Defining "Crimes Against Humanity" at the Rome Conference
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In short, all states may participate in the Preparatory Commission. The commission will report to the first Assembly of States Parties.\textsuperscript{56}

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DEFINING “CRIMES AGAINST HUMANITY” AT THE ROME CONFERENCE

I. INTRODUCTION

On July 17, 1998, the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) adopted the Rome Statute of the International Criminal Court (ICC).\textsuperscript{1} One of the many significant provisions of the ICC statute is Article 7, which defines “crimes against humanity” for the purpose of the ICC. A significant difference between the definition in the ICC statute and the major precedents on crimes against humanity is that the former definition was not imposed by victors (as were those in the Nuremberg and Tokyo Charters\textsuperscript{2}) or by the Security Council (as were those in the Statutes of the Yugoslavia and Rwanda Tribunals\textsuperscript{3}). In contrast, Article 7 was developed through multilateral negotiations involving 160 states.\textsuperscript{4} For this reason, one could reasonably expect Article 7 to be more detailed than previous definitions, given the interest of participating states in knowing the precise contours of the corresponding obligations they would be undertaking. For the same reason, one might expect the definition to be more restrictive than previous definitions.\textsuperscript{5} Fortunately, although the definition in the ICC statute is more detailed than previous definitions, it generally seems to reflect most of the positive developments identified in recent authorities. For example, the definition does not require any nexus to armed conflict, does not require proof of a discriminatory motive, and recognizes the crime of apartheid and enforced disappearance as inhumane acts.

\textsuperscript{56} Res. F, supra note 30, para. 8.

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\textsuperscript{1} General information on the conference, as well as the ICC statute, is available at <www.un.org/icc>. The statute is reprinted in 37 ILM 999 (1998).


\textsuperscript{4} Delegations readily agreed that “crimes against humanity” give rise to individual criminal responsibility in customary international law, but found that there was no single authoritative definition of the crime, and that there were inconsistencies among the major precedents on the definition. Given the number of states involved in the negotiations, and the fact that discussions were based on national positions as to the content of current customary international law, one may hope that the definition in the ICC statute will eventually be regarded as more authoritative than previous formulations.

\textsuperscript{5} A different dynamic results not only because of the number of states involved, but also because of the inclination to demand more rigor where the definition is not simply being imposed on others but is potentially more broadly applicable.
The negotiations on crimes against humanity at the Rome Conference were coordinated by Dr. Waleed Sadi of Jordan, and many delegations made a substantial contribution to the final product. Paragraph 1 of Article 7 mirrors the structure appearing in the ICTY and ICTR Statutes, featuring a list of inhumane acts, such as murder, torture and rape, and a chapeau that specifies the conditions under which the commission of those acts rises to the level of “crimes against humanity,” thereby warranting international scrutiny. Paragraphs 2 and 3 of Article 7 offer further clarification of the terms appearing in paragraph 1.

This paper will examine the definition of “crimes against humanity” developed at the Rome Conference. Before examining the provisions of Article 7, an overview of the historical development of “crimes against humanity” will be instructive.

II. OVERVIEW OF HISTORICAL DEVELOPMENT

The evolution of the concept of crimes against humanity in customary international law has not been orderly. A definition was first articulated in the Nuremberg Charter in 1945; but whether this was a legislative act creating a new crime or whether it simply articulated a crime already embedded in the fabric of customary international law remains controversial. The latter view is arguably supported by general principles of law recognized by the community of nations, as evidenced by, for example, the “Martens clause” of the 1899 and 1907 Hague Conventions, referring to the “laws of humanity”; the Joint Declaration of May 28, 1915, condemning “crimes against humanity and civilization”; and the 1919 report of the Commission on the Responsibility of the Authors of War, advocating individual criminal responsibility for violations of the “laws of humanity.” With this background, the drafters of the Nuremberg Charter found themselves confronted with an appalling “policy of atrocities and persecutions against civilian populations,” which in many cases did not fit the technical definition of war crimes (for example, inhumane acts against civilians who were not enemy nationals) and yet were unquestionably contrary to the dictates of the public conscience and general principles of law recognized by the community of nations. The drafters therefore formulated a definition intended to encapsulate these norms. Article 6(c) of the Nuremberg Charter defined “crimes against humanity” as

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6 Much has been written on this question; schools of thought are canvased in Kevin R. Chaney, Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials, 14 DICKINSON J. INT’L L. 58 (1995); and Joseph Rikhof, Crimes against Humanity, Customary International Law and the International Tribunals for Bosnia and Rwanda, 6 NAT’L J. CONST. L. 231 (1995). See also Bassiouni’s major text on the subject, supra note 2.

7 The Preamble to the Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247, and the Preamble to the Convention Respecting the Laws and Customs of War on Land, with annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, specify that in cases not included in the Hague Regulations, “the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”


9 Following the First World War, the 1919 Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of War and on Enforcement of Penalties for Violations of the Laws and Customs of War, excerpted in BASSIOUNI, supra note 2, at 553–65, recommended the creation of a high tribunal to try persons belonging to enemy countries who were guilty of “offences against the laws and customs of war or the laws of humanity.” However, the U.S. representatives objected to the creation of an international criminal tribunal and to the references to the laws of humanity on the grounds that these had not been sufficiently ascertained. See Annex II to the Report.

10 See BASSIOUNI, supra note 2, at 69–86; UNITED NATIONS WAR CRIMES COMMISSION. supra note 8, at 174–77.
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 law of the country where perpetrated.\(^\text{11}\)

The formulation in the Nuremberg Charter was incorporated, with some changes, in the Tokyo Charter and in the Allied Control Council Law No. 10.\(^\text{12}\) In the decades that followed, efforts to elaborate a generally acceptable definition of crimes against humanity did not make headway,\(^\text{13}\) although particular crimes against humanity, such as genocide, apartheid and enforced disappearance, were identified in subsequent international instruments.\(^\text{14}\)

The next major development was the adoption by the Security Council of the ICTY and ICTR Statutes in 1993 and 1994, respectively.\(^\text{15}\) The definition of “crime against humanity” in each Statute contains a list of inhumane acts, prefaced by a chapeau that describes the circumstances under which the commission of those acts amounts to a crime against humanity. There are differences between the two definitions; for example, the ICTY Statute suggests that a nexus to armed conflict is required, whereas the ICTR Statute suggests that a discriminatory motive is required (these differences are discussed in more detail below). The creation of the Tribunals also paved the way for the development of a body of international jurisprudence on crimes against humanity, which helped guide the delegations assembled at the Rome Conference.

III. ARTICLE 7 OF THE STATUTE

The Chapeau

The chapeau of Article 7, paragraph 1 of the ICC statute confirms that, “[f]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.” The important features of this chapeau, which will be discussed below, 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 “widespread or systematic attack” criterion, and (4) the element of mens rea.

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

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\(^{11}\) Nuremberg Charter, supra note 2, Art. 6(c).

\(^{12}\) Tokyo Charter, supra note 2; Allied Control Council Law No. 10, CONTROL COUNCIL FOR GERMANY, OFFICIAL GAZETTE, Jan. 31, 1946, at 50. The differences among these instruments will be discussed in the analysis below.


\(^{15}\) See supra note 3.
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 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.

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 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. 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 Tadić 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. 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.

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

16 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, supra note 13, 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. Tadić, 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 Criminalization 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.

17 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.


19 Id., paras. 650–52, 36 ILM at 943–44.
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.

**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.20

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. For example, the ICTR Statute requires that the inhumane acts be committed “as part of a widespread or systematic attack against any civilian population.”21

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 overinclusive. 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” 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 con-

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20 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.

See id. §6.4. See also 1996 ILC Report, supra note 13, at 94–96; and Tadić Opinion and Judgment, supra note 18, para. 648, 36 ILM at 942–43.

21 ICTR Statute, supra note 3, Art. 3 (emphasis added). Likewise, ICTY Trial Chamber II has confirmed that, “[i]n addition to the Report of the Secretary-General numerous other sources support the conclusion that widespreadness and systematicity are alternatives.” Tadić Opinion and Judgment, supra note 18, para. 647, 36 ILM at 942. Oddly, however, the French version of the ICTR Statute uses the conjunctive widespread and systematic test (généralisé et systematique) owing to a translation error. ICTR Statute, supra, Art. 3.

22 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.
cerns raised, by affirming that an “attack directed against any civilian population” involves some degree of scale, as well as a policy element, as is discussed in the following sections.

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.23 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.24 Likewise, in the Tadić 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.”25 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.”26

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,”27 whereas the term “course of conduct” and the reference to multiple acts were regarded as presenting a lower threshold.28 The second point is that it need not 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.29

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 persecu-

23 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.” UNITED NATIONS WAR CRIMES COMMISSION, supra note 8, at 193.
25 Tadić Opinion and Judgment, supra note 18, para. 644, 36 ILM at 941.
26 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.
27 Prosecutor v. Akayesu, supra note 20; see also 1996 ILC Report, supra note 13, at 96.
28 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.” 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 supra note 26.
29 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 Tadić 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.” Tadić Opinion and Judgment, supra note 18, 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, supra note 1, Art. 17(1)(d).
tion, repression and murder of civilians." \(^{30}\) In addition, the jurisprudence of subsequent military tribunals reveals that a policy element was a requisite for crimes against humanity. \(^{31}\)

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." \(^{32}\) The ILC noted that it is this direction or instigation that "gives the act its great dimension and makes it a crime against humanity." \(^{33}\) 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." \(^{34}\) 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." \(^{35}\) 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." \(^{36}\)

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 state practicing a policy of ideological hegemony." \(^{37}\) 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." \(^{38}\) 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."39

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 require-
ment of an “official policy of discrimination.”40 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 an official (i.e., state) policy. The first point was
addressed above in the discussion on “discriminatory motive,” but the second war-
rants specific comment here.

As the ICTY has correctly noted, in the past “[t]he traditional conception was, in
fact, not only that a policy must be present but that the policy must be that of a
State.”41 Today, however, the dominant view among commentators is that custom-
ary 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.”42 The Tadić opinion
and judgment acknowledges that the entity behind the policy could be an organiza-
tion with de facto control over territory, and leaves open the possibility that other
organizations might meet the test as well.43 To reflect these developments, the
delегations at the Rome Conference made reference to a state or organizational
policy.44

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.”45 In contrast,

40 Mark R. von Sternberg, A Comparison of the Yugoslav and Rwandan War Crimes Tribunals: Universal Jurisdiction
and the “Elementary Dictates of Humanity,” 22 BROOKLYN J. 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 supra note 37, describing Wexler’s
criticism of French decisions.
41 Tadić Opinion and Judgment, supra note 18, para. 654, 36 ILM at 944.
43 Tadić Opinion and Judgment, supra note 18, paras. 654–55, 36 ILM at 944–45. Rikhof, supra note 6, 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 nonstate 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, reprinted in
BASSIOUNI, supra note 2.
44 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 “organiza-
tion” 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.
45 Prosecutor v. Akayesu, supra note 20, §6.4; see also Tadić Opinion and Judgment, supra note 18, para. 648,
the term "policy" is much more flexible; for example, in the Tadić opinion and judgment, the ICTY noted that a policy need not be formalized. Thus, it is likely that, for example, proof of radio broadcasts advocating mass murder would be adequate proof of a "policy." In addition, the Tadić 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.

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. The term "civilian" excludes attacks against armed forces, although there is jurisprudence moderating this point. 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 expansive. 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 "widespread" 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.

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. 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

46 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).

47 Tadić Opinion and Judgment, supra note 18, para. 653, 36 ILM at 944.

48 Id. It remains to be seen whether the ICC will adopt this approach.

49 See United Nations War Crimes Commission, supra note 8, at 193.

50 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.

51 For example, the Tadić Opinion and Judgment refers to a "predominantly" civilian population, and gives an expansive interpretation to the term "civilian" in this context. The Tadić 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. See Tadić Opinion and Judgment, supra note 18, paras. 638–42, 36 ILM at 939–41.

52 ICC statute, supra note 1, Art. 7, para. 1.
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.\textsuperscript{53} 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 \textit{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 unaware of that attack.\textsuperscript{54} If such a case were to occur, however, the accused would have the \textit{mens rea} for murder, but not for the far more serious charge of a "crime against humanity."\textsuperscript{55}

\textit{The Enumerated Acts}

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.\textsuperscript{56} 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.

The term "murder" was considered to be sufficiently understood by reference to the applicable sources of law,\textsuperscript{57} and therefore not to require additional clarification. To preclude an inappropriately restrictive interpretation of the term "imprisonment," subparagraph 1(e) includes reference to "other severe deprivation of physical liberty."\textsuperscript{58} Paragraph 2 provides further clarification of the provisions on extermination,\textsuperscript{59} enslavement, deportation, torture, rape, persecution, enforced disappearance, apartheid and other inhumane acts.\textsuperscript{60}

\textsuperscript{53} Woolmington v. Director of Public Prosecutions, 1935 App. Cas. 462 (H.L.).
\textsuperscript{54} 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 supra note 29.
\textsuperscript{55} A similar conclusion was reached by the Supreme Court of Canada in the \textit{Finta} case, following a review of relevant jurisprudence:

\textit{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.}

\textit{... [T]he 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.}

\textit{Regina v. Finta, [1994] 1 S.C.R. 701, 819. The same approach was adopted by the ICTY in the \textit{Tadić} Opinion and Judgment, supra note 18, paras. 658–59, 36 ILM at 946.}

\textit{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. Enforced disappearance and the crime of apartheid were added to recognize particular types of inhumane act that have been identified by the international community as such, as is discussed below.}

\textsuperscript{56} 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.

\textsuperscript{57} Either of these activities must be "in violation of fundamental rules of international law." ICC statute, supra note 1, Art. 7, subpara. 1(e). This qualifier was necessary because imprisonment \textit{simpliciter} is carried out quite legitimately by all states (for example, the imprisonment of persons convicted after a fair trial).

\textsuperscript{58} Id., subparagraph 2(b) notes that "extermination" includes the "intentional infliction of conditions of life... calculated to bring about the destruction of part of a population." This language is borrowed from the
ment,60 deportation61 and torture.62 The classical reference to “rape” was expanded and clarified in subparagraph 1 (g), which refers to “[r]ape, sexual slavery, enforced prostitution, forced pregnancy,63 enforced sterilization, or any other form of sexual 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.64

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.

**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.65 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 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." 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.

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." 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 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. 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. 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."

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.

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66 The Tokyo Charter omitted "religious" grounds, apparently because there was little evidence of persecution on religious grounds in that conflict.
67 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.”
68 ICC statute, supra note 1, Art. 7, subpara. 1(h).
69 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, supra note 8, 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.
70 Indeed, the ICTY has held that "it is not necessary to have a separate act of an inhumane nature to constitute persecution." Tadić Opinion and Judgment, supra note 18, 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.
71 BASSIOUNI, supra note 2, at 318.
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 referred to in paragraph 1 (i.e., other inhumane acts). 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.

**Enforced disappearance and apartheid.** 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.” Many delegations pressed for specific acknowledgment of particular inhumane acts that have been of special concern to the international community. While such 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. Likewise, delegations agreed that enforced disappearance, also previously identified as a crime against humanity in international instruments, was

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72 ICC statute, supra note 1, Art. 7, subpara. 1(f).
73 The interpretation of this provision must, of course, be subject to the principle of *ejusdem 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 76 below.
74 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, supra note 14; as well as in other instruments, such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, supra note 43, 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, supra note 1, Article 7, subparagraph 2(h), the crime of apartheid is defined as "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime." While the explicit reference to "inhumane acts of a character similar to those referred to in paragraph 1" underscores the fact that this crime would have already fallen within subparagraph 1(k) (other inhumane acts), specific acknowledgment of this crime was considered desirable in order to demonstrate the international community's disapprobation, and to provide a specific label for prosecution of such acts.
75 Enforced disappearance is recognized as a crime against humanity in the UN Declaration on the Protection of All Persons from Enforced Disappearance, supra note 14, and in the Preamble to the Inter-American Convention on Forced Disappearance of Persons, supra note 14, which “reaffirm[s] that the systematic practice of the forced disappearance of persons constitutes a crime against humanity.” The ILC, noting these pronouncements, put forward "forced disappearance of persons" as a crime against humanity in its 1996 draft Code of Crimes, 1996 ILC Report, supra note 13. Subparagraph 2(i) of Article 7 of the ICC statute, supra note 1, defines enforced disappearance as

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to
an inhumane act similar to the other acts in character and gravity, which warranted specific acknowledgment.76

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,77 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.

IV. CONCLUSION

Article 7 of the ICC statute is a significant contribution to the refinement of international criminal law, 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 disappearance...
ance and the crime of apartheid explicitly acknowledges two types of inhumane act that 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.

In summary, although the process of multilateral negotiation necessitated a more precise and regulative approach than in previous instruments, this constraint 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 that should provide a sound basis for international criminal prosecution in the future.

Darryl Robinson*

PROGRESS AND JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

In May 1993, the United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY). Over the past five years, the ICTY has shifted from an institution lacking a basic structure, staff and other resources—not to mention indictees in custody—to a fully functioning tribunal pursuing (as of December 1998) twenty-two public indictments against fifty-six indictees; twenty-eight indictees are in custody, awaiting trial or serving a sentence; five have been convicted; one has pleaded guilty; one has been acquitted; several trials are under way; and several more are in pretrial stages. Although its ultimate success is not yet guaranteed, the ICTY is coming of age as a credible forum for the international prosecution of war crimes within its jurisdiction. The following account describes the ICTY’s current status, analyzes its jurisprudence (as seen in its most significant decisions), and briefly assesses its place in the development of international humanitarian law.

I. THE SHIFT TO TRIAL WORK

The first three years of the ICTY’s existence were largely spent addressing certain rudimentary matters, such as concluding arrangements with the Netherlands as host country; occupying a large, modern office building in The Hague; establishing field offices in the former Yugoslavia; recruiting experienced prosecutors, investigators, analysts, administrators and translators; electing eleven judges to serve on trial chambers and an appellate chamber; adopting rules governing procedure, evidence and detention; promoting implementing legislation by states so as to obtain their cooperation on matters such as detention of persons, deferral of national prosecutions to the ICTY, and postconviction imprisonment; securing increasing levels of funding through the regular UN budget; and obtaining contributions directly from states in the form of funds, personnel (on secondment) and contributions in kind (such as computer equipment). Once it had the necessary staff, the ICTY commenced investigations of persons reported

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