Crimes Against Humanity - Understanding The Impact Of The Rome Statute Of The International Criminal Court

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THE CHAPEAU OF CRIMES AGAINST HUMANITY
The Impact of the Rome Statute of the International Criminal Court

Cameron Charles Russell*

There is a widespread view that the Rome Statute of the International Criminal Court (ICC) was a leap forward for ending impunity for those guilty of violating international criminal law. The impact of the Rome Statute on the jurisprudential status of crimes against humanity, however, was not as revolutionary as is often thought. This article seeks to understand the legal imperfections and achievements of the Rome Statute in relation to crimes against humanity, so as to assess its impact more accurately and highlight the legal problems that face the jurisprudence of crimes against humanity today. This article examines the evolution of crimes against humanity in customary international law and considers some jurisprudential problems still facing the ICC. The article finds that crimes against humanity were more judicable before the Rome Statute than is commonly thought. Following this discussion, the article shows that the Rome Statute is largely reflective of the pre-Rome status of crimes against humanity under customary international law and addresses problems still inherent in the jurisprudence of crimes against humanity.

Keywords: crimes against humanity, chapeau, jurisprudence, judicability, Rome Statute

Justice for crimes against humanity must have no limitations.1
— Simon Wiesenthal

I. INTRODUCTION

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted The Rome Statute of the International Criminal Court on July 17, 1998.2 It created the “last great international institution of the Twentieth Century”—the International Criminal Court (ICC)—to punish war crimes, genocide, crimes against humanity, and the crime of aggression.3 It was heralded as a momentous advance in the development of international criminal law and the prosecution of international criminals. Burke-White reports

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that "the international community had extraordinarily high expectations that the court would bring an end to impunity and provide broad-based accountability for international crimes," and even former UN Secretary General Kofi Annan remarked, "[i]mpunity has been dealt a decisive blow."4

Others focused more specifically on the creation of the ICC as progress in the advancement of the international legal regime of crimes against humanity. For example, Wexler in 1996 saw international "crimes [as] undefined or poorly defined,"5 and "international criminal law, and particularly international humanitarian law, as . . . incoherent [and] incomplete."6 She made the argument that the role of an international criminal court would be to develop and clarify international criminal law.7 This article will focus on this aspect of the jurisprudence concerning crimes against humanity and not the broader issue of the relevance of the Rome Statute for ending impunity for those guilty of violations of international criminal law.

To judge properly the impact of the Rome Statute on the legal regime of crimes against humanity, it is necessary to understand two points. First, it is necessary to understand that there had been substantial development and consideration of the jurisprudence of such crimes before the negotiations in Rome. Second, it is necessary to understand what relationship the Rome Statute shares with the jurisprudential status of crimes against humanity prior to the negotiations in Rome. Only by showing the wealth of legal consideration on this concept, and by considering the status of customary international law at the time of the negotiations in Rome, is it possible to understand the impact of the Rome Statute in relation to the jurisprudence of such crimes. Therefore, this article will focus on both the jurisprudential status of crimes against humanity under customary international law before the Rome Statute and jurisprudential problems regarding crimes against humanity within the Rome Statute.

"Crimes against humanity" do not refer to all inhumane acts. Rather, in order for acts such as murder or rape to be crimes against humanity, they must occur in a context that warrants international adjudication.8 The "chapeau" of the Rome Statute, which precedes the enumerated acts that lay out what constitutes individual crimes, contextualizes the definition of crimes against humanity.9 A full understanding of the impact of the Rome Statute with respect to crimes against humanity must also examine

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6 Id. at 716.
7 Id. at 720.
9 Such substantive crimes include, but are not limited to: murder, extermination, enslavement, forcible transfer, torture, rape and other sexual crimes, enforced disappearances, and other inhumane acts.
the expanded number of substantive crimes that are listed in Article 7, but such an analysis is beyond the scope of this article. Rather, the focus of this article will be limited to the crucial chapeau elements because they “elevate what would otherwise constitute a crime under domestic jurisdiction to an act of international concern.”

This article will make the case that customary international law concerning crimes against humanity by the time of the Rome Conference was stronger and more highly judiciable than is commonly recognized. The definition of the term *judicable* for the purposes of this article is—capable of being judged or decided by courts. Highly, or clearly, judiciable means that courts face few difficulties with interpretation in deciding cases. That is, there exists a substantial and tangible body of jurisprudence concerning the law, such that there is clarity and reasonable consensus with respect to the definition and meaning of its elements. Such judicability—legal certainty or jurisprudential clarity—is necessary to avoid interpretive obstacles that can make cases difficult and costly to judge, and also because “the principle of legality requires [laws] to be elaborated to the fullest extent possible.” The necessity for clarity in definitions is important, especially when considering customary international law, where different fora (such as international tribunals, domestic prosecutions, and publications of international organizations) can be key in the development of the law. Such clarity can avoid both inconsistency between such fora and a consequent lack of clarity in the custom itself. It is an axiom of justice that the law is applied to all persons fairly and equally, and this is not possible if there is a lack of clarity with respect to what that law is. Defendants cannot properly prepare a defense, nor can prosecutors prepare a case if there is no legal certainty, or jurisprudential clarity, concerning the law at issue. Crimes need to be in this sense highly judiciable in order to avoid such potential problems with interpretation.

This article will show that the Rome Statute has not been the silver bullet for bringing an end to impunity for crimes against humanity. Not only is it the case that politics still plays too large a role in determining who is and who is not indicted for crimes against humanity, but the jurisprudence of these crimes under the Rome Statute is neither a dramatic advance, nor devoid of serious problems. Through customary international law, international criminal tribunals, international conventions, and cases tried in domestic courts, the definition of crimes against humanity was not

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12 It is true that there will always be room for debate over the exact definition and meaning of all laws, especially those that are founded in customary international law where there is no single convention or treaty that can be used as the basis for all interpretation. However, it is still possible, as this article argues, that there can nevertheless be a broad legal consensus with respect to at least certain key jurisprudential elements of categories of crimes, such as crimes against humanity.
as controversial, or "notoriously elusive,"\textsuperscript{15} as it is usually described, and crimes were more judicable than is commonly appreciated. With regard to the key jurisprudential elements of crimes against humanity,\textsuperscript{16} a degree of legal clarity and certainty had been reached before the negotiations at Rome.

The Rome Statute is broadly reflective of this contemporaneous status of crimes against humanity under customary international law, especially in relation to the key chapeau elements of the definition. Furthermore, the Rome Statute failed to address jurisprudential elements that were in need of clarification and elaboration, and also introduced jurisprudential problems.\textsuperscript{17} Through an understanding of the relationship between the Rome Statute and previous custom and the problematic jurisprudence that remains under the Rome Statute, it is possible to highlight the achievements and failings of this statute in relation to the legal regime of crimes against humanity.

This article is organized as follows. Part II presents the views of those that have seen the jurisprudence of such crimes as undeveloped and unclear, and sets forth the key chapeau elements of crimes against humanity. Part III first presents a framework for the study of the jurisprudence of crimes against humanity, and then proceeds to detail a jurisprudential history of crimes against humanity within this framework. This jurisprudential history will highlight some key developments since Nuremberg, concluding with the view that there was more jurisprudential clarity over the key jurisprudential elements of crimes against humanity than many have thought.

Part IV will then consider the Rome Statute, highlighting the relationship between the Rome Statute and contemporaneous customary international law. Part V addresses problematic jurisprudence under the Rome Statute, concerning uncertainties with regard to the meanings of the words "civilian," "organization," and "policy." Part VI then considers the value of the Rome Statute, given its relationship to contemporaneous custom. Part VII then concludes, offering a summary of this alternate perspective on the importance, effects, and value of the Rome Statute.

II. THE COMMON VIEW OF CRIMES AGAINST HUMANITY BEFORE THE ROME STATUTE

There are several sources of international law and several recognized ways in which it can develop.\textsuperscript{18} Treaties and conventions are the preeminent source. State custom, through state practice and {	extit{opinio juris}} (a feeling of legal obligation), is another important source of international law. Finally, the general principles of law recognized by civilized nations and the judicial decisions, judgments, and teachings of highly qualified publicists also contribute to international law. The jurisprudence of crimes

\textsuperscript{15} deGuzman, \textit{supra} note 10, at 336.
\textsuperscript{16} For the enumeration of such jurisprudential elements, see Section II.
\textsuperscript{17} See Section V, Problematic Jurisprudence of Crimes Against Humanity Under the Rome Statute.
\textsuperscript{18} See Barry E. Carter \textit{et al.}, \textit{INTERNATIONAL LAW} 3 (2007).
against humanity has developed through an evolution of customary international law: from state-backed fora, such as the Nuremberg Trials and the ad hoc International Tribunals for the Former Yugoslavia and Rwanda, to judicial precedent and interpretation by bodies like the International Law Commission.

However, while much of customary international law was codified in the second half of the twentieth century, and there is an increasing trend toward codifying customary international law, prior to the Rome Statute, there had never been a treaty or convention for the purpose of codifying crimes against humanity.\(^{19}\) This is in contrast to established conventions relating to war crimes and genocide, the two other main crimes within the jurisdiction of the ICC. In this regard, the judicability of crimes against humanity would appear to be weak.

Indeed, Sadat and Scharf have claimed that without a convention on crimes against humanity, and with its judicability so reliant on customary international law, its definition at Rome had to be “negotiated from a confused tangle of conflicting customary international and domestic norms, meaning that the negotiators made choices about the definitions of the crimes that went beyond a simple redaction of existing law.”\(^{20}\) Being founded on customary international law, with its several sources as diverse as the Nuremberg Trials and the writings of the International Law Commission, Hwang argued that the “scope of crimes against humanity [was] difficult to determine precisely.”\(^{21}\) This apparent lack of precision prompted some scholars to call for a specialized convention on crimes against humanity.\(^{22}\) The Rome Statute, negotiated by over 160 states, is the closest we have to such a convention.

The following section will trace the key international fora within which the customary law of crimes against humanity developed. Contrary to how Sadat and Scharf see the jurisprudential status of crimes against humanity, and contrary to Hwang’s perception of imprecise custom, the next section of this article will show that regarding the central jurisprudential elements of the concept the development of crimes against humanity has been less confused and imprecise than such scholars believe. Rather, the state of customary international law regarding crimes against humanity was far more judicable than these authors recognize.

There are several central jurisprudential elements to the chapeau of the crimes against humanity section of the Rome Statute that have been debated and disputed. These elements of the chapeau relate to the context within which the crime against humanity takes place. The elements include: first, the relationship between crimes against humanity and war

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\(^{19}\) Carter et al., supra note 18, at 1160.


\(^{22}\) Bassiouni, supra note 14, at 479.
crimes, and whether there is a requirement for each crime to have a nexus with armed conflict; second, whether the attack against the civilian population in which the crime against humanity takes place needs to be widespread and systematic, or whether it need only be one of the two; third, whether the chapeau itself includes a requirement that crimes are carried out within the context of a discriminatory intent, or whether only some crimes need be discriminatory in their perpetration; and finally, whether there is a requirement for state action (that is, actions of state-backed individuals) in committing, or a state policy to commit, such a crime.

The next section will show that between the Nuremberg Trials and the final stages of negotiations at Rome in 1998 customary international law was clear about: the lack of a requirement for crimes against humanity to be committed during armed conflict; the disjunction between the criteria widespread and systematic; the specifics of which crimes required discriminatory motives; and the fact that nonstate entities could be prosecuted for crimes against humanity. The status of crimes against humanity in customary international law was not at Rome "negotiated from a confused tangle of conflicting customary international and domestic norms" rather, there was more agreement over these central jurisprudential elements than many suggest.

III. THE JURISPRUDENTIAL HISTORY OF CRIMES AGAINST HUMANITY

Due to the pre-Rome absence of an international convention defining crimes against humanity, it is necessary to look to other sources of international law to investigate how it has developed and its jurisprudential status under customary international law. Prosecutions, state practice, international conventions, international institutions, and international tribunals have all contributed to the jurisprudential status of crimes against humanity in customary international law.

The following subsections will summarize the developments of the jurisprudence of crimes against humanity through several key international fora. These will include: the Martens Clause; the Nuremberg Charter and Trials, and prosecutions under Control Council Law No. 10; international conventions; the International Law Commission; domestic prosecutions; and the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).

Each of these constitutes an important forum for the jurisprudential development of crimes against humanity, shaping both the content of crimes against humanity as well as its judicability. Since the development of crimes against humanity is based in customary international law, with custom continually changing over time, the chronology of its development

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23 This "nexus with armed conflict" refers to whether a crime against humanity can only be committed during a time of armed conflict.

24 The precise meaning of these different jurisprudential elements, and whether they are required at all, is discussed below. For an exposition of each element, see Ratner & Abrams, supra note 20, at 45–77.

25 Ratner & Abrams, supra note 20, at 49.
is important. Therefore, in assessing the jurisprudential status of crimes against humanity before the Rome Statute, it helps to understand its chronological progression. However, given that there are several key jurisprudential elements of crimes against humanity, as outlined in the previous section, it is also important to track the development of each of these separately. Therefore, the following subsections will consider the developments of crimes against humanity from a chronological view of the different key international fora, and will be followed by a table summarizing the key developments of the relevant jurisprudential elements.

A. Developments Before Nuremberg—The Concept of the Laws of Humanity

The principle of *nullum crimen sine lege* holds that an act cannot be a crime unless there is a law that prohibits it. Therefore, when crimes against humanity were first prosecuted at the Nuremberg Trials after World War II, references to “laws of humanity” in the Martens Clause became central in legitimating those trials, despite the vague and imprecise nature of the phrase. Although the phrase “laws of humanity” was novel, it did not relate explicitly to any part of positive international law and at the time was not linked to crimes against humanity (which were themselves not specified, legally or otherwise). This phrase was, nevertheless, crucial for the development of crimes against humanity.

The Martens Clause is the name given to one section of the preamble to the 1907 Hague Convention Respecting the Laws and Customs of War on Land. This convention set out to codify the laws of war. Understanding that not all potential cases of war crimes could be included and covered in the convention, the Martens Clause states that in these other cases:

> [T]he 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.\(^{26}\)

This clause, then, states that a category of laws—“laws of humanity”—should still offer protection even in cases not covered explicitly by war crimes enumerated in the convention. That is, the “laws of humanity” were to offer protection for a subset of acts that did not constitute war crimes but were linked in nature to those crimes covered in the Hague Convention. However, after World War I, the phrase “the laws of humanity” remained essentially undefined, and there was not yet a connection with, or even a term for, “crimes against humanity.” Although there were attempts to prosecute Kaiser Wilhelm II of Germany, as well as those of the former Ottoman Empire responsible for the Armenian Genocide after World War I, for violations of the “laws of humanity,” such prosecutions never occurred.\(^{27}\) The exact content of “the laws of humanity” was left unspecified.


Nevertheless, it was the Martens Clause that “provided a foundation for the Nuremberg Charter’s prohibition of crimes against humanity.”28 Although crimes against humanity were first defined and prosecuted at Nuremberg, it was this phrase in the Martens Clause that was referenced in order to legitimate such prosecutions and avoid violating the principle of nullum crimen sine lege. When first enumerating crimes against humanity, people such as Robert Jackson, then Associate Justice in the US Supreme Court, turned to the Martens Clause and its laws of humanity for guidance as to their content.29 It is to the Nuremberg Charter and Trials that this article will now examine.

B. The Nuremberg Charter and Trials, and Control Council Law No. 1030

1. Nuremberg

Crimes against humanity were first codified with the Charter for the International Military Tribunal, commonly known as the Nuremberg Charter.31 Article 6(c) of the Charter defined crimes against humanity as:

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.

According to Lippman, this codification and conceptualization of crimes against humanity was “a major step towards the primacy of international law,” even though its application was limited to acts within the jurisdiction of the Tribunal (i.e., war crimes and crimes against peace or the “planning, preparation, initiation, or waging of a war of aggression”).32 In terms of

29 See, e.g., Lippman, id. at 177–179; M. Cherif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 83 (1999).
30 Following Wexler, the article will not discuss the “Tokyo Trials.” As she points out, “Much less weight is generally accorded to the judgments issued by the International Military Tribunal for the Far East than to the Nuremberg precedent for a variety of reasons, including the perception that the Tokyo proceedings were substantially unfair to many of the defendants.” See Wexler, supra note 5, at 673 n.46. Furthermore, there was no explicit charge of crimes against humanity during these Trials. See Lippman, supra note 28, at 202.
32 Lippman, supra note 28, at 188. Along with crimes against humanity, such acts within the Nuremberg Tribunal’s jurisdiction include:

Article 6 (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of [crimes against humanity or war crimes];

Article 6 (b) WAR CRIMES: namely, violations of the laws or customs of war.
those entities that could be found guilty of such crimes, the Charter gave
the authority to punish individuals as well as members of organizations
that aided the European Axis countries. Therefore, individuals associated
with nonstate entities could be found guilty of war crimes and crimes
against humanity.

The content and scope of crimes against humanity at this stage in their
formulation was still vague and in need of clarification. The unique cir-
cumstances that gave rise to the Nuremberg Charter (including, the end of
World War II, the extermination of Jewish and other peoples, including
German citizens, by the German state) and its narrow focus, meant that
crimes against humanity would inevitably be in need of jurisprudential
refinement if they were to become both more clearly defined and more
universally applicable as a set of crimes. For example, key terms such as
“any civilian population” were left undefined. The ICTY Trial Chamber
would later interpret this phrase in the Tadić judgment. However, the
definition of the word “civilian” is still a contentious jurisprudential is-
sue.

Moreover, the fact that crimes against humanity were required to be
linked to acts within the jurisdiction of the Tribunal meant that there was
no clear delineation of crimes against humanity from war crimes in the
Nuremberg Charter. These crimes, therefore, were not defined as a catego-
ry independent of the humanitarian laws of war. This was, in fact, for the
purpose of avoiding the problem of nullum crimen sine lege—the idea that
one cannot be punished for an act that was not illegal at the time of its oc-
currence. As Kuschnik explains, in order for “crimes against humanity to
be individually punishable for the first time in history, the tribunal felt a
necessity to connect it to war occurrences, in particular, war crimes.”
Essentially, crimes against humanity were a residual category of crimes that
could be used to prosecute those whose abusive acts were not considered
war crimes. Exactly how to delineate war crimes and crimes against hu-
manity under the Nuremberg Charter was, therefore, imprecise and the
universality of the concept was limited. Delineation between war crimes
and crimes against humanity would be necessary for future prosecutions,
as would recognition of crimes against humanity as a category of crimes that could be committed independently of war crimes. The Nuremberg Charter’s formulation of crimes against humanity was, thus, more limited and imprecise than the universality that the concept of crimes against humanity would attain in the future. Crimes against humanity, then, were seen as requiring a nexus with armed conflict—they could not be committed in times of peace. However, exactly what counted as a connection with war was not always clear. The case of Julius Streicher illustrates this.

Streicher was convicted for writings appearing in Der Stürmer dating back to 1935, which were seen as incitements to murder and extermination. The Judgment of the Military Tribunal in the Occupied American Zone in this case makes extensive reference to acts committed before the war as well as acts committed during the war. However, this judgment does not explain how or which of Streicher’s acts constituted crimes against humanity. The Nuremberg Trials, therefore, left unclear what constituted a connection to the war and what separated crimes against humanity from war crimes and crimes against peace, or even from ordinary crimes under domestic law.

2. Allied Control Council Law No. 10

The Allied Control Council Law No. 10 was a law enacted for the purpose of prosecuting those persons indicted for war crimes after the major war criminals had been prosecuted at Nuremberg. It allowed each of the four occupying allied powers to put on trial those suspected of war crimes and crimes against humanity. It became the first of several fora for developments that would help to sever the connection between crimes against humanity and armed conflict or war crimes.

The definition of crimes against humanity in Article II(c) of the Allied Control Council Law No. 10 does not make any explicit requirement that such crimes have a nexus with war crimes or crimes against peace. However, the preamble states: “In order to give effect to the terms of . . . the Nuremberg Charter . . . and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows . . . .” Thus, it can be argued that Control Council Law No. 10 is implicitly limited by the Nuremberg Charter and

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41 Wexler, supra note 33, at 308–10.
42 Crimes against humanity are here defined as “Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated,” Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 Dec. 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50–55 (1946).
requires a nexus with armed conflict for crimes against humanity.

Thus, Control Council Law No. 10 cannot definitively be said to require a nexus with armed conflict. Indeed, in the Flick and Weizsäcker cases, such a nexus was judged to be necessary, while in the cases of Altstoetter (the Justice Case) and Ohlendorf (the Einsatzgruppen Case) the nexus was seen as superfluous. The Justice Case concerned the prosecutions of legal officials for acts prior to and not connected with the war. The acts that were deemed to be crimes against humanity included, among others, the sentencing to death of Jews for “racial pollution,” assisting in secret detentions, and deportations. The Einsatzgruppen Case involved the prosecution of commanders of killing squads that killed Jews, communists, and others after the invading German army advanced through a territory. The crimes were, therefore, not committed during armed conflict.

However, these latter two judgments laid precedent for crimes against humanity not to require a nexus with armed conflict or war crimes. Indeed, when the ICTY later ruled in its 1995 Tadić judgment on whether there was a nexus requirement, it cited Control Council Law No. 10 as supportive of the view that this nexus was no longer required in customary international law. As such, these Control Council Law No. 10 judgments helped to sever the connection between armed conflict and crimes against humanity.

Prosecuting crimes against humanity without needing to establish a connection with war crimes, or crimes against peace, helps us to recognize such crimes as independent, rather than as a subset, of other crimes. As such, this separation would later make it easier to chart the independent jurisprudential development of crimes against humanity. Furthermore, this initial semiseverance of the nexus requirement under Control Council Law No. 10 signaled a shift in regulation of state behavior toward its own citizens at any time, rather than the regulation of state behavior only toward citizens of other states and only during wartime.

Along with this first semiseverance of the nexus with armed conflict, the Control Council cases also introduced in the Justice Case judgment a restriction on the definition of crimes against humanity:

It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual. It is significant that [Control Council Law No. 10] employs the words “against any civilian population” instead of “against any civilian individual.” The provision is directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systemat-
ly organized and conducted by or with the approval of government.\textsuperscript{50}

Thus, crimes against humanity were seen to be restricted to the "systematic commission of severe, State-sponsored delicts."\textsuperscript{51} This would prove significant for further developments of the jurisprudence of crimes against humanity in years to come.\textsuperscript{52}

One potential ambiguity that arose from the Nuremberg Charter and Control Council Law No. 10 concerned whether all acts required a discriminatory motive. This ambiguity can be seen in the Nuremberg definition above.\textsuperscript{53} The ambiguity arises with the wording, "or persecutions on," which does not make clear whether crimes enumerated previously (murder, etc.) were to be crimes of persecution, committed on discriminatory grounds, or whether the act of persecution was itself a crime. The issue became one of whether all acts required a discriminatory motive or just those acts of persecution. The general view regarding this ambiguity is that the Charter separates some crimes that are always so heinous that they require no discriminatory motive (such as murder, torture, and rape) and others that are elevated to the status of crimes against humanity when carried out with discriminatory motives (i.e., persecutions).\textsuperscript{54}

C. Post-Nuremberg Developments

Two post-Nuremberg conventions—the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (Convention on Statutory Limitations)—each state that there need be no nexus with armed conflict for crimes against humanity.\textsuperscript{55}

The text of the Genocide Convention states, "Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law, which they undertake to prevent and to punish."\textsuperscript{56} Although at this point there was no explicit statement that genocide constituted a crime against humanity (despite the efforts of some during the drafting process of the Convention),\textsuperscript{57} there would be substantial legal evidence to support the view that genocide is a crime against hu-

\textsuperscript{50} United States v. Josef Altstoetter et al., reprinted in III TRIALS OF THE WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW 10, 973 (1951)—the Justice Case.

\textsuperscript{51} Hwang, supra note 21, at 461; Lippman, supra note 28, at 204, 212; Ratner & Abrams, supra note 20, at 58.

\textsuperscript{52} See section III.v.

\textsuperscript{53} See section III.ii.

\textsuperscript{54} Ratner & Abrams, supra note 20, at 60–61.


\textsuperscript{57} Note especially the efforts of the French delegate Mr. Ordonneau and subsequently the efforts of Mr. Chaumont at the meetings of the Sixth Committee. See Lippman, supra note 28, at 225–26.
humanity before the negotiations in Rome. The development of customary international law that saw a connection between genocide and crimes against humanity was important, and this would further help to establish that crimes against humanity could be committed in times of peace.

In 1978, the Special Rapporteur on Genocide, following a UN-commissioned report on the prevention and punishment of genocide argued that "[g]enocide . . . is by its nature simply a crime against humanity."\(^{58}\) In *Quinn v. Robinson*, the U.S. Ninth Circuit of Appeals wrote in the majority opinion that "[c]rimes against humanity, such as genocide, violate international law."\(^{59}\) The District Court Judgment in the trial of Adolf Eichmann in Israel also stated that "the crime of 'genocide' is nothing but the gravest type of 'crime against humanity'."\(^{60}\) The acknowledgement that genocide could be committed in times of war or of peace is, thus, supporting evidence that crimes against humanity need not be linked with armed conflict.

The Convention on Statutory Limitations states in Article I: "No statutory limitation shall apply to the following crimes, irrespective of the date of their commission: . . . (b) Crimes against humanity whether committed in time of war or in time of peace. . . ."\(^{61}\) This convention, along with the Genocide Convention signaled that crimes against humanity were losing their nexus with armed conflict.\(^{62}\) This helped to distinguish crimes against humanity from both war crimes, in general, and World War II, in particular. In turn, this helped to define more clearly, and improve the judicability of, crimes against humanity. By cutting the requirement for a nexus with war or armed conflict, crimes against humanity more clearly constituted an independent category of crimes.

D. The International Law Commission, the Formulation of the Nürnberg Principles, and the Draft Codes of Offenses Against the Peace and Security of Mankind

Established by the UN General Assembly in 1948 and given the authority to codify international law, the International Law Commission (ILC) was crucial for the jurisprudential development of crimes against humanity before the Rome Statute.\(^{63}\) One of its first undertakings was the codification of the law relevant in the Nuremberg Trials,\(^{64}\) and, in this in-
stance, its interpretations are to be considered authoritative.\(^6\) The definition of crimes against humanity contained in the ILC's "Formulation of the Nürnberg Principles," part of its 1950 report to the General Assembly, is as follows:

VI (c): Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.\(^6\)

This formulation clarified an ambiguity in the Nuremberg Charter in that it explicitly differentiates "inhuman acts" from "persecutions." It makes clear that discrimination on political, racial, or religious grounds is a requirement for crimes of persecution; inhuman acts are not required to have been committed with discriminatory intent. This clarified the ambiguity in the Nuremberg Charter, highlighted above, which did not make clear whether crimes such as murder, extermination, and enslavement need be committed with discriminatory motives.\(^6\) Furthermore, the definition of crimes against humanity in Principle VI (c) of this report omitted the phrase "before or during the war," present in the Nuremberg Charter. Comment 123 following this principle states: "The Commission is of the opinion that such crimes may take place also before a war in connexion with crimes against peace." This restriction would later be relaxed.

In accordance with its UN mandate, the ILC later drew up the first of its Draft Code of Offenses Against the Peace and Security of Mankind in 1951.\(^6\) While this Draft Code and later drafts are neither definitive nor declarative of the law, and have been described as "soft law,"\(^6\) they influenced the development of the jurisprudence of crimes against humanity. For example, the ILC's Draft Codes were cited by the ICTY in its 1997 Tadić judgment.\(^7\)

This 1951 Draft Code was superseded by the 1954 Draft Code wherein Article 2 enumerates acts that constitute offences against the peace and security of mankind:

Article 2 (11): Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any ci-
This definition of crimes against humanity is separated from Article 2 (12), which prohibits "Acts in violation of the laws or customs of war," i.e., war crimes. Furthermore, the Comment following Article 2 (11) states that: "The Commission decided to enlarge the scope of the paragraph so as to make the punishment of the acts enumerated in the paragraph independent of whether or not they are committed in connexion with other offences defined in the draft Code." It can be seen, then, that the 1954 Draft Code "eliminates altogether the requirement that crimes against humanity be committed in connection with any other crime."  

This 1954 Draft Code also narrowed the relatively broad scope of the 1951 Draft Code with respect to those entities that could be charged with crimes against humanity. The 1951 Draft Code had an expansive scope, with all "private individuals" capable of being charged with crimes against humanity. The 1954 Draft Code, however, limits this to "private individuals acting at the instigation or with the toleration of [the State]." The scope of which entities could commit crimes against humanity would be a significant jurisprudential element in the custom of crimes against humanity.  

The Cold War put a stop to further developments by the ILC in the jurisprudence of crimes against humanity, with consideration suspended until the ILC was requested to take up its work again in 1981. In 1991, the ILC adopted a new Draft Code of Crimes Against the Peace and Security of Mankind. However, this Draft Code made no explicit mention of crimes against humanity, unlike the Draft Code adopted by the ILC in 1996, which reads:

Article 18: A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group . . . .

This 1996 formulation reaffirmed the lack of a requirement of a nexus with armed conflict, both by being separated from Article 20, which concerns war crimes, and by Comment 6 following Article 18, which explicitly rejects the nexus requirement.

Regarding the requirement for a discriminatory motive, Article 18(e)
and (f) of the 1996 Draft Code make it explicit that such motives are required only for crimes of persecution and institutionalized discrimination, not for other crimes against humanity, such as murder, extermination, etc.\(^7\) The 1996 Draft Code also broadened the term “authorities” from the 1954 Draft to include “a Government [or] any organization or group.” However, the terms “organization” and “group” were left undefined. Thus, while it was clear that nonstate entities could commit crimes against humanity, it was left unclear as to what constituted an organization or group. According to Hwang, the inclusion of the phrase “organization or group” was intended to exclude isolated acts of individuals unconnected with more large-scale coordinated action and to broaden the scope of crimes against humanity to include those that exercised \textit{de facto} control over territory.\(^7\)

The 1996 Draft Code also included in its definition of crimes against humanity acts “committed in a systematic manner or on a large scale.” This was explicitly disjunctive—a crime need only be “systematic” (i.e., involve a preconceived plan or policy) or on a “large scale” (i.e., involve a multiplicity of victims).\(^7\) The ILC justified this by reference to developments in international law since Nuremberg.\(^8\) These developments include, the domestic prosecutions of crimes against humanity, the ICTY, and the ICTR, which will be discussed in the following section of this article. In addition, the ILC explained that systematicity may be adduced from the existence of a “preconceived plan or policy,” but the existence of such a policy was not required.\(^8\)

E. Domestic Prosecutions of Crimes Against Humanity

Domestic prosecutions of international crimes can also affect the development of customary international law. Judicial decisions on international crimes are often cited as evidence of customary law by judges around the world. While many countries’ courts made rulings on crimes against humanity,\(^8\) three cases in particular—\textit{Barbie}, \textit{Touvier}, and \textit{Finta}—were particularly important in influencing the development of crimes against humanity before the Rome Conference.\(^8\) Jurisprudence from these

\(^7\) Article 18 reads, in full: “A crime against humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group: (a) Murder; (b) Extermination; (c) Torture; (d) Enslavement; (e) Persecution on political, racial, religious or ethnic grounds; (f) Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population; (g) Arbitrary deportation or forcible transfer of population; (h) Arbitrary imprisonment; (i) Forced disappearance of persons; (j) Rape, enforced prostitution and other forms of sexual abuse; (k) Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm.”

\(^8\) See Ambos & Wirth, \textit{supra} note 55, at 26–27; Hwang, \textit{supra} note 21, at 466–67.

\(^9\) See Hwang, \textit{supra} note 21, at 468–69; Boot, \textit{supra} note 39, at 467.

\(^8\) See Sections III.ii and III.v.

\(^8\) See ILC Report 1996, \textit{supra} note 75. See also Hwang, \textit{supra} note 21, at 466.

\(^8\) For descriptions of prosecutions of crimes against humanity in the United States, Australia, Ghana, the Netherlands, and Austria, see \textit{generally} Lippman, \textit{supra} note 28.

\(^8\) Ratner & Abrams, \textit{supra} note 20, at 45–78. See also, Hwang, \textit{supra} note 21, at 469.
trials, particularly in relation to the element of a “state policy,” was referenced in both later international tribunals as well as during the drafting of the Rome Statute. Of all those countries that prosecuted individuals for crimes against humanity, France was unique in limiting the scope of the definition of the crime beyond what was required by international law and, in doing so, suggested some controversial new aspects to the law that would, nevertheless, become important for the evolution of this area of customary international law.

In 1982, Klaus Barbie was indicted for crimes against humanity perpetrated in his capacity as the head of the Lyon Gestapo during World War II. In 1992, Paul Touvier, an officer in the Vichy regime, was also charged with crimes against humanity. Both cases reached the French Court of Cassation, which used the following definition of crimes against humanity:

The inhumane acts and the persecutions which, in the name of a State practicing a hegemonic political ideology, have been committed in a systematic fashion, not only against persons because they belong to a racial or religious group, but also against the adversaries of this [State] policy, whatever the form of their opposition.

Three elements are emphasized here: the systematic nature of the crimes committed, the discriminatory motive of the acts, and the policy of “hegemonic political ideology.”

It should be noted, however, that while these cases were important for the development of crimes against humanity, they were also highly political and controversial. For example, the term “hegemonic political ideology” has been seen to be included in order to prosecute Klaus Barbie for crimes against humanity, while simultaneously protecting from prosecution those French citizens that committed similar atrocities in Algeria. While the French in Algeria were guilty of many atrocious acts, because they were not committed in pursuance of a “hegemonic political ideology,” like Nazism, they did not constitute crimes against humanity under this French law. Defining crimes against humanity in such a way as to ensure that some who are guilty of such atrocities go unpunished, while others do not, is at the very least ethically questionable.

Imre Finta, a former Royal Hungarian Gendarmerie, was tried in 1988 under the crimes against humanity provisions in Canada’s Criminal Code, which defined crimes against humanity as: “Murder, [etc.] or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons . . .” The existence of a state pol-

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85 The phrase “hegemonic political ideology” contained in the French definition is not found in other definitions of crimes against humanity after Nuremberg. However, the idea of targeting acts committed in pursuance of a plan to dominate other nations originates in several drafts of the Nuremberg Charter. See, e.g., Lippman, supra note 28, at 186, 186, and 255.
86 Quoted in Hwang, supra note 21, at 470.
88 Quoted in Lippman, supra note 28, at 246.
icy of discrimination or persecution was also seen as necessary for a successful conviction of this international crime, despite this not being contained in the definition of crimes against humanity in the Canadian Criminal Code.\(^8\)

In both these French and Canadian cases there was no need for a nexus with armed conflict. In addition, both required discriminatory intent for the prosecution of crimes against humanity. This requirement is explicit in the French definition and implicit in the Canadian Criminal Code that requires acts to be directed against a population or identifiable group. This is in broad alignment with the ILC’s earlier 1954 Draft Code but differs from its subsequent 1996 Draft Code, which does not require such a discriminatory intent to apply to all acts.\(^9\)

The French cases also involved a requirement that the crimes against humanity were “committed in a systematic fashion.” At this point, the necessity of a systematicity requirement was not firmly established in customary international law. While it had not been recognized previously in the Nuremberg Charter or any ILC Draft Code, it had been recognized in the Justice Case.\(^9\) This systematicity requirement would later make it into the 1996 ILC Draft Code,\(^9\) as well as the jurisprudence of the ICTY and ICTR.\(^9\) It would become an important and accepted element in the jurisprudence of crimes against humanity.

**F. Crimes Against Humanity in the International Tribunals for the Former Yugoslavia and for Rwanda**

In 1993 and 1994, respectively, the ICTY and ICTR were set up in order to prosecute, among other offenses, crimes against humanity.\(^9\) The statutes of each tribunal differ in their jurisdiction and in their chapeau elements relating to crimes against humanity. One major reason for these differences is the vastly dissimilar situations over which each tribunal was to have jurisdiction. The circumstances in the Former Yugoslavia and Rwanda each informed the content of the tribunals’ statutes. For example, political considerations of the UN Security Council, as well as considerations concerning the workload of the tribunals, may have been important considerations in informing the wording of the statutes.

Therefore, the statutes of each tribunal should not be seen as attempts to state customary international law; rather, each sets the jurisdictional limits for their respective tribunal. The tribunals, themselves, have the task of applying customary international law within the jurisdictional parameters of their statutes. For example, although the statute for the ICTY re-

\(^8\) Hwang, *supra* note 21, at 473; Lippman, *supra* note 28, at 246.

\(^9\) Hwang, *supra* note 21, at 465, 474.

\(^9\) See Section III.ii.

\(^9\) See Section III.iv.

\(^9\) See Section III.vi.

quires all crimes against humanity to have a nexus with armed conflict, this is a limitation of the scope of the tribunal's jurisdiction and not a reflection of customary international law. Such a jurisdictional limitation is similar to that of the Nuremberg Trials, which was limited to crimes related to World War II.

The influence of the Nuremberg Trials, domestic trials, and the ILC's Draft Codes is evident in the formulation of the ICTY and ICTR statutes. As such, the previous jurisprudential history of crimes against humanity is central for the statutes of these international tribunals. These tribunals are also central for clarifying the status of crimes against humanity in customary international law before the Rome Statute, not merely because their content is informed by previous jurisprudential development, but also because each tribunal added to this jurisprudence through numerous judgments in which the scope and limits of crimes against humanity were debated. Indeed, Mettraux has said that the jurisprudence resulting from several prosecutions and judgments within the Tribunals have had a "[great] impact on the law of crimes against humanity, by systematically identifying and clarifying each element of the offense."\(^95\)

The chapeau of Article 5 of the Statute for the ICTY reads: "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. . . ." Article 5 makes reference to the necessity of a nexus between crimes against humanity and armed conflict. While this may seem to echo the nexus requirement for the prosecutions at Nuremburg, by this time the nexus requirement was by no means a necessary element of the jurisprudence of crimes against humanity under customary international law. Article 5, then, should be seen to limit the jurisdictional scope of the international tribunal, rather than reflect contemporaneous custom on this point.\(^96\)

Supporting evidence for not viewing a nexus with armed conflict as necessary comes from various sources. In the first instance, the Tribunal itself ruled in the 1995 Tadić judgment that crimes against humanity no longer required a nexus to armed conflict and that this was a "settled rule of customary law."\(^97\) The 1993 Report of the Secretary-General stated that only those laws that were without reasonable doubt part of customary international law at the time of the Statute's creation should apply.\(^98\) The ICTY's ruling was that customary international law did not require a nexus with armed conflict at this time. This is supported by several of the jurisprudential developments outlined above (such as Control Council Law No. 10, the Genocide Convention, Convention on the Non-Applicability of

96 Id. at 263–267. See also Sections III.ii and III.iii.
Statutory Limitations, and the ILC's 1954 Draft Code). It is also supported by a later paragraph of the Secretary-General's report, which states: "[Crimes against humanity] are prohibited regardless of whether they are committed in an armed conflict, international or internal in character." Furthermore, a Commission of Experts appointed by the Secretary-General also stated that "crimes against humanity apply to all contexts." Mr Doudou Thaim, Special Rapporteur on the Draft Code of Crimes Against the Peace and Security of Mankind, was able to report in 1989 that under customary international law there was "no longer [a] link [between crimes against humanity and] a state of war." Finally, Meron, after a prolonged discussion on the jurisprudence of the nexus requirement, wrote that by 1994, "The better opinion today . . . is that crimes against humanity exist independently of war."

Other legal fora have found that the nexus requirement was dropped in customary law even earlier. In the Hussein case, the Iraqi High Tribunal concluded, citing the Convention on Statutory Limitations, that the nexus requirement had disappeared by 1982. Additionally, the Trial Chamber for the Extraordinary Chambers in the Courts of Cambodia recently ruled that the nexus requirement was not a part of customary law by 1975. This position was backed by Control Council Law No. 10, the 1948 Genocide Convention, 1954 ILC Draft Code, 1968 Statute of Limitations Convention, and the 1973 Apartheid Convention.

Although not explicit in the ICTY Statute, the Secretary-General's report for the ICTY concluded that crimes against humanity must be perpetrated as part of a "widespread or systematic attack," basing this on the requirement for attacks to be directed against a civilian population. This was informed by the requirements of Control Council Law No. 10 and the French domestic cases. These were judged to be explicitly disjunctive criteria. The Trial Chamber judgments for Tadić and Mrkšić both confirmed that "widespread" and "systematic" were to be read in the alternative.

The Commission of Experts added that there was a requirement of a "policy of persecution or discrimination," echoing the Canadian Finta decision. However, the ICTY in its 1997 Tadić decision made clear that it would infer such policies from whether widespread or systematic crimes
were committed, essentially nullifying the policy requirement. This is in line with the ILC's position in its 1996 Draft Code, which treated a "policy" as an indicator of "systematic." With no explicit requirement to show a "policy" in its statute, and in conjunction with the ICTY's willingness to infer such a policy from other requirements of the statute (i.e., "systematic" or "widespread" attacks), the Commission of Experts' "policy requirement" is not clearly a separate jurisprudential requirement. The importance of this requirement, according to scholars such as Hwang, has been seen to have a role in helping to establish which entities were capable of committing crimes against humanity, i.e., those that were capable of maintaining "policies.

Following reports by the Secretary-General and the Commission of Experts, the Statute for the ICTR required crimes against humanity to be "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds." This excludes a reference to a nexus between conflict and crimes against humanity and includes a requirement for an attack to be "widespread or systematic." As with the ICTY, the later judgments at the ICTR of Akayesu and Kayishema confirmed that these were to be read as disjunctive. Similar to the nexus requirement in the ICTY Statute, the need for a discriminatory motive for all crimes under the ICTR Statute has been seen as a jurisdictional restriction of the court. The discriminatory motive is not a requirement of customary law. It follows the ICTY in its position on the policy requirement.

G. Views on the State of Crimes Against Humanity Before the Rome Statute

As stated above, opinions have differed over the judicability of crimes against humanity before the negotiations in Rome. Some see the law of crimes against humanity as unclear and confused, while others have seen it as having achieved a degree of clarity in customary international law. Scholars such as van den Herik argue that the former view is "[supported by] the definitional and conceptual confusion that existed in relation to crimes against humanity since they came into being." She sees differences in the statutes of the ICTY and ICTR as symptoms of this confusion. As described

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110 Id., at 491.
111 Id.
112 Hwang, supra note 21, at 503.
113 ICTR Statute, supra note 94, Article 3.
114 Mettraux, supra note 95, at 259.
115 Id. at 258–69.
117 While the Trial Chamber in the Tadić case deemed a "group policy" to be sufficient, the Appeals Chamber saw the more stringent requirement of an "organizational" policy; neither, however, required a state policy. For more on the policy requirement, and associated jurisprudential problems, see Section V.
118 Larissa van den Herik, Using Custom to Reconceptualize Crimes Against Humanity, in Shane Darcy et al. (eds.), JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 80, 83 (2010).
above, the former requires a link to armed conflict, while the latter does not; and the latter requires every crime to be committed with a discriminatory motive, whereas the former does not. However, as stated above, the statutes for the ICTY and ICTR were each informed by the circumstances in the countries within which crimes had taken place. Van den Herik is wrong to see dissimilar statutes for these international tribunals as evidence of confusion; rather, the differences that van den Herik highlights are jurisdictional differences. They are not differences of opinion over the content of customary international law regarding crimes against humanity. This was confirmed by cases judged at each tribunal.119

Others scholars, like Charney, see the developments outlined above, and especially the jurisprudence of the ICTY and ICTR, to have “elaborated on the pertinent law through . . . statutes, rules, and judgments [thus creating] a substantial and tangible body of jurisprudence, which was lacking in the past,” and conclude that “through these advances governments have become accustomed to the idea that international criminal law constitutes a real and operative body of law.”120 It is true that there were elements within the jurisprudence of crimes against humanity that were unclear, such as the definition of “civilian,” and “organization;” however, the four central jurisprudential elements of crimes against humanity considered above show—to differing extents—a degree of jurisprudential clarity and broad consensus such that it is, therefore, possible to see crimes against humanity as more judicable than is usually acknowledged.

Table 1, starting on the next page, summarizes the jurisprudential developments of the definition of crimes against humanity until the Rome Statute.121 It shows that crimes against humanity, while not free of jurisprudential confusion or holes, were, nevertheless, far more clearly judicable than many scholars, both pre and post Rome Statute, have suspected. It includes an assessment of how well accepted and how clear each component of the definition of crimes against humanity was before the negotiations at Rome.

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119 See Section III.vi.
120 Charney, supra note 11, at 122.
121 The table has been constructed from all the sources mentioned in the preceding section, including: Bassiouni, supra note 14; Bassiouni supra note 29; deGuzmán, supra note 10; Hwang, supra note 21; Lippman, supra note 28; Meron, supra note 103; Mettraux, supra note 95; Ratner & Abrams, supra note 20; Wexler, supra note 33.
<table>
<thead>
<tr>
<th>Jurisprudential Element</th>
<th>Forum for Jurisprudential Input</th>
<th>Result of Input</th>
<th>Assessment of Jurisprudential Standing Before Rome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nexus With Armed Conflict, Crimes Against Peace</td>
<td>Nuremberg Trials</td>
<td>Crimes against humanity were linked with war crimes and crimes against peace.</td>
<td>It was settled under customary international law by the time of the negotiations in Rome that the requirement of a nexus to armed conflict, or to crimes against peace or war crimes, was no longer necessary. The ICTY's statutory link to armed conflict was judged to be a jurisdictional limitation only. The general direction and development of international human rights and humanitarian law supports the idea that such crimes could be committed in both times of conflict and of peace.</td>
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<tr>
<td></td>
<td>Control Council Law No. 10</td>
<td>No necessary nexus with war crimes or crimes against peace (under most assessments).</td>
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<td></td>
<td>International Conventions and Tribunals</td>
<td>Genocide Convention, Convention on Statutory Limitations, ICTY's Tadić Decision, and ICTR Statute all implicitly or explicitly support the severance of the nexus with armed conflict.</td>
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<tr>
<td></td>
<td>International Law Commission</td>
<td>The ILC 1954 and 1996 Draft Codes do not contain the nexus requirement.</td>
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<tr>
<td>Jurisprudential Element</td>
<td>Forum for Jurisprudential Input</td>
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<tr>
<td>Widespread and/or Systematic Criteria</td>
<td>Nuremberg Trials</td>
<td>Interpretations of the Nuremberg Charter and Control Council Law No. 10 both required systematic governmental action. Isolated acts were not covered.</td>
<td>The disjunction between “widespread” and “systematic” was well founded before the Rome Statute. Wording was explicit in the Statute for the ICTR, and the disjunction had been discussed in relation to the ICTY’s Statute and in its judgments. Other laws such as the domestic French and Canadian laws made mention of attacks directed against a civilian population, which would suggest large-scale actions. Isolated instances would not count as crimes against humanity unless they were of sufficient scale or were part of a systematic policy to commit such attacks.</td>
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<tr>
<td></td>
<td>Control Council Law No. 10</td>
<td>The French trials of Barbie and Touvier both required demonstration of acts committed in a “systematic manner” and the Canadian statute applicable in the Finta case required acts directed against “a civilian population or identifiable group of persons.”</td>
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<td></td>
<td>International Conventions and Tribunals</td>
<td>The ICTY Statute requires attacks to be directed against a ‘civilian population,’ and the Secretary General’s report included the necessity of the crimes being part of a “widespread or systematic attack.” The ICTR Statute includes this language of “widespread or systematic attack.”</td>
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<td></td>
<td>International Law Commission</td>
<td>The 1996 Draft Code uses the language “in a systematic manner or on a large scale,” suggesting that either large-scale actions or small-scale systematic actions both could count as crimes against humanity.</td>
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<td>Jurisprudential Element</td>
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<tr>
<td>Discriminatory Motive Criteria</td>
<td>Nuremberg Trials and Control Council Law No. 10</td>
<td>Although the Nuremberg Charter is ambiguous as to whether a discriminatory motive is required for all crimes, it is generally agreed that the Charter suggests that some crimes are so heinous as to be classed as crimes against humanity without need for the existence of a discriminatory motive.</td>
<td>There are two possible perspectives on this point. The first is that discriminatory motive is required for all crimes; the second is that it is only required for the crime of persecution. The tendency has been an evolution toward seeing the latter as the view that is most supported by customary law. The ICTY Tadić judgment, based on its interpretation of customary international law, ruled that the discriminatory motive is not required for all crimes against humanity. Many readings of the Nuremberg Charter, and the most recent jurisprudence of the ICTY and ILC all favor the view that the discriminatory motive is only required for the crime of persecution.</td>
</tr>
<tr>
<td>Domestic Trials</td>
<td>The Barbie and Touvier prosecutions both required discriminatory motives for persecution, and the law relevant for the Finta decision talks of attacks directed against &quot;[an] identifiable group of persons.&quot;</td>
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<tr>
<td>International Tribunals</td>
<td>The ICTY only requires evidence of a discriminatory motive for the crime of persecution, and not other crimes such as murder, torture, rape etc. The ICTR Statute requires a discriminatory motive for all crimes, but this is only a jurisdictional limitation of the Tribunal.</td>
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<tr>
<td>International Law Commission</td>
<td>The 1954 Draft Code requires a discriminatory motive for all crimes, although the 1996 Draft Code reduces this necessity to just the crime of persecution.</td>
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<tr>
<td>Jurisprudential Element</td>
<td>Forum for Jurisprudential Input</td>
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<tr>
<td><strong>State Action and Policy</strong></td>
<td><strong>Nuremberg Trials</strong></td>
<td>The Charter gave the authority to punish individuals and members of organizations that aided the European Axis countries. There was no explicit policy requirement.</td>
<td>The necessity of state action or a state policy was by the time of the negotiations at Rome outdated. However, some link to an organization or group was still a requirement for a crime to rise to the level of a crime against humanity. However, the exact status of such organizations or groups had not received widespread elaboration. A “policy” was not a separate requirement under the 1996 ILC Draft Code, or in the statues of the ICTY and ICTR. Although the Tadić judgment speaks of a “policy to commit acts of crimes against humanity,” such a “policy” would be inferred from the systematic (or widespread, in the case of the international tribunals) nature of attacks and so was not a separate requirement of crimes against humanity.</td>
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<tr>
<td></td>
<td><strong>Control Council Law No. 10</strong></td>
<td>No explicit mention is made in the law concerning state action, though some industrialists were found guilty for their actions, without a connection to a state policy.</td>
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</tr>
<tr>
<td></td>
<td><strong>Domestic Trials</strong></td>
<td>The definition of crimes against humanity for the <em>Barbie</em> and <em>Touvier</em> trials required action from a government “practicing a hegemonic ideology.” Canada’s law does not explicitly require a state policy, though the <em>Finta</em> judgment found one necessary.</td>
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<tr>
<td></td>
<td><strong>International Tribunals</strong></td>
<td>Neither the ICTY nor the ICTR require any state action when a crime against humanity is committed, reflecting the large number of crimes committed by nonstate entities. A policy would be inferred from widespread or systematic crimes.</td>
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</tr>
<tr>
<td></td>
<td><strong>International Law Commission</strong></td>
<td>The 1996 Draft Code includes acts “instigated or directed by a government or by any organization or group.” A “policy” would be seen to imply ‘systematic’ attacks.</td>
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</table>
IV. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

In order to appreciate the formulation of crimes against humanity in the Rome Statute, it is first necessary to present a brief background of the preparations and negotiations before and during the Rome Conference that relate to the several jurisprudential elements discussed above. This section will then consider the Rome Statute's definition of crimes against humanity as it relates to the jurisprudential development outlined above.

A. The Negotiation and Drafting of Crimes Against Humanity for the Rome Statute

Although the idea of setting up a permanent international criminal court had been around for decades, it was a 1989 UN General Assembly resolution, proposed by Trinidad and Tobago, which desired an international criminal court to prosecute narcotics trafficking, that eventually led to the drafting of the Rome Statute. Setting up the ad hoc ICTY and ICTR strained the capabilities and resources of the UN, which was suffering from "tribunal fatigue." Therefore, the ILC was asked to draw up a draft proposal for a permanent international criminal court with worldwide jurisdiction, which it did in 1994. To consider further the content of this draft statute, including which crimes would be included in the jurisdiction of the court and how they should be defined, the UN set up an Ad Hoc Committee on the Establishment of an International Criminal Court, later superseded by the Preparatory Committee on the Establishment of an International Criminal Court ("Preparatory Committee"). Building on the work of this Preparatory Committee, the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened in Rome, from June 15 to July 17, 1998, to negotiate the final formulation of the Rome Statute. Participants included 160 states, 33 intergovernmental organizations, and a coalition of 236 NGOs. An unrecorded vote at the end of the conference counted 120 in favor of the Rome Statute, 21 abstentions, and 7 against the motion (including China, India, Israel, and the United States).

Despite this large support for the Rome Statute, there were considerable problems that had to be overcome for an agreement to be reached. The resolution of such problems was complicated by the fact that the ICC could bind the states that ratified its statute, directly affecting the sovereignty of each State party. While the Nuremberg trials (which could be described as victors' justice) the ICTY, and the ICTR were constructed by states that would not be liable to prosecution in their various fora, this new court would have the power to prosecute members of the states establishing it.

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123 Hwang, supra note 21, at 491.
124 Bassiouni, supra note 122, at 57.
Moreover, the court would be set up to prosecute future crimes, rather than those that had already taken place, thus constraining potential future state action. As such, each provision was more highly scrutinized, and many political considerations regarding the definitions of crimes and the jurisdictional reach of the court were instrumental in its formulation. The final complete draft statute that was taken to Rome contained approximately 1,700 portions of text that had been square bracketed to highlight alternative definitions of crimes, points of disagreement over jurisdictional matters, and other unresolved issues. Part II of the Statute, which deals with, among other matters, the definitions of crimes, including crimes against humanity, was particularly controversial; indeed, it was "the primary basis on which Governments determined whether the Statute as a whole would be an acceptable instrument."

In its first session in 1996, the Preparatory Committee was broadly in agreement that crimes against humanity should be included within the jurisdiction of the court, and that the definition of these crimes should take into account developments since the prosecutions at Nuremberg but there was substantial division over how to formulate the crimes, especially regarding the chapeau. In the two years between the first session of the Preparatory Committee and the Rome Conference, many of these divisions were left unresolved. The Third Session of the Preparatory Committee was the last source of input concerning the definition of crimes against humanity before the negotiations at Rome. It formulated such crimes as follows:

For the purpose of the present Statute, a crime against humanity means any of the following acts when committed:

[as part of a widespread [and] [or] systematic commission of such acts against any population]:[as part of a widespread [and] [or] systematic attack against any [civilian] population] [committed on a massive scale] [in armed conflict] [on political, philosophical, racial, ethnic or religious grounds or any other arbitrarily defined grounds]. . .
It is evident that by this time there was no agreement over: the requirement of a nexus with armed conflict, the need for a discriminatory motive, or whether the "widespread/systematic" criteria would be conjunctive or disjunctive.

1. **Nexus with Armed Conflict**

Despite the evidence outlined above that the nexus requirement had dropped from customary international law by the 1998 negotiations in Rome, the report of the Preparatory Committee indicates that several states insisted that it should be required in the Rome Statute.\(^{135}\) This position was supported by several delegations of the Arab Group, as well as some African and Asian delegations. Some states went as far as arguing for a definition that required a nexus to international armed conflict.\(^{136}\) During the negotiations at Rome both China and Turkey continued to insist on the necessity of the nexus, even when the vast majority of states were in favor of a definition that excluded it.\(^{137}\)

The majority was successful in leaving the nexus requirement out of the Rome statute, relying on customary law that included the Genocide Convention, the Convention on Statutory Limitations, the ICTY's **Tadić** Decision, and the ICTR Statute, each of which implicitly or explicitly supported the severance of the nexus with armed conflict. The United States supported this view of customary international law, arguing that "contemporary international law makes it clear that no war nexus for crimes against humanity is required."\(^{138}\) In addition, there was a functional consideration that highlighted the importance of the severance of this nexus: if it were to be included, crimes against humanity could well be subsumed within the jurisprudence of war crimes and, thus, would be a redundant category of crimes.\(^{139}\)

2. **Discriminatory Motive**

During the first session of the Preparatory Committee's meeting, France insisted on a discriminatory motive requirement for all crimes against humanity, in alignment with the definition of crimes against humanity used in the **Barbie** and **Touvier** cases. However, the Preparatory Committee reported that "other delegations expressed the view that the inclusion of such a criterion would complicate the task of the Prosecution by significantly increasing its burden of proof in requiring evidence of this subjective element" and that this requirement did not exist in customary


\(^{136}\) von Hebel & Robinson, supra note 127, at 92 n43.

\(^{137}\) Hwang, supra note 21, at 496.


\(^{139}\) von Hebel & Robinson, supra note 127, at 93.
When the matter was again raised by France at the negotiations in Rome, only three delegates addressed this proposal, and all opposed it. France conceded defeat, and the final statute lacks a discriminatory motive requirement.

3. Widespread/Systematic Criteria

It was widely agreed during the Preparatory Committee meetings and the Rome Conference that, in accordance with customary law and the desire to exclude isolated crimes, a stringent threshold requirement for crimes against humanity was required. Thus, two familiar terms—"widespread," and "systematic"—were adopted to qualify which crimes would count as crimes against humanity. This, however, proved to be the most contentious issue in the negotiations over the definition of crimes against humanity at the Rome Conference.

On one side was the like-minded group of states, committed to a strong court with a comprehensive jurisdictional mandate, that favored a disjunction between "widespread" and "systematic" such that only one of the criteria need be fulfilled for an act to be determined to be a crime against humanity. These states consisted of many western European states, as well as many South American states, and after the victory of the Labour Party in the 1997 General Election, the U.K. On the other side favoring a conjunctive reading were the rest of the UN Security Council members, as well as many Arab Group and Asian Group delegations. This side feared that a disjunctive reading would lead to an over-inclusive statute. For example, a crime wave might be "widespread" but without some kind of connection between the crimes taking place, it could not be said that the crimes would constitute crimes against humanity.

This negotiating impasse was broken when the Canadian delegation at the Rome Conference presented a proposal that included an additional subparagraph that would define the words "attack directed against a civilian population" in the chapeau. The Canadian proposal read:

(1) For the purpose of the present Statute, a crime against humanity means any of the following acts when knowingly committed as part of a widespread or systematic attack against any civilian population . . .

(2) For the purpose of paragraph 1: (a) "attack against any civilian population" means a course of conduct involving the commission of multiple acts referred to in paragraph 1 against any civilian population, pursuant to or knowingly in furtherance of a governmental or organizational policy to commit those acts . . .
The subparagraph was thus intended to preserve the disjunction between “widespread” and “systematic,” while at the same time introducing requirements for multiple acts to be committed and for there to be a policy to commit those acts. This move to carve out a middle ground was an attempt to overcome the problems of an unqualified disjunctive test, while not being too stringent by requiring both the “widespread” and “systematic” criteria to be fulfilled. Rather than acts needing to be “widespread,” they may instead be “multiple acts;” and instead of the need for “systematicity,” there need be a “policy.” These were seen by some to be lower thresholds than either “widespread” or “systematic.”

An altered form of this proposal eventually became the formulation of crimes against humanity in the Rome Statute. However, while this compromise produced a workable solution, it is jurisprudentially problematic, as shown below. Essentially, the wording of the final definition does not unambiguously introduce two lower-threshold tests; rather, it makes unclear how the disjunction between “widespread” and “systematic” operates, given the subparagraph. Thus, this subparagraph muddies the jurisprudential matters of the crimes against humanity regime under the Rome Statute.

4. Elements of Crimes

The final development from the negotiations during the Preparatory Committee meetings and at Rome was Article 9 of the Statute, the “Elements of Crimes.” This would mandate that a Preparatory Commission on the International Criminal Court produce a document clarifying the definitions of crimes within the court’s jurisdiction after the Rome Statute had been signed. Initially a U.S. proposal, it was argued that these “were necessary to provide the requisite certainty and clarity,” in accordance with the legal principle of nullum crimen sine lege. A majority of states opposed this proposal, arguing that there was enough clarity in the definition of crimes in the statute itself and that more elaboration on the crimes might substantially revise the agreements reached at Rome. In addition, there were concerns that the time it took to produce the Elements of Crimes could delay the coming into effect of the statute and that it could produce a restrictive “checklist” approach to international humanitarian law. Article 9 was the compromise that was reached: the Elements of Crimes would be clarified after the Rome Statute was signed (and completed by June 30, 2000), but would not be binding and would have to be consistent with the statute; in addition, it should be adopted by a two-thirds
majority of state parties, with any subsequent amendments also subject to such a majority.

B. Article 7 of the Rome Statute

The final formulation of crimes against humanity, defined in Article 7 of the Rome Statute, reads:

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . .

2. For the purpose of paragraph 1:
   (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack . . .

This definition of the scope of crimes against humanity evidently takes into account the jurisprudential developments that had occurred within the legal regime over the previous half century, but is also reflective of negotiations before and at Rome, as outlined above. In terms of the jurisprudence of crimes against humanity, its developments were almost entirely prior to the negotiation and adoption of the Rome Statute, as shown by the jurisprudential history above, and enumeration of the Rome Statute, below.

*Nexus to armed conflict:* One of the most apparent features of this definition is the lack of any explicit reference to a nexus between crimes against humanity and armed conflict of any kind. This definitional element is in accordance with previous developments in the concept of crimes against humanity, as outlined above.

5. *Discriminatory Motive*

There is also no reference in the chapeau to the need for a discriminatory motive for crimes, other than that of persecution. Article 7 (1h) includes the only reference to discrimination. When enumerating the various crimes that are to count as crimes against humanity, it reads: “Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law.” The lack of a discriminatory motive required for other crimes reflects the reasoning of the *Tadić* decision, the ILC 1996 Draft Code, as well as the majority position at Rome.

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153 Rome Statute, supra note 2.
154 Boot, supra note 39, at 484–85.
6. **Widespread/Systematic Criteria**

Article 7(1) has these criteria as disjunctive. However, this disjunction is qualified by the requirements of subsection 2(a). This wording reflects the political compromise presented by the Canadian delegation. As described above, some states argued for the necessity of both the "widespread" and "systematic" criteria being fulfilled, while others argued that only one of the two should be necessary for an act to count as a crime against humanity. The latter had been the conclusion of the ICTY and ILC Draft Code of 1996, both working on interpreting customary international law at the time. Subsection (2a) of Article 7 is meant to qualify the disjunction in section 1 by introducing the necessity for "multiple commission of acts...pursuant...to a policy..." As will be shown, this essentially nullifies the disjunction between "widespread" and "systematic" by requiring all crimes to be part of "systematic" attacks.

7. **Policy Requirement**

The Rome Statute's introduction of a "policy" requirement, be it "State or organizational" in character, is important. Problematically, the Rome Statute does not elaborate on what constitutes an "organization." Moreover, the Rome Statute is the "first international legal instrument to include a requirement of 'State or organizational policy' in the definition of crimes against humanity." Its inclusion in the statute is against the jurisprudence of the ICTY and ICTR; neither includes a policy requirement in their statutes, and each has been willing to infer a policy from the existence of systematic or widespread attacks. In addition, the Nuremberg Trials and the ILC Draft Codes do not include this requirement. Mettraux argues that there was "nothing in customary international law which mandate[d] the imposition of an additional requirement that [acts] be connected to a policy or plan."

Scholars disagree over what must be demonstrated to fulfill this "policy" requirement. Robinson sees subsection (2a) as requiring lower thresholds than either "widespread" or "systematic" would require. Hwang, in contrast, sees subsection (2a) as requiring higher evidentiary standards. And van den Herik sees the word "policy" as indicating that all crimes must be part of systematic attacks. As will be shown, the lack of clarity in relation to the "policy requirement" is problematic, as is the lack of elabo-

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155 Id. at 477–79.
156 States taking this position included members of the U.N. Security Council, as well as some Arab states. See Arsanjani, supra note 125, at 31; Robinson, supra note 84, at 47.
157 States taking this position mainly included states from the "Like-minded group," such as the U.K., France, Canada, Germany, Italy, and some South American states. See Robinson, supra note 84, at 47; Arsanjani, supra note 125, at 23.
158 See Section V.iii.
159 See Section V.ii.
160 deGuzman, supra note 10, at 368.
161 Mettraux, supra note 95, at 281.
162 See Robinson, supra note 84, at 47–51.
163 Hwang, supra note 21, at 502–03
164 van den Herik, supra note 118, at 94.
ration regarding the meaning of “organization.” 165

As we can see, the Rome Statute is broadly based on the jurisprudence of crimes against humanity that came before it. That it was based on previous jurisprudence is to be expected. But the more important point to note is that the Rome Statute’s Article 7 on crimes against humanity is largely reflective of customary international law that was already more judicable than is commonly acknowledged. The Rome Statute was less revolutionary in its jurisprudence on crimes against humanity than it was declarative of international custom regarding the law. This is so in relation to the nexus requirement, the discriminatory motive requirement, its disjunction between “widespread” and “systematic,” and its acceptance of nonstate culpability for such crimes.

Table 2 below sets out clearly the relationship of crimes against humanity under the Rome Statute to previous jurisprudence, illustrating that the Rome Statute followed settled customary international law on many points. As such, the judicability of crimes against humanity was far clearer before the Rome Statute than is often acknowledged, and the Rome Statute was not as helpful for the legal regime of crimes against humanity as many have believed and many had hoped.

However, the Rome Statute did deviate from previous jurisprudence in some respects. For example, the content of subsection (2a) is novel. This addition, as well as several omissions, has meant that the Rome Statute failed to achieve a desirable level of jurisprudential clarity. This problematic jurisprudence is the subject of the next section.

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165 See Sections V.ii, and V.iii.
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<th>Jurisprudential Element</th>
<th>Relevant Section of Rome Statute</th>
<th>Relationship to Previous Customary Law</th>
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<tr>
<td>Nexus With Armed Conflict</td>
<td>No mention of a link to armed conflict in Art. 7.</td>
<td>Reflects the customary law on this point before the Rome Statute.</td>
</tr>
<tr>
<td>Widespread and/or Systematic Criteria</td>
<td>Article 7 (1) uses the disjunction “widespread or systematic.” Subsection (2a) includes the wording: “multiple commission of acts...pursuant to or in furtherance of a...policy.”</td>
<td>Customary law had accepted that widespread and systematic were to be treated as disjunctive. Subsection (2a) in the Rome Statute introduces new thresholds to be met. The “multiple commission of acts” and “policy” requirements effectively require that isolated acts would not count as crimes against humanity, and all crimes must be systematic in that they adhere to a policy. However, the exact relationship between “widespread or systematic” and subsection 2(a) is unclear. (See Section V.c).</td>
</tr>
<tr>
<td>Discriminatory Motive Criteria</td>
<td>Article 7 (1) requires that only persecution need be committed on discriminatory grounds.</td>
<td>While domestic prosecutions of crimes against humanity in the cases of Barbie, Touvier, and Finta required a discriminatory motive for all crimes, the Rome Statute here follows the more recent jurisprudence of the ICTY and ILC 1996 Draft Code.</td>
</tr>
<tr>
<td>State Action and Policy</td>
<td>Subsection (2a) requires that all acts are committed “pursuant to or in furtherance of a State or organizational policy.”</td>
<td>The Rome Statute recognizes that nonstate entities can be guilty of crimes against humanity, as had previously been settled in customary international law. The statute says that ‘organizations’ are capable of committing crimes against humanity. However, the relationship to &quot;groups&quot; as referred to in the ILC 1996 Draft Code is unclear, and no definition of organization is offered. In addition, the introduction of a separate policy requirement was contrary to the jurisprudence of the ICTY and ICTR (which would infer a “policy” from widespread or systemic attacks), and the ILC’s Draft codes, including the 1996 Draft Code (which did not include such a policy requirement).</td>
</tr>
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</table>
V. PROBLEMATIC JURISPRUDENCE OF CRIMES AGAINST HUMANITY UNDER THE ROME STATUTE

The Rome Statute, the Preparatory Committee on the Elements of Crimes,\textsuperscript{166} and the ICC, itself, have not been able to eliminate several important problems with the judicability of crimes against humanity, as the interpretive problems below will show. Lack of clarity over the wording in Article 7 has meant that the Rome Statute has not helped to develop the jurisprudence of crimes against humanity where it could, but has added interpretive obstacles. Three problems will be discussed below, with reference to cases judged at the ICC, in order to illustrate the problems.

First, this article will discuss the definition of the word "civilian." That civilians are the target of crimes against humanity is central to the very legal concept of such crimes. However, there is no consensus on what constitutes a "civilian" for the purposes of the law.

Second, this article will consider the definition of "organization." Such a definition is crucial for the jurisprudence of crimes against humanity, as only once we understand what is meant by "organization" can we determine which individuals can be criminals against humanity. In addition, such a definition is crucial in drawing the boundary between crimes at the domestic level and at the international level.

Finally, this article will consider the confused and inconsistent "policy requirement" under the Rome Statute. This jurisprudential requirement in subsection (2a) of Article 7 is perhaps the most controversial aspect of jurisprudence in the Rome Statute. There is no clarity or consensus with respect to its substantive requirements or link with the chapeau of Article 7 (1), and it hampers the judicability of crimes against humanity at the ICC.

A. The Definition of Civilian

The definition of the word "civilian, which occurs throughout the several definitions of crimes against humanity discussed above, was not elaborated upon in the Rome Statute. Nor does the Preparatory Committee's Elements of Crimes help to clarify its meaning.\textsuperscript{167} Its exact parameters are unclear. This is partially the result of the loss of the nexus with armed conflict requirement, leaving the "meaning of 'civilian'... open to interpretation."\textsuperscript{168} When crimes against humanity were linked to war crimes and, therefore, international humanitarian law the word "civilian" was used in distinction to "combatants." The meanings of both "civilian" and "combatant" are central to international humanitarian law, but as crimes against humanity lost their connection with this branch of law (i.e., when crimes against humanity could be committed in times of armed conflict or in times of peace), the meaning of "civilian" became less clear. Indeed, the

\textsuperscript{166} This Preparatory Committee was set up in accordance with Article 9 of the Rome Statute following its signing in July 1998. Since its report on the "Elements of Crimes" in the Rome Statute does not affect those jurisprudential elements that are considered in this article, the report will not be discussed further. See Section IV.


\textsuperscript{168} van den Herik, supra note 118, at 95.
term has proved problematic to interpret. Before the Rome Statute, customary international law had not achieved jurisprudential clarity with respect to the exact scope and meaning of the word "civilian." Furthermore, the statutes for both of the international tribunals and the Rome Statute are silent on the issue of who can count as a victim of a crime against humanity, as opposed to the "civilians" that must be the target, according to the chapeau. In this sense, the Rome Statute simply failed to elaborate on a term that was in need of clarification. That the term was unclear is illustrated by the cases of Kayishema and Ruzindana and Akayesu at the ICTR and Mrkšić, Blaškic, and Martić at the ICTY. In each of these cases, the international tribunal in question has had to decide which individuals count as "civilians." These cases, therefore, illustrate the need for such clarification.

The central issue concerns which individuals count as "civilians" and whether the victim of a crime against humanity need be a "civilian" of the same kind that is referenced in the chapeau. In other words, do the victims of crimes against humanity have to be the same "civilians" against which attacks are directed, or is the scope for who counts as a victim wider than those "civilians" referred to in the chapeau? Moreover, do combatants hors de combat qualify as "civilians" in the context of the chapeau? And can combatants hors de combat be victims of crimes against humanity?

The jurisprudence on these questions is not consistent. However, custom seems to suggest that there is ample reason to differentiate civilians as referred to in the chapeau from victims of crimes against humanity. Regarding the definition of "civilian" in the chapeau, the Akayesu, Blaškic, Mrkšić, and Martić decisions each differentiate between "civilians" and victims, despite no explicit differentiation in the statutes for the ICTY and ICTR. Dungel sees this differentiation between "civilians" and victims as inconsistent: the group that is the target for crimes against humanity need not be the same group that can be described as victims of crimes against humanity.

Jurisprudence is less clear regarding the definition of "civilian" in the chapeau. The jurisprudence of the ICTY from the Mrkšić, Martić, and Mišutinović cases finds that the definition of "civilian" should follow Article 50 of the Additional Protocol I of the Geneva Conventions. Article 50 holds that a civilian is anyone that does not belong to the armed forces, a militia, or resistance group; prisoners of war and other persons hors de combat do not count as civilians. However, a number of cases at the ICTR (for example, those of Rutaganda, Musema, and Seromba) used Common Article 3 of the Geneva Conventions to define "civilian." Common Ar-

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169 Id.
170 "Hors de combat" is a French term used to refer to combatants that are, for reasons such as sickness, being wounded or detained, etc., unable to perform their military function. They are usually given special protection and treatment, like prisoner-of-war status.
171 Dungel, supra note 167, at 746.
173 Dungel, supra note 167, at 744.
article 3 states that persons “taking no active part in hostilities” should be counted as civilians;\textsuperscript{174} this would include persons \textit{hors de combat}. Regarding the status of the victims, the jurisprudence of the ICTY, from the \textit{Mrki\v{s}i\c} Appeals Chamber judgment,\textsuperscript{175} and the \textit{Blaskic} and\textit{ Marti\'c} decisions, indicates that victims can include persons \textit{hors de combat}. However, while the \textit{Marti\'c} decision is supposed to settle the matter regarding “civilians” versus victims as regards the jurisprudence of the ICTY,\textsuperscript{176} it is not clear that the evidence presented for combatants \textit{hors de combat} being victims of crimes against humanity is sound. The Tribunal gives evidence of custom through many sources, including cases tried at Nuremberg and the \textit{Barbie} and \textit{Touvier} cases where victims were armed resistance fighters.\textsuperscript{177} However, this evidence is consistent with identifying all combatants as potential members of a “civilian” population and not merely combatants \textit{hors de combat}.\textsuperscript{178} This would seem far too broad a scope for victims of crimes against humanity.

Jurisprudence on this issue outside the ICC, then, is not clear. Dungel points to the inconsistency inherent in differentiating between the term “civilian” in the chapeau—the target against which crimes against humanity are directed—and the victims of the crimes. While van den Herik shows that the \textit{Marti\'c} judgment is consistent with a far broader scope of victims than it intended to support.

The ICC has not yet come to its own conclusion on this issue.\textsuperscript{179} In the Pre-Trial Chamber decisions on the confirmation of charges for the cases of \textit{Katanga and Chui} and \textit{Bemba}, the ICC neither expressly accepted nor rejected the \textit{Marti\'c} position, whereby “civilian” is defined to exclude combatants \textit{hors de combat}, but such persons can be counted as victims.\textsuperscript{180} Although the \textit{Bemba} decision used Additional Protocol I, Article 50, to define the term “civilian” (consistent with the \textit{Marti\'c} decision), it did not clarify the issue of the required status of victims.\textsuperscript{181}

Dungel argues that there are several ways in which the ICC may ultimately judge this issue, although he points out that because this problem was not tackled during the formation of the Rome Statute there are now no perfect remedies.\textsuperscript{182} Given the ICC’s likely reliance on the ICTY’s own judgments, Dungel sees the \textit{Marti\'c} standard as the likely interpretive approach to take, though he also points out that this “solution comes at the price of internal inconsistency in the formulation of crimes against humanity.”\textsuperscript{183} 

\begin{thebibliography}{9}
\bibitem{175} Dungel, \textit{supra} note 167, at 731.
\bibitem{176} \textit{Id.} at 728.
\bibitem{177} van den Herik, \textit{supra} note 118, at 97–98.
\bibitem{178} \textit{Id.}
\bibitem{179} van den Herik, \textit{supra} note 118, at 98.
\bibitem{180} Dungel, \textit{supra} note 167, at 740–43.
\bibitem{181} \textit{Id.} at 742.
\bibitem{182} \textit{Id.} at 727–28.
\bibitem{183} \textit{Id.} at 752.
\end{thebibliography}
Such lack of clarity in terms of customary law on this point harms the judicability of the concept of crimes against humanity at its very core, for the idea of attacks against a "civilian population" have been seen as central to the very concept of such crimes.\textsuperscript{184} This issue of the definition of "civilian" and who can count as a victim of crimes against humanity is important for almost all cases currently before the ICC.\textsuperscript{185} Furthermore, this lack of precision harms the legality of the proceedings at the ICC, given that "parties are entitled to know the legal confines within which they are to prepare their cases from the outset of the proceedings, lest they suffer serious prejudice."\textsuperscript{186}

\section*{B. The Definition of an Organization}

As mentioned previously, neither the Rome Statute nor previous jurisprudence had come to a definitive conclusion on the definition of what constitutes an "organization."\textsuperscript{187} The dropping of the nexus requirement for crimes against humanity not only led to difficulties with the interpretation of the word "civilian" but also with the definition of the word "organization" within crimes against humanity. Because crimes against humanity no longer require a link with armed conflict, either international or internal in character, the exact nature of "organization" needs explicit definition to differentiate it from the entity of the state. It is clear that under customary international law individual members of nonstate entities can be guilty of crimes against humanity, but exactly what these entities are is not certain.

According to Kress, the "judicial debate [on the definition of organization] is not only a textbook example of the challenges involved in the interpretation of the Statute. Its outcome is of paramount importance for the future development of the law on crimes against humanity."\textsuperscript{188} This is so because without a clear definition of "organization" there is no legal certainty on the outer limits of which entities are covered by the laws of crimes against humanity. To take a recent example, in the immediate aftermath of the bombing and shooting in Oslo in July 2011 that killed 77 and injured 151, many were considering whether to bring a charge of crimes against humanity against Anders Behring Breivik.\textsuperscript{189} Were this to have been done, a central concern of the prosecutor would be to show that

\begin{itemize}
\item \textsuperscript{184} Mettraux, \textit{supra} note 95, at 254; van den Herik, \textit{supra} note 118, at 95.
\item \textsuperscript{185} Dungel, \textit{supra} note 167, at 752.
\item \textsuperscript{186} \textit{Id.} at 752. Dungel makes the final point that this issue of who can count as a victim of crimes against humanity is also important to clarify so that those who have suffered such egregious acts can have a chance to participate in legal proceedings with the ICC and to claim reparations.
\item \textsuperscript{187} Although it would have been possible to adopt the definition of an "organization" from the United Nations Convention against Transnational Organized Crime, this was not done. \textit{See} Claus Kress, \textit{On the Outer Limits of Crimes Against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision}, 23 \textit{Leiden J. Int'l L.} 855, 857–58 (2010).
\item \textsuperscript{188} \textit{Id.} at 872.
\end{itemize}
Breivik was part of an "organization." It is still not entirely clear what relationship Breivik shares with several far-right groups and whether these groups would meet the standard of "organizations" under the Rome Statute; therefore, only by clarifying the definition of organization could we be certain as to whether Breivik's alleged crimes were capable of being adjudicated under the Rome Statute.190

There are several schools of thought related to what constitutes an "organization." Legal scholars such as Robertson and Hwang have argued that what defines an "organization" is its ability to implement a "policy," through dominion over territory, or capability to carry out large-scale human rights abuses.191 The 1997 Tadić judgment found that "organizations" with de facto control over territory would be covered by the definition, but did not limit "organizations" to just this criteria.192

The ICC itself has not definitively come to a conclusion on the issue, but has come closest to doing so in the Pre-Trial Chamber II (PTC II) decision regarding the Situation in the Republic of Kenya. The case concerns postelection violence that occurred in Kenya in late 2007 and early 2008, which led to approximately 350,000 people fleeing their homes. The violence was instigated by gangs that were supported by businessmen who themselves had links to the main political parties. These "organizations" were very much distinct from "state-like" entities and lacked territorial control or a structure that would be appropriate for an "organization" involved with an internal conflict.193 Nevertheless, the majority of judges in PTC II found that despite a lack of state-like characteristics these entities were covered by the meaning of "organizations" in the Rome Statute. Judge Kaul dissented.

That the definition of an "organization" is not yet clear under the jurisprudence of the ICC is shown by the fact that the majority argued that the "distinction should be drawn on whether the group has the capability to perform acts which infringe on basic human values."194 This relatively imprecise statement is followed by six criteria that may be considered when deciding on whether an entity constitutes an "organization." However, of the six criteria that the majority in the PTC II decision offers as qualities of an "organization," none is seen as necessary for an organization nor is the list seen as exhaustive.195 The majority decision, therefore, explicitly does

191 Robertson, supra note 126, at 431; Hwang, supra note 21, at 484–85, 491.
192 See Kress, supra note 187, at 868.
193 Id. at 856.
194 Id. at 857.
195 The majority decision reads as follows: “In making [the determination of what counts as an ‘organization’], the Chamber may take into account a number of considerations, inter alia: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian popula-
not provide a definitive, exhaustive, or minimal definition of “organization.” By contrast, the dissenting opinion of Judge Kaul takes a more restrictive approach and sees an “organization” to be a body with more state-like characteristics than is necessary in the majority opinion; however, this opinion was not only not favored by the majority of judges, but also does not set out a minimal definition of “organization” that could be consistently relied upon. As such, the ICC will have to face the problem of offering a more concrete definition of “organization” in future cases that come before it.

Whether one supports an expansive definition of “organization” that would likely capture more crimes within its scope or a more restrictive definition that could favor the autonomy of states, this lack of a concrete—or at least more clearly specified—definition seems likely to be problematic. As Kress shows, both the majority and the dissent of Judge Kaul in the PTC II decision in the Situation in the Republic of Kenya case are backed by previous jurisprudence from Nuremberg to the ILC Draft codes and the jurisprudence of the ICTY. Of crucial importance to the positions of the majority and the dissent in this case is the central role of crimes against humanity under international criminal law and related domestic law. The majority opinion, by using a more expansive definition of organization than the dissent, seems to see crimes against humanity under international criminal law as “a legal tool to protect and enforce international human rights law.” In contrast, the dissent sees the prosecution of crimes against humanity as necessary either when human rights abuses reach a certain scale or gravity or when there is reason to believe that states are unlikely to prosecute such crimes because of their explicit or implicit involvement in them. This view essentially sees the role of crimes against humanity under international criminal law to be more restricted and more deferential to the rights of states to handle internal matters using their own domestic law. 

While these two opposing views on the role of crimes against humanity as part of international criminal law still exist, it seems unlikely that a definition as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfills some or all of the aforementioned criteria. It is important to clarify that, while these considerations may assist the Chamber in its determination, they do not constitute a rigid legal definition, and do not need to be exhaustively fulfilled.” Quoted in Kress, supra note 187, at 857.

Kaul describes an organization as having to “partake of some characteristics of a State. Those characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale.” Quoted in Kress, supra note 187, at 862.

Although Kress, supra note 187, argues that the majority’s opinion was mistaken and that of Judge Kaul was better founded in customary international law, his article presents the arguments made by the majority to justify their position.

Id. at 861.

Id. at 866.
A definitive answer can be given as to how to define an “organization.” Other questions also remain concerning what constitutes an “organization”: What is the difference between an “organization” and a “group” as mentioned in the ILC 1996 Draft Code? Does the Rome Statute’s restriction of consideration to “organizations” and not “groups” imply that only more rigidly organized entities should be considered? Can a single person count as an “organization”? Does an “organization” require any link with the state it is in or the state in which the crimes are committed? If the “organization” is to be defined according to whether it is capable of having a “policy,” what does this entail?

In sum, there is much that remains unclear in the Rome Statute concerning the definition of an “organization.” While concerns over lack of clarity with respect to the definition of an “organization” were evident before the Rome Statute, and because the Elements of Crimes does not clarify the definition of “organization,” it seems that it will be necessary for case law to answer these questions that are central to the jurisprudence of crimes against humanity.

C. The Problem with the Policy Requirement

As noted above, the “policy requirement” in subsection (2a) or Article 7 is novel in the jurisprudence of crimes against humanity. It is also problematic. Halling argues that the policy requirement within the Rome Statute creates an accountability loophole within international criminal law: crimes that would fulfill the requirements of customary international law, and thus could be within the jurisdiction of the ICC, are excluded for lack of a policy element. The problem with the policy requirement is that it makes unclear the disjunction between “widespread” and “systematic” in section 1 of Article 7.

Scholars have reacted differently to the interpretation of this policy requirement and its relationship with “widespread or systematic” attacks in Article 7. According to some, the policy requirement is inconsistent with, or nullifies, this disjunction; by having to show the existence of a “policy,” one also has to show a level of systematicity. If this is the case then the disjunction loses all meaning, as an attack must always be shown to be “systematic” and never just “widespread.” This is the position taken by Halling, Heller, and Ambos and Wirth.

Other legal scholars have interpreted this policy requirement differently. Hwang sees the policy requirement as a higher-threshold requirement than the “systematic” requirement. Attacks may be systematic without showing

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201 See Section IV.
203 Halling, supra note 202, at 836.
205 Ambos & Wirth, supra note 55, at 33.
206 Hwang, supra note 21, at 502–03.
that there is a corresponding policy; therefore, the requirement that there is
a policy in addition to systematic attacks means that only those systematic
attacks attached to a policy to commit such attacks could count as a crime
against humanity. For example, if a series of acts of extermination pro-
gressed along a road through land occupied by an ethnic minority, this may
count as systematic. However, if it could not be shown that there was an ex-
PLICIT policy to exterminate the ethnic minority in this manner, then the
crime could not be prosecuted as a crime against humanity.

That the policy requirement is not a "low threshold test," as argued by
Robinson, is shown by the way it has been interpreted within the jurispru-
dence of the ICC. Both the Katanga and Bemba cases at the ICC have
found that the policy requirement is a "high threshold" requirement. The
Katanga Confirmation Decision sees that a widespread attack must be
"thoroughly organised and follow a regular pattern," and follow a "com-
mon policy." This language follows the ICTR's definition of "systematic"
in its jurisprudence on the Akayesu case, thus confirming that "systematic"
and "policy" are synonymous. As such, "the disjunctive language fought for
at Rome has lost all meaning in the court's first cases."

This interpretation of the "policy requirement" could be seen to go
gainst the drafters' intent in its construction of subsection (2a) because it
nullifies the disjunction between "widespread" and "systematic." This is
why Robinson argues that the policy requirement is a lower threshold test
than "systematic" requires. Hwang sees the existence of the "policy re-
quirement" not for requiring a demonstration of systematicity, but instead
for establishing "some degree of State or organizational involvement." This
would be in line with the ICTY's use of "policy," which was used to
describe which entities may be culpable of crimes against humanity.

It is uncertain, therefore, what the exact meaning is of the disjunction
between "widespread" and "systematic," as well as the relationship be-
tween "systematic" and "State or organizational policy." This is problem-
ic for the jurisprudence of crimes against humanity not only because it
seems to generate an inconsistency within the Rome Statute itself, but also
because making "policy" synonymous with "systematic" effectively goes
against the customary international law present at the creation of the
Rome Statute. Rather than clarifying custom on this point, the Rome Stat-
ute seems to have muddied the waters. Future prosecutions of crimes
against humanity, within or outside the ICC, may well have to contend
with problems of interpretations of custom, as well as with the Rome Stat-
ute on this point.

In fact, it is not unreasonable to assume that this may harm the de-
velopment of crimes against humanity through custom; national courts could
prosecute crimes against humanity using the disjunctive criteria as well as
not requiring a showing of a "policy" element, while the ICC may continue

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207 Robinson, supra note 84, at 47-51.
208 See Halling, supra note 202, at 837.
209 Id. at 836-37.
210 Hwang, supra note 21, at 503.
211 Id. at 491.
to require the showing of a “policy” and, therefore, systematicity in all prosecutions of crimes against humanity. If this is the case, then it will be even harder to establish the exact parameters of crimes against humanity in customary international law.\textsuperscript{212}

VI. THE VALUE OF THE ROME STATUTE AND THE ICC FOR THE CRIMES AGAINST HUMANITY LEGAL REGIME

Given the above analysis of the limited contribution of the Rome Statute to the definition of the chapeau elements of crimes against humanity and the legal problems that still remain with the concept, what can we say about the importance of the ICC for the jurisprudence of crimes against humanity? The following points highlight the areas in which the Rome Statute has made its most significant contributions.

i. The ICC has provided an international forum for the prosecution of crimes against humanity as well as a baseline definition that is not specific to certain conflicts, times, or geographical areas, as those of the ICTY and ICTR are. Because of this scope, it avoids problems such as the context-dependency of these Statutes. Its jurisdiction does not suffer from interpretive problems about the intent of the UN Security Council in its formation, as was a problem with the ICTY and ICTR.\textsuperscript{213} As such, issues of interpretation of customary international law can be simplified by this noncontext-dependent definition.

ii. The ICC is a body with a jurisdiction of its own, delegated the power to interpret crimes against humanity for any case it takes up. Being set up by negotiations between 160 states and with membership currently at 120, the ICC is a permanent institution for prosecuting crimes against humanity that will outlast the ICTY and ICTR, which are both due to close soon. Although there are problems with its jurisprudence, as discussed, the ICC’s large membership and permanent status arguably make it the preeminent source for the evolution of customary international law regarding crimes against humanity.

iii. The Rome Statute provided a baseline definition of crimes against humanity that has been adopted into many countries’ own legal

\footnote{\textsuperscript{212} In fact, the policy requirement is perhaps the most contentious current issue surrounding the chapeau of crimes against humanity. While the ICTY and ICTR after the \textit{Tadić} decision would infer a “policy” from the nature of attacks, the decision in the \textit{Kunarac} case in 2002 at the ICTY removed entirely the need to show the existence of a policy. This decision has been supported by some scholars, such as Mettraux, \textit{supra} note 96, and criticized by many others (see William Schabas, \textit{State Policy as an Element of International Crimes}, 98 J. CRIM. L. & CRIMINOLOGY 953 (2008); van den Herik, \textit{supra} note 118, at 88–95; and Halling, \textit{supra} note 202, at 830–31. The result has been that that not only is the “policy requirement” contentious in the jurisprudence of the ICC because of the inconsistency it generates within the Rome Statute, but the issue has become contentious also in the jurisprudence of the ICTY.}

\footnote{\textsuperscript{213} See Section III.vi.}
codes. For example, Germany and The Netherlands have both included the Rome Statute's Articles 6, 7, and 8 (genocide, crimes against humanity, and war crimes) into their domestic law verbatim. More fora for interpretation of the same law could help to clarify disputed points of interpretation.

iv. Although the Rome Statute is problematic, nevertheless, it has ensured that several previous jurisprudential developments of crimes against humanity are unlikely ever to be questioned again. For example, although there was some disagreement during negotiations about whether a nexus with armed conflict should be required, the Statute came down in favor of previous jurisprudence (for example, at the ICTY) on this point.

v. The Rome Statute includes certain enumerated crimes previously not specified as crimes against humanity, and though this current analysis concerns the chapeau of crimes against humanity, this development is important and should not be forgotten. For example, the interpretation of sexual violence to include sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization is a welcome addition to the previously specified crime of rape. Also welcome are the inclusions of enforced disappearance and apartheid as crimes against humanity.

vi. According to Grover, one of the most significant advances of the Rome Statute was to differentiate between "interpretation" and "application" of the law, including the laws of crimes against humanity. The differentiation between interpretation and application of the laws under the statutes of both the ICTY and ICTR had not always been clear. This lack of clarity was partly due to potential confusion between the jurisdictional parameters of the tribunals and the contemporaneous status of customary international law regarding crimes against humanity. However, the Rome Statute recognizes the differentiation between "interpretation" and "application" in Article 21, and judgments in various cases have made use of the distinction. In terms of crimes against humanity, this not only clarifies the basis on which suspects are prosecuted but also legitimates the role of judges as interpreters of international criminal law, which had been contested.

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215 See Section IV.
217 See Section III.vi.
218 Article 21 (3) reads: "The application and interpretation of law pursuant to this article . . .," thus identifying the separation between the two. (Grover, *supra* note 216, at 549).
219 Id. at 550.
VII. CONCLUSION

The scenes on the final day of negotiations over the Rome Statute have been described as jubilant, marked with many standing ovations. The high rhetoric at the time followed decades of arguments for the existence of just such an institution, and has been matched by repeated arguments as to the ICC's importance in the prosecution of crimes against humanity as well as more generally in its task to end impunity.

This article has not tackled many issues that concern the ICC, including the politics of who is indicted by the institution; the importance of countries such as the United States, China, Russia, and India remaining non-signatories to the Rome Statute of the ICC; or the effect the ICC has had, and is likely to have, on national prosecutions through the complementarity principle. Nor has this article tackled other issues concerning international law, such as universal jurisdiction, the evolution of customary law in relation to international criminal law, procedural aspects of international criminal law, judicial activism and networking, the substantive crimes enumerated under various definitions of crimes against humanity, or any normative arguments concerning the jurisdictional parameters of crimes against humanity and the relationship between domestic and international law. These subject areas are all important for an accurate picture of the overall political and legal importance of the ICC. This article has focused more narrowly on a set of legal issues at the

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221 Sadat & Carden, supra note 3, at 457.
heart of the Rome Statute.

This article’s analysis should temper our attribution of importance to the ICC; as the ICC’s importance in relation to the legal regime of crimes against humanity is not to be found in its definition of such crimes. Regarding the four key jurisprudential elements—the nexus requirement, the widespread/systematic criteria, the discriminatory motive criteria, and the state action and policy requirement—it is possible to show a higher degree of judicability regarding crimes against humanity before the Rome Statute than many suggest.

Furthermore, not only was the Rome Statute not so significant an advance for the jurisprudence of the central jurisprudential chapeau elements of crimes against humanity, but it also failed to address other problems that are significant in the jurisprudence of such crimes. The Rome Statute failed to address definitional issues relating to the meaning of “civilian” and “organization.” In addition, the policy requirement of subsection (2a) seems to produce internal inconsistency within the Rome Statute as well as inconsistency between international fora for prosecuting crimes against humanity.

Thus, if we focus on the chapeau elements and set aside the important developments in the jurisprudence of the enumerated crimes (such as the inclusion of gender as a basis for discrimination and additions to the list of possible sexual crimes), the jurisprudence of crimes against humanity under the Rome Statute was not such a significant development and has failed to address some key jurisprudential concerns. This is where this article hopes to make a necessary contribution to the understanding of crimes against humanity within the Rome Statute: by taking a dispassionate and objective view of the impact of the Rome Statute and ICC on the legal regime of crimes against humanity, it is possible to understand what problems still exist and, therefore, what changes might be made in order to clarify the laws and improve the judicability of crimes against humanity. The task of ending impunity for those guilty of the most atrocious crimes certainly did not end with the signing of the Rome Statute, but rather entered a new phase—one that still requires improvements to the laws of crimes against humanity within this new framework.

Even with the existence of this Statute and even when governments are willing to prosecute suspected criminals against humanity or send them to the ICC for prosecution, without a highly judicable framework for such crimes the interests of justice may not be served. It often takes a lot of money, effort, and/or political capital to put suspects in crimes against humanity cases into a courtroom, as the cases of Mladić and Karadžić have shown. The phase of legal prosecution should not be similarly problem-

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226 As welcome as it is to include the possibility of prosecuting discrimination based on gender, the definition of “gender” in paragraph 3 of Article 7, included at the insistence of the Vatican and some Islamic states, has been criticized. This paragraph defines gender to refer to “the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above;” as such, it seems that prosecuting discrimination against homosexuals would not be possible. For a scathing critique of the inclusion of article 7(3), see Robertson supra note 126, at 433.

227 See, e.g., Cameron Charles Russell, The Europeans Have Got it Right: Justice Does
atic. Given that the ICC lacks the power of the purse and the sword, it is paramount that efforts are made to ensure that the prosecution of crimes against humanity face as few legal difficulties as possible so that if and when those who are indicted reach The Hague, their trials can proceed swiftly, efficiently, and with the full force of the law. Only in this way can the ICC have the deterrent effect that it is widely desired—and seen—to have.\textsuperscript{228} This article hopes to help our understanding of the jurisprudence of crimes against humanity so that problems of prosecution may be highlighted and resolved, and justice may be served.