-94-1-T, para. 11 (Nov, 14, 1995).
[36]Tadic Opinion and Judgment, supra note 18, para. 644, 36 ILM at 941.
[37] The "acts referred to in paragraph 1" are the enumerated unlawful acts, such as murder, enslavement and torture. The somewhat awkward phrase "multiple commission of acts" was adopted instead of "commission of multiple acts" because several delegations were concerned that the latter formulation might be erroneously construed as requiring more than one kind of unlawful act.
[38] Prosecutor v. Akayesu, op. cit; see also 1996 ILC Report, op. cit, at 96.
[39] The terms "course of conduct" and "multiple commission" were regarded by delegations as presenting a considerably lower threshold than the "massive, frequent, large-scale" action connoted by "widespread."

be proven that the accused personally committed multiple offenses; an accused is criminally liable for a single inhumane act (e.g., murder), provided that the act was committed as part of the broader attack.[40]

The plain meaning of the phrase "attack directed against any civilian population" also implies an element of planning or direction (the "policy element"). The compromise reached in Rome was made possible by the explicit recognition of this element. Many observers would have preferred not to recognize the policy element explicitly, for fear of making prosecution more difficult, but the applicability of the policy element is supported by the bulk of authority since Nuremberg. The drafting history of the Nuremberg Charter and the pronouncements of the Nuremberg Tribunal underscore the focus on the "policy of atrocities and persecutions against civilian populations," also described as a "policy of terror" and a "policy of persecution, repression and murder of civilians."[41] In addition, the jurisprudence of subsequent military tribunals reveals that a policy element was a requisite for crimes against humanity.[42]

The latter terms, loosely derived from Tribunal jurisprudence, were chosen to rule out isolated or single acts. On the somewhat awkward phrase "multiple commission of acts," see op.cit.

[40] Article 7, paragraph 1 of the Rome statute affirms that a crime against humanity means "any of the following acts when committed as part of a widespread or systematic attack." This is consistent with existing authorities. See, e.g., the Tadic Opinion and Judgment: "Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable." Tadic Opinion and Judgment, op. cit, para.649, 36 ILM at 943. However, it does not necessarily follow that the ICC will choose to be seized of cases where the accused committed only a single murder (albeit as part of a widespread or systematic attack); in some cases the court may decline jurisdiction where the gravity of the case does not justify that it take further action. See ICC statute, op. cit, Art. 17(1) (d).

[41] See, e.g., the excerpts of the Nuremberg Judgment quoted by the United Nations War Crimes Commission, op.cit, at 194-95; and BASSIOUNI, supra note 2, at 756-66.

[42] See, e.g., the decision of the U.S. Military Tribunal in Nuremberg in the Altstotter case, regarding "proof of systematic governmental organisation of the acts as a necessary element of crimes against humanity." 6 Law Reports of Trials of Major War Criminals 1, 79-80 (UN War Crimes Commission, 1948).

This policy element has subsequently been reflected in the work of the ILC, the decisions of the ICTY and the writings of jurists. The ILC draft Code of Crimes requires that all crimes against humanity must be "instigated or directed by a Government or by any organization or group."[43] The ILC noted that it is this direction or instigation that "gives the act its great dimension and makes it a crime against humanity."[44] The ICTY, when interpreting the phrase "directed against any civilian population," confirmed that "there must be some form of a governmental, organizational or group policy to commit these acts."[45] Virginia Morris and Michael Scharf, in the *Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia,* observe that the phrase "directed against any civilian population" requires a "systematic plan or general policy."[46] M. Cherif Bassiouni, in his leading text on the subject, *Crimes against Humanity in International Criminal Law,* notes that the policy element is "the essential characteristic of 'crimes against humanity,"' giving these otherwise domestic crimes the requisite "international element."[47]

The policy element of crimes against humanity is also affirmed by decisions of national courts. For example, the French *Cour de Cassation* in the *Barbie* and *Touvier* cases required that the criminal acts be affiliated with or accomplished in the name of "a

[43] 1996 ILC Report, op. cit, at 93, 95-96.
[44]Ibid, p.96.
[45]Tadic Opinion and Judgment, op. cit, para.644, 36 ILM at 941.
[46]Virginia Morris & Michael P. Scharf, *An Insider's Guide To The International Criminal Tribunal For The Former Yugoslavia* 79-80 (1995). Similarly, much earlier authorities such as Joseph B. Keenan & Brendan F. Brown, *Crimes Against International Law* 117 (1950), noted that crimes against humanity are inhumanities which result from policy decisions made on the highest plane of civil or military authority. They are the effects of a definitely criminal State policy.
[47]Bassiouni, op. cit, at 244, 247.

state practicing a policy of ideological hegemony."[48] The Netherlands Hoge Raad in the *Menten* case held that "the concept of 'crimes against humanity' also requires . .. that the crimes in question form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of peoples."[49] Likewise, the Supreme Court of Canada in the *Finta* case held that "[w]hat distinguishes a crime against humanity from any other criminal offence under the Canadian Criminal Code is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race."[50]

Thus, there is ample authority recognizing the policy element of crimes against humanity. Some commentators have persuasively argued against the policy element that has appeared in previous authorities, and in particular the supposed requirement of an "official policy of discrimination."[51] Fortunately, the ICC definition overcomes many of these objections, as it is more inclusive than some of the authorities just noted. First, Article 7 does not require a discriminatory policy and, second, Article 7 does not require

[48] Barbie, Cass. crim., Dec. 20, 1985, 1985 Bull. Crim., No. 407, at 1053; Touvier, Cass. crim., Nov. 27, 1992, 1992 Bull. Crim., No. 394, at 1085. The stringent policy element adopted in these cases is criticized in Leila Sadat Wexler, The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again, 32 Colum.J. Transnat'l L. 289 (1994). Wexler persuasively questions both the requirement of state action and the requirement that the state be one "practicing a hegemonic political ideology." Ibid. at 360.

[49] Public Prosecutor v. Menten, 75 ILR 362, 362-63 (1981).

[50] Regina v. Finta, [1994] 1 S.C.R. 701, 814.

[51] Mark R. von Sternberg, *A Comparison of the Yugoslav and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity,"* 22 Brooklynj. Int'l L. 111 (1996), argues that the suggestion of the UN Commissions of Inquiry (for former Yugoslavia and for Rwanda) that an "official policy of discrimination" is required would add a difficult evidentiary hurdle. He suggests replacing this test with a new element, "the degree to which the misconduct. . . has become repugnant in the public conscience." While philosophically useful, this test is too vague for use in a criminal law instrument. See also op. cit, describing Wexler's criticism of French decisions.

an official (i.e., state) policy. The first point was addressed above in the discussion on "discriminatory motive," but the second warrants specific comment here.

As the ICTY has correctly noted, in the past "the traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State."[52] Today, however, the dominant view among commentators is that customary international law has evolved in such a way that reference only to a state policy would be too restrictive. Nevertheless, some degree of organization is still required. For example, the ICTY has affirmed that crimes against humanity "need not be related to a policy established at a State level, in the conventional sense of the term," but "they cannot be the work of isolated individuals alone."[53] The *Tadic* opinion and judgment acknowledges that the entity behind the policy could be an organization with de facto control over territory, and leaves open the possibility that other organizations might meet the test as well.[54] To reflect these developments, the delegations at the Rome Conference made reference to a state or organizational policy.[55]

[52]Tadic Opinion and Judgment, op. cit, para.654, 36 ILM at 944.
[53]Prosecutor v. Nikolic, Review of the Indictment Pursuant to Rule 61, No.IT-94-2-R61, para. 26 (Oct 20, 1995).
[54]Tadic Opinion and Judgment, op. cit, paras.654-55, 36 ILM at 944-45.Rikhof, op.cit, at 255-62, helpfully canvases the authorities, including national tribunals and international military tribunals, supporting the conclusion that a state policy is not needed and that a policy of a non-state organization will suffice. See also 1991 draft code, supra note 13; and Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, Art. 2, 754 UNTS 73.
[55] Although the 1954 ILC draft code required the involvement or acquiescence of public officials, the ILC subsequently expanded this to include instigation by a "State, organization or group" in the 1991 draft Code of Crimes. The solution reached in Rome was to refer only to a state or organization, as it was agreed that using the term "organization" would sufficiently capture the present state of customary international law. The term "organization" is fairly flexible, and to the extent that there may be a gap between the concepts of "group" and "organization," it was considered that the planning of an attack against a civilian population requires a higher degree of organization, which is consistent with the latter concept.

It must be emphasized that recognition of the policy element does not reintroduce the "systematic" criterion as a mandatory requirement in all cases. The term "systematic" requires a very high degree of organization or orchestration, and has been interpreted by the ICTR as meaning "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources."[56] In contrast, the term "policy" is much more flexible;[57] for example, in the *Tadic* opinion and judgment, the ICTY noted that a policy need not be formalized.[58] Thus, it is likely that, for example, proof of radio broadcasts advocating mass murder would be adequate proof of a "policy." In addition, the *Tadic* opinion and judgment suggests that the existence of a policy can in some circumstances reasonably be deduced from the manner in which the acts take place.[59]

i. **Clarifying the Term "Any Civilian Population":** The phrase "any civilian population" in the chapeau of Article 7, paragraph 1, and subparagraph 2(a) deserves specific comment. First, the term "any" confirms the well- established principle that the civilians need not be nationals of a foreign power; all civilians are protected.[60] The term "civilian" excludes attacks against armed forces,[61]

[56] Prosecutor v. Akayesu, op. cit 20, ?6.4; see also Tadic Opinion and Judgment, supra note 18, para. 648, 36 ILM at 942-43; and 1996 ILC Report, op. cit, at 94.
[57] The phrase "policy to commit such attack" in subparagraph 2(a) was deliberately chosen instead of "policy to commit such acts," in order to overcome the concern that the latter formulation would be too restrictive. The Women's Caucus for Gender Justice (an NGO) raised the concern that, in the case of rape, it might have been argued on the latter formulation that it was necessary to prove a policy to commit rape specifically. See Women's Caucus for Gender Justice, Priority Concerns about Crimes Against Humanity: Informal on Part II (July 1, 1998) (on file with author). Delegations therefore agreed to adopt the phrase "policy to commit such attack" in order to make clear that what is required is proof of a policy to commit an "attack," as generally defined in subparagraph 2(a).
[58] Tadic Opinion and Judgment, op. cit, para.653, 36 ILM at 944.
[59] Ibid. It remains to be seen whether the ICC will adopt this approach.
[60] See United Nations War Crimes Commission, op.cit, p.193.

although there is jurisprudence moderating this point.[62] The term "population" reflects the collective nature of the object of the attack, as was discussed above.

The test resulting from paragraph 1 and subparagraph 2(a) of Article 7 reflects a middle ground between a conjunctive test (widespread and systematic), which was clearly too restrictive, and an unqualified disjunctive test (widespread or systematic), which was considered too expensive. The text adopts the previously recognized threshold test of a "widespread or systematic" attack, but defines "attack," on the basis of relevant authorities, to alleviate concerns about an unqualified disjunctive test.

As a result, the prosecution must establish an "attack directed against any civilian population," which involves multiple acts and a policy element (a conjunctive but low threshold test), and show that this attack was either widespread or systematic (higher threshold but disjunctive alternatives). If the prosecutor chooses to prove the "wide- spread" element, the concern about completely unrelated acts is addressed, because of the policy element. If the prosecutor chooses to prove the "systematic" element, some element of scale must still be shown before ICC jurisdiction is warranted, because a course of conduct involving multiple crimes is required.

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[61] Some states and nongovernmental organizations would have preferred to expand the definition to include "any population," but the term "civilian" was retained as part of the compromise, since the term is well established in the precedents. Moreover, widespread or systematic attacks against military personnel remain a legitimate and inescapable aspect of warfare.

[62] For example, the Tadic Opinion and Judgment refers to a "predominantly" civilian population, and gives an expansive interpretation to the term "civilian" in this context. The Tadic Opinion and Judgment also refers to the comments in the Barbie case that the members of an armed resistance could be victims of crimes against humanity in appropriate circumstances.

2.3.4 The Mental Element of the Crime against Humanity: *Mens rea*

The definition in the ICC statute confirms that the accused, while not necessarily responsible for the overarching attack against the civilian population, must at least be aware of the attack.[63] Some observers had suggested that such knowledge should not be required. On this view, the existence of the attack against a civilian population would simply be a jurisdictional hurdle; once this hurdle is overcome, an accused could be convicted of a crime against humanity even if unaware of the overall attack. However, in the view of this author, the approach taken at the Rome Conference is more consistent with fundamental principles of criminal law. The obligation of the prosecution to prove all elements of crimes, including the mental elements, has been described as the "golden thread" of criminal law.[64] The connection to a widespread or systematic attack is the essential and central element that raises an "ordinary" crime to one of the most serious crimes known to humanity. To convict a person of this most serious international crime, if the person was truly unaware of this essential and central element, would violate the principle *actus non facit reum nisi mens sit rea.* Moreover, the obligation to prove all mental elements does not impose an inappropriate burden on the prosecution. Given the inescapable notoriety of any widespread or systematic attack against a civilian population, it is difficult to imagine a situation where a person could commit a murder (for example) as part of such an attack while credibly claiming to have been completely

[63] ICC statute, supra note 1, Art. 7, para. 1.
[64] Woolmington v. Director of Public Prosecutions, 1935 App. Cas. 462 (H.L.).

unaware of that attack.[65] If such a case were to occur, however, the accused would have the *mens rea* for murder, but not for the far more serious charge of a "crime against humanity."[66]

2.4 The Enumerated Acts of the Crime

The chapeau of Article 7 sets out the conditions in which the enumerated acts are elevated from ordinary crimes to "crimes against humanity." The acts enumerated in subparagraphs 1(a) to (k) of Article 7 are murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, enforced disappearance, apartheid and other inhumane acts.[67] For most of the enumerated acts, several delegations insisted on additional provisions that clarify these terms. The clarifications in paragraph 2 of Article 7 are drawn from various sources.[68]

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[65] As noted above, a single inhumane act (for example, a murder) by the accused can suffice to establish a crime against humanity, provided that the requirements of the chapeau are met. See op. cit.

[66] A similar conclusion was reached by the Supreme Court of Canada in the Finta case, following a review of relevant jurisprudence:

These cases make it clear that in order to constitute a crime against humanity. . . there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity.

... The mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crimes against humanity.

Regina v. Finta, [1994] 1 S.C.R. 701, 819. The same approach was adopted by the ICTY in the Tadic Opinion and Judgment, op.cit paras. 658-59, 36 ILM at 946.

[67] Murder, extermination, enslavement, deportation, persecution and other inhumane acts appeared in the Nuremberg and Tokyo Charters. Rape, imprisonment and torture were added in Control Council Law No. 10 to form a list that has been accepted as reflecting customary international law; that same list appears in the ICTY and ICTR Statutes.

[68] For example, the Prosecutor v. Akayesu, op. cit; United Nations War Crimes Commission Report, op. cit.

2.4.1 Murder

The term "murder" was considered to be sufficiently understood by reference to the applicable sources of law,[69] and therefore not to require additional clarification. To preclude an inappropriately restrictive interpretation of the term "imprisonment," sub-paragraph 1(e) includes reference to "other severe deprivation of physical liberty."[70] Paragraph 2 provides further clarification of the provisions on extermination,[71] enslavement,[72] deportation[73] and torture.[74] The classical reference to "rape" was expanded and clarified in subparagraph 1 (g), which refers to "rape, sexual slavery, enforced prostitution, forced pregnancy,[75] enforced sterilization, or any other form of sexual

[69] Article 21 of the ICC statute specifies that the court shall apply (a) in the first place, the statute, the "Elements of Crimes" (to be adopted by the Assembly of States Parties) and the Rules of Procedure and Evidence; (b) in the second place, applicable treaties and principles and rules of international law; and (c), failing that, general principles of law derived from national laws of legal systems of the world.

[70] Either of these activities must be "in violation of fundamental rules of international law." ICC statute, Art. 7, subpara.1 (e). This qualifier was necessary because imprisonment simpliciter is carried out quite legitimately by all states (for example, the imprisonment of persons convicted after a fair trial).

[71] Ibid., subparagraph 2(b) notes that "extermination" includes the "intentional infliction of injury on life ... calculated to bring about the destruction of part of a population".

[72] Ibid., subparagraph 2(c) specifies that "enslavement" means "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons' in particular women and children."

[73] Ibid., subparagraph 1(d) encompasses "deportation or forcible transfer of population," which, under subparagraph 2 (d), is defined as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law."

[74] Ibid., subparagraph 2(e) defines "torture" as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions." This definition is based on Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, Dec. 10, 1984, 1465 UNTS 85,

[75] The inclusion of the crime of "forced pregnancy" has been the subject of considerable misunderstanding. This term does not create a universal right to abortion and does not in any way restrict the ability of states to regulate in this sensitive area on the basis of their own constitutional or philosophical principles. The term is included to recognize a particular harm inflicted on women, particularly during armed conflict, and to affirm the agreements reached in UN DEP'T OF PUB. INFO., PLATFORM FOR ACTION AND THE BEIJING DECLARATION: FOURTH WORLD CONFERENCE ON WOMEN, BEIJING, CHINA, UN Sales No. E.DPI/1766 (1996). ICC statute, op. cit, subparagraph 2(f) specifies that "forced pregnancy" has three elements: (1) unlawful confinement, (2) of a woman forcibly made pregnant, and (3) with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

violence of comparable gravity." This provision confirms that these acts, which have persisted in history, are inhumane acts encompassed within the definition of crimes against humanity.[76]

The definition of persecution, the recognition of enforced disappearance and apartheid, and the definition of "other inhumane acts" are of particular interest in the evolution of crimes against humanity and deserve more detailed comment.

2.4.2 Persecution

Persecution is the "intentional and severe deprivation of fundamental rights contrary to international law" against "any identifiable group or collectivity" on prohibited discriminatory grounds.[77] Although the crime of persecution is recognized in the major precedents (the Nuremberg and Tokyo Charters and the ICTY and ICTR Statutes), it was not defined, and many delegations were deeply concerned about the inclusion of this crime for fear that any discriminatory practices could be characterized as "crimes against humanity" by an activist court. All delegations agreed that the court's jurisdiction relates to serious violations of international criminal law, not international human rights law. To address the concerns raised about this crime, it was emphasized that, while discrimination may not be criminal, extreme forms amounting to deliberate persecution clearly are criminal. It was eventually agreed that the recognition of "persecution" as a crime was justified by the deliberate severity of the violations, the

[76] See 1996 ILC Report, supra note 13, at 102-03; Theodor Meron, Rape as a Crime under International Humanitarian Law, 87 AJIL 424 (1993); Amnesty International, the International Criminal Court: Ensuring Justice for Women (AI Index No. IOR 40/06/98, 1998).

[77] ICC statute, op. cit, Art.7, subpara.2(g). The ICTY noted in the Tadic Opinion and Judgment that, "although often used, the term has never been clearly defined in international criminal law," and concluded that it requires discrimination intentionally resulting in a denial of fundamental human rights. Tadic Opinion and Judgment, op. cit, para.694, 36 ILM at 955.

intentional discrimination on prohibited grounds, and the connection with other enumerated acts.

The Nuremberg Charter and the ICTY and ICTR Statutes include persecution on "political, racial or religious grounds."[78] As delegations wished to take into account the evolution of international norms, the ICC statute builds on these precedents by adding national, ethnic and gender grounds, which were drawn from the definition in the ICTR Statute.[79]

While many delegations would have preferred an open-ended list of grounds, this approach was strongly resisted on the basis that it would be too imprecise and would violate the principle of legality, since the statute would be an instrument of criminal law and not a declaratory human rights instrument. A compromise was eventually reached by including an open-ended, but very high-threshold provision, which refers to "other grounds that are universally recognized as impermissible under international law."[80] Thus, if any other prohibited grounds of discrimination become clearly established in international law, they can automatically be incorporated without amending the statute. Universal recognition, however, is a very high threshold; consequently, amendment of the statute to reflect future developments remains a possibility.

Another difficult issue at the Rome negotiations was whether the crime of persecution could be committed only in the context of other crimes; i.e., whether a

[78] The Tokyo Charter omitted "religious" grounds, apparently because there was little evidence of persecution on religious grounds in that conflict.

[79] These three additional grounds appear- in the chapeau of the ICTR Statute's definition, where they would apply to all crimes against humanity (unlike the ICC statute; see the discussion above of "discriminatory grounds"). "Gender" is defined in Article 7, paragraph 3 of the ICC statute as referring to "the two sexes, male and female, within the context of society."

[80] ICC statute, op. cit, Art.7, subpara.1 (h).

connection to another crime was a prerequisite for "persecution." Under the Nuremberg Charter, persecution was only justiciable where a connection was established between the persecution and other crimes in that instrument.[81] This "connection" requirement appeared again in the Tokyo Charter but not in subsequent instruments, such as Control Council Law No. 10, or more recently, the ICTY and ICTR Statutes.[82] Nevertheless, many delegations strongly felt that such a connection was a necessary element of the crime of persecution, because of the vague and potentially elastic nature of this crime and the need to ensure an appropriate focus on its criminal nature. This position was not without merit; as Bassiouni has noted, "there is no crime known by the label 'persecution' in the world's major criminal justice systems, nor is there an international instrument that criminalizes it," and therefore "a reasonable nexus between the discriminatory policy and existing international crimes is needed."[83]

Other delegations were concerned that a requirement of a connection to other crimes would mean that persecution would be only an auxiliary offense, to be used as an additional charge or aggravating factor but never as a crime in itself.

The compromise reached at the Rome Conference was to require a connection between persecution and any other crime within the jurisdiction of the ICC or any act

[81] In fact, the Berlin Protocol of October 6, 1945, amended the English and French texts of the Nuremberg Charter, making clear that such a connection would be required for all crimes against humanity, not just persecution. The Berlin Protocol is discussed in the authoritative article by Schwelb, op. cit, at 187-88, 193-95. By removing a semicolon in the English text and rewording the French text, it was clarified that a connection to other crimes in the Nuremberg Charter (war crimes or crimes against peace) was a prerequisite for a crime against humanity.

[82] Indeed, the ICTY has held that "it is not necessary to have a separate act of an inhumane nature to constitute persecution." Tadic Opinion and Judgment, op. cit, para.697, 36 ILM at 956. In this respect, the compromise reached at the Rome Conference appears to be more restrictive than the law applied by the ICTY.

[83] Bassiouni, op. cit, at 318.

referred to in paragraph 1 (i.e., other inhumane acts).[84] This latter phrase ensures that persecution will not be merely an auxiliary offense or aggravating factor. It is not necessary to demonstrate that the "connected" inhumane acts were committed on a widespread or systematic basis; it will suffice to show a connection between the persecution and any instance of murder, torture, rape or other inhumane act, which need not amount to a crime against humanity in its own right. While it could be argued that such a connection was no longer required in customary international law, its inclusion helped emphasize the criminal nature of persecution and bolstered support for inclusion of the crime. In practical terms, the requirement should not prove unduly restrictive, as a quick review of historical acts of persecution shows that persecution is inevitably accompanied by such inhumane acts.

2.4.3 Enforced Disappearance and Apartheid

Comment [n1]:

The delegations participating in the Rome Conference agreed that the purpose of the deliberations on the definition of crimes was to identify existing customary international law and not to progressively develop the law. It was also agreed that this approach did not necessitate the reproduction of the list of inhumane acts that appeared in the Nuremberg Charter fifty years ago. Every formulation since Nuremberg has concluded its list of enumerated inhumane acts with the general phrase "other inhumane acts."[85] Many delegations pressed for specific acknowledgment of particular inhumane acts that have been of special concern to the international community. While such

[84] ICC statute, op. cit, Art.7, subpara.1 (f).
[85] The interpretation of this provision must, of course, be subject to the principle of *e jus dem generis*, and therefore restricted to acts of a character and gravity similar to those of the other enumerated acts; see the discussion of "other inhumane acts" in text following note 194 below.

references could have been placed in the final subparagraph ("other inhumane acts," discussed below), delegates chose to include these references in separate subparagraphs.

Delegations were able to agree that the crime of apartheid was an inhumane act that resembled the other enumerated acts in character and gravity, and that warranted a specific reference, particularly as it had been identified as a crime against humanity in international instruments.[86] Likewise, delegations agreed that enforced disappearance, also previously identified as a crime against humanity in international instruments, is a specific acknowledgment of the prevalence of the crime[87].

The view that enforced disappearance clearly constitutes an "inhumane act" that would have fallen within previous definitions of crimes against humanity (all of which included "other inhumane acts") is bolstered by the fact that the Nuremberg Tribunal found that the Nazi practice of enforced disappearance constituted a crime against humanity as follows[88]:

> On 7 December 1941 Hitler issued the directive since known as the "Nacht und Nebel Erlass" (Night and Fog decree), under which persons who committed offenses against the Reich …were to be taken secretly to Germany .... After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came, or their relatives; even in cases when they died awaiting trial the families were

[86] The crime of apartheid is identified as a crime against humanity in Article 1 of the Convention on the Suppression and Punishment of the Crime of Apartheid, as well as in other instruments, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, op. cit, Art. 1 (b) (definition of crimes against humanity); and numerous General Assembly resolutions, e.g., GA Res. 48/89, UN GAOR, 48th Sess., Supp. No. 49, at 192, UN Doc. A/48/49 (1993). In ICC statute.

[87] Enforced disappearance is recognized as a crime against humanity in the UN Declaration on the Protection of All Persons from Enforced Disappearance, see also the Preamble to the Inter- American Convention on Forced Disappearance of Persons, which "reaffirm[s] that the systematic practice of the forced disappearance of persons constitutes a crime against humanity." See also the 1996 Draft Code of Crimes, 1996 ILC Report, and subparagraph 2(i) of Article 7 of the ICC statute.

[88] 12 Trial of the Major War Criminals before the International Military Tribunal 475-76 1948, p. 498.

> not informed, the purpose being to create anxiety in the minds of the family of the arrested person. Hitler's purpose in issuing this decree was stated by the Defendant Keitel in a covering letter, dated 12 December 1941, to be "Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal."[89]

2.4.4 Other Inhumane Acts

As the final heading, "other inhumane acts," appeared in the major precedents (including the Nuremberg Charter, the Tokyo Charter, Control Council Law No. 10, and the ICTY and ICTR Statutes), many delegations felt strongly that this provision must be preserved. Other delegations raised grave concerns about its imprecise and open-ended nature, which was considered inappropriate in a criminal law instrument. This argument was not without merit. Indeed, there is no crime by that label under other sources of international or national law,[90] which further deprives the term of precision and juridical pedigree.

The solution was to agree to include this final heading but to provide a clarifying threshold, specifying that the acts must be of a character similar to that of the other enumerated acts and must intentionally cause great suffering or serious injury to mental or physical health. Unlawful human experimentation and particularly violent assaults were two possibilities considered likely to fall within this heading.

[89] Ibid
[90] See BASSIOUNI, op. cit, at 320. Bassiouni observes that the category "other inhumane acts" must be carefully circumscribed if it is not to violate the principle of legality.

2.5 The Influence of Nuremberg Conception of Crimes Against Humanity on the Development of International Criminal Law

The Nuremberg Principles[91] and the conception of Crimes Against Humanity did not only affect the formation of International War Crimes Tribunals. Its impact caused several effects beyond creating a mere term to be used in military tribunals and political purposes. One of these effects was the United Nations Resolution 96 (1), drawn up on the 11th of December 1946, stating that "…genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world." Deriving from the Nuremberg concept of Crimes Against Humanity, and the crimes perpetrated by the Nazis in their total war, this declaration was finally embodied two years later in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. This convention criminalized genocide and related activities in the international sphere, and the convention itself is heavily influenced by many of the Nuremberg principles. It also extended this crime against humanity beyond periods of war and the specific scenario of the Second World War. The Genocide Convention was not, per se, a major advancement in the upholding of international human rights, especially considering its provision in Articles V and VI, which provide that states should regulate their legal systems accordingly to criminalize such acts in the domestic sphere, and that those found guilty of the crime of genocide should be tried in the courts of the country where the acts were committed in absence of a competent international tribunal

[91] Nuremberg Trial Proceedings Vol. 1, Charter of International Military Tribunal contained in the Avalon Project archive at Yale Law school, New Haven, CT, USA: Cryer, Robert; Hakan Friman; Darryl Robinson; Elizabeth Wilmshurst (2007). *An Introduction to International Criminal Law and Procedure*. Cambridge University Press. p.188.

with consented jurisdiction over the matter, and many academics have shown to be quite skeptical about its practical possibilities. However, on the theoretical arena the Convention Against Genocide is a development from the precepts set in Nuremberg, in such a sudden and ad hoc manner, especially where codification of Crimes Against Humanity is concerned. The Convention takes the main aspect of these crimes, extirpates it from a broad definition, and narrows it down into one separate and codified principle. Genocide as defined in Articles II and III practically cover all those measures taken by the Nazis during their persecution and brutal extermination of certain social, religious and cultural groups: those same atrocities which the members of the Court dubbed as Crimes Against Humanity took concrete form in this Convention.

In 1948 the United Nations issued the Universal Declaration of Human Rights,[92] the first legal document to recognize such rights as binding, and creating the notion of Human Rights as we understand it today. The influence which Nuremberg and to a certain extent the Tokyo trials had upon the formulation and conception of such a declaration cannot be understated. Nuremberg had for the first time in international law traced a definite distinction between *jus ad bello* a doctrine concerned exclusively on the conduct in warfare, and jus ad bellum, which concerns itself with the justice or legality of the waging of war. By introducing the new principles of Crimes Against Peace and Crimes Against Humanity, Nuremberg effectively fathered a globalized concern towards certain attitudes in war and, by extension, for the rights of all human beings suffering the effects of certain modes of violence. This supposed impact on the Universal Declaration

[92]Adopted by the United Nations on December, 10 1948.

has been backed up by the fact that some academics have stated that the UN Charter itself was almost a product of Nuremberg and the issues raised before, during and after the Trial.

2.6 Evolutionary Development of the Distinctive Elements of the Notions of Crimes Against Humanity and Genocide: The Jurisprudence of ICTY and ICTR

Although it is among the major international crimes, "crimes against humanity" remains undefined in legal scholarship and authoritative commentary.[93] As it will be examined in detail below, unlike the crime of genocide, the definition of the crimes against humanity varies from one statute to another. The history of the development of these crimes may be an explanation for this uncertainty. Martens Clause of the Hague Convention of 1907 was the first time that laws of humanity were recognized in conventional international law. Then, following the World War II, from 26 June to 8 August 1945, a conference was held by victorious allied powers in London in order to draft the Charter of the International Military Tribunal (Hereinafter IMT), to punish Nazi atrocities.[94] Also known as the Nuremberg Charter The IMT Charter defined 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 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."

[93]Bassiouni M. C (1994), *"Crimes Against Humanity":* The Need for a Specialized Convention, 31 Colum. J. Transnat'l L. 457,458

[94]Short, Jonathan M.H. (2003), *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, Michigan Journal of Race and Law, Spring, p. 5

The second international instrument including a provision of crimes against humanity was Control Council Law No. 10 (CCL No. 10) of 1945, the major importance of which is the abolition of the *war nexus* requirement that meant the acts be connected with war to be punishable.[95] CCL No. 10 defined crimes against humanity as: "atrocities or offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

Since the Nuremberg Charter and CCL No 10, a significant number of instruments that include various definitions of crimes against humanity have been adopted.[96] But 1948 Convention on the Prevention and Punishment of the Crime of Genocide[97] (hereinafter Genocide Convention) is definitely the most important one among others.

More recently, the statutes of the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) and International Criminal Tribunal for Rwanda (hereinafter ICTR) emerged after serious offences, representing important provisions on the constitutive elements of the crime against humanity on the International Criminal law. However the differences between the statutes of these two caused uncertainties within the international community about the elements of crimes against humanity, the definitions

[95]Control Council Law No. 10, 20 Dec. 1945, 3 Official Gazette Control Council for Germany 50 (1946), *reprinted in* 1 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 at xvi (1949).
[96]Bassiouni, M. C., Crimes Against Humanity in International Law, p.328
[97]Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* 9 Dec. 1948, (*entered into force*12 Jan. 1951).

of crimes against humanity under these statutes reflect major developments in international law since the Nuremberg Trials.

Unlike the crime of genocide[98], this category of crimes did not have a specific international convention. But it was again, included within Rome Statute of the International Criminal Court (hereinafter referred as Rome Statute) which was adopted on 17 July 1998.[99] The definition of crimes against humanity was criticised as too narrow by some NGOs.[100]

2.6.1 Notion of Genocide

Genocide term was coined in legal terminology in 1944, by Raphael Lemkin in his book 'Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposal for Redress' that was written about Nazi crimes in Europe during World War II.[101]

Being within the context of crimes against humanity, genocide as a term in international law instruments first appeared in the judgment of several cases dealt with under Control Council Law No. 10[102], beginning with *Justice Case*. In this judgment, genocide was described as *"the prime illustration of a crime against humanity".*[103] It should be remembered that, at that time, the crime of genocide was, and, in contrast to the

[98]Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* 9 Dec. 1948, (*entered into force* on 12 Jan. 1951).
[99]Under Article 7 of the Rome Statute of the International Criminal Court, the International Criminal Court has jurisdiction over crimes against humanity.
[100]Robertson, Geoffrey, Crimes Against Humanity: The Struggle For Global Justice, p.357
[101]Schabas, William A., *An Introduction to the International Criminal Court,* p.36
[102]Control Council Law No. 10, 20 Dec. 1945, 3 Official Gazette Control Council for Germany 50 (1946), *reprinted in* 1 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 at xvi (1949).
[103]Orentlicher, Diane F, *The Law of Universal Conscience: Genocide and Crimes Against Humanity,* http://www1.ushmm.org/conscience/analysis/details/1998-12-09/orentlicher.pdf

Genocide Convention, crimes against humanity could only be committed in association with an international armed conflict[104].

Genocide, including the intentional killing, destruction, or extermination of groups or members of a group as such, was first assessed to be purely a sub-category of crimes against humanity"[105].The solid definition of genocide is the one set forth in the Genocide Convention in 1948, which defines genocide as one of five types of acts committed with the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. By means of this Convention, genocide acquired independent importance as a specific crime.[106] The context of genocide in 1948 Genocide Convention was narrower than both that of crimes against humanity and than context of genocide expressed by Lemkin.[107] However, clarifying the conception of crime of genocide, Articles II and III of the Genocide Convention were reproduced in a verbatim form in Article 4 of ICTY Statute and Article 2 of ICTR Statute.

Under Article 4 of the ICTY, genocide refers to any criminal activity aiming to destroy, in whole or in part, a particular human group, as such, by certain means. Those are two elements of the special intent requirement of genocide: (1) the act or acts must

[104]Schabas, , William A., *An Introduction to the International Criminal Court,* p.36.
[105]Cassese, Antonio, *International Criminal Law*, p.97
[106]Article II and III of the Genocide Convention; Article II In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.
Article III: The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.
[107]Schabas, William A., *An Introduction to the International Criminal Court,* p.36

target a national, ethnical, racial or religious group; (2) the act or acts must seek to destroy all or part of that group"[108].

Under Article 2 of ICTR Statute, the Chamber of ICTR concluded that a crime has to be if any of the acts listed under Article 2(2) of the ICTR Statute was committed and, if only this act was committed with the specific intent to destroy a specifically targeted national, ethnical, racial or religious group, , in whole or in part. For this reason, an act in order to be punished under 'genocide' provisions must contain both the prohibited underlying act and the specific genocidal intent (*dolus specialis).*[109]

The crime of genocide is considered to be the most serious and most aggravated type of crime against humanity, and "the crime of crimes" among other international crimes.[110]

2.6.2 Distinction Between Genocide and Crimes Against Humanity

Generally, a principal distinction between Genocide and crimes against humanity is that genocide deals with a particular group which could be ethnic, racial, national or religious group, while crime against humanity is an offence perpetrated on any individual generally without any distinction as to whether or not it relates to a particular group. Other distinctions are categorized and discussed below:

[108]ICTY, *Krstic*, (Trial Chamber), August 2, 2001, para.550; see also: ICTY, *Krstic*, (Trial Chamber), August
2, 2001, para.580 and ICTY, *Jelisic*, (Trial Chamber), December 14, 1999, para.62.
[109]*Prosecutor v. Bagilishema,* Case No.ICTR-95-1-A-T (Trial Chamber), June 7, 2001, para.55.
[110]Schabas, William A., *An Introduction to the International Criminal Court,* p.37

1. Perpetrators of Crimes

The prosecution must established the following beyond reasonable doubt in order to succeed a conviction on offenders on persons charged for the offence of crimes against humanity.

a. *Mens Rea*

Specific "intent to destroy" is the most important and outstanding difference between genocide and crimes against humanity. This is the intent to destroy a national, ethnical, racial or religious group, in whole or in part.[111] Since generally, the acts of genocide also form crimes against humanity, genocide is often considered a sub-set of crimes against humanity.

In the case of Kupreskic[112], the Trial Chamber held that both persecution and genocide crimes are perpetrated against people who belong to a particular group and who are targeted because of being a member of that group. Discriminative approach (on listed grounds) is the common factor for both categories. If an individual had the intention to destroy a group (in whole or in part) just aiming to obtain their land or removing them from that territory, this would not amount to genocide, since *"the complete disregard shown for this particular group would not be sufficient to make the intended mass destruction genocidal".*[113]

[111]Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* 9 Dec. 1948, (*entered into force*12 Jan. 1951), Art. 2
[112]The Prosecutor v. ZoranKupreskic, MirjanKupreskic, VlatkoKupreskic, DragoJosipovic, DraganPapic, Vladimir Santic, IT-95-16-T (14 January 2000).
[113]Cécile Tournaye, 'Genocidal Intent before the ICTY', *ICLQ* 52 (2003), 447-462

Jelisic Appeal Judgment[114] was an important standing point to separate genocide from persecution. In this case, the Appeal Chamber of ICTY held that the genocide intent is a specific intent which should be separate from and go beyond the discriminatory intent and the genocidal intent is more specific than the discriminatory intent which is included within the crime of persecution. Proof of a plan to destroy the target group which was selected on certain discriminatory grounds should make it easier to prove the genocidal intent.

Whereas In the crime of persecution, the discriminatory intent may take many inhuman forms, while in genocide it must strictly be accompanied by the specific intent (*dolus specialis*) for genocide, that is, to destroy in whole or in part a specific group.[115] For persecution, this discriminatory intent can emerge as ill treatment, harassment , bringing about great suffering or injury to the target person or group on religious, political, racial or other such grounds.[116] This is the element what makes persecution to a *dolus specialis* degree among other crimes against humanity but this *dolus specialis* doesn't reach the "special intent to destroy" a group as a whole or in part.

A*ctus reus* for persecution in the ICTY Statute does not require a link to crimes enumerated in the Statute, but on the other hand, its definition may encompass crimes not listed in the Statute because of its broad concept. However, there must be undoubtedly defined limits on the extension of the persecution type crimes.[117]*Mens rea* for persecution

[114]Appeal Judgements rendered on the 5th July 2001.
[115]Bantekas, Ilias& Nash, Susan, *International Criminal Law*, p.388
[116]Cassese, Antonio, *International Criminal Law*, p.82
[117]Kupreskic Judgment,14 January 2000

is higher than other crimes within the ambit of crimes against humanity, but lower than genocide.

Crime of persecution 'derives its unique character from the requirement of a specific discriminatory intent'[118]. And in various cases,[119] it was emphasized that this discriminatory intent can show itself in many different forms of denial or infringement on a fundamental right laid down in international customary or treaty law.[120] These infringements can be commitment of other underlying offences as murder, rape, serious bodily assault, expulsion from the area, torture, etc.[121]

So, as they are only the genocidal acts to be 'committed with intent to destroy' under ICTY and ICTR statutes, the distinction between genocide and persecution as for *mens rea* is that, the perpetrator "of genocide must intend to destroy all or part of a protected group, while the perpetrator of a crime against humanity need not have such intent and persecution can be seen in many other forms of inhuman and discriminatory intent other than intent to destroy.[122]

b. *Actus Reus* as a Part of Widespread or Systematic Attack

Whereas the ICTY Statute does not require a link between crimes against humanity and that the acts which form the crimes against humanity be "committed as part

[118]Prosecutor v. Krnojelac, Judgment of 15 March 2002
[119]Kordic and Cerkez, Kupreskic and others
[120]Schabas, William A., *An Introduction to the International Criminal Court,* p.49
[121]Cassese, Antonio, *International Criminal Law*, p.167
[122]Cassese, Antonio, *International Criminal Law*, p.168

of a widespread or systematic attack", it is clearly mentioned in the Statutes of the ICTR and ICC as a requirement.[123]

Here, 'widespread' refers to the scale of the offences or quantity of victims[124]. Provided that it is a part of broader widespread series of acts, even a single attack may amount to a crime against humanity. A "systematic" attack refers to "a pattern or methodical plan." but this plan is not required be formally adopted as a policy of the state[125].

The perpetrator who is acting as an agent of a systematic attack is not required to anticipate all the results of his misconduct. Being aware of the '*risk*' that his act might lead him to serious consequences is enough for him to be a perpetrator of a crime against humanity.[126]

This perpetrator can be an individual acting in his private capacity provided that his acts find support from a general state policy. But if the state officials commit this offence acting in a private capacity, there must be some sort of explicit or implicit approval or endorsement of the state authorities or at least this offence must fit clearly within such a policy.[127] So, similar to genocide, the jurisprudence of ad hoc tribunals

[123]According to Article 5 of the ICTY Statute,
"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."
[124]Prosecutor v. Akayesu, ICTR Trial Chamber, September 2, 1998, para. 579; Kayishema and Ruzindana, ICTR Trial Chamber, May 21, 1999, para. 123.
[125]Akayesu, para. 580.
[126]Cassese, Antonio, *op. cit*, p. 81
[127]Ibid at p. 83

clarified that crimes against humanity can be committed by state authorities and their agents, as well as by nonstate entities.[128]

Whereas, for genocide, the punishable acts don't have to be part of a widespread or systematic attack or a part of a general and organized plan. In Jelisic Case, Appeals Chamber concluded that, "*the existence of a plan or a policy is not a legal ingredient of crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases."*[129]

Consequently, what is important for the crime of genocide is the intent to destroy *"in whole or in part".* So, the intent to destroy is not sufficient, but intent must be destroying a large number of members of the target group. The actual number of the victims is not important but where the number of victims reaches to a significant level, it can be an important evidence of genocidal intent to destroy the members of the group "in whole or in part".[130] Although it is sufficient to prove that the perpetrator committed the crime of persecution, depriving the victims severely of fundamental rights, regardless from the actual number of victims, the intention to do so needs to be proven for genocide.[131]

This means, in contrast to crimes against humanity, the size of the attack of which the offence is part is not important for genocide. Instead of being a part of a 'widespread

[128]Bantekas, Ilias& Nash, Susan, *International Criminal Law*, p.384
[129]Prosecutor v. Jelisic, Judgment of 5 July 2001
[130]Schabas, William A., *An Introduction to the International Criminal Court,* p.39
[131]Cassese, Antonio, *International Criminal Law*, p. 107

or systematic attack', the subject group to specific intent is required to be large in number.[132]

c. War Nexus

For the offence of genocide, it's not required that the acts take place during an armed conflict or 'widespread or systematic attack against a civilian population.' "An act of genocide could be planned or committed on a large scale, or committed as an individual undertaking."[133] On the other hand, under ICTY Statute, crimes against humanity and persecution in particular must be committed during armed conflict whether international or internal in character. However, differentiating from ICTY, there's not a requirement of nexus to an armed conflict for persecution under ICTR and Article 7 of the Rome Statute.[134]

Although crimes against humanity were required to be associated with other crimes[135] within the jurisdiction of Nuremberg Trials, following the initial Nuremberg trial, Control Council Law No.[136]10 (CCL 10) concluded that the "*war nexus requirement"* was excluded from the definition of crimes against humanity.

On its face, the ICTY statute requires a connection between *crimes against humanity* and *armed conflict*, which is not itself a crime under the statute; marking a

[132]Bantekas, Ilias & Nash, Susan, *International Criminal Law*, p.392
[133]Short, Jonathan M.H., Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court, Michigan Journal of Race and Law, Spring 2003, p. 3; see also Guenael Mettraux, Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the
Former Yugoslavia and for Rwanda, 43 Harv. Int'l L.J. 237, 295-96 (2002)
[134]Bantekas, Ilias& Nash, Susan, *International Criminal Law*, p.384-385
[135]These are war crimes and crimes against humanity
[136]Control Council Law No. 10, 20 Dec. 1945, 3 Official Gazette Control Council for Germany 50 (1946), *reprinted in* 1 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No.10 at xvi (1949)

progress over the Nuremberg Charter by clearly removing the requirement of *connection to another crime under international law.* However, it was not clear how to interpret "committed in armed conflict." On this point, following the declaration of ICTR without insistence upon this *nexus*, the ICTY Appeal Chamber solved this problem in 1995 *Tadic Case*.[137] This jurisdictional decision of 1995 was the first major judgment of the ICTY. In this case, the ICTY went well beyond the Nuremberg precedents by declaring that *"crimes against humanity could be committed in peace time"*. Furthermore, *nexus* was described to be *'obsolescent'* and abandoned as 'there is no logical or legal basis for this requirement'. This was the abolition of war nexus requirement. Since then, the nexus with armed conflict set out in Article 5 of the Statute has been described to be 'purely jurisdictional'.[138]

2. Victims of Crimes

Victims of crimes are discussed in the following categories.

a. Group as a Subject to Discrimination

Under the Statute of ICTY, "crimes against humanity may be committed against '*any individual'*. The definition of crimes against humanity under the ICTY Statute clarifies that discriminatory intent is required only for persecution type crimes.[139] The same situation is preserved in ICC Statute (Article 7). On the other hand, under the ICTR

[137]Prosecutor v. Tadic (Case no. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (1997) 35 ILM 32, para. 140
[138]Schabas, William A., *An Introduction to the International Criminal Court,* p.43
[139]Appeal Judgments rendered on the 5th July 2001.

Statute, not only persecution, but all underlying crimes must be committed on discriminatory grounds in order to qualify as crimes against humanity.[140]

Bearing the specific intent distinction in mind, genocide and crime of persecution can only be committed against individuals who belong to specifically protected groups on the grounds of their identifiable properties.

But, as for the ICTY Statute, crimes against humanity may be committed against '*any individual'*, whereas genocide can only be committed against individuals who belong to specifically protected groups characterized by their national, ethnical, racial, or religious identity.[141]

b. Context of Discriminatory Grounds

In its essence, genocide was recognized as a crime of "universal jurisdiction" since its declaration by General Assembly of United Nations in 1946, following Nuremberg Trials. This position made it sufficient to be prosecuted by the courts other than those where the offence was committed. So, narrowing the mental and material elements of this crime has been the price to pay.[142] And in Statutes of ICTY and ICTR, being verbatim reproductions from Articles II and III of the 1948 Genocide Convention,[143] the intent to destruction must be directed at one of the listed groups. These are: 'national, ethnical, racial and religious' grounds. As its reason was mentioned above, this limited scope of

[140]Under Article 3 of the ICTR Statute: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds : Murder; Extermination; Enslavement; Deportation; Imprisonment; Torture; Rape; Persecutions on political, racial and religious grounds; Other inhumane acts."
[141]Short, Jonathan M.H., Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court, Michigan Journal of Race and Law, Spring 2003, p. 3
[142]Schabas, William A., *An Introduction to the International Criminal Court,* p.36
[143]Ibid

discriminatory grounds for genocide has been criticized during the drafting discussions of Genocide Convention and Rome Statute as well.[144]

And as a reflection of reaction to this strict narrowing of the scope, the Trial Chamber in Akayesu case stated that the four groups protected by the convention share a "*common criterion*," namely, "that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner." So, the Chamber went far beyond the text of the ICTR Statute as it didn't contain such requirements as "permanent" and "stable". The Tutsi were alleged to constitute a *stable and permanent group* and were acknowledged as such by all."[145]

Assessed to be "puzzling words" by Schabas,[146] *'as such'* in the text of genocide was interpreted by the Chamber of the ICTR to mean that the act must be committed against an individual only because of the reason the individual was a member of a specific group, so that the victim is the group itself, not merely the individual himself.[147] So, these words don't affect the exhaustive scope of genocide.

Whereas, as for the crime of persecution, the ICC Statute covered more discriminatory grounds as: 'political, racial, national, ethnic, cultural, religious, gender, and other grounds that are universally recognised as impermissible under international law'.[148] The 'other inhuman acts' in Rome Statute leaves the door open to evolutionary

[144]Ibid,p.40
[145]ICTR, *Akayesu,* (Trial Chamber), September 2, 1998
[146]Schabas, William A., *An Introduction to the International Criminal Court,* p.40
[147]ICTR, *Prosecutor v. Niyitegeka,* Case No. ICTR-96-14 (Trial Chamber), May 16, 2003
[148]Article 7/1 (h) of the ICC Statute :

developments in international law. In view of ICTY, these other inhuman acts provide crimes against humanity with the flexibility to cover severe deprivation of fundamental rights which were not specified in this definition such as forcible transfer of civilian groups, sexual exploitation and enforced disappearances of persons.[149]

As additional criteria to those of genocide, there are political, cultural, gender and 'other' grounds under ICC Statute but under ICTY and ICTR Statutes, the scope is narrower than ICC definition of persecution. These are: 'political, racial and religious' grounds.

Under provisions of all Statutes, persecution contains the 'political' ground different from genocide. And as for genocide, a similar term; 'cultural genocide' can be assessed as an important indicator of physical genocide.[150]

c. Victims as Civilian or Combatant

Stemming from its unique definition, crimes of genocide can be committed against any individual, whether civilian or combatant. As for crime of persecution, at first sight, the texts of both ICTY and ICTR Statutes seem to require that, victim of this crime may only be 'civilian population' who have been attacked on discriminatory grounds due to their race, religion or political tendencies. This 'civilian population' requirement was preserved under Rome Statute as the same. Due to this textual approach, it is alleged by some authors that genocide may be committed against any individual, whether civilian or

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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;

[149]Bantekas, Ilias & Nash, Susan, *International Criminal Law*, p.386; see also Schabas, William A., *An Introduction to the International Criminal Court,* p.49

[150]Prosecutor v. Karadzic and Mladzic, 11 July 1996, para.94

military personnel, while crimes against humanity "may only be committed against 'civilians.[151]But, according to Cassese:

> Persecutions embrace actions that may not be prohibited by national legal systems. …such actions may take the form of acts other than murder, extermination, enslavement, or deportation. Furthermore, since no mention is made of the possible victims of persecutions, or rather, as it is not specified that such persecutions should target 'any civilian population', the inference is warranted not only any civilian group but also members of armed forces may be the victims of this class of crimes.[152]

Cassese alleges it is clear from Article 6(c) the victims of persecution don't have to be civilians; they may be military personnel as well. This approach was confirmed implicitly by the Dutch Special Court of Cassation in Pilz and by French courts in Barbie and Touvier.[153]

[151]Guenael Mettraux, Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, 43 Harv. Int'l L.J. 237, 295-96 (2002) ; see also Short, Jonathan M.H., Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court, Michigan Journal of Race and Law, Spring 2003, p. 3
[152]Cassese, Antonio, *International Criminal Law*, p. 85
[153]Cassese, Antonio, *International Criminal Law*, p. 89

CHAPTER THREE

ANALYSIS OF LEGAL FRAMEWORK ON THE CONSTITUTIVE ELEMENTS OF CRIMES AGAINST HUMANITY

3.1 Introduction

Genocide and war crimes have been codified in treaties, whereas Crimes Against Humanity (CAH) have evolved under customary international law.[1] Crimes against humanity were first charged under the Nuremberg Tribunal Charter.[2] The definition of CAH was set out in the Charter and the Nuremburg judgement. The UN General Assembly endorsed the concept of CAH in 1946.[3] The content of crimes against humanity has evolved since World War II through the jurisprudence of the ICTY, ICTR and ICC.

It is noteworthy to mention here that the current constitutive elements of crimes against humanity in international law and the process of multilateral negotiation necessitated a more precise and regulative approach of the understanding of concept in international practice. This arguably served to strengthen the definition and the basis for individual criminal responsibility for these acts. Article 7 of the ICC statute sets forth a modernized and clarified definition of crimes against humanity as a basis for sound international criminal prosecution at all times.

[1] *See* Robert Cryer, et al., An Introduction to International Criminal Law and Procedure, 230 – 233 (2010); or Commentary on the Rome Statute of the Criminal Court, 121 – 122 (Otto Triffterer ed., 1999) for a background to the development of crimes against humanity.
[2] Yale Law School, Charter of the International Military Tribunal, Constitution, *available at* http://avalon.law.yale.edu/imt/imtconst.asp (accessed 24 June 2011).
[3] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremburg Tribunal, G.A. Res. 95(I), UN Doc A/64/Add.1 (Dec. 11, 1946).

3.2 Analysis of the Constitutive Elements of Crimes Against Humanity

A crime against humanity is committed when:

(a) The accused commits a prohibited act;

(b) That is part of: an "attack"; which is "widespread or systematic" and "directed against any civilian population";

(c) And when there is a link or "nexus" between the acts of the accused and the attack.

The ICTY Statute requires that the attack be committed in the context of an armed conflict,[4] and the ICTR Statute requires that the attack have a discriminatory element.[5] Neither of these elements are required by the definition of crimes against humanity under customary international law. However, the following additional elements are required to go along with the commission of the crime against humanity:

i. Contextual Elements

A crime against humanity involves the commission of certain prohibited acts committed as part of a widespread or systematic attack directed against a civilian population. When committed within this context, what would have been an "ordinary" domestic crime, such as murder, becomes a crime against humanity.

[4] However, the ICTY has held that under customary international law, a connection with an armed conflict is not required. Dusko Tadic, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995, p.141, *See also* Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Trial Judgement, 26 July 2010, p. 2I8.

[5] See infra, section 7.2.2.1.7.

ii. An Attack

A person commits a crime against humanity when he or she commits a prohibited act that forms part of an attack.[6]

Factors to consider when determining whether an "attack" against a civilian population has taken place include: Were there discriminatory measures imposed by the relevant authority? Was there an authoritarian takeover of the region where the crimes occurred? Did the new authority in fact establish "governmental" structures? Did summary arrests, detention, torture, rape, sexual violence or other crimes take place? Did massive transfers of civilians to camps take place? Was the "enemy population" removed from the area?[7]

The concepts "attack" and "military attack" differ. A crime against humanity can occur when there is no armed conflict.[8] Thus, an attack is not limited to the conduct of armed hostilities or use of armed force. CAH can include mistreatment of a civilian population. The attack could also precede, outlast or continue during an armed conflict, without necessarily being part of it.[9] The attack does not need to involve the military or violent force.[10]

[6] *See, e.g.,* Jean-Paul Akayesu, Case No.ICTR-96-4-T, Trial Judgement, 2 Sept. 1998, p.205.
[7] Dragan Nikolic, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, TC, IT-94-2-R61, 20 Oct. 1995, p.27.
[8] Except at the ICTY, where crimes against humanity must be committed "in armed conflict, whether international or internal in character". ICTY Statute, Art. 5. This requirement was abandoned in the ICTR and ICC Statutes.
[9] Dragoljub Kunarac et al., Case No. IT-96-23-A, Appeal Judgement, 12 June 2002, p.86.
[10] Akayesu, T.J. Op.cit, pp.676 – 684.

ICTY and ICTR jurisprudence, and the Rome Statute, provide that there must be at least "multiple" victims or acts to be considered an attack directed against a civilian population.[11] The acts can be of the same type or different.[12]

At the ICC, an attack is "a campaign or operation carried out against the civilian population".[13]

iii. Directed Against any Civilian Population

"Directed against" requires that the civilian population must be the primary target of the attack, not just an incidental target.[14] Thus, the primary object of the attack is "any civilian population".[15]

"Any" highlights the fact that CAH can be committed against both enemy nationals and crimes by a state' own subjects.[16]

"Civilian" refers to non-combatants.

"Population" refers to a larger body of victims and crimes of a collective nature.[17] It is not required that an entire population of an area be targeted. It is enough to show that a certain number of individuals were targeted in the course of the attack, or that individuals were targeted in such a way that demonstrates that the attack was in fact

[11]Rome Statute of the International Criminal Court, Art. 7(2)(a); Dragoljub Kunarac et al., Case No. IT-96-23-T, Trial Judgement, 22 Feb. 2001, 415; Milorad Krnojelac, Case No.IT-97-25-T, Trial Judgement, 15 March 2002, 54.
[12] Clément Kayishema et al., Case No. ICTR-95-I-T, Trial Judgement, 21 May 1999, 122.
[13]"ICC Elements of Crimes" ICC-ASP/1/3 (adopted 9 Sept. 2002, entered into force 9 Sept. 2002), Introduction to Art.7 (ICC Elements of Crimes).
[14]Tihomir Blaskic, Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, 106.
[15]Kunarac et al., Op.cit, p.91.
[16]Cryer, Op.cit, p. 241.
[17]Duško Tadic, Case No.IT-94-1-T, Trial Judgement, 7 May 1997, 644.

directed against a civilian "population", rather than against a small and randomly selected number of individuals.[18]

Factors to determine whether the attack was directed against a civilian population include:

a) The means and methods used in the course of the attack;

b) The number of victims;

c) The status of the victims;

d) The discriminatory nature of the attack;

e) The nature of the crimes committed in the course of the attack;

f) The resistance to the assailants at the time; and

g) The extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[19]

The ultimate objective—such as restoring democracy—of a fighting force can be no justification for attacking a civilian population. Rules of IHL apply equally to both sides of a conflict, irrespective of who is the "aggressor", and the absolute prohibition under international customary and treaty law on targeting the civilian population precludes military necessity or any other purpose as a justification.[20]

[18]Kunarac *et al.*, AJ 90; StanislavGalic, Case No. IT-98-29-T, Trial Judgement, 5 Dec. 2003, 143; Krnojelac, TJ 56; Kunarac *et al.*, TJ 424-425; Mladen Naletilic et al., Case No. IT-98-34-T, Trial Judgement, 31 March 2003, 235; Akayesu, TJ 82; Georges A. N. Rutaganda, Case No.ICTR-96-3-T, Trial Judgement, 26 May 2003, 71; Kayishema, T.J. p.128.
[19]Blaskic, AJ, 106; Kunarac *et al.*, AJ 90.
[20]Moinina Fofana et al., Case No. SCSL-2003-11-A, Appeal Judgement, 28 May 2008, 247.

At the ICC, "civilian population" refers to people who are civilians, and not members of armed forces or other legitimate combatants.[21] The civilian population must be the primary target of the attack, not a secondary victim.[22]

iv. Relationship Between any Civilian Population and Military Targets

Since the primary object of the attack must be any civilian population, attacks that are directed primarily at military targets are excluded. To determine whether an attack was aimed at civilian or military targets, the court may consider whether or not the relevant party complied with the laws of war[23] (this does not mean that targeting civilians is lawful when justified by military necessity—there is an absolute prohibition on targeting civilians under international law[24]).

For example, in the *Mr. Ksic*case at the ICTY, crimes were directed against a group of people based on their perceived involvement in the armed forces and therefore were treated differently than the civilian population. The facts of this case involved wounded combatants being selected for execution and killed. These crimes were not crimes against humanity, however, even though they were committed just two days after the perpetrators had participated in a major attack on civilians in the same region. Since

[21]Geneva Conventions 1949 (adopted 12 Aug. 1949, entered into force 21 Oct. 1950) (GC I-IV), Common Art.3, and Additional Protocol I (adopted 8 June 1977, entered into force 7 Dec. 1978) (AP I) Arts. 43 and 50; Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, 82 (fn 74), citing Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009 78; *Kunarac et al.*, TJ 425.

[22]*Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute, p.82(fn 73), citing *Bemba Confirmation Decision* 77; *Kunarac et al.*, AJ 91-2; Milomir Stakic, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, 624; Mitar Vasiljevic, Case No.IT-98-32-T, Trial Judgement, 29 Nov. 2002, p.33.

[23]*Kunarac et al.*, Op.cit, p.91; Dragomir Miloševic, Case No. IT-98-29/1-A, Appeal Judgement, 12 Nov. 2009, pp. 54, 96, 127 – 128, 250.

[24]*Blaškic*, Op.cit, p.109.

the perpetrators acted with the understanding that their victims were members of the armed forces, they did not intend for their acts to form part of the attack on the civilian population and therefore no nexus existed.[25]

v. Relationship Between any Civilian Population and Combatants

Members of the civilian population are people who are not taking any active part in the hostilities.[26] The presence within that population of some individuals who do not come within the definition of civilians does not deprive the population of its civilian character. "Civilian population" describes the overall character of the population. A population is still considered "civilian" even if there are armed police or isolated soldiers in the group.[27] The population must be "predominantly" civilian.

The presence within a population of members of resistance groups, or former combatants who have laid down their arms, and of other non-civilians does not alter the civilian character of that population, as long as the population is "predominantly civilian".[28]

In order to determine whether the presence of soldiers or other non-civilians within a civilian population deprives the population of its "predominantly civilian" character, the number of soldiers or non-civilians, as well as whether they are on leave, may be considered.

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[25] Mile Mrksic et al., Case No. IT-95-13/1-A, Appeal Judgement, 5 May 2009, p.42.
[26] *See generally* Cryer, supra note 258 at p. 241 – 3; Tadic, TJ p.638; Blaškic, Op.cit pp.110, 113-5; PavleStrugar ("Dubrovnik"), Case No. IT-01-42-T, Trial Judgement, 31 Jan. 2005, p.282; Milan Martid, Case No.IT-95-11-A, Appeal Judgement, 8 Oct. 2008, pp.302-6, 308, 311, 313, 318-319, 346, 355.
[27] Kordid et al., op.cit p.50; StanislavGalid, Case No. IT-98-29-A, Appeal Judgement, 30 Nov. 2006, pp.136-137, *See also* VidojeBlagojevic et al., Case No. IT-02-60-T, Trial Judgement, 17 Jan. 2005, p.544.
[28] Blaškic, Op.cit pp.113 – 115; Mrkšic, Op.cit, p.35; Martic, Op.cit, p.313; Blagojevic et al., Op.cit, p.544.

Who are non-civilians? Article 50 of Additional Protocol I to the Geneva Conventions (AP I) contains a definition of civilians and civilian populations; its provisions "may largely be viewed as reflecting customary law"[29] and are used to determine who is a civilian and the civilian character of populations for the purposes of CAH.

Persons placed *hors de combat* remain members of the armed forces of a party to a conflict and are not civilians.[30] Members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status, even when not armed or in combat. Further, members of other militias and members of other volunteer corps (other than those forming part of the armed forces, mentioned above), including organised resistance groups cannot claim civilian status, provided that: they belong to a party of the conflict; they are commanded by a person responsible for his subordinates; they have a fixed distinctive sign recognisable at a distance; they carry arms openly; and they conduct their operations in accordance with the laws and customs of war.[31]

However, non-civilians, such as persons placed *hors de combat*, can still be the victims of an act amounting to a CAH if all other necessary conditions are met and in particular the act in question is part of a widespread or systematic attack against any

[29]Blaskic, Op.cit, p.110.
[30]Mrksic, Op.cit, p.35; Blaskic, Op.cit, p.110, 113-114; Dario Kordic et al., Case No. IT-95-14/2-A, Appeal Judgement, 17 Dec. 2004, p.97; Galic, Op.cit, fn 437.
[31] International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Art., 4., 12 August 1949, 75 UNTS 135, *available at* http://www.unhcr.org/refworld/docid/3ae6b36c8.html (accessed 27 June 2011).

civilian population. In other words, there is no requirement nor is it an element of CAH that each victim of the underlying crimes be a civilian.[32]

vi. Widespread or Systematic

"Widespread or systematic" describes the character of the attack, particularly its scale. "Widespread" refers to the large-scale nature of an attack, primarily reflected in the number of victims. There is no set number of victims that makes an attack "widespread". "Widespread" may include a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.[33]

"Systematic" refers to the organised nature of the acts of violence and the recurrence of similar criminal conduct on a regular basis.[34] It involves "a pattern or methodical plan"[35] that is "thoroughly organized and following a regular pattern".[36]

The requirement that the attack is "widespread" or "systematic" is disjunctive: only one must be proven. So a crime against humanity could be committed as part of a large-scale attack against a civilian population resulting in many deaths, or as part of regular and methodical violence or crimes with fewer victims.

Only the attack as a whole, not the accuser's acts, must be widespread or systematic.[37] In other words, the separate underlying prohibited acts do not need to be widespread or systematic (*i.e.* there is no requirement that the murders must be

[32]Martic, Op.cit, pp.306, 313.
[33]Akayesu, Op.cit, pp.579-580; Rutaganda, Op.cit, pp.67-69; Alfred Musema, Case No.ICTR-96-13, Trial Judgement, Jan. 27 2000, p. 204.
[34]Tadic, Op.cit, p.648; Kunarac et al., Op.cit, p.429; Elizaphan Ntakirutimana et al., Case No.ICTR-96-10-T and ICTR-96-17-T, Trial Judgement, 21 Feb. 2003, p.804.
[35]Tadic, Op.cit, pp.646-648.
[36]Akayesu, Op.cit, p.580.
[37]Blaškic, Op.cit, p.101; Kunarac et al., Op.cit, pp.93-96; Radosla v. Bradanin, Case No.IT-99-36-T, Trial Judgement, 1 Sept. 2004, pp.35-6.

widespread or systematic under a charge of murder as a crime against humanity), as long as the prohibited acts form part of an attack that is widespread or systematic.

Factors to consider when determining whether an attack is "widespread or systematic" include the: number of criminal acts; existence of criminal patterns; logistics and resources involved; number of victims; existence of public statements related to the attacks; existence of a plan or policy targeting the civilian population;[38] means and methods used in the attack; foreseeability of the criminal occurrences; involvement of political or military authorities; temporally and geographically repeated and coordinated military operations leading to same result; alteration of ethnic, religious, racial or political composition of overall population; establishment of new political or military structures in region; and adoption of various discriminatory procedures.[39]

vii. Policy and Organizational Requirement

Before the ICTY, it has been held that as a matter of customary law that it is not required to show that the attack was carried out as part of a policy or plan.[40] The existence of a policy or plan can be relevant to establish that the attack was widespread or systematic, or directed against a civilian population.[41]

[38] Previous ICTR jurisprudence held that a systematic attack encompassed acts done pursuant to a policy or plan; this was later rejected by the Appeals Chamber. Laurent Semanza, Case No. ICTR-97-20-A, Appeal Judgement, 20 May 2005, pp. 268-269; Kunarac *et al.*, Op.cit, p.98 (existence of policy or plan may be evidence going to other elements of the crime, but is not an independent legal element).
[39]Semanza, Op.cit, pp.268-269; Kunarac *et al.*, Op.cit, p.98; *Galic*, Op.cit, p.147; *Bradanin*, Op.cit, p.137; GoranJelisic, Case No. IT-95-10T, Trial Judgement, 14 Dec. 1999, p.53.
[40]Kunarac *et al.*, Op.cit, p.98; Blaskic, Op.cit, p.100.
[41]Kunarac *et al.*, Op.cit, p.98; Blaskic, Op.cit, p.100; *But see Situation in the Republic of Kenya*, Case No. ICC-01/09-01/1, Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, Pre-Trial Chamber II, 06 March, 2011; William Samoei Ruto et al., Case No. ICC-01/09-01/11, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", 15 March, 2011.

However, at the ICC, the attack must be committed "pursuant to or in furtherance of a State or organizational policy to commit such attack", and requires that "the State or organization actively promote or encourage such an attack against a civilian population".[42] It is not required that the policy be adopted by the highest level of the state; policies adopted by regional or local state organs could be sufficient.[43]

By a majority, a Pre-Trial Chamber at the ICC has held that non-state organisations can, for the purposes of Article 7(2) of the Rome Statute, devise and carry out a policy to attack a civilian population.[44] The following elements may be considered to determine, on a case-by-case basis, whether a group qualifies as an organisation under Article 7(2) as follows:

i. Whether the group is under a responsible command, or has an established hierarchy;

ii. Whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population;

iii. Whether the group exercises control over part of the territory of a state;

iv. Whether the group has criminal activities against the civilian population as a primary purpose;

v. Whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; and

[42]Rome Statute, Art.7(2), ICC Elements of Crimes (n 85), Introduction to Art. 7.
[43]*Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute, p.89 (fn 81), citing Tihomir Blaškic, Case No. IT-95-14-T, Trial Judgement, 3 March 2000, p.205.
[44]*Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute, p.92.

vi. Whether the group is part of a larger group, which fulfils some or all of the above mentioned criteria.

One trial panel at the Court of BiH has held that Article 172(2)(a) of the BiH Criminal Code required that an attack be committed "pursuant to or in furtherance of a State or organizational policy to commit such attack.[45] However, another trial panel noted that there is no requirement that the acts of the accused were supported by any form of "policy" or "plan" at the ICTY or in customary international law.[46]

viii. Nexus

The acts of the accused must be "part of"-and not simply coincide with-the widespread or systematic attack directed against a civilian population.[47] Except for extermination, the underlying offence need not be carried out against multiple victims in order to constitute a CAH.[48] Thus an act directed against a limited number of victims, or even against a single victim, may suffice, provided it forms part of a widespread or systematic attack against a civilian population.[49]

The nexus requirement has two elements the prosecution must prove:

i. The commission of an act that, by its very nature or consequences, is liable to have the effect of furthering the attack.

[45] 46Court of BiH, Momir Savic, Case No. X-KR-07/478, 1st Instance Verdict, 3 July 2009, p. 36 (p. 32 BCS) (relevant part upheld on appeal).
[46] Ibid.(p. 32 BCS) (relevant part upheld on appeal) referring to Kunarac et al., Op.cit, p.98.
[47] Tadic, Op.cit, pp.248-255; Kunarac et al., Op.cit, p.417; Kunarac et al., Op.cit, p.99.
[48] But the attack must include multiple acts, see section 7.2.2.1.3.
[49] Ferdinand Nahimana, Case No. ICTR-96-11A, Appeal Judgement, 28 Nov. 2007, p924; Blaškid, Op.cit, p.101; Kunarac et al., Op.cit, p.96.

ii. Knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack.[50]

Factors to determine whether a prohibited act of an accused forms "part of" an attack include: the characteristics; aims; nature, and consequences[51] of the act; The similarity between the accuser's act and the other acts forming the attack; The time and place of the acts, and how they relate to the attack;[52] and in particular; How the acts relate to the attack or further any policy underlying the attack.

The accuser's act must be *related to* the attack. A crime which is committed before, after or away from the main attack against the civilian population could still, if sufficiently connected, be part of that attack.[53]

The prohibited act must not, however, be an isolated act. An act would be regarded as an isolated act when it is so far removed from the attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.[54]

The acts of the accused need not be the same as other acts committed during the attack. For example, if an attack results in killings, and a person commits sexual violence as part of the attack, the person is guilty of a CAH of sexual violence, when the necessary contextual elements and nexus are satisfied.[55]

[50]Mrkšic, Op.cit, p.41; Kunarac et al., Op.cit, p.418; Kunarac et al., Op.cit, p.99.
[51] Laurent Semanza, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, p.326.
[52]See, e.g., Tadic, Op.cit, pp.629- 633.
[53]Mrkšic, Op.cit, p.41; Krnojelac, Op.cit, p.127.
[54]Mrkšic, Op.cit, p.41; Kunarac et al., Op.cit, p.100.
[55]Kayishema, Op.cit, p.122.

ix. *Mens Rea* and Knowledge of the Attack

In addition to the intent to commit the underlying crime (such as murder, persecution, torture), an accused must know of the broader context in which his actions occur, and more particularly, he must:

(a) know of the attack directed against the civilian population, and

(b) know that his criminal act comprises part of that attack or at least take the risk that his acts are part of that attack.[56]

An absence of such knowledge may suggest an ordinary crime or, depending on the circumstances, a war crime. Usually, a crime against humanity will be committed in the context of an attack that is well known, and an accused could not credibly deny knowing about the attack. Thus, knowledge can be proven by drawing inferences from relevant facts and circumstances.[57]

The *mens rea* relates to knowledge of the context, not motive.[58] A CAH may be committed for purely personal reasons.[59] The accused need not share the purpose or goal behind the attack:

> It is irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence

[56]Kunarac et al., Op.cit, p.02; Brđanin, Op.cit, p.38; Galic, Op.cit, p.148; Krnojelac, Op.cit, p.59; Kunarac et al., Op.cit, p. 434.
[57]MitarVasiljevic, Case No. IT-98-32-A, Appeal Judgement, 25 Feb. 2004, pp.20-28; International Criminal Court, Elements of Crimes, General Introduction, p.3 (9 Nov. 2002) available at http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Elements+of+Crimes.htm (accessed 27 June 2011).
[58]Tadic, Op.cit, pp.271-2.
[59]Ibid. at pp.252, 272-305.

> that he committed the acts for purely personal reasons could be indicative of a rebuttable presumption that he was not aware that his acts were part of that attack.[60]

x. *Mens Rea* in Relation to Discriminatory Grounds

The ICTY Appeals Chamber has ruled that discrimination is not a requirement for CAH in general—only in the case of persecution.[61] The ICTR Statute requires that CAH be committed because of discriminatory grounds. However, the ICTR Appeals Chamber has held that the discriminatory grounds restriction in the ICTR Statute applies only to that court and is not a requirement in customary international law.[62]

xi. Prohibited Underlying Acts or Underlying Overview

The ICTY and ICTR Statutes prohibit the following underlying offences that can constitute CAH: Murder; Extermination; Enslavement; Deportation; Imprisonment; Torture; Rape; Persecutions on political, racial and religious grounds; and Other inhumane acts.

The ICC has also incorporated the following acts under crimes against humanity: Sexual slavery; Enforced prostitution; Forced pregnancy; Other sexual violence; Enforced disappearance; and Apartheid.

Any of these acts can be a crime against humanity if it is part of the overall attack on civilians.[63] If it is committed on a very large scale, such as using biological weapons against a civilian population, it could by itself be considered the attack.[64]

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[60] Blaškic, Op.cit, p. 124; Kunarac et al., Op.cit, p.103.
[61] Tadic, Op.cit, pp. 282-305 (holding "[Customary international law does not presuppose a discriminatory or persecutory intent for all crimes against humanity); See also Blaškic, Op.cit, pp. 224, 260.
[62] Jean-Paul Akayesu, Case No. ICTR-96-4-A, Appeal Judgement, 1 June 2001, pp.461-9.
[63] Kunarac et al., Op.cit, p.96; Blaškic, Op.cit, p. 101.

The underlying acts do not have to be the same as the other acts committed during the attack. A person who rapes a woman during a forceful takeover of power could be guilty of the crime against humanity of sexual violence.

Some of the prohibited acts have special mental requirements, but in general, the perpetrator must have committed the act with intent and knowledge of the relevant circumstances.[65]

xii. Murder

"Murder" is unlawfully and intentionally causing the death of a human being.[66]

Mens rea– the perpetrator intends to kill, or intends to inflict grievous bodily harm likely to cause death but is reckless as to whether death ensues.[67] The appeals chamber has recognised that the *mens rea* includes both direct and indirect forms of intention.[68]

It is not required to recover the body to prove beyond a reasonable doubt that a person was murdered. The fact of a victim's death can be inferred circumstantially from other evidence.[69] One Trial Chamber also stated that circumstantial evidence is sufficient as long as "the *only* reasonable inference is that the victim is dead as a result of the acts or omissions of the accused".[70]

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[64]Blaškic, Op.cit, p.206.
[65]See, e.g., Rome Statute, Art. 30.
[66]Akayesu, Op.cit, p.589; Jelisic,Op.cit, p.35; Zoran Kupreškic et al., Case No.IT-95-16-A, Appeal Judgement, 23 October 2001, pp.560-1.
[67]Zejnil Delalic et al. ("Čelebici"), Case No. IT-96-21-T, Trial Judgement, 16 Nov. 1998, p.439; Akayesu, Op.cit, p.589; Dario Kordid et al., Case No. IT-95-14/2-T, Trial Judgement, 26 Feb. 2001, p.236.
[68]Pavle Strugar ("Dubrovnik"), Case No. IT-01-42-A, Appeal Judgement, 17 July 2008, p.270.
[69]Moinina Fofana et al. (CDF Case), Case No. SCSL-2003-11-T, Trial Judgement, 2 Aug. 2007, p.144, citing Krnojelac, Op.cit, p.326.
[70]Bradanin, Op.cit, p.385 (emphasis in the original).

The elements of "murder" as a crime against humanity are the same as "willful killing" as a war crime.

xiii. Extermination

The elements of the crime of extermination are:

(a) the killing of persons on a massive scale (*actus reus*); and

(b) the accuser's intent, by his acts or omissions of either: killing on a large scale; or the subjection of a widespread number of people; or the systematic subjection of a number of people;

(c) to conditions of living that would lead to their deaths (*mens rea*).[71]

xiv. Massive Scale: Difference Between Extermination and Murder

Extermination is murder on a massive scale. A person who murders someone within the context of mass killing can be guilty of extermination.[72] The ICTR appeals chamber has held that "extermination" differs from murder in that it requires an element of mass destruction, which is not required for murder".[73]

The term "mass", which can mean "large-scale", does not suggest a minimum number of killings[74] but should be determined on a case-by-case basis using a common sense approach.[75]

[71]Milomir Stakic, Case No.IT-97-24-A, Appeal Judgement, 22 March 2006, p.259.
[72]ICC Elements of Crimes, Art. 7(1)(b)(2); Kayishema, p.147.
[73]Elizaphan Ntakirutimana et al., Case No. ICTR-96-10-A and ICTR-96-17-A, Appeal Judgement, 13 Dec. 2004, p.516.
[74]Stakic, Op.cit pp.260-261; Ntakirutimana et al., p.516; Jean De DieuKamuhanda, Case No.ICTR-99-54A-T, Trial Judgement, 22 Jan. 2004, p.692; Juvénal Kajelijeli, Case No.ICTR-98-44A-T, Trial Judgement, 1 Dec. 2003, p.891; Ignace Bagilishema, Case No.ICTR-95-1T, Trial Judgement, 7 June 2001, p.87; Kayishema, Op.cit p.142.
[75]Kayishema, Op.cit p.145.

Extermination must also be collective, and not just directed towards singled out individuals (except, unlike in genocide, the accused does not need to intend to destroy a group or part of a group).[76]

The "mass" element means that evidence of the *actus reus* of extermination can be established through an accumulation of separate and unrelated incidents, or on an aggregated basis.[77] It is not required to precisely describe victims or designate victims by name.[78]

xv. *Actus Reus* of Extermination; Indirect or Remote Participation and Single Killing

Being involved in directly killing a person can constitute extermination. However, so can other acts or omissions. Any indirect act or omission, or cumulative acts or omissions, which directly or indirectly cause the death of the targeted group of individuals, can also constitute extermination.[79]

The accused's involvement in the killings can be remote or indirect participation.[80] Often persons with authority are therefore charged with extermination. In those cases, the accused, either because of their position or authority, could decide the fate of or had control over a large number of people.[81] However, it is not required that the prosecution

[76]Bradanin, Op.cit, p.390.
[77]Ibid, p.391; Radislav Krstic, Case No.IT-98-33-T, Trial Judgement, 2 Aug. 2001, p.501.
[78]Ntakirutimana et al., op.cit, p.518-9.
[79]Rutaganda, Op.cit, p.83; Brđanin, Op.cit, p.389; Athanase Seromba, Case No.ICTR-2001-66-A, Appeal Judgement, 12 March 2008, p.189.
[80]Rutaganda, Op.cit, p.81; Kayishema, Op.cit, p.146.
[81]Brđanin, Op.cit, p.390; Vasiljevic, Op.cit, pp.222, 227; Stakic, Op.cit, p.639.

prove that the person had *de facto* control. Also, it is important to remember that others—persons who do not have authority or control—can also be charged with extermination.[82]

Extermination also includes the creation of conditions of life that are calculated to cause the destruction of part of the population. That means the accused created circumstances that ultimately caused mass death, such as imprisoning a large number of people and withholding the necessities of life, food and medicine.[83]

There is inconsistent case law on whether responsibility for a single or small or limited number of killings is sufficient for a finding of extermination. ICTY and ICTR trial chambers have held that "responsibility for a single or a limited number of killings is insufficient".[84] In other cases, they have held that a perpetrator may be guilty of extermination if he kills, or creates the conditions of life that kills a single person, as long as he is aware that his act or omission forms part of a mass killing event.[85] For a single killing to form part of extermination, the killing must actually form part of a mass killing event.[86] A "killing event" exists when the killings have close proximity in time and space.[87]

For example, if numerous officers fire into a crowd killing everyone, and Officer X is a poor shot and kills only a single person, whereas Officer Y kills sixteen people,

[82]Stakic, Op.cit, pp.256-257, citing Ntakirutimana et al., Op.cit, p.539.
[83]Kayishema, Op.cit, p.146; Brđanin, Op.cit, p.389.
[84]Vasiljevic, Op.cit, p.228; Sylvestre Gacumbitsi, Case No.ICTR-01-64, Trial Judgement, 17 June 2004, p.309; André Ntagerura et al., Case No.ICTR-96-10T, Trial Judgement, 1 Sept. 2009, p.701.
[85]Kayishema, Op.cit, p.147; Bagilishema, p.88.
[86]Kayishema, Op.cit, p.49.
[87]Ibid

both will be guilty of extermination because they participated in the mass killing and were both aware that their actions formed part of the mass killing event.[88]

At the ICC, it seems that a single killing would be sufficient.[89]

Mens Rea

As stated by the ICTY:

> The *mens rea* standard for extermination is the same as the *mens rea* required for murder as a crime against humanity with the difference that 'extermination can be said to be murder on a massive scale'. The prosecution is thus required to prove beyond reasonable doubt that the accused had the intention to kill persons on a massive scale or to create conditions of life that led to the death of a large number of people. The *mens rea* standard required for extermination does not include a threshold of negligence or gross negligence: the accused's act or omission must be done with intention or recklessness (*doluseventualis*).[90]

a. No Need to Prove Plan or Policy

No proof is required of the existence of a plan or policy to commit extermination or that the killings were tolerated by the state.[91] The existence of such a plan or policy, or the existence of state tolerance, may be important evidence that the attack was widespread or systematic. If the accused had knowledge that his action is part of a vast murderous enterprise in which a larger number of individuals are systematically marked for killing or killed, it will be taken as evidence tending to prove the accused's knowledge that his act was part of a widespread or systematic attack against a civilian

[88]Ibid. at p.147.
[89]ICC Elements of Crimes, Art. 7(1)(b)(1).
[90]Bradnin, Op.cit, p.395; See also Stakic, Op.cit, pp.252-261; Krstic, Op.cit, p.495; Stakic, Op.cit, pp.638, 642.
[91]Sylvestre Gacumbitsi, Case No. ICTR-01-64-A, Appeal Judgement, 7 July 2006, p.84.

population.[92] However, knowledge of a vast scheme of collective murder is not an element required for extermination as a crime against humanity.[93]

b. Enslavement/Slavery

The definition of enslavement is based in part on the 1956 Slavery Convention. The elements of enslavement are:

1) The exercise of any or all of the powers attaching to the right of ownership over a person (*actus reus*), and
2) The intentional exercise of said powers (*mens rea*).[94]

The ICTY has held that the elements of enslavement as a crime against humanity are the same as the elements of slavery as a violation of the laws or customs of war.[95]

c. Relationship Between Accused and Victim

The nature of the relationship between the accused and victim is key to enslavement. Factors to be considered in determining the nature of the relationship include:[96] control of someone's movement; control of the physical environment; psychological control; measures taken to prevent or deter escape; force; threat of force or coercion; assertion of exclusivity; subjection to cruel treatment and abuse; control of sexuality; control of forced labour; and duration of that control.

[92]Bradanin, Op.cit, p.394; Radislav Krstic, Case No.IT-98-33-A, Appeal Judgement, 19 April 2004, p.225.
[93]Stakic, Op.cit, p.259.
[94]Kunarac et al., Op.cit, pp.116-124.
[95]Ibid, p.116;
[96]Ibid, pp.119-121, 356.

It is usually insufficient just to show that a person was held in captivity. There must be another indication of enslavement, such as exploitation, forced labour, sex, prostitution or human trafficking.[97]

d. Duration Not an Element

The duration of enslavement is not an element of the crime, but can be evidence that a person was enslaved.[98]

e. Torture or Ill-Treatment not Elements

The following passage about slavery equally applies to enslavement:

> Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. Even if all other elements which often accompany slavery, such as ill-treatment, starvation, or beatings, were not present or ignored, the fact of compulsory uncompensated labour would still constitute slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.[99]

f. Lack of Consent not an Element

Lack of consent is not an element of enslavement. However, it can be evidence of whether enslavement was committed.[100] Lack of resistance does not mean a person consented.[101] Circumstances that make it impossible to express consent may be sufficient to presume the absence of consent.[102]

[97] Ibid, p.542.
[98] Ibid, pp.121-356.
[99] Ibid, pp.119-121-356.
[100] Ibid, p.120.
[101] Ibid
[102] Ibid

g. Sexual Slavery

Sexual slavery[103] is not listed as a separate underlying crime at the ICTY and ICTR, but it is at the ICC and the SCSL. At the ICTY/ICTR, it is dealt with under enslavement.

At the ICTY and ICTR, corroboration is not legally required; corroborative testimony only speaks to weight. In terms of the intentional exercise of a power to the right of ownership, it is not required to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts.

h. Forced Labour

Forced labour can constitute enslavement, and is a factor that can be considered when determining whether enslavement was committed. The facts must establish that the victims had no real choice about whether they would work.[104] However, this evidence must be objective that is the victims' perception that they were forced to work is not sufficient to establish lack of consent.[105]

[103]Ibid. pp.122-268. Elements of the Slavery Convention and Human Trafficking Convention are of potential relevance to any sexual enslavement charge, as they are in relation to other "kinds" of enslavement; *See* Alex Tamba Brima et al. ("AFRC Case"), Case No. SCSL-04-16-A, Appeal Judgement, 22 Feb. 2008, pp.175-203 on sexual slavery and forced marriage at SCSL and in ICL generally.
[104]Krnojelac, Op.cit, p.359; See also Issa Hassan Sesay et al. (RUF Case), Case No. SCSL-04-15-T, Trial Judgement, 25 Feb. 2009, p.202.
[105]Milorad Krnojelac, Case No. IT-97-25-A, Appeal Judgement, 17 Sept. 2003, p.195; See also Sesay et al. (RUF Case), Op.cit, p.202.

i. Deportation

The elements of deportation are:

i. forced displacement of persons by expulsion or other forms of coercion from the area in which they are lawfully present, across a *de jure* state border or, in certain circumstances, a *de facto* border, contrary to international law (*actus reus*);

ii. with the intent to do so (*mens rea*).[106]

It is not required that the perpetrator intended to displace the individuals permanently. There is no requirement that a minimum number of persons are deported or displaced.[107] Moreover, the return of victims does not impact the perpetrator's criminal responsibility.[108]

j. Difference Between Deportation and Forcible Transfer

The offence of deportation is provided for in the ICTY Statute, whereas forcible transfer is prosecuted through "other inhumane acts".

Both "deportation" and "forcible transfer" consist of the forced displacement of individuals from the area in which they are lawfully present without grounds permitted under international law. The protected interests underlying the prohibition against deportation and forcible transfer are the same: the right of victims to stay in their home and community and the right not to be deprived of their property by being forcibly displaced to another location.[109]

[106]Stakic, Op.cit, pp.278, 279-307, 317.
[107]Ibid, p.685.
[108]Ibid, p.687.
[109]Stakic, Op.cit, p.277.

The distinction between the *actus reus* of "deportation" and "forcible transfer" is the destination of displacement. The appeals chamber has found that under customary international law, deportation consists of the forced displacement of individuals *beyond* internationally recognized state borders. In contrast, forcible transfer may consist of forced displacement *within* state borders.[110] When displacement occurs across a state border it is punishable as the CAH of deportation; when displacement occurs within a state border it is punishable as CAH of other inhumane acts through forcible transfer.[111] In the case of *De Jure vs De Facto Borders*. ICTY held:

> The default principle under customary international law with respect to the nature of the border is that there must be expulsion across a *de jure* border to another country […]. Customary international law also recognises that displacement from "occupied territory", as expressly set out in Article 49 of Geneva Convention IV and as recognised by numerous UN Security Council resolutions is also sufficient to amount to deportation [...]. Under certain circumstances displacement across a *de facto* border may be sufficient to amount to deportation. In general, the question of whether a particular *de facto* border is sufficient for the purposes of the crime of deportation should be examined on a case by case basis in light of customary international law.[112]

k. Deportation and Forcible Transport must be Unlawful

Deportation and forcible transfer occur when the displacement of the civilian population is unlawful. So, lawful deportations of aliens present in the territory of a state will not qualify.

[110]Ibid. at p278; See also Krstic, Op.cit, p. 521; Krnojelac, Op.cit, p.474; BlagojeSimic et al., Case No. IT-9509, Trial Judgement, 17 Oct. 2003, p122; Naletilic et al., Op.cit, p.670; Bradanin, Op.cit, p.540.
[111]Bradnin, Op.cit 544.
[112]Stakic, Op.cit, p.300.

Further, Geneva Convention IV Article 49 and AP II Article 17 allow total or partial evacuation of the population if their security or imperative military reasons so demand. However, Article 49 specifies that such evacuees must be transferred back to their homes as soon as hostilities in the area have ceased. Failing that, such evacuation may amount to the CAH of deportation or forcible transfer.[113]

Although displacement for humanitarian reasons is justifiable in certain situations, it is not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused's own unlawful activity.[114]

Assistance by humanitarian groups does not make the displacement lawful.[115]

l. Proof of Coercion

For deportation and forcible transfer, the displacement must take place under coercion.[116] The essential element in establishing coercion is that the displacement must be involuntary in nature,[117] where the persons concerned had no real choice.[118]

Genuine choice cannot be inferred from the fact that consent was expressed or a request to leave was made where the circumstances deprive the consent of any value.[119] An apparent consent induced by force or threat of force should not be considered to be

[113]Krstic, Op.cit, pp.524-7.
[114]Stakic, Op.cit, p.287.
[115]Stakic, Op.cit, p.683.
[116]Krnojelac, Op.cit, p.475; Naletilic et al., Op.cit, p.519; Stakic, Op.cit, p.682.
[117]Krstic, Op.cit, p.528; Krnojelac, Op.cit, p.475; Naletilic et al., Op.cit, p.519.
[118]Krnojelac, Op.cit, p.475; Bradnin, Op.cit, p.543.
[119]Stakic, Op.cit, p.279; Krnojelac, Op.cit, p.229.

real consent.[120] For example, fleeing in order to escape persecution or targeted violence is not a genuine choice.[121]

A lack of genuine choice may be inferred from, *inter alia*, threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will. These acts can include the shelling of civilian objects; the burning of civilian property; and the commission of the crime or threat to commit other crimes, including threats of a sexual nature. These crimes must be "calculated to terrify the population and make them flee the area with no hope of return".[122]

m. Imprisonment

Imprisonment as a CAH should be understood as arbitrary imprisonment, that is, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population.[123] The elements of the underlying offence of imprisonment as a CAH are the same as the elements of unlawful confinement as a war crime.[124]

The elements of imprisonment are:

1) an individual is deprived of his liberty;
2) the deprivation of liberty is imposed arbitrarily, meaning, no legal basis can be invoked to justify the deprivation of liberty;

[120] Slobodan Milosevic, Case No. IT-02-54-T, Trial Chamber Decision on Motion for Judgment of Acquittal, 16 June 2004, p.73.
[121] Krstic, Op.cit, p.530.
[122] Simic et al., Op.cit, p.126.
[123] Kordic et al., Op.cit, pp.115-6; See also Kordic et al., Op.cit, p.302.
[124] Simic et al., Op.cit, p.63.

3) the act or omission by which the individual is deprived of his physical liberty is performed by the accused or person(s) for whom the accused bears criminal responsibility; and

4) the accused has intent to deprive the individual arbitrarily of his physical liberty or has reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.[125]

The Rome Statute includes the term "or other severe deprivation of physical liberty" as part of the CAH of imprisonment to demonstrate that house arrest and other forms could constitute imprisonment.[126]

The deprivation must be arbitrary. There are many forms of lawful arrest that would not qualify, such as: lawful arrest and detention; conviction following trial; lawful deportation or extradition; quarantine; assigned residence during armed conflict; internment on security grounds during armed conflict; and or internment of prisoners of war.[127]

The ICTY has held that the deprivation of liberty must be without due process of law,[128] and the ICC Statute says that it must be "in violation of fundamental rules of international law".[129] However, it is recognised that small procedural errors would not be sufficient to constitute imprisonment. The ICC will evaluate the "gravity of conduct" that

[125]Krnojelac, Op.cit, p.115.
[126]Rome Statute, Art. 7.
[127] International Committee of the Red Cross (ICRC), Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949, Arts. 5, 42, 43, available at http://www.unhcr.org/refworld/docid/3ae6b36d2.html (accessed 28 June 2011); Third Geneva Convention, Arts. 21-32
[128]Kordic et al., Op.cit, p.302.
[129]ICC Elements of Crimes, Art. 7(1)(e)(1).

was in violation of fundamental rules of international law,[130] and the ICTY jurisprudence states that detention is arbitrary when "there is no legal basis […] to justify [it]".[131]

n. Torture

Torture, as defined in Article 1 of the 1984 Torture Convention (CAT), is prohibited by both conventional and customary international law and constitutes a norm of *jus cogens*.[132] The ICL definition is based on, but is not the same as, the CAT definition.

o. Elements

Various ICTY and ICTR judgements have considered torture as grave breaches of the Geneva Conventions, violations of the laws or customs of war (a separate category in the ICTY Statute) and as CAH.[133] Except at the ICC, the definition of torture remains the same regardless of the category of atrocity crime it is charged as.[134]

The elements of torture are:

(a) The infliction, by act or omission, of severe pain or suffering, whether physical or mental;

(b) The act or omission must be intentional; and

[130]Ibid., Art. 7(1)(e)(2).
[131]Krnojelac, Op.cit, p.14.
[132]Celebidi, Op.cit, pp.452-459; Anto Furundzija, Case No.IT-95-17/1-T, Trial Judgement, 10 Dec. 1998, pp.137-146, 153-157; Anto Furundzija, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000, p.111.
[133]See, e.g., Celebidi, TJ; Furundzija, TJ; Kunarac et al., TJ; Miroslav Kvocka et al., Case No. IT-98-30/1-T, Trial Judgement, 2 Nov. 2001.
[134]Bradanin, Op.cit, p.482. Regarding the ICC

(c) It must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.[135]

p. Severe Pain or Suffering

The seriousness of the pain or suffering sets torture apart from other forms of mistreatment.

In assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed.[136]

Relevant subjective criteria for assessing the gravity of the harm include: the physical or mental condition of the victim; the effect of the treatment; the victim's age, sex, state of health; or the victim's position of inferiority.[137]

Permanent injury is not a requirement for torture and evidence of the suffering need not be visible after the commission of the crime.[138]

q. Prohibited Purpose

Under customary international law it is not settled whether torture as a CAH requires the act to be committed with a specific purpose.[139] The ICTY and ICTR require

[135]Kunarac et al., Op.cit, pp.142-148 (clarifying Furundzija, Op.cit, p.111 and Celebidi, Op.cit, p.494; Fatmir Limaj et al., Case No. IT-03-66-T, Trial Judgement, 30 Nov. 2005, pp.234-240.
[136]Bradanin, Op.cit, p.484.
[137]Ibid.
[138]Kunarac et al., Op.cit, pp.149-150; Bradanin, Op.cit, pp.483-4.
[139]Cryer, p.252.

the purpose element. Indeed, ICTY and ICTR jurisprudence considers the purpose element as the distinguishing feature of torture as opposed to inhumane treatment.[140]

The CAT definition requires that the act be committed with a specific purpose, such as obtaining information or a confession from the victim or a third person, punishing the victim for an act the victim or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind. This is not an exhaustive list.

Moreover, the prohibited purpose does not need to be the only reason for the torture, but it must be part of the motive.[141] If one prohibited purpose is fulfilled by the conduct, it is immaterial if the conduct was also intended to achieve another purpose (even of a sexual nature).[142]

The ICC Elements of Crimes requires the "purpose" element with respect to torture as a war crime but not as a crime against humanity.[143]

r. Official Sanction not an Element of Torture in ICL

Article 1 of the CAT requires that torture be committed "with the consent or acquiescence of a public official or other person acting in an official capacity". This constitutes customary international law in so far as states and their conduct are concerned. It is based on human rights law, and the idea that human rights are violated by states or government.

[140]Akayesu, Op.cit, pp.593-5; Celebici, Op.cit, p.459; Furundzija, Op.cit, p.161; Krnojelac, Op.cit, p.180.
[141]Kunarac et al., op.cit, p.155, Kvocka et al., Op.cit, p.153; Celebidi, Op.cit, p.470.
[142]Celebici, Op.cit, p.470-472; Bradanin, Op.cit, p.486-7; Kunarac et al., Op.cit, p.155.
[143] ICC Elements of Crimes, fn 14 (stating "It is understood that no specific purpose need be proved for this crime").

However, outside the CAT framework, there is no public official requirement under customary international law relating to the criminal responsibility of an individual for torture.[144] There is no requirement that the perpetrator is a public official, or that torture was committed in the presence of an official. The ICC does not require a link between an official and the act of torture.[145] It is the nature of the act that matters, not the perpetrator's relationship to the state.

s. Custody and Control (ICC)

At the ICC, there is an additional requirement that the victim be in the "custody and control" of the perpetrator.[146]

3.3 Acts Constituting Torture, and Rape and Sexual Abuse as Torture

Both acts or omissions can constitute torture. Omissions may provide the requisite material element, provided that the mental or physical suffering caused meets the required level of severity and that the omission was intentional and not, when judged objectively, accidental.[147]

The following acts have been found to constitute torture:[148] beatings; extraction of nails, teeth, etc.; burns; electric shocks; suspension; suffocation; exposure to excessive light or noise; administration of drugs in detention or psychiatric institutions; prolonged denial of rest or sleep; prolonged denial of food; prolonged denial of sufficient hygiene; prolonged denial of medical assistance; total isolation and sensory deprivation; being

[144]See, e.g., Kunarac et al., Op.cit, p.142-8; Miroslav Kvocka et al., Case No. IT-98-30/1-A, Appeal Judgement, 28 Feb. 2005, p.284.
[145]ICC Elements of Crimes, Art. 7(2)(e).
[146]Ibid., Art. 7(1)(f)(2).
[147]Čelebici, Op.cit, p.468.
[148]See, e.g., Celebici, Op.cit, pp.461-469; Furundzija, Op.cit, p.113.

kept in constant uncertainty in terms of space and time; threats to torture; the killing of relatives; total abandonment; simulated executions; being held incommunicado; rape; sexual aggression; rubbing of a knife against a woman's inner thighs and stomach, coupled with a threat to insert the knife into her vagina; being paraded naked in humiliating circumstances; and being forced to watch someone being sexually assaulted.

Acts of torture embrace all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity.[149]

Some acts *per se* establish the requisite level of suffering to qualify as torture. Rape is such an act.[150] Severe pain or suffering can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering; sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisationas an act of torture.[151] It should be noted that other acts of sexual violence can be charged as either persecution or other inhuman acts.[152]

[149]Furundzija, Op.cit, p.186.
[150]Kunarac et al., Op.cit, pp.150-1.
[151]Celebici, Op.cit, pp.495-496; Bradanin, Op.cit, p.485; Kunarac et al., Op.cit, pp.150-1; Akayesu, Op.cit, p.596; Furundzija, Op.cit, pp.163-171.
[152] Milan Milutinovid et al. ("Sainovid et al.".), Case No. IT-05-87-T, Trial Judgement, 26 Feb. 2009, pp.194-201.

a. Rape

The *actus reus* of the crime of rape at the ICTY is:

a) the sexual penetration, however slight: of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or; of the mouth of the victim by the penis of the perpetrator,[153]

b) without the consent of the victim.[154]

At the ICTY, the *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[155]

The ICC Elements of Crimes defines the crime of rape is defined as:

a) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight: of any part of the body of the victim or of the perpetrator with a sexual organ, or; of the anal or genital opening of the victim with any object or any other part of the body.[156]

b) By force, or

c) By threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[157]

[153]Kunarac et al., Op.cit, p.127.
[154]Ibid. at p.129; See also Cryer, p.254 – 255. Early ICTY jurisprudence applied a coercion requirement, but after conducting an analysis of various legal systems, it was established by the Appeals Chamber that lack of consent was the correct element.
[155]Kunarac et al., Op.cit, p.127; Stakic, Op.cit, p.755; Gacumbitsi, Op.cit, p.147-157.
[156]ICC Elements of Crimes, Art. 7(1)(g)-1(1).
[157]Ibid., Art. 7(1)(g)-2(2).

The *mens rea* is controlled by Article 30 of the Rome Statute. This means the perpetrator must have acted with intent and knowledge—the perpetrator must have intended to penetrate the victim's body, and was aware that the penetration was by force or threat of force. However, nothing in the Elements or Statutes indicates that the perpetrator needed to have any knowledge regarding the consent of the victim.

The definition of the conduct is more gender-neutral and broad than at the ICTY. However, the "coercion" requirement could be more complicated to prove than the simpler requirement of lack of consent. Notably, the ICC RPE includes rules of evidence related to consent, so it is possible that the ICC judges could conclude that the Elements of Crimes do not reflect a correct reading of the Rome Statute.

The same definition of rape applies as a crime against humanity and as a war crime. Consent must be given voluntarily, as the result of the victim's free will, assessed in the context of the surrounding circumstances.[158]

Force or threat of force may be relevant to demonstrate a clear lack of consent.[159] While force or threat of force provides clear evidence of non-consent, it is not an element *per se* of the crime of rape at the ICTY. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.[160]

[158]Kunarac et al., Op.cit, p.460; Kunarac et al., Op.cit, p.128.
[159]Ibid, p.129.
[160]Ibid.; Stakic, op.cit, p.755.

b. No Need to Prove Resistance

There is no requirement that the victim provide continuous resistance in order to provide adequate notice to the perpetrator that the sexual activity is non-consensual. However, evidence of resistance could support a finding that the sexual penetration occurred without the consent of the victim and that the perpetrator knew that it occurred without consent.[161]

c. Persecutions on Political, Racial and Religious Grounds

Persecution is defined as an act or omission which: discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds (*mens rea*).[162]

At the ICTY and ICTR, grounds for discrimination can be political, racial or religious. In addition to these, the Rome Statute includes national, ethical, cultural, or gender or "other grounds that are universally recognized as impermissible under international law".[163]

Although persecution often refers to a series of acts, at the ICTY a single act may be sufficient, as long as this act or omission discriminates in fact and was carried out deliberately with the intention to discriminate on one of the listed grounds.[164] However,

[161]Kunarac et al., Op.cit, p.128-129.
[162]Blaskic, Op.cit, p.131; Krnojelac, Op.cit, p.185; Bradanin, Op.cit, p.992.
[163]Rome Statute, Art. 7(1)(b).
[164]Vasiljevic, Op.cit, p.113; Blaskic, Op.cit, p.135.

the Rome Statute requires that the persecution be committed in connection with at least another crime against humanity or crime within the jurisdiction of the ICC.[165]

d. Discriminatory Intent

The crime of persecution derives its unique character from the requirement of a specific discriminatory intent. It is insufficient for the accused to be aware that he is in fact acting in a discriminatory way; he must consciously intend to discriminate on one of the listed bases.[166]

e. Discriminatory Nature of the Act

A discriminatory act exists where a person is targeted on the basis of religious, political or racial considerations, *i.e.* for his membership in a certain victim group that is targeted by the perpetrator. It is not necessary that the victim belong to the group targeted by the perpetrator.[167] However, it must be established that the act did in fact discriminate against the person based on one of these grounds.

f. Acts Amounting to Persecution

Persecution as a CAH can encompass various forms of conduct. Acts amounting to persecution may include any of the acts listed as CAH. However, they can also include other acts which rise to the same level of gravity or seriousness, when committed with discriminatory intent,[168] including other crimes listed in the ICTY statute as well as acts which are not necessarily crimes in and of themselves. This approach is to be

[165]Rome Statute, Art. 7(1)(h).
[166]Krnojelac, Op.cit, p.435; Kordic et al., Op.cit, p.212.
[167]Krnojelac, Op.cit, p.185; Bradanin, Op.cit, p.993.
[168]Blaskic, Op.cit, pp.138-9.

distinguished from that taken at in the Rome Statute, which requires a nexus with another crime within the jurisdiction of the ICC.

Acts which have been found to amount to persecution include:[169]

(a) Deportation, forcible transfer or displacement;

(b) Destruction of property, including religious buildings;[170]

(c) Attacks in which civilians are targeted, as well as indiscriminate attacks on cities, towns, and villages;

(d) Detention of civilians who were killed, used as human shields, beaten, subjected to overcrowding, physical or psychological abuse and intimidation, inhumane treatment or deprived of adequate food and water;

(e) Humiliating and degrading treatment;

(f) Any sexual assault falling short of rape, embracing all serious abuses of a sexual nature;[171]

(g) Denial of fundamental rights such as the rights to employment, freedom of movement, proper judicial process and proper medical care;

(h) Violations of human dignity such as harassment, humiliation and psychological abuses

(i) Hate speech, on the basis that it violates the right to human dignity and the right to security; and

[169]See, e.g., Bradanin, Op.cit, p.994, 1005, 1012, 1014, 1023, 1025, 1049; Blaskic, Op.cit p.149, 153, 155, 159; Stakic, Op.cit, p.757; Kvocka et al., Op.cit, pp.323-5; Nahimana, Op.cit, pp.986-7.
[170] Before the ICTY it has been held that destruction of cultural and religious property can constitute persecution even though it is not specifically listed under Art. 5 of the Statute, See Vlastimir Dordevid, Case No. IT-05-87/1-T, Trial Judgement, 23 Feb. 2011, pp.1770-1774; Kordic et al., Op.cit, p.834.
[171]See, e.g., Milutinovic, Op.cit, pp.194 – 201.

(j) Forced labour, excluding work (even if forced) required or permitted in the ordinary course of lawful detention, but including forced labour assignments which require civilians to take part in military operations or which result in exposing civilians to dangerous or humiliating conditions amounting to cruel and inhumane treatment.[172]

At the ICTY, acts of persecution, considered separately or together, must reach the level of gravity of other crimes against humanity.[173] In determining whether this threshold is met, acts should not be considered in isolation but should be examined in their context and with consideration of their cumulative effect. Separately or combined, the acts must amount to persecution, though it is not required that each alleged underlying act be regarded as a violation of international law.[174] Conversely, the mere fact that an infringement of rights was committed with discriminatory intent does not mean it is grave enough to be considered persecution.[175] It is not clear whether the ICC will adopt this same approach or whether the Rome Statute requirements of "severe" deprivation and a connection to other crimes will be interpreted differently.

[172]*See, e.g.,* Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, ETS 5, Art. 4(3), *available at* http://www.unhcr.org/refworld/docid/3ae6b3b04.html (accessed 28 June 2011); *Krnojelac*, Op.cit, p.200; Third Geneva Convention, Art. 52(2); Simid et al., Op.cit, pp. 91-93.
[173]Blaskic, Op.cit, p.135.
[174]Krnojelac, Op.cit, Separate Opinion, pp.5-7; Bradanin, Op.cit, p.995.
[175]Ibid. pp.135-138; Naletilic et al., Op.cit, p.635.

g. No Requirement of Discriminatory Policy

There is no requirement that a discriminatory policy exists or that, in the event that such a policy is shown to have existed, the accused needs to have taken part in the formulation of such discriminatory policy or practice.[176]

h. Other Inhumane Acts

The ICTY Appeals Chamber stated that ICTY Statute Article 5(i), covering other inhumane acts, was "deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition".[177] Other inhumane acts include those crimes against humanity that are not otherwise specified in the ICTY and ICTR Statutes, but are of comparable seriousness.

The elements of other inhumane acts are:

(a) The occurrence of an act or omission of similar seriousness to the other enumerated acts;

(b) The act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and

(c) The act or omission was performed deliberately by the accused or person(s) for whose acts and omissions he bears criminal responsibility.[178]

[176]Bradanin, Op.cit, p.996.
[177]Stakic, Op.cit, pp.315-6.See also Brima, Op.cit, p.183.
[178]Kordic et al., Op.cit, p.117; Galic, Op.cit, p.152; See also Naletilic et al., Op.cit, p.247; Kayishema, Op.cit, pp.150-1, 154; Akayesu, Op.cit, p.585.

In the Rome Statute, there is a threshold that other inhuman acts must: be of similar character to other prohibited acts; and cause great suffering or serious injury to body or to mental or physical health.[179]

Examples of other inhumane acts are:[180]

a) Sexual violence (which is not limited to physical invasion of the body and may include acts which do not involve penetration or even physical contact, *e.g.* forced undressing of women in coercive and humiliating circumstances);
b) Forced undressing of women and marching them in public;
c) Beatings; and
d) Forcible transfer, that is the forced displacement of civilians which may occur within a state border; this displacement need not be permanent.

Some of these examples, recognised by the ICTY as "other inhumane acts", have been specifically defined by the ICC as crimes against humanity.

i. Assessing Seriousness

In order to assess the seriousness of an inhumane act or omission, consideration must be given to all the factual circumstances of the case. These may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex, and health, and the physical, mental, and moral effects of the act or omission upon the victim.[181]

[179]Rome Statute, Art. 7(1)(k).
[180]See, e.g., Akayesu, Op.cit, p.697; Simic et al., Op.cit, p.78; Stakic, Op.cit, p.317; Brima Op.cit, p.184.
[181]Galic, Op.cit, p.153; Krnojelac, Op.cit, p.131; Celebici, Op.cit, 536; Kunarac et al., Op.cit 501.

j. *Mens Rea*

The offender must intend to inflict inhumane acts. At the time of the act or omission, the offender had the intention to inflict serious physical or mental suffering or to commit a serious attack upon the human dignity of the victim, or knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity.[182] It is not required that the accused considered his actions "inhumane".[183]

k. Sexual Slavery

Sexual slavery is not a separate crime at the ICTY and ICTR, although cases that could qualify as sexual slavery have been tried under charges of enslavement.[184] Sexual slavery, although a separate crime, is a form of enslavement. The first element of sexual slavery is therefore the same as enslavement, and the second element reflects the sexual component of the crime:

a) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

b) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.[185]

Sexual slavery encompasses human trafficking.[186] The drafters of the Rome Statute noted that sexual slavery could involve more than one perpetrator as part of a

[182]Ibid, p.153.
[183]Celebici, Op.cit, p. 543.
[184]See, e.g., Kunarac, Op.cit, p.119; Kunarac, Op.cit, pp.539-543 .
[185]ICC Elements of Crimes, Art. 7(1)(g)-2 fn 18.

common criminal purpose.[187] It was also noted that the deprivation of liberty could also include forced labour.[188] Sexual slavery could also include forced marriages. The Court of BiH has referred to the Rome Statute in articulating a definition of sexual slavery.[189]

l. Enforced Prostitution

The Geneva Conventions included enforced prostitution as an attack on a woman's honour (GC IV 1949) or as an outrage upon personal dignity (AP I). In the Rome Statute, it was included as a separate crime. The elements of enforced prostitution are:

a) The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

b) The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.[190]

[186]Ibid.
[187]Ibid. at 7(1)(g)-2, fn 17.
[188]Ibid. at 7(1)(g)-2 fn 18.
[189]See Court of BIH, Predrag Kujundzic, Case No. X-KR-07/442, 1st Instance Verdict, 30 Oct. 2009, p.512 (relevant part upheld on appeal).
[190]ICC Elements of Crimes, Art.7 (1) (g)-3.

m. Forced Pregnancy

Forced pregnancy is a crime against humanity in the Rome Statute. It was also recognised in the Vienna Declaration and Programme of Action and the Beijing Declaration and Platform for Action.[191]

To convict a person of forced pregnancy, the prosecutor must prove that the perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.[192] The law does not affect national laws relating to pregnancy and abortion,[193] but reflects cases where captors have impregnated women and held them until it was too late to have an abortion.[194]

n. Enforced Sterilization

No treaty before the Rome Statute recognised enforced sterilization as a crime against humanity and war crime. The ICC Elements of Crimes defines the crime as:

a) The perpetrator deprived one or more persons of biological reproductive capacity.

b) The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.[195]

[191] Vienna Declaration, World Conference on Human Rights, UN Doc. A/CONF.157/24 (1993) Part II, p.38; Beijing Declaration and Platform for Action, Fourth World Conference on Women, 15 Sept. 1995, A/CONF.177/20 (1995) and A/CONF.17720/Add.1 (1995) Chapter II, p.115.
[192] ICC Elements of Crimes, Art.7 (1) (g)-4.
[193] ICC Rome Statute, Art. 7(2)(f).
[194] *See, e.g.*, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), transmitted to the Security Council by a letter from the Secretary-General to the President of the Security Council dated 27 May 1994 (S/1994/674), pp.248 – 250.
[195] ICC Elements of Crimes, Art.7 (1) (g)-5.

The drafters to the Rome Statute did not mean to include non-permanent birth-control methods within the definition of this crime. They also recognised that genuine consent is not given when the victim has been deceived.[196]

o. Sexual Violence

When considering crimes against humanity, an ICTY trial chamber has recognised that "'sexual assault' falls within various provisions safeguarding physical integrity (…)" and could also constitute an "outrage upon personal dignity", which the chamber considered "a violation of a fundamental right".[197] The chamber also noted that "sexual assault offences may reach the requirement of gravity equal to that of other crimes against humanity enumerated in Article 5 of the (ICTY) Statute".[198]

The chamber found that the elements of sexual assault as a form of persecution as a crime against humanity are:

a) The physical perpetrator commits an act of a sexual nature on another, including requiring that person to perform such an act.

b) That act infringes the victims' physical integrity or amounts to an outrage to the victim's personal dignity.

c) The victim does not consent to the act.

d) The physical perpetrator intentionally commits the act.

[196] *Ibid.* at fns 19 – 20.
[197] Milutinovic, op.cit, p.192.
[198] Ibid, p.193.

e) The physical perpetrator is aware that the act occurred without the consent of the victim.[199]

"Other sexual violence of comparable gravity" is a crime against humanity in the Rome Statute. The ICC defines the crime as:

(1) The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

(2) Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.

(3) The perpetrator was aware of the factual circumstances that established the gravity of the conduct.[200]

p. Enforced Disappearance

Enforced disappearance has been recognized as a crime against humanity in several international declarations and conventions.[201] ICC definition of Enforced Disappearance is understood under the following factors:

1. The perpetrator:

[199] Ibid, p.201
[200] ICC Elements of Crimes, Art. 7(1)(g)-6.
[201] Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49 (1992); Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994); International Convention for the Protection of All Persons from Enforced Disappearance, E/CN.4/2005/WG.22/WP.1/Rev.4 (2005).

(a) Arrested, detained or abducted one or more persons; or

(b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.

2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or

(b) Such refusal was preceded or accompanied by that deprivation of freedom.

3. The perpetrator was aware that:

(a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or

(b) Such refusal was preceded or accompanied by that deprivation of freedom.

4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.

5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.

6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

The ICC definition does not require that the perpetrator be involved in both detaining and refusing information about the victim. A person can be guilty of enforced

disappearance if they either detained a person, knowing it was likely that there would be no acknowledgment or information provided, or if they refused acknowledge a detention or provide information about it, knowing that a detention had likely taken place.

The underlying act of detention can include maintaining a detention that has already taken place, which could have been lawful. If the perpetrator maintains a detention in these circumstances, the perpetrator would have to know that the refusal to acknowledge or give information about the arrest had already taken place.[202]

q. Apartheid

The Rome Statute also includes apartheid as a crime against humanity. Although apartheid has long been recognised as a crime against humanity,[203] the ICC definition broadened the crime to include situations beyond that which occurred in South Africa. ICC Definition of Apartheid

1. The perpetrator committed an inhumane act against one or more persons.
2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.
3. The perpetrator was aware of the factual circumstances that established the character of the act.

[202] ICC Elements of Crimes, fns 25 – 28.
[203] *See, e.g.,* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968); UN General Assembly, International Convention on the Suppression and Punishment of the Crime of Apartheid ("Apartheid Convention"), 30 November 1973, A/RES/3068(XXVIII), *available at* http://www.unhcr.org/refworld/docid/3ae6b3c00.html (accessed 28 June 2011).

4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.

"Inhumane acts" in the context of apartheid can include murder, torture, arbitrary detention, persecution, conditions calculated to cause the destruction of a group or legislative measures to prevent a group's participation in politics, society, or economic and cultural activities, etc. At the ICC, apartheid is a specific intent crime, requiring that the perpetrator intend to maintain a regime of systematic oppression through the commission of inhumane acts.

War crimes and CAH may overlap. For example, a mass killing of civilians can be both a war crime and CAH. The main differences between a war crime and CAH include:

1. War crimes require a nexus to an armed conflict, whereas a CAH do not (despite CAH often being committed during armed conflicts), but CAH require an attack on civilian populations;
2. War crimes focus on the protection of certain protected groups, including enemy nationals, whereas CAH protect victims regardless of nationality of affiliation to the conflict; and
3. War crimes regulate conduct on the battlefield and military objectives, whereas CAH regulate actions against civilian populations.

3.4 Differences between the ICC Rome Statute, ICTY and ICTR Statutes on Crimes Against Humanity, Genocide and War Crimes

The drafters of the Rome Statute believed that the definitions of crimes over which the ICC would exercise Jurisdiction would reflect existing international norms. For this reason, they looked to existing relevant treaties and customary international law when developing the definitions of crimes. The most relevant treaties were the Four Geneva Conventions of 1949 and their Additional Protocols of 1977, the Torture Convention, the Genocide Convention, the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda and other conventions dealing with specific crimes such as enslavement and apartheid. In some cases, the definitions of crimes adopted in the Rome Statute reflect a conservative interpretation of the law established by these conventions and forming part of customary international law. In other cases, they reflect a more expansive interpretation of international law in 1998 when the Rome Statute was negotiated. This part of the thesis describes some of the more significant differences in definitions of international crimes as follows:

i. Crimes against humanity

Unlike the Nuremberg Charter, no nexus to an armed conflict is required for crimes against humanity under the Rome Statute. This is an important and positive development in international law and domestic crimes against humanity laws should not include such a nexus. The approach taken in the Rome Statute reflects the fact that crimes against humanity are often committed against civilians in the absence of hostilities and

that the seriousness of the crime is not affected by whether it is committed in peace or war time.

In another positive development, the Rome Statute definition, unlike the definition in the Nuremberg Charter and the Statute of the International Criminal Tribunal for Rwanda (ICTR), does not require that the perpetrator have a discriminatory intent when committing a crime against humanity. This means that the attack against civilians that is the crime against humanity need not be committed against a particular group sharing certain characteristics such as nationality or religion.

ii. Torture

Under the Torture Convention, the definition of "torture" requires that the act of torture be committed for a purpose, for example obtaining a confession or as a punishment. It also requires that the torture be committed "by or at the instigation of or with the consent or acquiescence of a public official or a person acting in an official capacity." The Rome Statute definitions of torture, whether as a crime against humanity or a war crime, does not require either of these conditions to be met. The Rome Statute clearly includes torture when committed by persons with no connection to the state. Furthermore, there is no requirement that torture be committed for a purpose. For example, article 7(2)(e), defining torture as a crime against humanity, covers acts that are purposeless or merely sadistic.

The Rome Statute definitions of torture, better reflects the reality that torture is committed frequently by people who are not "officials" and who may have no purpose in

torturing someone than to inflict severe pain and suffering. States parties implementing these crimes into their law should follow the Rome Statute definition.

iii. Enslavement

The definition of enslavement in the Rome Statute builds on the 1926 Slavery Convention definition. However, article 7(2)(c) of the Rome Statute adds an element not present in the Slavery Convention definition. The Rome Statute defines enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children." The explicit reference to trafficking in women and children reflects developments in international law since the Slavery Convention was adopted. In particular, it reflects the growing number of women and children who are trafficked and the international community's attempts to stop this crime.

iv. Persecution

Article 6(c) of the Nuremberg Charter included the crime of persecution, defining it by reference to certain grounds on which persons could be persecuted (i.e. political, racial or religious). Those grounds reflected the basis for persecution that occurred in the Second World War and which the Nuremberg trials were to address. The Rome Statute definition in article 7(1)(b) provides that persecution can be committed "against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds universally recognized as impermissible under international law." This expanded list of grounds for persecution better reflects the pattern that persecution has taken since the end of the Second World War. It is appropriate that States

that incorporate this crime against humanity into their domestic law include a non-exhaustive list of grounds for which persons may be persecuted.

Article 7 (1)(h) also provides that, for the purposes of the ICC, persecution must occur in connection with an act referred to in article 7(1) or any crime within the Jurisdiction of the ICC. Importantly, this language differs from the Nuremberg and Tokyo Charters. Those Charters required that persecution be committed in connection with another crime within their respective Tribunal's Jurisdiction. The Rome statute provides an alternative. Persecution must occur either in connection with another crime within the Jurisdiction of the ICC or in connection with any act referred to in article 7(1). This article sets out all the acts that could amount to a crime against humanity for the purposes of the ICC. This means that persecution in connection with a single act of, say, torture may fall within the Rome Statute definition even if the single act of torture would not itself amount to a crime against humanity.

v. Enforced disappearance

There are two major differences between the definition of enforced disappearance in article 7(2) (i) of the Rome Statute and those found in other international instruments. The first is that the Rome Statute definition provides that, in addition to states, political organizations should be held responsible for the crime of enforced disappearance. Until the adoption of the Rome Statute, enforced disappearances could only be committed by states or with their approval or acquiescence. Secondly, the Rome Statute definition adds the concept of detention for a "prolonged" period of time to distinguish enforced disappearance form other unlawful deprivations of liberty.

Article 7(2) (i) defines the crimes against humanity of enforced disappearance as:

> The arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of , a State or a political organisation, followed by a refusal to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

vi. War Crimes

Article 8 of the Rome Statute gives the ICC Jurisdiction over war crimes when committed during international conflicts (articles 8(2)(a) and (b) and when committed during non-international armed conflicts (articles 8(2)(c) through (f).

Article 8(2)(a) of the Rome Statute, defines war crimes as grave breaches of the Geneva Conventions of 12 August 1949, namely any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention." Eight acts are listed. These largely follow the provisions in the Geneva Conventions.

Article 8(2)(b) defines war crimes as "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts." Twenty six acts are enumerated.

In most respects, the definitions of war crimes committed in international armed conflict in the Rome Statute are consistent with existing international law, in particular with the definitions in the four 1949 Geneva conventions, and the Hague Regulations.

War crimes committed in non-international armed conflicts are addressed in international law. Subparagraph 8(2)(c) follows common article 3 of the four Geneva

Conventions. Subparagraph 8(2)(e) draws on The Hague Regulations, the Geneva conventions, and Additional Protocol II. Subparagraphs 8(2)(d) and (f) limit the scope of the ICC's Jurisdiction over acts committed in non-international conflicts. They exclude internal disturbances and tensions, riots, isolated and sporadic acts of violence and other acts of a similar nature.

The following explains some of the more important differences in the war crimes definitions.

i. A showing of serious injury to body or health

Three of the crimes listed in article 8(2)(b) of the Rome Statute are found in article 85 (3) of Protocol I: Intentionally directing attacks against civilian objects (b) (ii); intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or wide spread and severe damage to the natural environment (b) (iv); and attacking or bombarding, by whatever means, town, villages etc (b) (v).

Article 85(3) of protocol I to the Geneva Conventions States that "the following acts shall be regarded as grave breaches of this Protocol, when committed willfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health." By contrast, the Rome Statute does not explicitly require "death, serious injury to body or health" in connection with these three crimes. States are urged to adopt the Rome Statute definition.

ii. Widespread and severe damage to the natural environment.

Article 8(2)(b)(iv) of the Rome Stature includes "widespread, long-term and severe damage to the natural environment" in the list of acts defining the war crime of internationally launching an attack in the knowledge that such attack will cause incidental loss. This violation is not found in the Geneva Conventions or the Additional Protocols. Note however the article 8(2)(b) threshold that such damage must be "clearly excessive" in relation to the overall military advantage anticipated.

iii. Indirect transfer of civilian population

Article 8(2)(b) (viii) defines the war crime of transferring civilian populations by an occupying power. The Rome Statute definition of this crime refers both to the direct and indirect transfer of civilian population and includes the transfer of its own civilian population into territory it occupies as well as the deportation or transfer of all parts of the civilian population of the occupied territory.

This crime is based on article 49 of the Fourth Geneva Convention, which is now recognised as a grave breach in article 85 (4)(a) of Additional Protocol I. However, the Rome Statute expands this prohibition to cover transfers of the occupying power's own civilian population into the territory it occupies. The additional prohibition against "indirect" transfers in article 8(2)(b) (viii) is intended to make explicit that this crime includes the situation of an occupying power failing to take measures to prevent its civilian population from transferring itself into the territory it occupies.

iv) Attacks against UN peacekeepers

Article 8(2)(b)(iii) of the Rome Statute prohibits intentionally directing attacks against UN personnel involve in humanitarian or peacekeeping missions as long as they are entitled to protection given to civilians under international law of armed conflict. The Rome Statute is the first international treaty to include in a war crimes definition, explicit reference to international attacks against this particular group of people and their installations and property.

v. Crimes of Sexual Violence.

Under article 8(2)(b)(xxii) of the Rome Statute, "committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions' is a war crime when committed in international armed conflict.

Although none of these acts are "new" crimes, the Rome Statute is the first treaty to contain such an extensive list of crimes of sexual violence. For example, article 4(e) of the Statute of the ICTR prohibits "rape, enforced prostitution, and any form of indecent assault." Rape, forced prostitution, and indecent assault are prohibited under the Fourth Geneva Convention article 27, and Protocol 1, article 76 (1), but are not expressly listed as grave breaches. Article 32 of the Geneva Convention prohibits any "measure of brutality whether applied by civilian or military agents." Protocol II, article 4(2)(e), prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault". Article 4(2)(f)

prohibits "slavery and the slave trade in all their forms." Rape was prosecuted as a war crime by the International Military Tribunal for the far East in the Tokyo trials.

The definition of war crimes of sexual violence committed in armed conflict not of an international nature is set out in article 8(2)(e)(vi). This provision contains the same list of acts as article 8(2)(b)(xxii), namely rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence.

This definition compares favourably with those found in other international conventions covering crimes of sexual violence committed in internal conflicts. For example, article 4(2)(e) of Additional Protocol II prohibits rape, enforced prostitution, and any form of indecent assault. Article 4(2)(f) prohibits "slavery and the slave trade in all their forms." Article 4(e) of the statute of the ICTR prohibits "rape, enforced prostitution, and any form of indecent assault. The list of acts is the same as in article 8(2)(b)(xxii) covering." States parties are urged to ensure that their national laws criminalize every act listed in articles 8(2)(b)(xxii) and 8(2)(e)(vi) both as war crimes and as national crimes.

vi. Child Soldiers

Under articles 8(2)(b) (xxvi) and 8(2)(e)(vii), it is a crime to conscript or enlist children under the age of 15 years into the national armed forces or to use them to participate actively in hostilities. This is consistent with Protocols I and II additional to the Geneva Conventions and the UN Convention on the Rights of the Child, which set 15 as the minimum age for military recruitment and participation.

However, a stronger standard is established in the Optional Protocol to the convention on the Right of the Child on the involvement of children in armed conflict, which establishes 18 as the minimum age for participation in armed conflict, for compulsory recruitment or conscription and raises the minimum age for voluntary recruitment by governments from the current age of 15 years. The Protocol also prohibits any form of recruitment of children under the age of 18 by armed groups. States should adopt the standard in the optional protocol, not the Rome statute, and prohibit any recruitment of those less than 18 years, whether forced or voluntary.

3.5 Differences in the Contextual Requirement of Crime against Humanity (CAH)

The statutes of the international tribunals generally reflect CAH as they existed under customary international law. However, there are some differences in the contextual requirements for CAH in the Statutes of the various international tribunals, which are discussed in more detail below.

i. Articles 5 and 3 of the ICT Yugoslavia and Rwanda Statute

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.

ii. Article 7 of the ICC Rome Statute

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: (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.

This chapter deals with the general contextual elements that apply to all crimes against humanity. These are the essential elements which must be established before any particular act can constitute a crime against humanity.

The main contextual elements that are discussed in this chapter are:

i. The meaning of an "attack" against the civilian population;

ii. The requirement of a nexus between the attack and the acts of the accused;

iii. The definition of the civilian population;

iv. The definition of the terms “widespread” and “systematic”; and

v. The knowledge required on the part of the accused of such an attack.

CHAPTER FOUR

CHALLENGES IN THE PROSECUTION OF CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW

4.1 Introduction

International law permits states to investigate and, if there is sufficient admissible evidence, to prosecute crime against humanity based on universal jurisdiction, regardless of where those crimes were committed, regardless of the nationality or location of the suspect or the victims and irrespective of any specific connection to the prosecuting state. One of the justifications for this rule of international law is that such crimes are crimes against the international community as a whole and, as such, each member of the international community has an inherent interest and responsibility to ensure that perpetrators of such crime do not evade justice or fail to provide reparations to the victims and their families[204].

Over the past decade however, there are cases in which persons suspected of the crime against humanity have escaped investigation and prosecution[205]. In fact, the commission of these crimes continue to plague nearly every corner of the globe. While this has demonstrated the urgent need to enforce such crimes vigorously, unfortunately, their effective prosecution remain elusive in spite of the important advances of the past

[204]Fenrick W.J. *"Some International Law Problems Related to Prosecution Before the International Criminal Tribunal for the Former Yugoslavia"*, (1995) 6
[205]Harvard Research in International Law, 29 Am. J. Int'l L. Supp. 435, 636 (1935).

twenty years, including the establishment of the International Criminal Court[206]. The Writer has identified the following as challenges to the prosecution of crimes against humanity.

4.2 Challenges Related to international Jurisdiction

The universal jurisdiction rule applies to crimes against humanity, the problem however, is to determine when and on what terms these crimes should be prosecuted on the basis of universal jurisdiction[207]. In some countries, treaties are automatically the law of the land and can be relied upon directly in domestic courts. In many others like Nigeria, however, treaties must be incorporated into domestic law in order for someone to rely on them in court. In those cases, a domestic legislature must adopt implementing legislation. Consequently, while the number of states that have expressly recognized crimes against humanity and war crimes in their domestic criminal law has increased exponentially in recent years, it is still the case that these provisions do not exist in all countries. Even in the many states where such domestic criminal laws do exist, not all have explicitly provided for universal jurisdiction prosecutions. This gap between international obligations, and what domestic law actually allows for, poses a significant challenge in the prosecution of crime against humanity[208].

The legal basis for exercising universal jurisdiction differs depending on whether the crime is set out in an international treaty or is part of customary international law.

[206]Bassiouni, M. C. *"Crimes Against Humanity": The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 491-493 (1994); Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT'L L. (2013) 334, 337-40.
[207]Richard Vokes, " The Arusha Tribunal: Whose Justice?" Anthropology Today, 18:5, 1-2, (2002), at 2.
[208] International Council of Human Rights Policy (1999):Hard Cases: Bringing Human Violators to Justice Abroad: A guide to Universal Jurisdiction, 48, chemin du Grand-Montfleury, 1290 Versoix, Switzerland. p.47.

While most experts agree that customary international law allows for universal jurisdiction prosecutions of all crimes against humanity, it is not clear whether, in relation to states are obliged to prosecute such crimes[209]. These uncertainties have real-life consequences, as the Pinochet case[210] demonstrated. There, the British judges showed extreme reluctance to apply customary international law and seemed comfortable only when they were dealing with specific treaty provisions that had been incorporated into national law.

A closer look at the Pinochet case illustrates exactly how difficult it is to prosecute a case of crime against humanity based on the principle of universal jurisdiction. In this case, Spain charged that Pinochet had been responsible for the murder of Spanish citizens in Chile at the time when he was the Chilean President, and that he was responsible for systematic acts in Chile and other countries including murder, torture, disappearance, illegal detention and hostage-taking. On that basis, Spain asked the UK to arrest Pinochet, and to extradite him to Spain. Augusto Pinochet challenged his threatened extradition to Spain on the basis that he was immune from prosecution because he was a former head of state. State (or sovereign) immunity is a long-recognized legal rule that since all states are sovereign and equal, they are prevented from sitting in judgment on the acts of each other. The seven judges who heard the case in the House of Lords (the highest court in the UK) found that under the laws of the UK, a former head of state is immune from

[209]Madeline H. Morris, " The Trials of Concurrent Jurisdiction: The Case of Rwanda," *Duke Journal of Comparative and International Law* 7:349, 349-374, (1996-97) at 354.
[210]R. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (1998) UK HL 41, 3 W.L.R. 4156

prosecution for official acts undertaken while serving as head of state, regardless of where the official acts occurred.

The judges then considered whether Pinochet was immune from prosecution for the acts of torture, conspiracy to commit torture, murder, and conspiracy to murder. They concluded that state immunity did apply to the charges of murder and conspiracy to commit murder. Apparently, the judges did not believe that murder was a crime of sufficient gravity to fall outside the usual rules by which immunity applies. At the same time, six of the seven judges held that state immunity did not apply to the allegations of torture and conspiracy to commit torture. They relied heavily on the UN Convention against Torture in deciding that Pinochet was not immune. In reaching that decision, the judges concluded that while the Convention against Torture does not explicitly refer to heads of state, heads of state were included within the definition of torture in Article 1 of the Convention which refers to a public official or other person acting in an official capacity. In addition to determining whether Pinochet was immune from prosecution, the House of Lords also had to decide whether the crimes alleged by Spain were subject to extradition under the laws of the UK. Under UK law, if extradition is sought for crimes committed outside the territory of the requesting state (extra-territorial crimes), then those crimes must also be punishable under the UK's law when they occur outside its territory. In the House of Lords decision, the application of this rule took a surprising turn. The judges accepted Pinochet's argument that for this standard to be satisfied, the crimes at issue must have been crimes punishable in the UK at the time they occurred, not just at the time the extradition request was made. Under this standard, it was not enough that

torture, murder, and hostage-taking were punishable under UK law even if they occurred outside the country at the time the arrest warrant was issued against Pinochet. Instead, the question became whether each of these offences (as well as conspiracy to commit both torture and murder) were recognised as extraterritorial crimes in the UK at the time the alleged offences occurred. Under UK law, torture became an extra-territorial offence on 29 September 1988, through an amendment to the UK law recognizes murder as an extra-territorial offence, but only if committed after 1 August 1978 in one of the states to which the provisions of the European Convention on the Suppression of Terrorism apply (which do not include Chile). Most of the charges contained in the Spanish arrest warrants were thus eliminated, including all torture charges pre-dating 29 September 1988, and all murder (and conspiracy to murder) charges pre-dating 1 August 1978. Both torture and murder charges relating to acts alleged in Spain survived, given that those crimes were not extra-territorial (they were alleged to have occurred in the country requesting extradition). The judges also threw out the charge of hostage-taking, based on Lord Hope's analysis that the acts alleged did not meet the definition of hostage-taking contained in the relevant UK law. The majority of the judges also found that torture is a crime under customary international law. In particular, they concluded that prohibition of torture amounts to a norm with special status *(jus cogens)* that takes precedence over treaties and customary international law generally. Yet, despite this finding, all the judges except one still found it necessary to rely on the Convention against Torture to conclude both that torture met the extradition standards of UK law and that Pinochet could not claim state immunity from the torture charges. In the end, the House of Lords found that

Pinochet was subject to extradition and was not entitled to state immunity only with regard to the charges of torture and conspiracy to commit torture that occurred after 8 December 1988 (the date when the UK finally ratified the Convention against Torture). The actual extradition proceedings against Pinochet could then proceed and got underway in September 1999.

This case illustrates that immunity laws are in a confusing state in many countries. It seems that most states have not modified their existing laws on immunities to take account of the evolution of law towards a more restricted view of official immunity. Even when ratifying international treaties such as the Convention against Torture, which are predicated upon the responsibility of government officials for their criminal acts, states have not modified their laws to strip immunity for such acts. Thus, in cases involving current or former heads of state, immunity laws present a substantial obstacle to prosecutions based on universal jurisdiction.

4.3 High Burden of Proof

Crimes against humanity involves widespread and systematic' attacks ranging from murder and torture to acts of sexual slavery and rape on a civilian population. The Prosecutor therefore is required to prove that the underlying offences are committed as part of a widespread or systematic attack against a civilian population[211]. The Prosecutor in addition to proving this is also expected to ascertain that the perpetrator has committed

[211]Bassiouni, Cherif, *Crimes Against Humanity in 'Crimes of War II*: *What the Public Should Know,* Revised and Expanded Edition' by Roy Gutman (Editor), David Rieff (Editor), Anthony Dworkin (Editor), W. W. Norton; Rev Upd edition, 2007). Available @ http://www.crimesofwar.org/thebook/crimes-against-humanity.html, accessed on 20th January, 2015.

the attacks with the knowledge of the attack[212]. Under Article 30 (3) of the International Criminal Court Statute[213], "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Hence, the Prosecutor is expected to prove that the defendant was aware of either the existence of the attack or its consequence. Particularly, he needs to prove that the defendant knew the conduct was part of or intended to be part of a widespread and systematic attack directed against a civilian population[214]. The International Criminal Tribunal for Rwanda (ICTR) Statute requires that the widespread and systematic attacks directed against a civilian population must be on the national, ethnic, racial, political, and religious grounds[215]. Hence, an ICTR Prosecutor is expected to prove that the attacks are directed on a civilian population defined by either of the grounds cited above. This means that under the ICTR, attacks committed on a civilian population, who could not be identified as national, racial, ethnic, political or religious group are not be considered as Crimes against Humanity. Meanwhile, in other instruments such as the ICC statute, where crimes against humanity are defined as widespread and systematic attacks on any civilian population or as simply attacks on civilian population, the proof of the existence of widespread or systematic attack on such population, with the perpetrator's knowledge, is enough to say crimes against humanity is committed. In other words, the prosecutor needs to show that the

[212]Article 7 (2) International Criminal Court (ICC) Statute. 2002.
[213] Ibid
[214]Art.7(1)(a)-(k) ICC elements of Crimes
[215] Art. 3 ICTR Statute, 1994.

victim is civilian and he is targeted as part of the systematic and widespread attack on a civilian population[216].

In addition to all these requirements of proof emanating from the legal requirements, there is also the context in which these crimes occur. Usually they occur within the context of massive scale conflicts either of an intra or inter-state nature. Often their Prosecution involves the indictment of many individuals. These factors coupled with the requirements of the proving the elements of the crimes pose a great challenge to a prosecutor. For example, in case of Genocide, the prosecutor needs to provide witnesses from different places of the country where such crimes are committed to show that intent to destroy a particular group exists by reason of speeches made by the group of perpetrators, the consistent targeting of a group believed to be a victim of the atrocities, the existence of the overall plan for the destruction of such group, the method employed in one area also is similar or identical with that used in other areas. To show all these facts before the Courts, the Prosecutor needs to call lots of witnesses, and needs to produce other evidences that are deemed to prove his case. This requires the prosecutor to dedicate his various resources and efforts in to each case. This fact also has its bearing on the speediness of the trial as more and more of witnesses are called to testify and more and more of time is taken hearing other evidence, then the trial might take long time to complete with a negative impact on the right of the accused to a speedy trial[217]. This could be illustrated more when one sees the fact that during its sixteen years of its

[216]Guenael Mettraux, "Crimes against humanity in the Jurisprudence of the International Criminal Tribunals for the
Former Yugoslavia and Rwanda", Harvard International Law Journal 43:237 (2002):237-316, at 256.
[217] Ibid.

existence, the ICTR dispatched only 36 cases, while 8 cases are on appeal, 8 accused were acquitted, and another 22 still in progress[218]. This number is doubt small in comparison to the domestic prosecutions where a good number of people were prosecuted[219]. The reason for this discrepancy may not be unconnected to the fact that at the international court or tribunal, both the Prosecutors and the Courts are faced with a challenge in trying to balance the need to produce evidence against the accused and the right of the accused for a fair trial.

4.4 Challenges of Legitimacy for the ICC

The ICC was established as the first permanent international criminal tribunal charged with entertaining cases of the commission of Crimes against Humanity, Genocide, and War Crimes in the territory of the members or by their nationals. However, it faces a huge challenge of legitimacy resulting from the referral of the Darfur case via the UNSC and its subsequent indictment of the President of Sudan, Omar Hassen Al-Beshir[220]. It managed to do this, through Art.13 (b)of the ICC Statute which allows the United Nations Security Council (UNSC) to refer a case to the court[221].

It would be recalled that after many efforts to take action following the conflict that has raged over the western Sudan territory of Darfur[222], the UNSC decided to set up a

[218] See http://www.unictr.org/Cases/tabid/204/Default.aspx accessed on 23rd January, 2015.
[219]William Schabas, "Rwandan Courts and the Quest for Accountability: Genocide Trials and Gacaca Courts," *Journal of International Criminal Justice* 3:879 (2005): 879-95 at 882.
[220]Paragraph 11 of the Eighth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593(2005) available on http://www.icc-cpi.int/NR/rdonlyres/BBA77B57-C81C-4152-988C-D8D953471453/279075/8thUNSCreportsenttoUNENG1.pdf accessed on 22nd January,2015.
[221]Art. 13(b) ICC Statute, 2002.
[222]Gerard Prunier, *Darfur: The Ambiguous Genocide*, 2nd edition, (Ithaca: NY, Cornell University Press, 2007), 1-20

Commission of Inquiry on Darfur on 18 September, 2004[223]. In January 2005, the Commission came up with its report, which found that crimes were being committed in Darfur with the government involvement but there was 'no evidence' to suggest that it was Genocide[224]. The Commission also suggested that the Khartoum government was 'unlikely' to bring the perpetrators before justice, so the UNSC should refer it to the International Criminal Court (ICC). The Commission emphasized that the ICC is the best option to prosecute the perpetrators and annexed evidence as well as a sealed list of persons accused of committing crimes and the reasons for them to be regarded as such[225].After considering the recommendation, the UNSC decided to refer the case to the ICC on 31March, 2005, with the cooperation of all member states of the UN in the work of the court , by a vote of 11-4 with the rest abstaining[226].The ICC Prosecutor, Luis Moreno Ocampo acting under this Mandate, on 27 Feb, 2007,appliedfor a warrant to be issued on Ahmed Muhammed Harun, a former Minister of State for the Interior of the Government of Sudan and Currently Minister for Humanitarian Affairs, and Ali Muhammed Ali Abdel-Rahman (Also known as Ali Kushayb) an alleged Militia leader[227].

[223]United Nations Security Council Resolution on the report of the Secretary General on the situation in Sudan, S/Res/1564 (2004), adopted on the 5040th meeting 18 September,2004, Para. 12
[224]Para. 518, the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva, 25 January, 2005 available on http://www.un.org/News/dh/sudan/com_inq_darfur.pdf accessed on 22nd January, 2015,
[225] Ibid.
[226]Robert Cryer, "Sudan, Resolution1593, and International Criminal Justice," Leiden Journal of International Law, 19:195, 195-222, (2006) at 203 available at http://eprints.bham.ac.uk/167/1/Leiden_06_R_Cryer.pdf accessed on 23rd January, 2015.
[227]See http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/ accessed on 24th January, 2015.

The Sudanese government refused to cooperate with the Court and even refuse to recognize the court. Up on the application of the Prosecutor, ICC issued warrant against the President Omar Hassan Al-Basher in March, 2009.In addition to the government officials, the Prosecutor also charged a JEM military commander, named Abu Garda for War crimes and crimes against humanity. Mr. Abu Garda was summoned to appear before the court, which he accepted and made a first appearance before the court. However, Pre-trial Chamber refused to confirm the charge on him[228].The ICC's issuance of a warrant against the President of Sudan has also met opposition among the leaders of Africa. The leaders through the AU Assembly of Heads of States and Governments expressed their "deep concern" at the application of the Prosecutor for the warrant of arrest of President Bashir and after the warrant is issued expressed their "grave concern" on the impact the indictment might ensue difficulties on the peace process in various regions[229]. They subsequently decided to suspend all cooperation with the court by citing Art.98 of the ICC statute[230].

In another case, while Israeli Defence Forces (IDF) repeatedly bombed the Gaza Strip in December 2009 and April 2014 as many as 4000 civilians including women and children perished[231]. A UN report later found that war crimes were committed during these bombing campaigns[232]. The UNSC so far did nothing to present accountability to

[228]Ibid
[229]Para.1, AU decision on the case of Hissene Habre, Feb 2009.
[230] Ibid. Para 10
[231]US House rejects Goldstone Report, www.aljazeera.net, posted on 4 November, 2009 available on http://www.thefreelibrary.com/US+House+rejects+Goldstone+report.-a0211130330 accessed on 21st January, 2015.
[232]Report of the United Nations Fact Finding Mission on the Gaza Conflict (Goldstone Report) available at

these crimes, and no effort was made particularly on its part to refer the case to the ICC based on Article 13(b) of the ICC Statute[233]. The writer believes that the Gaza bombing campaigns and the subsequent reaction of the UNSC did not only challenge the legitimacy of the UNSC, but also poses a huge challenge to the prosecution of crime against humanity under international law as it deprives the ICC of the opportunity to hear such issues. Under the UN charter[234], the UNSC has been given not only the power to act on those situations that are deemed to be threats to the international Peace and Security but also the power to determine what constitutes a threat to international peace and security. As a political organ, it makes these decisions based on political considerations. A political organ is not expected to decide on legal issues purely on legal considerations; the political considerations outweigh, if not dominate it entirely. Moreover, the fact that out of the fifteen members of the Council Five of them has veto power (the so called P-5) also indicates that their interests are always respected. They can protect their allies and move to punish those who do not serve their interests. Hence, the existence of such a system as one of its trigger mechanisms presents a massive challenge of legitimacy of the court as it could easily be considered as a tool of the P-5s rather than an independent international judicial body. This in turn presents a massive challenge of securing cooperation with states in arresting perpetrators wanted by the court and subsequent detention after sentencing.

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http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf accessed on 21st January,2015.

[233] ICC Statute, 2002.

[234] Article 1 (1), 33 (1) & 39, United Nation Charter, 1945.

4.5 Intimidation and Withdrawal of Witnesses

Apart from political challenges, another major challenge to the successful prosecution of crime against humanity is intimidation and withdrawal of witnesses. This was particularly the situation faced by the ICC by in the Kenyan cases. The withdrawal of these witnesses and their testimonies faces the Prosecutor with a major setback in the collection of evidence. Nevertheless, in her determination to pursue the Kenyan cases, the Prosecutor responded by compelling the attendance of the eight withdrawn witnesses in the Ruto case, through issuing a subpoena that was approved by Trial Chamber. In the case against President Kenyatta, where two key witnesses withdrew, the Prosecutor requested the adjournment of the trial date to provide her with more time to "complete efforts to obtain additional evidence". The Trial Chamber decided to adjourn the trial until October 7, 2014, in order to give the Government of Kenya an opportunity to provide the Prosecution with access to certain records, and to provide the Prosecution with more time to collect sufficient evidence[235].

In taking action against those corruptly influencing witnesses, the Prosecutor requested Kenya to arrest Walter Barasa, who allegedly tried to bribe potential witnesses in the case against Mr. Ruto. These actions would make him criminally responsible for several offences against the administration of justice under Article 70 of the Rome Statute[236], in particular for corruptly influencing witnesses under Article 70(1) (c)[237]. On

[235]Laura van Esterik "The Challenges of the Kenyan Cases at the International Criminal Court" American NGO Coalition for the International Criminal Court, June 17th 2014
[236]Rome Statute of the International Criminal Court, 17 July 1998, available at: http://www.icrc.org/ihl.nsf/WebART/585-07?OpenDocument
[237] Ibid.

May 14, 2014, Kenyan Principal High Court Judge Richard Mwongo ordered that an arrest warrant be issued against Mr. Barasa. However, the accused continues to attempt to block his extradition to the ICC by appealing the decision. As a result, on May 29, Kenya's Court of Appeal decided to suspend the arrest warrant[238]. This incident is a clear case intimidation and unjust action of the prosecution against African leaders and as such Africans perceived the court to be sentimental and unfair to the Africans.

4.6 The Capacity to Entertain Many Cases at a Time

Unlike the ad hoc Tribunals, the ICC, which currently is composed of 114 member states[239], is required to initiate proceedings if either Crimes against Humanity, Genocide or War crimes or two or all of them occur within these 114 member states' territories or if these crimes are committed by their national(s) as per Art.12 of its Statute[240]. It might happen that cases within the jurisdiction of the court could occur in many countries at a time. This creates a personnel, financial as well as logistical challenges for the work of the Court. Currently, the Court has 18 judges in three divisions with the Pre-trial division composing of two chambers of three judges each, the Trial chamber composing of eight judges and the appeals chamber consisting of the president of the court with four other judges[241].

The Office of the Prosecutor where it is made up of three divisions; the prosecutions, investigations and the jurisdiction, complementarities and cooperation

[238] Laura van Esterik, op.cit.no.32
[239] See http://www.icccpi.int/menus/icc/about%20the%20court/icc%20at%20a%20glance/icc%20at%20a%20glance?lan=en-GB and also see http://www.icc-cpi.int/Menus/ASP/states+parties/ for the list of state parties to the court. Both Sites accessed on 24th January, 2015.
[240] ICC Statute, 2002.
[241] See http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court accessed on 24th January, 2015.

divisions, headed by the deputy prosecutor and two other staff members[242]. If there were to be many more cases, these personnel as well as other resources of the court may well be stretched. This will in turn impact the court's mission of ending impunity as it might be forced to cut back on some cases and forced to choose the high profile cases over 'the less important' ones(as the high profile cases would give it high publicity and create the perception that it is performing).

4.7 The Challenge of Providing Adequate Funding for the Trials

The International Criminal Tribunal for Rwanda gets its funding from the UN's regular budget, while the Special Court gets its funding entirely from voluntary contributions of the international community and the ICC from the regular assessed contribution from member states and other voluntary contributions by the international community. The domestic tribunals, on the other hand, are funded mostly by their own governments from the regular budget of the governments[243]. In practical terms, however, these funds may hardly be available for use or if they are, they are often inadequate for the activities to be carried out. For example, in case of the ICTR, the UN often cannot meet the required budget and for the Special Court, since the contribution is voluntary it is always difficult to get the contribution needed[244].

There might also be donor fatigue which makes states and international organizations alike to be reluctant. This problem could be even worse in the domestic

[242]See http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor accessed on 24th January, 2015.
[243]Lana Ljuboja, *"Justice in an Uncooperative World: ICTY and ICTR foreshadow ICC ineffectiveness,"* Houston Journal of International Law 32:767(2009-10):767-804, at 782.
[244]Shea, O. "*Ad hoc* Tribunals in Africa: A Wealth of Experience but a Scarcity of Funds," African Security Review, 12:4, 17-24, (2003), p. 4

trials as the domestic trials are marred by delays and violation of the Fair Trial Guarantees from which the international community tends to shy away rather than being associated with, let alone fund such trials. When the international community abandons them, the Countries being poor, the trials suffer a lot and the violations of the rights of fair trials also get worse as there will not be state appointed defence counsels, there will be fewer prosecutors and investigators, and no experts participating in the investigation, thus causing delays in the investigation and the subsequent trial. This is what has happened in Rwandan and Ethiopian cases[245]. There is also the case of Hissene Habre, entertained by Senegal, in light if its agreement to prosecute Hissene Habre on behalf of Africa as per the decision of the AU Assembly of Heads of States and Governments with the assumption that the funding for the Trial will come from the voluntary contribution of member states and the international community especially the EU and AU member states. However, neither the EU nor the member states contributed to the budget of the trial which led the AU to pass its decision to call a donor conference. This also did not materialize which led the Senegalese President to threaten to 'hand Habre over to the AU' signaling his frustration with the process[246]. Securing a regular and adequate funding is also another challenge to the success of prosecutions of crimes against Humanity and Genocide.

[245]Yacob Hailemariam, "*The Quest for Justice and Reconciliation: the International Criminal Tribunal for Rwanda and the Ethiopian High Court,"* Hastings International & Comparative Law Review 22:667(1998-1999):667-746.
[246]Senegal Threatens to Hand Chad Dictator to AU, AFP Global Edition posted on 3 February, 2009 available on http://www.thefreelibrary.com/Senegal+threatens+to+hand+Chad+dictator+to+AU-a01611785320 accessed on 15 January, 2015.

4.8 Lack of Uniform Legal Regime

Despite extensive debates surrounding the scope of the contextual element of crimes against humanity during the 1998 negotiations leading up to the formal establishment of the permanent International Criminal Court (ICC), the meaning of the so-called State or organizational policy requirement contained in Article 7(2)(a) of the Rome Statute remains unsettled over a decade later[247]. The origins of this ambiguity can be traced to its earliest legal use in the Nuremberg International Military Tribunal immediately after World War II, and the corresponding vagueness of its subsequent interpretation and uncertain status in customary international law[248]. This lack of clarity has persisted throughout the more recent history of international criminal law. Part of the problem is that, unlike the crime of genocide, which has a widely accepted definition in the 1948 Genocide Convention, or war crimes, which are codified in the 1949 Geneva Conventions and their additional protocols, there is no single treaty addressing crimes against humanity[249]. Thus, despite the centrality of the offense to modern world, the various definitions of the crime and its contextual and other elements have been developed and used in different national and international contexts over the years have made prosecution of crime against humanity very difficult[250].

[247]Darryl Robinson, *The Elements of Crimes Against Humanity*, *in* the International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence 57, (2001), p.80
[248]Larissa van den Herik & Elies van Sliedregt, Removing or Reincarnating the Policy Requirement of Crimes Against Humanity: An Introductory, LEIDEN J. INT'L L. 825 (2010)
[249]Leila N., Forging a Convention for Crimes Against Humanity, Wash. University. in St. Louis Legal Studies Paper Ser. No. 11-11-04, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013254 (2011), p.18, accessed on 24th January, 2015.
[250] Ibid.

A related problem here is that, although crimes against humanity are a core part of the Rome Statute, there appears to be a lack of conceptual consensus on what makes a crime against humanity a crime against humanity as opposed to a common offence under domestic law. The predominant view, at least in the ICC formulation of the crime, requires the commission of certain underlying prohibited acts such as murder or rape as part of a widespread or systematic attack directed against any civilian population. The multiple commissions of the impugned acts against civilians will give rise to crimes against humanity when carried out pursuant to, or in furtherance of, a State or organizational policy. But even the Rome Statute definition does not resolve the problem. For example, Professor Darryl Robinson has identified about four theories associated with the State or organizational policy requirement that serve as a key component of the ICC definition of the offense[251]. The starting point is the plain textual requirement that there must be a State policy to commit the attacks. That said, he shows that some scholars argue that no policy element is required, while others insist that there must be a policy. Similarly, regarding the organizational aspect, some theorists claim that in the absence of a State policy there must be an organization, but only a "State-like" organization having some type of policy would qualify. Finally, there is the even broader pro–human rights suggestion that crimes against humanity should encompass any entity with the capacity to

[251]Darryl Robinson, *Essence of Crimes Against Humanity Raised at ICC*, BLOG OF THE EUR. J. OF INT'L L. (Sept. 27, 2011), http://www.ejiltalk.org/essenceof- crimes-against-humanity-raised-by-challenges-at-icc (drawing the theories from the text of the Rome Statute, recent ICC cases relating to violence in Kenya, the jurisprudence of international tribunals, and scholarly literature), accessed on 23rd January, 2015.

carry out crimes against humanity[252]. The latter category would presumably include some of the judges at the ICC who have advanced, in a seminal decision that will be discussed later, the so called Basic Human Values Test as the determinative criterion for the classification of a prohibited act as a crime against humanity.

In Ethiopian Criminal code[253], for instance, crimes against humanity are not recognized as a crime. Ethiopia is the first country in Africa to ratify the 1948 Convention on the prevention and punishment of the crime of Genocide[254]. After ratifying it, it has included it under the 1957 Penal Code of the Empire of Ethiopia. Under this law[255], committing killings, bodily harm or serious injury to physical or mental health in any way whatsoever, or imposing measures to prevent the reproduction or the continued survival of the members of the group or their children, compulsively moving or dispersal of peoples or their children or placing them in conditions calculated to bring about their death or disappearance against national, ethnic, racial, religious or political group, whether in time of war or in time of peace, is considered as Genocide and is punishable with rigorous imprisonment of five up to life and exceptionally up to death. According to this same article, planning, organizing and engaging in the above illustrated acts results in the same kind of punishment.

[252] Ibid.
[253]The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No 414/2004 promulgated on 9 May, 2005,
[254]See http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en , accessed 23rd January, 2015.
[255] Article 281, Penal Code of the Empire of Ethiopia, Proclamation No 158/1957, promulgated on 23 July, 1957,Art.281

However, this was later repealed in 2004 by the new Criminal Code of the Federal Democratic Republic of Ethiopia[256]. With the exception of adding to the list of protected group, "causing members of the group to disappear" to the list of underlying offences and shortening the default punishment to rigorous imprisonment of five to twenty five years and adding life imprisonment to the punishment of more serious cases, it largely retained the elements listed above[257]. Unlike its 1957 counterpart, it does not mention Crimes against Humanity[258].

On the other hand, in the case of ICTR[259] crimes against humanity occur when the widespread and systematic attacks are directed on a civilian population on national, ethnic, racial, political and religious grounds. Moreover, there is also a difference with respect to the underlying offences included under the definition of crimes against humanity. Thus, despite its frequent invocation in contemporary legal and popular discourse, it is not entirely clear what is the distinguishing characteristic or feature of a crime against humanity that moves it from the realm of the domestic to the international, such that its commission would be easily identified and prosecuted. All these highlight the piece meal approach to the understanding of the crime. This kind of definitions undermines the conception of the crimes and the integrity of the international criminal justice system. It creates different understanding of what constitutes Crimes against Humanity and what does not, its eventual consequence being politically motivated

[256]The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No 414/2004 promulgated on 9 May, 2005,
[257]Ibid, Art.269
[258] Ibid.
[259] Art. 3 ICTR Statute, 1994.

prosecutions. This is so because governments could prosecute their opponents, either in their territories or outside it, by including some elements in the definition of either crimes against humanity or genocide just to settle political score. This is also another challenge for prosecuting crimes against humanity under international law.

4.9 The USA and the ICC

The United States of America, being the most powerful nation, has been actively participating in matters of international criminal justice since the days of Nuremberg and Tokyo Trials. However, starting from the negotiation for the establishment of the Court it has been its most vocal opponent[260]. It is one of the seven countries which voted against at the UN conference for the establishment of the court[261]. The USA opposes primarily the Court's assumption of jurisdiction based on territoriality principle, the power of the prosecutor to initiate proceedings by its own motion or (*propio motu*) powers and the court's power to decide on whether a state is unable or unwilling to prosecute[262].

The US believes that such powers will result in a politically motivated prosecutions against its armed forces stationed in other countries which are members of the court[263]. The US later removed its signature of the court that it signed during the last days of the Clinton Administration and started to seek immunity agreements (later

[260]The US and the International Criminal Court, Human Rights Watch available on http://www.hrw.org/campaigns/icc/us.htm accessed on 24th January 2015.
[261]The other countries were China, Iraq, Libya, Yemen, Qatar and Israel. See New International Criminal Court Set Up available on http://www.telegraph.co.uk/news/uknews/1390655/New-international-criminal-court-set-up.html accessed on 24th January, 2015.
[262]Gerhard Hafner, "An Attempt to Explain the Position of the USA towards the ICC", Journal of International Criminal Justice 3:323 (2005):323-332, p. 325.
[263]Paul W. Kahn, "Why the United States is So Opposed; The International Criminal Court: An End to Impunity?" (the Magazine), Published in December, 2003 available on http://www.crimesofwar.org/icc_magazine/icc-kahn.html accessed on 24th January, 2015.

became known as BIAs or Bilateral Immunity Agreements[264]) with countries which are members or non-members of the court protecting its citizens from prosecutions that might arise in the territory of these countries[265]. By 2006, the US had secured more than 100 of such BIAs out of which 46 were state parties to the ICC[266]. In Africa alone it has managed to secure the agreement of 38 states out of 53 countries in total, out of which 24 are state parties[267].

As per the American Service members' protection Act (ASPA), Countries who refuse to sign any such agreement will lose their military aid and other economic assistance[268]. These measures suggest that the ICC has the USA as its most powerful enemy. This is a huge challenge for the court when it investigates cases in which there are serious crimes against humanity committed by Americans. Not prosecuting them would seriously jeopardize its legitimacy as a judicial organ and it could not proceed to prosecute them because the states would refuse to detain and transfer the persons wanted by the Court. This will seriously undermine its work.

[264]These agreements are also Known as Article 98 Agreements named after Art.98of the ICC Statute which exempts states from cooperation with the court if any such cooperation will be inconsistent with any of its international obligations including bilateral treaties. See Schiff, *Building the International Court*, at 174.
[265]US Opposition to the International Criminal Court, Global Policy Forum available at http://globalpolicy.org/empire/us-un-and-international-law-8-24/us-opposition-to-the-icc-8-29.html accessed on 23rd January, 2015.
[266]Status of U.S.Bilateral Immunity Agreements by Region availableohttp://www.iccnow.org/documents/CICCFSBIAstatuscurrent. pdf accessed on 23rd January, 2015.
[267]Ibid.
[268]Raj Purohit, "Article 98/Bilateral Immunity Agreements, "http://humanrights.foreignpolicyblogs.com/2008/06/03/article-98-bilateral-immunity-agreements/ accessed on 23rd January, 2015.

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

Chapter one discussed the general framework of the dissertation relating to the acts which constitute the crime against humanity and the justification of this research which was premised on the prevalence of the commission of the crime within the recent time. This general framework gave a comprehensive understanding of the topic by running through the objectives, statement of problem, literature review and research methodology as the principal bedrock of the research.

Chapter two entitled, "*the development of the concept of crimes against humanity"* discussed the evolution of the constitutive elements of the crime against humanity such as nexus to armed conflict, discriminatory motive, widespread or systematic attack, enforced disappearance and apartheid among others as requirements necessary to established the commission of the crime against humanity. Under this consideration, the provision of Article 7 of the ICC statute is a significant contribution to the understanding of crime against humanity, as it is the first instance of a definition of crimes against humanity developed by multilateral negotiations among 160 states. The result of the natural tension between delegations favoring either a maximalist or a minimalist approach is a definition that is relatively balanced: although it contains more detail and precision than previous definitions, it also does not backtrack on essential points. Of particular importance is the absence of any requirement of a nexus to armed conflict or of

a discriminatory motive. The text preserves the disjunctive "widespread or systematic" threshold test, together with an elaboration of the concept of an "attack against any civilian population," which is derived from relevant precedents. The explicit recognition of the policy element will be regretted by some observers, as it was not explicitly identified in previous instruments, but it is well supported by the jurisprudence of international and national tribunals and the relevant commentaries. The inclusion of enforced disappear are of particular concern to the international community. Relatively vague terms such as "persecution" and "other inhumane acts" are preserved by clarifying and circumscribing their scope.

Chapter three entitled "*Analysis of legal framework on the constitutive elements of crimes against humanity"* discussed the various constitutive elements of crimes against humanity in international law and the process of multilateral negotiation which necessitated a more precise and regulative approach than in previous instruments. This arguably served to strengthen the definition and the basis for individual criminal responsibility for these acts. Article 7 of the ICC statute sets forth a modernized and clarified definition of crimes against humanity as a basis for sound international criminal prosecution at all times.

Chapter four entitled "*challenges in the prosecution of crime against humanity in international law",* discussed the challenges of crimes against humanity in international law in relation to the practical approach of the theoretical framework by the use of relevant judicial authorities such as the Pinochet case, President Omar Hassen Al-Bashir's case among others. These challenges were considered on the grounds of

jurisdiction, high burden of proof, legitimacy of the court (ICC), intimidation and withdrawal of witnesses, inadequate funding, lack of uniform legal regime among others.

Chapter five entitled "*summary and conclusion"* which this segment is centered, gave the general concluding framework of the dissertation by identifying findings in relation to the statement of problem and objective of the research earlier noted in chapter one of the dissertation. In this wise, chapter five is concluded by preferring viable recommendations to addressing the findings made.

5.2 Findings

The findings of this dissertation are as follows:

i. Lack of a Specific International Treaty on Crimes Against Humanity

On this issue, the study found that, although it is among the major international crimes, 'Crimes Against Humanity' remains without a comprehensive definition and constitutive elements in a single/specific international convention/statute/covenant.[1]

Unlike the crime of genocide and war crimes, the definition and constitutive elements of 'crimes against humanity' in international law varies from one statute to another since the 1945 Charter of the International Military Tribunal to punish Nazi atrocities (also known as the Nuremberg Charter.[2] This is evident from the differences between the Statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), that caused uncertainties within the international

[1]As a legally binding treaty.
[2]Adopted on 8th August 1945.

community and legal scholarship about the elements of crimes against humanity despite the fact that the definitions of the crimes under these two Statutes reflect major developments in international law since the Nuremberg Trials.[3] But this category of crimes was a gain, included in the most recent treaty, the Rome Statute of the International Criminal Court,[4] whose definition of crimes against humanity was criticized by some stakeholders as too narrow.[5] Hence, the history of the development of this category of international crimes may be an explanation for this uncertainty.

ii. Outstanding Differences Between Crimes against Humanity and Genocide

The study also found that specific "intent to destroy" is the most important and outstanding difference between genocide and crimes against humanity. The distinction as for *mens rea* is that, the perpetrator 'of genocide must intend to destroy all or part of a protected group," while the perpetrator of a crime against humanity need not have such intent, and persecution can be seen in many other forms of inhuman and discriminatory intent other than intent to destroy a national, ethnic, racial or religious group, in whole or in part.

Whereas the ICTY Statute does not require a link between crimes against humanity and that the acts which form the *actus reus* of the crimes against humanity be

[3]See Andres Clapham in "From Nuremberg to The Hague: The Future of International Criminal Justice, Philippe Sands", Cambridge University Press, 2003, p.31.
[4]Adopted in Rome and Itally, in July 1998 and came into force on 1st July, 2002.
[5]Mostly coalition on the Rome Statute of the ICC as stakeholders.

"committed as per of a widespread or systematic attack", it is clearly mentioned in the Statutes of the ICTR and ICC as a requirement.[6]

Hence, in contrast to crimes against humanity, the size of the attack of which the offence is part is not important for genocide. Instead of being a part of a "widespread or systematic attack", the subject/targeted group to specific "intent to destroy" is required to be large in number.[7] The actual number of the victims is not important but where the number of victims reaches a significant level, it can be an important evidence of genocidal intent to destroy a large number of members of the group "in whole or in part".[8]

Further, in contrast with the crime of genocide, under Article 5 of the ICTY Statute, crimes against humanity and persecution in particular must be committed during internal armed conflict (war). However, differentiating from ICTY, there is not a requirement of war nexus with the acts of attack against a civilian population for persecution as a crime against humanity under the ICTR Statute and Article 7 of the Rome Statute of the ICC. On this point, following the declaration of ICTR without insistence upon this war nexus, the ICTY Appeal Chamber solved this problem in the 1995 Tadic case.[9] In this case, the ICTY went well beyond the Nuremberg precedents by declaring that "crimes against humanity could be committed in peace time". Furthermore, the nexus was described to be 'obsolescent' and abandoned as 'there is no logical or legal

[6]According to Article 5 of the ICTY Statute.
[7]See Bantekas, Ilias, Nash and Sussan, International Criminal Law p. 392.
[8]See Schabas, W. A, An Introdcution to the International Criminal Court, p.39.
[9]The Prosecutor v. Tadjic (Case no.IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (1997) 35 ILM 32, para 140.

basis for this requirement'. This was the abolition of war nexus requirement. Since then, the nexus with armed conflict set up in Article 5 of the ICTY Statute has been described to be 'purely jurisdictional'.[10]

iii. The Broadened and Inconclusive Nature of Crimes against Humanity in International Law

The study found on comparative analysis of the legal regimes that contextually, a crime against humanity involves the commission of certain prohibited acts committed as part of a widespread or systematic attack against a civilian population. When committed in this context, what would have been an "ordinary" domestic crime such as murder, becomes a crime against humanity.

Whilst the ICTY and ICTR Statutes prohibit the following underlying offences that can constitute Crimes Against Humanity: - Murder; Extermination; enslavement; Deportation; Imprisonment; Torture; Rape; Persecutions on political, racial and religious grounds; and other inhumane acts, the ICC Rome Statute has also incorporated the following acts under Crimes Against Humanity: - Sexual Slavery; Enforced prostitution; Forced pregnancy; other sexual violence; Enforced disappearance; and Apartheid.

Hence, any of these acts can be a crime against humanity of it is part of the overall attack on civilians. If it is committed on a very large scale, such as using biological weapons against a civilian population, it could by itself be considered the attack. The underlying acts do not have to be the same as the other acts committed during these

[10]See Schabas supra note 702 at p.43.

attack. A person who rapes a woman during a forceful takeover of power could be guilty of the crime against humanity of sexual violence. Some of the prohibited acts constituting crimes against humanity have special mental requirements, but in general, the perpetrator must have committed the act with intent and knowledge of the relevant circumstances.

Further strikingly, found that the concepts of "attack" and "military attack" differ under international legal regimes. A crime against humanity can occur when there is no armed conflict. Thus, an attack is not limited to the conduct of armed conflict or use of armed force. Crimes Against Humanity can include mistreatment of a civilian population. The attack could also precede, outlast or continue during an armed conflict, without necessarily being part of it. The attack does not need to involve the military or violent force. Accordingly, ICTY and ICTR jurisprudence, and the Rome Statute, provide that there must be at least "multiple" victims for acts to be considered an attack directed against a civilian population. The acts can be of the same type or different. At the ICC, an attack is a "campaign or operation carried out against the civilian population.

The term "directed against" requires that the civilian population must be the primary target of the attack, not just an incidental target. Thus, the primary object of the attack is "any civilian population". At the ICC, the term "civilian population" refers to people who are civilians, and not members of the armed forces or other legitimate combatants. The civilian population must be the primary target of the attack, not a secondary victim.

iv. Lack of Municipal or Domestic Implementation Legislation of the Rome Statute of the ICC

In so far as Nigeria's obligations under the Rome Statute of the ICC are concerned, the biggest challenge remains the lack of implementing legislation that: - First, accommodates the definitions and constitutive elements of all the international crimes, particularly, crimes against humanity under the Rome Statute; second, clarifies all issues relating to the implementation of the complimentarity principle and cooperation scheme between Nigeria and the ICC; third, reconciles its obligations under the constitutional immunity clause and any other bilateral immunity agreement with its obligations under the Rome Statute; fourth, provides for procedural guarantees/safeguards to accused persons and protects victims and witnesses consistent with the requirements of the Rome Statute.

It is hard to imagine how Nigeria can effectively give meaning to both the complimentarity and cooperation principles under the Rome Statute without legislation that defines how this must be achieved. For example, as earlier highlighted in chapter 4, Nigeria's provisions on surrender of suspects under Extradition/Mutual Aid in Criminal Matters Act and Constitutional immunity clause do not allow room for Nigeria's effective cooperation with the ICC for the purposes of surrender of suspects as an obligation under the Rome Statute. It is important to note that nothing in Mutual Assistance in Criminal Matters Act can be interpreted to authorize the arrest or detention or extradition with a view to surrender any person/suspect to the ICC for any crime, because the legal

assistance in criminal matters is rendered by Nigeria to the Commonwealth Countries listed in the schedule or in the Order made by the President in consultation with the Central Authority. The ICC is not listed thereunder and no provision is made for the processing of surrender or extradition requests from any international organization.

The above position highlights several difficulties that are likely to arise should there be an immediate need for Nigeria to honour a request to surrender a suspect to the ICC.

Further, strictly speaking, the crimes against humanity and genocide in the Rome Statute have not been domestically recognized as criminal offences under Nigerian law. This would mean that since the conduct for which surrender is sought is not criminal in Nigeria, co-operation would not necessarily be forthcoming. However, it must be pointed out here that Nigeria National Assembly passed the Bill of Crime Against Humanity, War Crimes, Genocide and related offences Bill in July 17, 2012 (at its second reading)[11], yet it has not move into the third reading to enable it become a law as at the time the National Assembly was dissolved with the coming in of the new administration in May 2015.

v. Over emphasis on Africa: The other criticism directed at the ICC by Africans is that the court has tended to focus almost exclusively on Africans and – more specifically- black Africans. Worse atrocities in other countries have not featured prominently in the court's agenda. For example, American breaches of human rights during George Bush era which were not brought before the court suggest that there are biases in the selection of

[11] http://www.jfjustice.net/nigeria.net accessed August 10, 2015.

countries and cases followed up by the court. A number of critics have expressed serious reservations about this practice, and voice fear about bias and the perception that the ICC is yet another instrument of foreign intervention in a long history of Western/Northern interference in African affairs. Even if various geographical pressures have simply made it easier for the prosecutor to begin investigations in Africa rather than elsewhere, commentators contend that this sends a negative signal about how the ICC may continue to work, and they maintain that the ICC cannot investigate African crises alone. However Proponents of the ICC raise a number of explanations for the Court's concentration on Africa. First, each of the situations under investigation has been initiated upon referral by an African government or the UN Security Council. It is difficult to claim that the prosecutor is biased against Africa in his investigations if three of the four investigations were requested by the governments of those countries themselves. The prosecutor has also noted that he has begun his investigations because it is in Africa that the breaches of humanitarian law are most severe. Sexual assault, forced displacement and massacre are issues that are present on a massive scale in the countries under investigation. He said it was only natural that they should come under investigation first because the National legal systems are weak in Africa, so the complementarily principle has led to ICC jurisdiction in Africa faster than in some other states[12].

5.3 Recommendations

[12] For example, the prosecutor is seriously monitoring the situation in other countries around the world, including Afghanistan, Georgia and Colombia.

It is evident from the above findings that there is the need for the following measures to be taken in order to address the gaps and challenges identified above.

i. Enactment of Specific International Treaty

In order to address the earlier pointed out differences in the contextual requirements for crimes against humanity contained in the Statutes of the International Criminal Tribunals, there is the need for a specific international treaty on crimes against humanity that will provide a comprehensive definition of crimes against humanity; and by so doing it will harmonize constitutive elements of each of the crimes against humanity and this will further promote greater certainty and uniformity in the development of the jurisprudence of the law of crimes against humanity.

The Convention on the Prevention and Punishment of the Crime of Genocide adopted by Resolution 260(111)A of the United Nations General Assembly on 9 December 1948, should serve as the model framework in terms of preambular paragraphs/rationale, structure and contents subject to the peculiarities of the nature and scope of the crimes against humanity in international law jurisprudence today.

ii. Domestic implementation of the Rome Statute of the ICC containing the crimes against humanity

Under the complimentary regime of the Rome Statute, Nigeria has primary responsibility to exercise its criminal jurisdiction over persons responsible for the crimes against humanity. Therefore, locally Nigeria must ensure that it has adequate legal

framework to investigate, prosecute and try persons for those crimes and in particular that all offences and modes of criminal responsibility, established by the Rome Statute are part of domestic law and can be readily applied in national courts, and that adequate procedures are in place to conduct effective investigations and prosecutions and independent and fair trials on allegations of such crimes.

Having draft implementing legislation in place can be equated to a serious manifestation of intent to comply with the Rome Statute. But the process of coming up with draft implementing legislation and finally passing it into law can be long and tedious and so it seems to be the case with Nigeria.

Hence, there is the urgent need for the Nigerian Government to take the final step and transform the draft into binding legislation before it can fully comply with its treaty obligations under the Rome Statute. This would also properly align Nigeria to cooperate with the International Criminal Court in line with the Statute while at the same time allowing the court to complement Nigeria' efforts towards eradicating the culture of impunity rooted in the perpetration of acts constituting crimes against humanity.

iii. Public Sensitization

As Nigeria contemplates the domestication of the Rome Statute it is important to realize that it is a process in which a deliberated attempt to involve all stakeholders must consciously be undertaken, especially having regard to the need to synchronize the subtleties of the Rome Statute with domestic law. There is the obvious need of harnessing

the full potential of Civil Society Organizations in the country. Civil Society's network across the federation ought to be utilized to ensure widespread sensitization and to galvanize a broad-based discussion over all issues pertaining to the Rome Statute and Nigeria. This would help confer legitimacy on the entire process of domestication. It is important to note that some of the animosity in Africa about the ICC may be as a result of a failure by civil society to generate awareness about the ICC and the need to pass domesticating legislation.

Civil Society Organizations have an essential role to play in raising public awareness of the rationale, contents and state obligations under the Statute. It is important to ensure that people who are potential victims of a "systematic or widespread attack", know about the Statute and the ways in which it sets out to protect their rights. Equally organizations that advocate for their rights will also need to be aware of the Statute and its provisions, so that they can start using it to achieve their promotional and protective goals and objectives.

More generally, information about the Statute must be available to all people, organizations and institutions with any responsibility for preventing acts constituting crimes against humanity and protecting the rights of citizens against the culture of impunity.

Civil Society Organizations (CSOs) can therefore use a broad range of activities to help raise awareness of the Statute. Some examples are:

i) Translating key provisions of the Rome Statute into local languages;

ii) Distributing the text of the Statute or relevant extracts to all stakeholders, in the form of leaflets, flyers, posters which provide simplified provisions of the Statute.

iii) Promoting drama, quizzes and games to spread information about the Statute.

iv) Organizing workshops or training sessions about the Statute and state obligations for different target groups, media practitioners, politicians, local communities, inter-faith groups etc.

CSOs can be actively involved in the above through collaboration with relevant government ministries, departments and agencies, as well as parliamentarians in organizing media forum, public hearing and stakeholders' Forum on the domestication process of the Statute.

It must be record that the purposes of international law is for the maintenance of international peace and security and to prevent all acts of aggression and threat to the peace which the jurisdiction of the court seeks to protect, therefore it is recommended that for an effective jurisdiction of the court every state must be answerable to the court. Otherwise, the international community will fail in the attainment of its purposes.

Further, the yardstick for the selection of cases for trial should be based on strict adherence to jurisdictional requirements of the court as spelt out by the statutes and by so doing political dimensions will be narrowed down. For example, before the appointment of the current prosecutor, more than 200 complaints had been registered, but the

prosecutor has been able to dispose quickly of large quantities of unsubstantiated allegations, as a large percentage do not meet the jurisdictional requirements.

5.4 Conclusion

From the discussion in this chapter it must have emerged quite clearly that states must move beyond mere ratification and take concrete steps towards domestication of the Rome Statute if they have to properly fulfill their obligations under the Statute. The case for domestication of the Rome Statute, as was demonstrated earlier in the chapter, is highly compelling and flows, principally, from a state party's signature and/or ratification of the Statute. For all those states that have signed and/or ratified the Rome Statute domestication must come as a matter of course.

International crimes, particularly war crimes and Crimes Against Humanity, have been, regrettably, all too common. Ongoing violence and widespread civil unrest continue in numerous situations, those responsible for atrocities have rarely faced justice. With a substantially increased risk of further terrorist attacks in the aftermath of the September 11th terrorist attacks and the Bali bombings, the development of appropriate legislative and institutional responses to international crimes has acquired a new urgency.

For more than four decades after the establishment of the Nuremberg and Tokyo tribunals the enforcement of international criminal law remained an exclusively national responsibility and the report card is appalling. The abject failure of an exclusive reliance on national courts and legal processes to rein in impunity for the perpetration of atrocities is the single most compelling argument for an effective international criminal law regime. This is not to suggest that the international community needs an effective international

regime to replace or supplant national courts and processes. Rather, the suggestion here is for an effective international supplement to national structures and processes – a multilateral institutional framework to hold some key individuals to account while simultaneously providing a catalyst for more effective national enforcement of international criminal law.

International criminal law is undergoing a rapid transformation. One of the most important events in this evolution was the coming into force of the Rome Statute of the International Criminal Court (the "ICC") on July 1, 2002. There is no doubt that the international community is entering a new era in which perpetrators of international crimes will no longer enjoy impunity.

The creation of the new international Criminal Court will prove a catalyst for states to take the national enforcement of international human rights law much more seriously than has hitherto been the case. Many states, recognizing the potential scope of the International Criminal Court's jurisdiction – particularly in relation to the so-called "principle of complementarity" – have already enacted broad-ranging criminal legislation to ensure that all the crimes within the Rome Statute are covered by domestic penal law. The overwhelming motivation for this unprecedented criminal law reform is to maximize the potential benefits of the principle of complementarity in the event of allegations against a State's own nationals.

The Rome Statute is one of the sources of international criminal law. The pre-existing sources on which the Statute was built not only include rules of international humanitarian law, and in particular those contained in the Geneva Conventions and their additional protocols, but also the rules and categories established under the Nuremberg and Tokyo War Tribunals – "war crimes," "Crimes Against Humanity," and the crime of "aggression." Another important source includes the experience gained from the ad hoc tribunals created by the UN Security Council – the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

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