

Defining Crimes Against Humanity

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Defining Crimes Against Humanity

Practicality and Value Balancing

Margaret M. deGuzman*

Abstract

Since crimes against humanity were first defined in the Charters of the International Military Tribunals at Nuremberg and for the Far East, various international, hybrid and national institutions have adopted definitions that differ in important respects. The International Law Commission's draft articles are the latest definition, using language that is almost identical to the definition in the Rome Statute of the International Criminal Court. This article explains that decision, as well as the few divergences between the draft articles and the Statute. Defining crimes against humanity involves balancing the value of respecting state sovereignty against that of protecting human rights, and the values of consistency and clarity against those of breadth and flexibility. It argues that in adopting the draft articles, states will affirm the balance among these values that was struck in Rome, but that both definitions contain sufficient flexibility to permit new balances to be found as global values evolve.

Keywords: crimes against humanity, Rome Statute, Draft Articles, state sovereignty.

1 Introduction

The concept of crimes against humanity represents an effort to identify the kinds of crimes that ought to be subject to international adjudication – whether at an international court or a national court exercising universal jurisdiction – even when committed inside the territory of a single state and outside the context of armed conflict. Since the first definitions of these crimes in the Charters of the International Military Tribunals at Nuremberg and for the Far East (IMT and IMTFE), various international, hybrid and national institutions have adopted definitions that differ in important respects. These divergences stem in part from variations in the drafters' visions of how to balance the values at stake. One of the advantages of adopting an international convention on crimes against humanity is that it will enable the international community to express a global vision of crimes against humanity.

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The International Law Commission's (ILC) draft articles on crimes against humanity define these crimes in language that is almost identical to the definition in the Rome Statute of the International Criminal Court (ICC). This essay explains that decision, as well as the few divergences between the draft articles and the Statute. First, however, it situates the drafting process as an effort to balance competing values. Defining crimes against humanity involves balancing the value of respecting state sovereignty against that of protecting human rights, and the values of consistency and clarity against those of breadth and flexibility. It concludes that in adopting the draft articles, states will affirm the balance among these values that was struck in Rome, but that both definitions contain sufficient flexibility to permit new balances to be found as global values evolve.

2 Balancing Values in the Definition of Crimes Against Humanity

Crimes against humanity were defined for the first time in the IMT and IMTFE Charters. They were included to justify international jurisdiction over crimes committed by, or at the instigation of, the German and Japanese states against their own citizens, which were some of the worse crimes the world had witnessed. The Allies favoured accountability for these crimes, but were also mindful that crimes committed within a state and outside the context of war had theretofore been within the exclusive jurisdiction of sovereign states. The definition of crimes against humanity thus sought to balance the desire for international adjudication of serious human rights violations against the value of protecting state sovereignty. 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.¹

Notably, unlike most subsequent definitions, the Charters' definitions did not rely on the gravity of the crimes to counterbalance sovereignty. Instead, they included a 'war nexus' that linked crimes against humanity with international armed conflict, which was clearly a subject of international law, to address concerns about sovereignty and the principle of legality.² This was the high watermark of attention to state sovereignty in defining crimes against humanity. Most later definitions tilted more towards human rights protection.

- 1 Agreement for the prosecution and punishment of the major war criminals of the European Axis, and Charter of the International Military Tribunal, entered into force on 8 August 1945, 82 UNTS 279, Art. 6(c).
- 2 The Allies may also have included the war nexus at least in part to avoid accountability for human rights violations within their own territories. See W.A. Schabas, 'Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?', *New England Law Review*, Vol. 35, No. 2, 2001, p. 299.

Soon after the end of the war, the ILC began work on several projects related to crimes against humanity, including the Nuremberg Principles, a draft Statute of an ICC, and a draft Code of Crimes Against the Peace and Security of Mankind. In these contexts, the ILC struggled with how to strike the right balance among competing values. The ILC's early efforts to define crimes against humanity emphasized the political nature of the crimes. This can be seen as a concession to sovereignty in that only when political forces were behind the crimes would they qualify. Later efforts, however, relied more on the concept of gravity to define crimes against humanity. Gravity became the linchpin between sovereignty and human rights protection, leading to difficult discussions about how to define this element.³ The ILC never fully resolved this issue.

The next legally operative definition of crimes against humanity came in the Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY). This definition largely mirrored that of the Nuremberg Charter, even maintaining the war nexus, which the ILC had rejected. However, the ICTY quickly acknowledged in its jurisprudence that the war nexus was not part of the customary law of crimes against humanity and it was omitted from all later definitions.⁴

The definition in the Statute of the International Criminal Tribunal for Rwanda (ICTR) shifted the focus officially to gravity, inserting the requirement that constitutive acts be part of a widespread or systematic attack on a civilian population. This became the centrepiece of all subsequent definitions. The ideas of widespreadness and systematicity seek to identify the kinds of crimes for which the international community believes sovereignty concerns should cede to concerns about protecting human rights. This element and other aspects of the definition also seek to strike a balance between clarity, to satisfy the requirements of the principle of legality, and flexibility, to ensure that the definition is able to capture future crimes that ought to be subjects of international attention.

3 The Decision to (Mostly) Follow the Rome Statute

The ILC has explained its decision to adopt essentially the Rome Statute's definition of crimes against humanity as a practical one. The commentary to the draft definition notes that the Rome Statute's definition has been accepted by the 122 states parties to the Court, many of which are using the definition in their

3 For a detailed examination of these discussions, see M.M. deGuzman, *Shocking the Conscience of Humanity: Gravity and the Legitimacy of International Criminal Law*, Oxford, Oxford University Press, 2020, pp. 47-52.

4 *Prosecutor v. Tadić*, IT-94-1-AR72, ICTY, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Para. 141.

national legislation.⁵ The Commission thus considered the Rome Statute definition “to be an appropriate basis for defining such crimes” in the draft articles.⁶ Adopting this definition avoids placing states in the difficult position of having to amend national laws or maintaining two legal definitions of the same crimes on the books.

However, the decision largely to follow the Rome Statute definition cannot be reduced to pragmatics; it also reflects an affirmation that the ICC definition strikes an appropriate balance among competing values. For that reason, some participants have resisted the decision from the beginning of the process. At the first meeting of experts at the Whitney R. Harris Institute in 2008 to discuss a potential convention on crimes against humanity, a number of experts argued for significant modifications to the Rome Statute’s definition. For instance, some experts supported deleting the requirements of a “civilian population” and that acts be committed “pursuant to or in furtherance of a State or organizational policy”.⁷

A relatively small number of states have raised concerns during the ILC process about following the Rome Statute definition. A few have suggested the definition may be too broad. For instance, the United States has objected to the inclusion of such terms as “fundamental rules of international law”, which it considers insufficiently specific.⁸ Other states consider the Rome Statute’s definition to be unduly narrow, and thus out of step with the broader definition they believe has evolved in customary international law.⁹ The policy requirement in particular has been subject to this critique. This is unsurprising since the policy element is one of the most controversial aspects of the Rome Statute, with some experts arguing

5 Int’l Law Comm’n, *Report of the Work of Its Seventy-First Session*, A/74/10 (2019), at p. 30, available at: <https://legal.un.org/docs/?symbol=A/74/10>. Most of the states that responded to the Commission’s request for information about their national laws indicated that their national definitions essentially align with that in the Rome Statute. See S. Murphy (Special Rapporteur on Crimes Against Humanity), *Second Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/690, Annex II, 21 January 2016, pp. 18-19, available at: <https://legal.un.org/docs/?symbol=A/CN.4/690>.

6 Int’l Law Comm’n, *supra* note 5, at 30.

7 L.N. Sadat (Ed.), *Forging a Convention for Crimes Against Humanity*, Cambridge, Cambridge University Press, 2013.

8 United States, *Comments from the United States on the International Law Commission’s Draft Articles on ‘Crimes Against Humanity’ as Adopted by the Commission in 2017 on First Reading*, p. 6, available at: https://legal.un.org/ilc/sessions/71/pdfs/english/cah_usa.pdf.

9 See, e.g., Sweden, *Comments on ILC Draft Articles on Crimes Against Humanity*, p. 1, available at: https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_sweden.pdf&lang=E; Sierra Leone, *Comments and Observations from the Republic of Sierra Leone*, p. 12, Para. 37, available at: https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_sierra_leone.pdf&lang=E.

that it reflects the customary international law of crimes against humanity,¹⁰ while others, including the ICTY Appeals Chamber, reject this view.¹¹

However, the majority of states have either expressed their support for the use of the Rome Statute definition or remained silent on the matter.¹² In Special Rapporteur Sean Murphy's first report to the Commission, he noted:

while from time to time the view is expressed that [the Rome Statute's definition] might be improved, and although disagreements may exist regarding whether it reflects customary international law, there can be little doubt that article 7 has very broad support among States as a definition of crimes against humanity.¹³

Murphy thus proposed a definition taken verbatim from the Rome Statute except for a few non-substantive changes required by the different context of the proposed convention. The Commission generally adopted this approach on first reading, making only a few substantive changes to the Rome Statute's definition in the draft that it submitted to governments and others for comment in 2017. Virtually all states that provided comments in response to the ILC's request supported the decision to follow the Rome Statute.¹⁴ The definition thus remained largely unchanged in the draft articles the Commission submitted to states in December 2019.

That states considered alternative perspectives suggests the decision to follow the Rome Statute was not just pragmatic, but also a statement of support for the balances struck among competing values in that instrument. The Commission's conclusion in this regard is reflected in the draft preamble, which the commentary notes "aims at providing a conceptual framework for the draft articles". The draft preamble asserts that states "consider[ed]" the Rome Statute definition, and the accompanying commentary notes that the Commission found the Rome Statute to be a 'useful model'. The preamble elucidates the conceptual relationship between the Rome Statute and the draft articles when, mirroring the Statute's preamble, it asserts that: "throughout history millions of children,

10 See, e.g., W.A. Schabas, 'State Policy as an Element of International Crimes', *The Journal of Criminal Law & Criminology*, Vol. 98, No. 3, 2008, p. 981; M.C. Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text*, 1st ed., New York, Transnational Publishers, 2005, pp. 151-152.

11 *Prosecutor v. Kunarac*, Appeals Chamber, Judgment, 2002 ICTY No. IT-96-23/1-A, Para. 98, n. 114.

12 See S. Murphy (Special Rapporteur on Crimes Against Humanity), *Fourth Report on Crimes Against Humanity*, U.N. Doc. A/CN.4/725 + Add. 1, 18 February 2019, p. 24, available at: <https://legal.un.org/docs/?symbol=A/CN.4/725%20>.

13 See S. Murphy (Special Rapporteur on Crimes Against Humanity), *First Report on Crimes Against Humanity*, UN Doc. A/CN.4/680, 17 February 2015, p. 57, available at: <https://legal.un.org/docs/?symbol=A/CN.4/680>.

14 *Crimes Against Humanity: Comments and Observations Received from Governments, International Organizations and Others*, International Law Commission, Seventy-First session, Geneva 29 April-7 June and 8 July-9 August 2019, U.N.G.A., Doc. No. A/CN.4/726 +Add. 1 + Add. 2 (2019), pp. 5-21, available at: <https://legal.un.org/docs/index.asp?symbol=A/CN.4/726>.

women and men have been victims of crimes that deeply shock the conscience of humanity.”¹⁵ The draft preamble adds that: “When such acts, because of their gravity, constitute egregious attacks on humankind itself, they are referred to as crimes against humanity.” The Commission thus concluded that the crimes defined in the Rome Statute are the crimes that amount to ‘attacks on humankind’ and thus ought to qualify as crimes against humanity with all of the incursions into state sovereignty that this entails, including the requirement that states prosecute or extradite persons suspected of these crimes found in their territories.

In accepting the proposed definition, states will thus implicitly affirm that the definition strikes an appropriate balance among values: that it is sufficiently broad to capture the kinds of future crimes that ought to be labelled crimes against humanity, and also sufficiently narrow to appropriately protect state sovereignty; it is adequately specific to meet the requirements of the principle of legality, while leaving enough room for interpretation to capture unforeseen crimes that ought to be included.

However, as further discussed below, the draft articles also leave open the possibility of different balances being struck in other contexts by including a caveat that the definition does not preclude the use of broader definitions in international, customary, or national laws.¹⁶ Inclusion of this provision indicates the Commission did not reach a conclusion on the controversial question of whether the Rome Statute’s definition codifies customary international law. This controversy is reflected both in the literature¹⁷ and in the discussions surrounding the draft articles.¹⁸ However, if a convention on crimes against humanity is widely adopted, there is little doubt that it will provide strong evidence of *opinio juris* regarding the definition, as does the Rome Statute definition. As such, this provision is unlikely to play a significant role in the future development of the definition.

4 Three Modifications, and a Proposed Modification, to the Rome Statute

The draft articles contain three material divergences from the Rome Statute, and an additional proposed modification has significant support among states.¹⁹ First, the definition of ‘persecution’ in the Rome Statute requires that it be connected with another act constituting a crime against humanity, or another crime within the ICC’s jurisdiction. The draft articles eliminate the second option,

15 Int’l Law Comm’n, *Draft articles on Prevention and Punishment of Crimes Against Humanity*, 2019, p. 2, available at: https://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/7_7_2019.pdf&lang=EF.

16 See *ibid.* at p. 4.

17 See C.C. Jalloh, “The International Law Commission’s First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?”, *Case Western Reserve Journal of International Law*, Vol. 52, No. 1, 2020, p. 358.

18 See Murphy, *supra* note 13, at Para. 122.

19 Non-material modifications such as the use of ‘draft articles’ in place of ‘Statute’ are not included in this discussion.

requiring that persecution be committed in connection with another act listed in the definition. Second, the definition of ‘gender’ in the Rome Statute has been removed from the draft articles. Third, as noted above, a paragraph has been added allowing for broader definitions to be used in other contexts. Additionally, some states support eliminating the Rome Statute’s intent requirement for enforced disappearances. Like the decision to largely follow the Rome Statute definition, each of these decisions reflects a particular balance among values.

4.1 *The Persecution Nexus*

The Rome Statute definition includes persecution as an enumerated act when it is committed “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”. This was included in an effort to ensure that insufficiently serious instances of persecution would not constitute crimes against humanity. The initial draft articles the Special Rapporteur proposed to the Commission replicated this provision, except with the technical change that the second clause was replaced with “or in connection with acts of genocide or war crimes”.²⁰ A number of states raised concerns about this aspect of the draft definition. Some states argued that persecution itself should be a crime against humanity, without any connection to another act, and others wanted to expand the listed connection crimes to include aggression, since that is also in the ICC’s jurisdiction.²¹ Such views reflect an emphasis on the value of preventing human rights violations, despite the additional restriction on sovereignty that such expansion entails.

The Commission ultimately removed the second clause entirely, thus requiring a connection with another act enumerated in the definition. It justified this divergence from the Rome Statute on the grounds that the nexus requirement is a jurisdictional limitation in the Rome Statute that does not “indicate the scope of what should constitute persecution as a crime against humanity more generally or for purposes of national law”.²² However, it also explained its retention of the first clause of the nexus element on the grounds that omitting this requirement “would bring within the definition of crimes against humanity a wide range of discriminatory practices that do not necessarily amount to crimes against humanity”.²³ In other words, it endorsed the nexus as an appropriate gravity threshold, although not in the precise form in which it appears in the Rome Statute.

The exclusion of the second clause of the Rome Statute’s nexus results in a narrower definition of persecution as a crime against humanity in the draft articles since there is a smaller number of eligible connection crimes. In particular, certain war crimes can serve as the nexus crimes for persecution under the Rome Statute but not the draft articles.²⁴ However, as an ICTY trial chamber has poin-

20 See Murphy, *supra* note 13, at Para. 176.

21 See Murphy, *supra* note 12, at Paras. 62-64.

22 Int’l Law Comm’n, *supra* note 5, at 44.

23 *Ibid.*

24 Leila Nadya Sadat, *Harris Institute Comments on Fourth Report*, 7 May 2019, pp. 5-7.

ted out,²⁵ and as indicated in the ILC Commentary,²⁶ the nexus requirement may not be a significant barrier to prosecution in most cases since it includes the connection to ‘other inhumane acts’. If ‘other inhumane acts’ is interpreted broadly, most acts of persecution will fall within the ambit of crimes against humanity.

The Commission’s decision to retain the modified nexus for persecution constitutes an effort to keep the balance of values from tipping too far in a direction that erodes sovereignty. However, its commentary noting the potentially broad scope of persecution when linked to ‘other inhumane acts’ also indicates an intention to ensure sufficient flexibility and scope to encompass most forms of persecution.

4.2 *Leaving Gender Undefined*

Another modification of the Rome Statute in the draft articles is the exclusion of the definition of the term ‘gender’, one of the grounds of persecution. Adoption of the definition in Rome was one of the most contentious aspects of negotiating the Rome Statute. While most states supported inclusion of the term without definition, a vocal minority strongly advocated for its exclusion. The compromise that ultimately prevailed was the inclusion of the term along with the explanation that it refers: “to the two sexes, male and female, within the context of society”.²⁷

The draft articles the ILC submitted to states after its first reading retained this definition, but it was deleted after many states objected. States opposed to the definition pointed out that it does not adequately reflect the current meaning of the term in international law. The Commentary notes that developments in international law since the adoption of the Rome Statute indicate an evolution in the international understanding of the term. These include guidance from the International Committee of the Red Cross, a Council of Europe convention, and reports of United Nations special rapporteurs and experts. The Commission also noted that the ICC’s Office of the Prosecutor has adopted a definition of the term in line with the understanding that has developed in international law.²⁸

The Commission thus concluded that the term should be left undefined, like many other terms in the draft articles. The Commentary does not suggest that the Rome Statute’s definition is outdated. Rather, as the ICC’s Office of the Prosecutor’s policy indicates, the Rome Statute definition can be interpreted in accordance with current understandings of the term. Indeed, such interpretation is required by the Rome Statute’s applicable law, which requires that the interpretation and application of the Statute be “consistent with internationally recognized human rights”.²⁹

25 *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-T, ICTY, Judgment, 14 January 2000, Para. 580, available at: www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.

26 See Int’l Law Comm’n, *supra* note 5, at p. 44.

27 Rome Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on 17 June 1998, entered into force on 1 July 2002, 2187 UNTS 90, Art. 7.

28 See Int’l Law Comm’n, *supra* note 5, at 45-46.

29 See Rome Statute, *supra* note 27, at Art. 21(3).

After the definition was deleted from the draft articles, some states voiced support, while others objected.³⁰ While this issue may thus merit further discussion, it is important to remember that non-inclusion of a definition in the convention does not preclude states from defining the term in their national laws, provided those definitions comport with international human rights law. Excluding the definition simply leaves it to states to interpret the term in their national laws and jurisprudence in the way that best expresses their view of the appropriate scope of the values to be protected.

4.3 Including a 'Without Prejudice' Clause

A third modification to the Rome Statute definition is the inclusion of Paragraph 3, which states: "This draft article is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law." While this addition is included here for the sake of completeness, it is not really a departure from the Rome Statute, which contains a similar statement in Article 10, which states:

Nothing in [the Part of the statute containing the definitions of crimes] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

In both cases, the caveats were included to reassure states that disagreed with aspects of the proposed laws that different approaches could be taken in the future, whether in national or international contexts. Although a few states commented favourably, and unfavourably, on the inclusion of this provision in the draft articles, it seems to enjoy widespread support.

The principal difference between the provisions is that Paragraph 3 of the draft articles is unidirectional. That is, only different approaches that are broader than that taken in the draft articles are considered appropriate. This reflects the view of most participants that the draft articles either balance relevant values appropriately or, if the balance is off, it is tilted in favour of protecting sovereignty. Participants do not support future definitions that are even more strongly protective of state sovereignty.

4.4 Keeping the Intent Requirement for Enforced Disappearance

Like the Rome Statute, the draft articles require that enforced disappearance be "committed with the intention of removing [the person] from the protection of the law for a prolonged period of time". In contrast, two other conventions – the 1994 Inter-American Convention on Forced Disappearance of Persons and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance – define enforced disappearance without this requirement. A number of states have objected to the inclusion of the intent requirement in the draft

30 See Int'l Law Comm'n, *supra* note 15, at 30-55.

articles on the grounds that it does not reflect the current state of the definition in international law and increases the burden of proof.³¹

Despite such objections, the Commission decided to retain the intent requirement to maintain conformity with the Rome Statute. Notably, the Committee on Enforced Disappearances established by the 2006 Convention supports this decision. It issued a statement in June 2018 stating that:

the overall consistency of the [draft articles] with the Rome Statute ought to be paramount, for the sake of effective co-operation between States Parties in the criminal prosecution of these crimes.³²

In the Commentary to the draft articles adopted on second reading, the Commission cited the difference between the Rome Statute and the other international instruments' definitions of enforced disappearance as a reason to adopt Paragraph 3's 'without prejudice' clause. The Special Rapporteur further noted that inclusion of the intent requirement may not be very significant because to qualify as crimes against humanity such acts must be part of a widespread or systematic attack pursuant to a state or organizational policy.³³ This contextual element will generally establish the necessary intent. He also noted that some scholars have argued that the intent requirement adds little to what would otherwise be required to prove a crime in any event.³⁴ As such, the decision to retain the Rome Statute's intent requirement is one that relied significantly on pragmatic considerations related to consistency with the Rome Statute, rather than on any particular approach to value balancing.

5 Conclusion

Defining crimes against humanity is an exercise in value balancing. To identify the crimes that ought to be subject to international and universal jurisdiction requires determining when sovereign prerogatives should cede to global human rights protection. This is not a static process because the global community's values evolve over time. As such, the definition must also balance the values of flexibility and adaptability against those of predictability and clarity, which are essential to protecting defendants' rights. In adopting the draft articles, the ILC engaged in this value balancing, and states are now doing so as they consider whether to adopt the draft articles. The decision to largely follow the Rome Statute's definition should thus not be viewed as merely a pragmatic one. Cer-

31 See, e.g., Chile, *Comments of the Government of Chile on the Draft Articles on Crimes Against Humanity*, pp. 4-5, available at: https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_chile.pdf&lang=E.

32 Committee on Enforced Disappearances, *Statement on the Draft articles on Crimes Against Humanity Adopted by the International Law Commission*, 2018, Para. 3, available at: https://tbinetnet.ohchr.org/Treaties/CED/Shared%20Documents/1_Global/INT_CED_STA_14_27312_E.pdf.

33 See Murphy, *supra* note 12, at Para. 77.

34 *Ibid.*

tainly, there are practical benefits to adopting a definition that is already widely accepted and used in many national systems. But in adopting this definition states are also affirming the value-balancing choices made in Rome. Although including a 'without prejudice' clause to leave open the possibility of broader definitions makes sense, states should not place too much weight on this caveat. Inclusion of a definition in the international convention on crimes against humanity that is virtually identical to that in the Statute of the ICC will be strong evidence of the customary international law concerning those crimes and thus a substantial barrier to the adoption of divergent definitions in the future. Now is the time for states to ensure they are satisfied that the definition appropriately balances their values.