

Crimes Against Humanity: The “Chapeau” Elements & the Underlying Acts

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Historical Overview

- ◆ **1915:** Joint Declaration (Armenian massacres) – "Crimes against civilization and humanity".
- ◆ 1945: The term "crimes against humanity" was adopted from Judge Robert H. Jackson, following the influential advice of Sir Hersch Lauterpacht.
- ◆ **1945: The Nuremberg Breakthrough** – Closing the "impunity gap" for state-on-citizen violence.
- ◆ **The "Nexus" Requirement:** Nuremberg linked these crimes to war (the *retroactivity* problem).

Evolution of the definition

♦ Art. 6 of IMT Charter (1945): The Nexus Requirement

(c) ' Crimes against humanity.- ' namely, 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.

♦ Art. 5 ICTY Statute (1993): A Partial Step

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.

Evolution of the definition (2)

♦ Art. 3 ICTR Statute (1994): The Discriminatory Intent

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**: 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.

♦ Art. 7(1) ICC Statute

or 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.

Analysis of Article 7(1) ICC Statute

The Contextual Threshold

- ◇ “Widespread or systematic attack directed against any civilian population.”
- ◇ Key Requirements:
 - ◇ Disjunctive Test: Either *Widespread* (Scale) OR *Systematic* (Organization).
 - ◇ The "Attack" Filter: A course of conduct, not random/isolated violence.
 - ◇ Knowledge: The perpetrator must be aware of the broader context

Victims of Article 7: The "Civilian" Requirement

“Directed against any civilian population”

- ◇ **"Any"**: Nationality and affiliation are irrelevant.
- ◇ **Collective Target**: Attacks against a "population" (collective) vs. isolated individuals.
- ◇ **The Predominance Rule**: The population must be predominantly civilian. The presence of non-civilians does not change the nature of the population (*Tadić*).
- ◇ **The *Martić* Distinction (The "Narrow" View)**:
 - ◇ *Rule*: "Civilian" strictly excludes soldiers *hors de combat*.
 - ◇ *Consequence*: You cannot establish a CAH if the attack is directed **only** at prisoners of war.
 - ◇ *Victim Status*: They can be victims **only if** the broader attack is directed at civilian

Widespread or systematic attack against

- ◇ Disjunctive requirements
- ◇ Can a widespread but purely random series of events qualify as a Crime Against Humanity?
- ◇ An **attack** is something which is planned, directed or organized and this excludes “spontaneous or isolated” acts of violence. (Bemba case)
- ◇ **Widespread = Scale & Geography**
- ◇ **Systematic = Pattern & Organization**

Pursuant to or in furtherance of a State or organizational policy to commit such attack

- ◇ Under 7(2)(a) of the Rome Statute an “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts against any civilian population, **pursuant to or in furtherance of a State or organizational policy to commit such attack**;
- ◇ **Objective:** To distinguish international crimes from ordinary, spontaneous violence.
- ◇ **State Policy:** Active promotion or **Acquiescence**
- ◇ **Organizational Policy:** Targets **Non-State Actors** with state-like capabilities (Hierarchical structure and the capacity to direct a course of conduct)
- ◇ **Excluded:** Spontaneous mobs, random unrelated acts,

The Mental Element (Mens Rea)

◇ Dual Layer of Intent:

1. Specific intent to commit the underlying act (e.g., to kill, to torture).
2. Contextual Awareness: Knowledge that the act is part of a *widespread or systematic attack*.

Threshold: Awareness of the context, not the full details of the plan.

◇ Special Intent (*Dolus Specialis*)

- ◇ *Only for specific crimes:* e.g. Persecution (Discriminatory intent), Forced Pregnancy (Ethnic composition), Apartheid (Regime maintenance).

The Underlying Acts (Article 7)

- ◆ **Common Acts:** Murder, Extermination, Enslavement, Torture, Sexual Violence, Persecution, Enforced Disappearance.
- ◆ **The "Domestic" Connection:** Acts already punished by national law, but "internationalized" through context.
- ◆ **Key Jurisprudence:** *Prosecutor v. Blaškić*
 - ◆ *The Scale Factor:* A single, massive act (e.g., biological warfare) can qualify as an "attack."
- ◆ **No Homogeneity Required:** An attack can be a "mosaic" of different prohibited acts (e.g., a mix of torture and displacement).

The Underlying Acts (2)

◆ Murder

1. Unlawful and intentional causing the death of a human being.
2. The perpetrator either intends to kill, or intends to inflict grievous bodily harm likely while being **reckless** as to whether death ensues.

◆ Extermination

1. can be understood as murder on a massive scale.
2. it includes the intentional infliction of conditions of life, inter alia the deprivation to access to food and medicine, calculated to bring about the destruction of part of a population (Stakic case)

The Underlying Acts (3)

◆ Enslavement

1. the de facto exercise of any or all of the powers attaching to the right of ownership over a person
2. ICTY, The Prosecutor v. Kunarac: “The essence of enslavement is found in the absence of the victim’s consent or free will and their exploitation”.
3. elements of control exercised over the victim

◆ Deportation or forcible transfer of population

Deportation: the forced movement of persons across an international border

Forced transfer: the displacement of people within a state

The Underlying Acts (4)

◆ Imprisonment or other severe deprivation of physical liberty

1. the detention involved must be **unlawful**, and “**the gravity of the conduct is such that it was in violation of fundamental rules of international law**”

◆ Torture

The infliction, by act or omission, of severe physical or mental pain or suffering.

◆ Rape and other serious sexual offences (sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence)

1. two-part mens rea: it requires the intent to engage in the sexual act and knowledge of the victim's lack of consent.
2. The absence of consent is assessed objectively through the existence of coercive circumstances in which meaningful consent is not possible.

The Underlying Acts (5)

◆ Persecution

1. **Underlying act:** Other crimes against humanity **or** severe deprivation of fundamental human rights . Must reach **comparable gravity threshold**

2. **Nexus requirement (ICC):** Ensures persecution is not “standalone” discrimination

3. **Discriminatory intent:** conduct must target a group on prohibited grounds. Requires **intentional discriminatory targeting**

◆ Enforced disappearances

Distinguished from other forms of detention because of the combination of deprivation and denial. The victim is not only deprived of liberty, but effectively erased from the protection of law

◆ Apartheid

◆ Other inhumane acts

Relationship with other International Crimes

- ◆ Crimes against humanity, war crimes, and genocide are all considered “core” international crimes
- ◆ Certain acts may amount to both war crimes and crimes against humanity.
- ◆ War crimes differ in that they can **only** be committed in the context of an **armed conflict**.
- ◆ Genocide differs because it requires a **specific intent** to destroy in whole or in part, a national, racial, ethnical, or religious group.
- ◆ Why do we need crimes against humanity as a separate category of international crimes?

Time for an International Treaty on Crimes against Humanity ?

- ◆ Unlike genocide and war crimes, crimes against humanity were never embodied in a comprehensive, specialized crimes against humanity treaty.
- ◆ The absence leaves significant gaps in the international legal order
- ◆ 2013: ILC began work on the matter
- ◆ 2019: ILC adopted the Draft Articles on the Prevention and Punishment of Crimes against Humanity. (a basis of a treaty to be adopted by states)
- ◆ December 2024: UN GA Res 79/122
- ◆ A four – year negotiation process
- ◆ It represents the first major effort to codify international criminal law under UN auspices since the adoption of the Rome Statute in 1998

Key Takeaways

- ◆ Crimes Against Humanity are more than just 'serious crimes.' They are an assault on the very concept of human dignity, orchestrated through the machinery of power—whether that power is a State or a non- state actor with state-like capabilities.
- ◆ The definition of crimes against humanity has evolved over time through the statutes and jurisprudence of major tribunals
- ◆ The Contextual Element
- ◆ The underlying acts do not have to be the same as the other acts committed during the attack
- ◆ The perpetrator must intend to commit the underlying offence and must also have the knowledge that the conduct is part of the broader ongoing attack.