The Rome Statute as Evidence of Customary International Law

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4 Crimes against Humanity: Article 7 of the Rome Statute and Custom

4.1 Introductory remarks

This Chapter aims to identify the relationship between article 7 of the Rome Statute and customary international law concerning crimes against humanity. In 2014, the International Law Commission (ILC) put the topic 'crimes against humanity' on its agenda aiming to adopt a convention on crimes against humanity, and appointed Sean Murphy as the Special Rapporteur.[1] In 2017, the ILC adopted the entire set of draft articles on crimes against humanity on first reading.[2] Draft article 3 of the proposed convention defined the notion of crimes against humanity. The first three paragraphs of draft article 3 are a replica of article 7 of the Rome Statute without any substantive modification.[3] The ILC deemed article 7 of the Rome Statute the legal basis for the draft article 3.[4] One of its explanations is that article 7 of the Rome Statute has been widely accepted by more than 120 States Parties and 'marks the culmination of almost a century of development of the concept of crimes against humanity and expresses the core elements of the crime'.[5]

Despite the general assertion that the notion of crimes against humanity is accepted under customary law, its contextual requirements remain controversial.[6] Article 7 of the Rome Statute provides contextual requirements of 'widespread or systematic attack', 'directed against any civilian popula-

1 UN Doc A/69/10 (2014), para 266; 'Resolution adopted by the General Assembly on 23 December 2015: Report of the International Law Commission on the work of its sixty-seventh session', GA Res 70/236 (2015), UN Doc A/RES/70/236.

2 'Crimes against Humanity', in 'Report of the International Law Commission', GAOR 72nd Session Supp No 10, UN Doc A/72/10 (2017), paras 35-46.

3 'Text of the draft articles on crimes against humanity adopted by the Commission on first reading', UN Doc A/72/10 (2017), para 45, pp 11-12.

4 UN Doc A/72/10 (2017), para 46, p 29.

5 'First report on crimes against humanity, by Sean D. Murphy, Special Rapporteur', UN Doc A/CN.4/680 (2015), para 8.

6 Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *AJIL* 43; William A. Schabas, 'State Policy as an Element of International Crimes' (2008) 98 *J Crim L & Criminology* 953; *Tadić* Opinion and Judgment, para 644, holding that policy is an element under customary law. *Contra Prosecutor v Kunarac et al* (Judgement) ICTY-96-23 and ICTY-96-23/1-A (12 June 2002) [*Kunarac et al* Appeals Chamber Judgment], para 98 and fn 114; Guénaël Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) 43 *Harvard Intl LJ* 237.

tion', 'state or organisational policy', and 'with knowledge of the attack' as well in its application. Judge Loucaides of the European Court of Human Rights (ECtHR) wrote: '[a]s regards the elements of crimes against humanity, one may take the recent Rome Statute of the International Criminal Court as declaratory of the international law definition of this crime'.[7] In contrast, Antonio Cassese wrote that: 'on some points, article 7 of the Rome Statute departs from customary law',[8] for instance, the 'policy' element goes beyond what is required under customary law.[9] A critical analysis is required on whether article 7 setting forth these elements was and is declaratory of custom.

This Chapter analyses whether article 7 was, and if yes, still is declaratory of custom with regard to crimes against humanity. This Chapter focuses on two issues, the absence of a nexus with an armed conflict and the policy element. The other elements are discussed when necessary. For this purpose, section 4.2 briefly analyses provisions of the Rome Statute to answer whether article 7 was intended by the drafters to be declaratory of custom concerning crimes against humanity. Section 4.3 elaborates on the development of the concept of crimes against humanity to show that crimes against humanity as defined in article 7, in general, were declaratory of custom.[10] The reiteration also serves to provide a common background for discussing the two contextual elements. Two consecutive sections (4.4-4.5) examine the elements of crimes against humanity. Section 4.4 discusses the absence of the nexus with an armed conflict and section 4.5 considers policy as a distinct element in article 7 and under customary law. Finally, some concluding remarks are provided in section 4.6 on the nature of article 7 of the Rome Statute as evidence of customary law on these two issues.

4.2 Provisions on crimes against humanity in the Rome Statute

Article 7 of the Rome Statute defines crimes against humanity. Article 7(1) provides a chapeau with an exhaustive list of underlying prohibited acts of crimes against humanity. Article 7(2) defines some terms used in paragraph one, and article 7(3) further defines the term 'gender'. The chapeau in article 7(1) stipulates that '[f]or the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowl-

7 *Streletz, Kessler and Krenz v Germany* (Merits, Concurring Opinion of Judge Loucaides) ECtHR Application No. 34044/96, 35532/97 and 44801/98 (22 March 2001).

8 Cassese *et al* (eds), *Cassese's International Criminal Law* 106.

9 ibid, 107.

10 The crime of genocide as a specific form of crimes against humanity is mentioned, see *Tadić* Sentencing Judgment, para 8, 'genocide is itself a specific form of crime against humanity'.

edge of the attack'.[11] Article 7(2)(a) defines the term 'attack': '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 organisational policy to commit such attack'.

Similar to article 8 about war crimes, the text of article 7 also does not expressly address whether this provision was declaratory of custom concerning the notion of crimes against humanity. The phrase 'for the purpose of this Statute' merely indicates that the Rome Statute is a self-contained regime. This view is reaffirmed by the 'without prejudice' clause in article 10 of the Rome Statute, which permits a discrepancy between the Rome Statute and customary law. In brief, the phrase 'for the purpose of this Statute' was not relevant to the issue of whether article 7 as a whole was of a declaratory nature. Likewise, as observed in Chapter 3, other texts and the structure of the Rome Statute also do not definitively show that article 7 in its entirety was declaratory of a pre-existing custom before the adoption of the Statute.[12]

The preparatory works of this provision seem to indicate that the notion of crimes against humanity was generally accepted before the 1998 Rome Conference. In discussing the 1996 Draft Code of Crimes in the Sixth Committee, States expressed positive views on whether to include crimes against humanity.[13] In the *Ad Hoc* Committee, discussions focused on the specification of this crime.[14] No State suggested excluding crimes against humanity in the Rome Statute.[15] In the Preparatory Committee, the UK, the US and Japan submitted their proposals for crimes against humanity.[16] Discussions in the Preparatory Committee were pertinent to the elements of crimes against humanity in custom. Some speakers said that the definition of crimes against humanity 'lay in aspects of customary international

11 1998 Rome Statute, art 7(1).

12 See section 3.2.

13 UN Press Release, 'Sixth Committee Hears Differing Views on Code of Crimes against International Peace and Security' (16 October 1995), UN Doc GA/L/2866.

14 'Question of the crimes to be covered and specification of the crimes, Rapporteur: Ms. Kuniko SAEKI (Japan)', UN Doc A/AC.244/CRP.6/Add.3 (1995), paras 6-9; 'Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court', UN Doc A/50/22 (1995), paras 77-80.

15 'Comments Received Pursuant to Paragraph 4 of General Assembly Resolution 49/53 on the Establishment of An International Criminal Court, Report of the Secretary-General' (20, 30-31 March 1995), and Addendums, UN Doc A/AC.244/1 and Add.1 and Add.2 (1995). See comments of China, 5 March 1995; Czech Republic, 22 March 1995; Sudan, 24 March 1995; US, 30 March 1995. 'Summary of the statement of the delegate of Japan, April 1995'; 'Summary of the Proceedings of the *Ad Hoc* Committee During the Period 3-13 April 1995', UN Doc A/AC.244/2 (1995), paras 32, 36

16 'The UK Proposal on Crimes against humanity' (March 1996); 'Japan Proposal Crimes Against Humanity'; US, 'Crimes Against Humanity, Lack of a Requirement for a Nexus to Armed Conflict' (26 March 1996).

law'.[17] The chair's drafts provided many brackets in its compiled definition of crimes against humanity.[18] Further works focused on defining the elements of crimes against humanity and the list of prohibited acts.[19] The Canadian Minister of Citizenship and Immigration openly stated that crimes against humanity in the Statute are endorsed as customary law in Canada.[20] The ICJ and the Preamble of the ILC's 2017 Draft articles on crimes against humanity provide that the prohibition of crimes against humanity possesses the character of *jus cogens*.[21] As opposed to war crimes in non-international armed conflict, crimes against humanity had been recognised as international crimes under customary law before the adoption of the Rome Statute.[22] Leena Grover also concluded that the provision on crimes against humanity in the Rome Statute was, in general, a codification of existing customary international law.[23] Observations in the next section further support such a preliminary finding.

4.3 Crimes against humanity as international crimes under customary law

This section first examines the origin of crimes against humanity to show that the category was created by the Nuremberg Charter and that the crime was generally accepted as an international crime under customary law

17 UN Press Release, 'Preparatory Committee on Establishment of International Criminal Court First Session 1st Meeting' (25 March 1996), UN Doc GA/L/2761, Australia and Netherlands; UN Press Release, 'Preparatory Committee for Establishment of International Criminal Court, Discussed Definitions of "Genocide", "Crimes Against Humanity"' (25 March 1996), UN Doc GA/L/2762; UN Press Release, '"Crimes Against Humanity" Must be Precisely Defined Say Speakers in Preparatory Committee for International Court' (26 March 1996), UN Doc GA/L/2763; UN Press Release, 'Preparatory Committee on International Criminal Court Concludes First Session' (12 April 1996), UN Doc GA/L/2787.

18 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol I, paras 82-102; 'Compilation of Proposals', UN Doc A/51/22 (1996), Vol II, pp 65-69.

19 Christopher K. Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 91 *AJIL* 177, 180; Christopher K. Hall, 'The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 92 *AJIL* 124,126-27.

20 *Sapkota v Canada* (Minister of Citizenship and Immigration), [2013] FC 790, para 28.

21 *Jurisdictional Immunities of the State* Judgment, 141, para 95; 'Report of the International Law Commission', GAOR 72nd Session Supp No 10, UN Doc A/72/10 (2017), para 46, pp 22-23.

22 For further national legislation and prosecution of crimes against humanity after World War II, see M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (New York: CUP 2011) 660-723.

23 Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* 220-344.

before 1998.[24] This section then goes on to analyse various definitions of crimes against humanity to demonstrate that the divergences in the definitions of crimes against humanity do not negatively affect the customary status of this crime in international law.

4.3.1 Revisiting the origins of crimes against humanity as international crimes

The notion of crimes against humanity as international crimes was defined by the Nuremberg Charter. Article 6(c) of the Nuremberg Charter provided that:

> Crimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[25]

The prohibited acts are not listed exhaustively[26] and are generally classified into two types: a murder type and a persecution type.[27] The former type includes all prohibited acts except for persecution.

In academia, there are debates about whether the concept of crimes against humanity was a creation of the Nuremberg Charter. One theory claims that the notion of this crime was created by the four powers (the UK, the US, France and the USSR).[28] The other theory argues that this concept was a codification of a pre-existing customary rule.[29] An American Military

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24 UN Doc A/CN.4/680 (2015), para 51; *Tadić* Appeals Chamber Decision on Jurisdiction, para 141; *Prosecutor v Tadić* (Opinion and Judgement) ICTY-94-1-T (7 May 1997) [*Tadić* Opinion and Trial Judgment], paras 618-23; *Tadić* Appeals Chamber Judgment, para 251; Yoram Dinstein, 'Case Analysis: Crimes against Humanity after *Tadić*' (2000) 13 *Leiden J Intl L* 373.

25 Nuremberg Charter, art 6(c), as amended by the Semi-colon Protocol.

26 'The Charter and Judgment of the Nuremberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General', UN Doc A/CN.4/5 (1949), 67, 81.

27 Egon Schwelb, 'Crimes against Humanity' (1946) 23 *British Ybk Intl L* 178, 191-95; United Nations War Crimes Commission (ed), *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HMSO 1948) 178. The persecution type includes prohibited acts in art 7(1)(h). The murder type includes other prohibited acts.

28 *Tadić* Opinion and Trial Judgment, para 628; Schabas, *Unimaginable Atrocities* 53-54; *Polyukhovich v The Commonwealth of Australia and Anor* (Order, High Court of Australia) [1991]172 CLR 501 (14 August 1991) [*Polyukhovich* case, [1991]172 CLR 501]. Some scholars argued that 'genocide' did not become recognised as an international crime after World War II until the 1948 *Genocide Convention*. See Leslie Green, 'Canadian Law, War Crimes and Crimes against Humanity' (1989) 59 *British Ybk Intl L* 217, 225-26; Josef Kunz, 'The United Nations Convention on Genocide' (1949) 43 *AJIL* 738, 742.

29 *France et al v Göring et al*, Attorney General Sir Hartley Shawcross's Opening Speech (4 December 1945), (1948) 3 TMWC 91, p 92; *Attorney General v Eichmann* (Judgment, District Court of Jerusalem, Israel), 11 November 1961, (1968) 36 ILR 5, 283.

Tribunal in the *Justice* case was aware of the challenge to this new crime and argued that this concept had existed under customary law.[30] The Tribunal in the *Justice* case referred to academic writing of Charles Hyde and of Lassa Oppenheim, political messages before World War II, and the UK Chief Prosecutor's words before the IMT as well as the 1946 General Assembly Resolution regarding genocide. The Tribunal concluded that the notion of crimes against humanity (in particular, persecution) was the product of customary law before World War II.[31] The argumentation of the second theory, however, does not seem persuasive.

In contrast to war crimes with some precedents before World War II, crimes against humanity were first punished as a separate type of international crimes by the IMT.[32] As Schabas noted, the term 'crimes against humanity' had been employed in a general sense for a long time.[33] It had also been employed in a legal sense before the Nuremberg Charter. After World War I, reference to 'the laws of humanity' were made to the Preamble of the 1899 and 1907 Hague Conventions (Martens Clause). The Martens Clause in the Hague Conventions speaks of 'the laws of humanity, and the dictates of the public conscience'.[34] At that time, the laws of humanity were confined to the context of a war between States. The phrase 'the laws of humanity' was not used in a technical legal sense to formulate a separate set of rules different from the 'laws and customs of war'. Violations of 'the laws of humanity' would be deemed a category of 'war crimes' rather than a new crime at that time.

On 28 May 1915, the governments of France, Great Britain and Russia made a Declaration with respect to the offences committed by Turkey against Armenians.[35] The 1915 Declaration about the Armenian atrocities provided that:

30 *US v Altstötter* [*Justice* case], (1948) 3 TWC 3, pp 966-68. A similar view was shared as regarding the customary status of Control Council Law No. 10 in *US v von Leeb* [*High Command* case], (1948) 11 TWC1, p 476; *US v List* [*Hostage* case], (1948) 11 TWC 759, p 1239; *S v Flick* [*Flick* case], (1948) 6 TWC 8, p 1189; *US v Krupp* [*Krupp* case], (1948) 9 TWC 1, p 1331; *US v Ohlendorf* [*Einsatzgruppen* case], (1948) 4 TWC 3, p 154.

31 *Justice* case, (1948) 3 TWC 3, pp 959-71.

32 Nuremberg Charter, art 6(c); UN Doc S/25704 (1993), para 47: 'crimes against humanity were first recognised in the Charter and Judgement of the Nuremberg Tribunal, as well as in Law No 10 of the Control Council for Germany'.

33 Schabas, *Unimaginable Atrocities* 51-53.

34 The Martens Clause states: 'Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the Protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.'

35 M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn, Leiden: Brill 2012) 544.

> En présence de ces nouveaux crimes de la Turquie contre l'humanité et la civilisation [these new crimes of Turkey against humanity], les Gouvernements alliés font savoir publiquement à la Sublime Porte qu'ils tiendront personnellement responsables des dits crimes tous les membres du Gouvernement ottoman ainsi que ceux de ses agents qui se trouveraient impliqués dans de pareils massacres.[36]

This declaration referred to violations of the laws of humanity in the territory of a State (Turkey). Most scholars deemed this declaration the first expression of 'crimes against humanity' in a document of political and legal significance.[37] The reference to 'crimes of Turkey against humanity' in that context remained in common usage, which was a non-technical term and referred to moral condemnations. This declaration might be considered as the seed of the modern idea of prosecuting inhumane acts committed by a government against its citizens, which acts are internationally condemned.[38]

The 1919 Commission on Responsibilities, established after World War I, considered violations of the laws of humanity as a category of offences, 'crimes against the laws of humanity'.[39] It is unclear whether the Commission deemed the notion of 'crimes against the laws of humanity' an independent offence as opposed to war crimes.[40] At the Paris Peace Conference, States upheld different views about the phrase 'crimes against the laws of humanity' recommended by the Commission on Responsibilities.[41] The Memorandum of the UK supported prosecution of offences against the laws of humanity.[42] However, the US, which later insisted on crimes against humanity as a part of the mandate of the IMT,[43] strongly objected to the reference to 'laws and principles of humanity'. The US delegation argued that this reference was a moral standard. In its view, 'there is no fixed and universal standard of humanity', and such breaches were not recognised

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36 It was quoted in the Armenian Memorandum presented by the Greek Delegation to the Commission on Responsibilities, Conference of Paris, 14 March 1919, as reproduced in UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 35 (translation added); Egon Schwelb, 'Crimes against Humanity' (1946) 23 *British Ybk Intl L* 178, 181.

37 But see Schabas, *Unimaginable Atrocities* 53, arguing that the powers were familiar with this term.

38 ibid.

39 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference' reprinted in (1920) 14 *AJIL* 95 [Report of the Commission on Responsibilities], 121.

40 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 35-36.

41 Report of the Commission on Responsibilities, Annex IV, art I; Annex II, 135-36, 144-45 and Annex III.

42 Schabas, *Unimaginable Atrocities* 53.

43 'Report of the President by Mr. Justice Jackson, June 6, 1945', in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington, DC: USGPO 1949) [*Report of Robert H. Jackson*] 50-51.

in international law applicable at that time.[44] Japan also opposed prosecuting 'offences against the laws of humanity'.[45] Finally, the reference to 'the laws of humanity' was omitted in the 1919 Treaty of Versailles. There was no charge of offences against the laws of humanity in the German Leipzig trials.

The 1920 Treaty of Sèvres also proposed prosecuting Turkish nationals, including those people whose victims were subjects of the Ottoman (Turkey) Empire, victims of the genocide of the Armenian people.[46] This idea might be the 'embryo' that was later called crimes against humanity.[47] Eventually, the Treaty of Sèvres was not ratified. There was also no actual prosecution based on this provision, despite some charges for this crime. This treaty later was replaced by the 1923 Treaty of Lausanne, which did not contain a provision on prosecuting Turkish nationals for this crime.[48] Bassiouni commented that political concerns prevailed over the pursuit of justice at that time.[49]

The definition of crimes against humanity was not further developed until the 1945 Nuremberg Charter. According to a 'Draft Statute for the Permanent International Criminal Court', presented at the 1924 ILA Conference by Huge Bellot, 'all offences committed contrary to the laws of humanity and the dictates of public conscience' was included in the jurisdiction of a proposed court.[50] The 1943 United Nations War Crimes Commission (UN War Crimes Commission) observed that the crimes committed against its population in Ethiopia during 1935-36 by the Italian government were qualified as war crimes and crimes against humanity.[51] Many official and semi-official declarations were issued concerning crimes against humanity, including the 1943 resolution passed by the London International Assembly.[52] These practices, however, still do not support the existence of what are now called 'crimes against humanity' as opposed to war crimes.

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44 'Memorandum of Reservations Presented by the Representatives of the United States to the Report of on the Commission on Responsibilities, 4 April 1919', annexed in Report of the Commission on Responsibilities, 135-36, 144, 146. *Violations of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission on Responsibilities, Conference of Paris, 1919* (Oxford: Clarendon Press 1919).

45 Bassiouni, *Introduction to International Criminal Law* 544.

46 Treaty of Peace between the Allied and Associated Powers and the Ottoman Empire (Treaty of Sèvres), 10 August 1920, (1920) UKTS 11, arts 215, 230; William A. Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge: CUP 2017) 4.

47 Schabas, ibid.

48 Treaty of Peace with Turkey (Treaty of Lausanne), 24 July 1923, 28 LNTS 11; Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* 93-94.

49 Bassiouni, 544; M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik* (2006) 22 *Ga St U L Rev* 541; M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability Over Realpolitik* (2003) 35 *Case W Res J Intl L* 191; M. Cherif Bassiouni, *Searching for Justice in the World of Realpolitik* (2000)12 *Pace Intl L Rev* 213.

50 Nationality and Naturalisation Committee, 'Draft Statute for the Permanent International Criminal Court, by Huge Bellot' in International Law Association Report of the 33rd Conference (Stockholm 1924) (ILA, London 1924) 81, art 25 (2).

51 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 189-90.

52 ibid, 190-91.

The international prosecution of crimes against humanity first occurred after the end of World War II. There were discussions of crimes against humanity in the UN War Crimes Commission. Desiring to prosecute atrocities committed on Axis territory, including Germany and Austria, as well as in Axis satellite countries, such as Hungary and Romania, against nationals of those countries, in particular, the Jewish population, the UN War Crimes Commission intended to extend international crimes to cover offences not constituting war crimes *stricto sensu*.[53] The US representative designated the 'offences perpetrated on religious or racial grounds against stateless persons or against any persons' as 'crimes against humanity' which were 'justifiable as war crimes'. These offences 'were crimes against the foundations of civilisation, irrespective of place and time, and irrespective of the question as to whether they did or did not represent violations of the law and customs of war'.[54]

Representatives of Czechoslovakia and the Netherlands supported this proposal because for them these offences were a matter of international concern.[55] In contrast, the British, Greek and Norwegian representatives objected to such an idea. They argued that the competence of the UN War Crimes Commission was limited to the punishment of 'war crimes', no matter how compelling it was that the other offences should be punished. In 1944, the Legal Committee of the UN War Crimes Commission, mandated to give legal opinions, submitted a draft resolution to the Commission and recommended that crimes against individuals on the ground of their race or religion should be considered as war crimes in a wider sense.[56] The British government insisted that the 'activities of the Commission should be restricted to the investigation of war crimes *stricto sensu* of which the victims have been Allied nationals'. As for crimes against Axis nationals, the perpetrators 'would one day have the punishment which their actions deserve'.[57] Given these different opinions, the UN War Crimes Commission abandoned the idea of adding another category of crimes to war crimes.[58]

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53 ibid, 11.

54 ibid, 175. See also 'Statement by the President, March 24, 1944', in *Report of Robert H. Jackson* 13.

55 'Notes on Fifth Meeting of Committee III' (27 March 1944).

56 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 175-76. Offences of war crimes sometimes overlap with crimes against humanity in armed conflict, such as murder or torture. The two offences committed in the context of an attack against civilian population might be charged both as a war crime and as a crime against humanity if other requirements are satisfied. See Egon Schwelb, 'Crimes against Humanity' (1946) 23 *British Ybk Intl L* 178, 179-80; *Flick* case, (1948) 6 TWC 8, pp 1187-212; *Hostage* case, (1948) 11 TWC 759; *UK v Bruno Tesch et al* [*Zyklon B* case], (1947) 1 LRTWC 93; *UK v Josef Kramer et al* [*Belsen* case], (1947) 2 LRTWC 1, in *Law Reports of Trial of War Criminals*: *Selected and Prepared by the United Nations War Crimes Commission* (London: HMSO 1947-49); *The Prosecutor v Dominic Ongwen* (Decision on the confirmation of charges, PTC II) ICC-02/04-01/15-422-Red (23 March 2016) [*Ongwen* Decision on Confirmation of Charges], paras 69, 74, 79, 84.

57 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 176.

58 ibid.

In short, during this period, the UN War Crimes Commission considered 'crimes against humanity' as 'war crimes' in a broader, non-technical sense. No agreement was reached among States concerning persecution on religious, racial or political grounds in Axis territory until the Nuremberg Charter, which first recognised crimes against humanity as a separate type of international crime.[59] In fact, in November 1945, the issue of crimes against humanity was raised again in the UN War Crimes Commission. By referring to the Nuremberg Charter, the Norwegian delegation suggested including 'crime against humanity' as a category of war crimes in a wider sense. Many members of the UN War Crimes Commission supported this proposal, and there were no votes opposing.[60] The change in the Commission's attitude was mainly due to the Nuremberg Charter.

As examined in Chapter 3 about war crimes, the UK, the US, France and the USSR adopted the London Agreement to which is annexed the Nuremberg Charter in August 1945.[61] In the final days of the London Conference in 1945, the American delegate Robert Jackson proposed renaming the category of 'atrocities, persecutions and deportations' as 'crimes against humanity'.[62] Article 6(c) of the Nuremberg Charter first designed crimes against humanity as a distinct international crime to cover offences that are related to war but not wholly covered by war crimes.[63] The term 'crimes against humanity' was also employed in the judgment of the IMT.[64] In the IMT, 17 of the 24 defendants were indicted for crimes against humanity, and 15 of the 17 indicted were convicted of this crime. The IMT did not examine the legality of its inclusion and the pre-existence of the crime, as the defences did not challenge crimes against humanity as an innovation. Assuming the issue of retroactive application of the law was put before the IMT, two approaches might have been available for this tribunal. The first approach was used by the IMT to justify its prosecution for crimes against peace. The IMT held that retroactive prosecution could be morally justified in order to pursue 'substantive justice' at that time.[65] The second approach, as adopted by the military tribunal in the *Justice* case, was to argue that the definition of crimes against humanity

59 Nuremberg Charter, art 6(c).

60 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 177; 'Minutes of Ninety-first Meeting, 9 January 1946', M. 91.

61 London Agreement, 82 UNTS 280.

62 Schabas, *Unimaginable Atrocities* 51; 'Minutes of Conference Session of July 23, 1945' and 'Revision of Definition of "Crimes" submitted by American Delegation, July 31, 1945', in *Report of Robert H. Jackson* 332-33, 395. 'Minutes of Conference Session of August 2, 1945', in *Report of Robert H. Jackson* 399-419, 416.

63 M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff 1992) 114-19.

64 Nuremberg Charter, art 6(c); *France et al v Göring et al*, (1948) 1 TMWC 171, p 254.

65 *France et al v Göring et al*, (1948) 1 TMWC 171, p 219.

was not an innovation but a reflection of a pre-existing customary rule.[66] This approach was employed by the IMT to justify its prosecution of war crimes.[67]

It appears that the IMT might have adopted the first approach to admit the creation of this new crime but justify its prosecution on grounds of substantive justice.[68] As Robert Jackson stated at the London Conference:

> It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems.[69]

Following the adoption of the Nuremberg Charter, in his letter to a legal officer in the Foreign Office, Hersch Lauterpacht described 'crimes against humanity' as an 'innovation'.[70] In addition, the 1991 UK *War Crimes Act* limited the jurisdiction to 'war crimes' committed between 1939 and 1945, leaving the issue of crimes against humanity untouched. The UK Parliament explained that 'in 1939 there was no internationally accepted definition of crimes against humanity […] [,] while the moral justification for trying crimes against humanity at Nuremberg is understandable, the legal justification is less clear'.[71] In short, despite having some roots in international law, the notion of crimes against humanity as a category of international crimes was created by the drafters of the Nuremberg Charter.[72] Some subsequent national cases also endorsed this idea indirectly.[73]

On the whole, the concept of crimes against humanity existed before World War II. At the outset, this concept was not designed as a distinct international crime but as part of war crimes in either a strict sense or a broader sense. The above observation suggests that the notion of crimes against humanity in the Nuremberg Charter, as an international crime, was a creation of its drafters. Crimes against humanity as a separate type of international crime were also first punished by the IMT.[74] The notion of crimes

66 *Justice* case, (1948) 3 TWC 3, pp 966-68.

67 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 253-54. 'The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General', UN Doc A/CN.4/5 (1949), 61-64.

68 Schabas, *Unimaginable Atrocities* 49-50.

69 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 331.

70 Hersch Lauterpacht to Patrick Dean, 30 August 1945, FO 371/51034, cited in Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge: CUP 2010) 273-74, and quoted in Schabas, *Unimaginable Atrocities* 58.

71 Thomas Hetherington and William Chalmers, *War Crimes: Report of the War Crimes Inquiry*, Command Paper 744, (London: HMSO 1989), paras 5.43 and 6.44.

72 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 332-33.

73 *R v Finta* (Judgment, Supreme Court), [1994] 1 SCR 701, holding that crimes against humanity did not exist under customary international law in 1942; *Polyukhovich* case, [1991]172 CLR 501, Justice Brennan stated that there is no evidence of widespread State practice or *opinio juris* as to the crimes against humanity in 1942, para 63.

74 Nuremberg Charter, art 6(c); UN Doc S/25704 (1993), para 47.

against humanity embedded in the Nuremberg Charter was the landmark for the formation of customary law.

After article 6(c) of the Nuremberg Charter and prior to the adoption of the Rome Statute, other international instruments formulated various definitions of crimes against humanity, for instance, article 5(c) of the Tokyo Charter, article II(1)(a) of Control Council Law No. 10 of 1945, the 1950 ILC Nuremberg Principles,[75] articles 5 and 3 of the ICTY and ICTR Statutes, as well as the ILC's texts of the Draft Code of Crimes. Crimes against humanity were also confirmed by the 1946 General Assembly Resolution. The notion of crimes against humanity was generally recognised as part of customary law before the adoption of the Rome Statute.[76] After the adoption of the Rome Statute, there were other international and national definitions of crimes against humanity adopted in the Statute of the SCSL,[77] Law of the Extraordinary Chambers in the Courts of Cambodia (ECCC),[78] Statute of the Iraqi High Tribunal,[79] the Regulation for Special Panels of Serious Crimes in East Timor,[80] and the amended Bangladesh International Crimes (Tribunals) Act[81] as well as the Statute of the Extraordinary African Chambers within the Senegalese Judicial System.[82] Other international and national cases prosecuting crimes against humanity as international crimes after World War II further enhance its customary status.[83] The current work of the ILC on a Convention on Crimes agaisnt Humanity shares the same feature.[84] It appears that article 7 of the Rome Statute, in general, was and is declaratory of customary law about the notion of crimes against humanity.

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75 UN Doc A/RES/95 (I); 'Report of the Committee on the plans for the formulation of the principles of the Nuremberg Charter and judgment' (17 June 1947), UN Doc A/AC.10/52, para 2; UN Doc A/RES/94 (I).

76 UN Doc A/RES/217 (III) A; *Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR), art 7(2); UN Doc S/25704 (1993), para 35; *Tadić* Appeals Chamber Decision on Jurisdiction, para 141.

77 Statute of the SCSL, art 6, para 1.

78 Law on the Establishment of the ECCC, art 5.

79 Statute of the Iraqi Special Tribunal, 43 ILM 231 (2004), art 12.

80 East Timor, Regulation for Special Panels for Serious Crimes 2000, § 5.

81 Bangladesh, The International Crimes (Tribunals) Act 1973, amended 2009, art 3(2)(a).

82 Statute of the Extraordinary African Chambers within the Senegalese Judicial System, arts 4(b) and 6.

83 Identifying crimes against humanity as one of the 'most frequently cited candidates for the status of *jus cogens*', see UN Doc A/CN.4/L.682 and Corr.1 (2006), para 374; *Almonacid Arellano et al v Chile* (Judgment, Preliminary Objections, Merits, Reparations and Costs, Inter-American CtHR), Series C No 154 (26 September 2006), para 96; *Jurisdictional Immunities of the State* Judgment, 141, para 95; *Tadić* Opinion and Trial Judgment, paras 618-23; UN Doc A/CN.4/680 (2015), para 51.

84 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-second session, prepared by the Secretariat', UN Doc A/CN.4/713 (2018), para 93; 'Third report on crimes against humanity, by Sean D. Murphy, Special Rapporteur', UN Doc A/CN.4/704 (2017), para 3; UN Doc A/72/10 (2017), para 45.

4.3.2 The definitions of crimes against humanity beyond the Nuremberg Charter

As shown above, after World War II, there were various definitions of crimes against humanity as international crimes. The 1950 and 1991 drafts of the ILC's Draft Code of Crimes even avoided using the term of 'crimes against humanity'.[85] All these definitions of crimes against humanity are different in specific aspects. For example, as opposed to article 7 of the Rome Statute, article 2 of the Statute of the SCSL provides a non-exhaustive list of prohibited acts. Also, according to the Nuremberg and Tokyo Charters as well as the 1950 Nuremberg Principles, a nexus with an armed conflict was a legal requirement. By contrast, this nexus was omitted in the 1945 Control Council Law No. 10 and abandoned in the Rome Statute. Article 5 of the ICTY Statute also explicitly referred to a link with an armed conflict; however, article 3 of the ICTR Statute did not refer to armed conflict despite all offences being committed in the context of a civil war. The 1954, 1991, and 1996 versions of the Draft Code of Offences (Crimes) do not refer to a connection with an armed conflict. In addition, with respect to the policy issue, neither the 1991 version of the Draft Code of Crimes nor Article 5 of the ICTY Statute refer to a 'State or organisational' policy. The 1996 Draft Code of Crimes requires acts committed 'in a systematic manner or on a large scale and instigated or directed by a Government or by any organisation or group'.[86] The definition of crimes against humanity for the ECCC does not require the policy element as set out in article 7(2)(a) of the Rome Statute. The treaty agreement for the Statute of the Extraordinary African Chambers also does not contain the term 'policy' in its definition of crimes against humanity.[87]

A view has been expressed that 'the existence of customary law on [the issue of a nexus with an armed conflict] was questionable in view of the conflicting definitions contained in the various instruments'.[88] Bassiouni pointed out that '[t]hese diverse definitions undermine the certainty of customary international law'.[89] Nevertheless, both statements should not be misinterpreted or exaggerated. These pre-Rome and post-Rome definitions show a lack of uniformity of the text of crimes against humanity. The impact of these definitions should be analysed by considering the jurisprudence of these

85 'Text of a Draft Code of Offenses against the Peace and Security of Mankind suggested as a working paper for the International Law Commission', UN Doc A/CN.4/SER.A/1950/Add.1; 'Draft Code of Offenses against the Peace and Security of Mankind', GAOR 46th Session Supp No 10, UN Doc A/46/10 (1991), para 176, p 96, art 21 'Systematic or mass violations of human right'.

86 1996 Draft Code of Crimes, art 18.

87 Statute of the Extraordinary African Chambers within the Senegalese Judicial System, art 6.

88 'Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court', UN Doc A/50/22 (1995), para 79.

89 M. Cherif Bassiouni, 'Revisiting the Architecture of Crimes against Humanity' in L.N. Sadat (ed), *Forging a Convention for Crimes against Humanity* 58.

international and national tribunals. For instance, the ICTY held that the reference to armed conflict in article 5 of the ICTY Statute was not a substantive element but a jurisdictional threshold for the tribunal.[90]

Some post-Rome definitions applicable at the national level have been limited in temporal scope. For example, the jurisdiction of the SCSL is confined to crimes committed during the period from 1996 to 2002. Likewise, the ECCC only has jurisdiction over crimes committed from 1975 to 1979. These post-Rome definitions endorse the idea of the acceptance of crimes against humanity before the adoption of the Rome Statute. The existence of different definitions would not inherently undermine the claim that there is a consensus on crimes against humanity as an international crime under customary law. The fact of various definitions only indicates different understandings of elements of these crimes.

These understandings are related to the issue of what makes an inhumane act a crime against humanity. Competing views exist in academia on this question.[91] One viewpoint is that these acts threaten the peace and security of the world. The second viewpoint is that these acts are serious violations of fundamental human rights. Third, the victims of the targeted group are human beings who should not be killed solely because of their affiliations. Fourth, from an historically descriptive perspective, most of the crimes were planned and committed by State actors, who are generally not the physical perpetrators who executed the crimes. It is likely that they would go unpunished without the availability of international jurisdiction. As thoroughly demonstrated by Margaret deGuzman, each approach has its merits and flaws to some extent.[92] None of these approaches could provide an entirely rational argument as regards every specific issue.[93] After examining the establishment of the IMT and the IMTFE, the historic experience of mass crimes in Cambodia, in the former Yugoslavia and in Rwanda, Judge Kaul of the ICC concluded that 'historic origins are decisive in understanding the specific nature and fundamental rationale of the category of international crime'.[94] He added that 'a demarcation line must be drawn between international crimes and human rights infractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation'.[95]

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90 *Tadić* Appeals Chamber Judgment, para 249*; Prosecutor v Stanišić & Simatović* (Judgement) ICYT-03-69-T (30 May 2013) [*Stanišić* & *Simatović* Trial Judgment], para 960.

91 Margaret M. deGuzman, 'Crimes against Humanity' in W. A. Schabas and N. Bernaz (eds), *Routledge Handbook of International Criminal Law* (New York: Routledge 2011) 121-38; Kai Ambos, *Treaties on International Criminal Law, Vol 1*: *Foundations and General Part* (Oxford: OUP 2013) 55-56; *Kenya* Authorisation Decision 2010, fn 62.

92 deGuzman, 'Crimes against Humanity', 121-38.

93 ibid.

94 *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's Decision), paras 58-65.

95 ibid, para 65.

The historical experience is vital to understanding what the fundamental rationale of crimes against humanity is. This Chapter addresses the issues of the nexus with an armed conflict and the element of policy from an historical perspective.

4.3.3 Assessment and conclusions

Observations of the development of crimes against humanity show that the notion of crimes against humanity was a new type of international crime in the Nuremberg Charter, as opposed to an existing customary rule. However, before the adoption of the Rome Statute, this crime had generally been recognised under customary law.[96] The observations further enhance the preliminary finding that article 7, in general, was declaratory of custom with respect to crimes against humanity. Various definitions of crimes against humanity do not affect the customary status of the crime but demonstrate controversial arguments about the contextual elements. The contextual element means that the underlying acts of crimes against humanity should be committed in this context of and constitute part of the attack.[97] The next section focuses on the issue of the nexus with an armed conflict.

4.4 No nexus with an armed conflict: was and is article 7(1) declaratory of custom?

The text of article 7 of the Rome Statute does not use the phrases 'in connection with an armed conflict' or 'whether or not committed in time of armed conflict'.[98] It is argued that under customary law crimes against humanity can be committed in times of war and peace. This section first briefly interprets article 7 and provides a preliminary examination of the nexus with an armed conflict issue, and then analyses the removal of this nexus under customary law to show whether article 7(1) was and is declaratory of customary law on the nexus issue.

4.4.1 The nexus issue in article 7(1) of the Rome Statute

For the lack of a reference to the connection with an armed conflict, a plain reading of article 7 is impractical on the nexus issue. The aim to 'put an end to impunity for the perpetrators of these crimes' and other provisions of the

96 See *Prosecutor v Marcelino Soares* (Judgment, District Court of Dili) SPSC-11/2003 (11 December 2003), paras 16-17.

97 *Prosecutor v Deronjić* (Judgement) ICTY-02-61-A (20 July 2005), para 109; *Limaj et al* Trial Judgment, paras 180, 188; *Prosecutor v Blagojević & Jokić* (Judgement) ICTY-02-60-T (17 January 2005) [*Blagojević & Jokić* Trial Judgment], para 547; *Prosecutor v Simić et al* (Judgement) ICTY-95-9-T (17 October 2003), para 41; *Tadić* Appeals Chamber Judgment, para 251.

98 UN Doc A/72/10 (2017), para 45, p 11, art 2.

Statute do not help in understanding this issue.[99] It seems that the strict construction requirement in article 22 and the wording 'civilian populations' support a stringent interpretation requiring a nexus with an armed conflict. However, given the reference to armed conflict in many previous definitions of crimes against humanity, the omission of this link in article 7 indicates that such a nexus with an armed conflict is not a requirement for crimes against humanity in the Rome Statute. It is agreed that the armed conflict nexus requirement cannot be implied in article 7.[100] The ICC's interpretation that the 'attack' 'need not constitute a military attack' further indicates that the link with an armed conflict was not a requirement of crimes against humanity.[101]

The drafting history of article 7 also demonstrates that a nexus with an armed conflict is not a legal requirement for the crimes against humanity. The *Ad Hoc* Committee in 1995 reported that 'in light of Nuremberg precedent and the two UN *ad hoc* tribunals, there were different views as to whether crimes against humanity could be committed in peace time'.[102] Australia said there is no longer any requirement of such a nexus between an armed conflict and crimes against humanity in customary law.[103] In the Preparatory Committee, there were debates about the nexus with an armed conflict.[104] It was generally agreed that the crime need not be limited to acts during international armed conflict.[105] The US strongly argued for removing

99 1998 Rome Statute, art 21(3).

100 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 148.

101 *The Prosecutor v Bemba* (Judgment pursuant to Article 74 of the Statute, TC III) ICC-01/05-01/08-3343 (21 March 2016) [*Bemba* Trial Judgment], para 149; *Katanga* Trial Judgment, para 1101; *Prosecutor v Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges, PTC II) ICC-01/05-01/08-424 (15 June 2009) [*Bemba* Decision on Confirmation of Charges 2009], para 75.

102 'Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court', UN Doc A/50/22 (1995), para 79. UN Press Release, 'Sixth Committee Hears Differing Views on Code of Crimes Against International Peace and Security' (16 October 1995), UN Doc GA/L/2866; 'Summary of Interventions by the Australian Delegation on the Specification of Crimes'(17 August 1995), Argentina supported crimes against humanity in peacetime; while India opposed this idea.

103 'Summary of Interventions by the Australian Delegation on the Specification of Crimes' (17 August 1995).

104 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol I, paras 88-90; UN Press Release, 'Preparatory Committee on International Criminal Court Concludes First Session' (12 April 1996), UN Doc GA/L/2787. For States supporting no armed conflict nexus, see UN Press Release, 'Preparatory Committee on Establishment of International Criminal Court First Session' (25 March 1996), UN Doc GA/L/2761, Australia and Netherlands; 'Proposal by Japan on Crimes against Humanity' (25 March 1996); 'Proposal by the United Kingdom on Crimes against Humanity: Article 20 *quarter*' (25 March 1996); Netherlands, 'Crimes Against Humanity' (27 March 1996); Denmark, 'Crime Against Humanity: Chapeau and residual clause' (27 March 1996).

105 UN Press Release, UN Doc GA/L/2762 (25 March 1996).

a nexus with an armed conflict.[106] By contrast, China and Russia argued for retaining the nexus with an armed conflict.[107] There were proposals to incorporate the wording 'in time of peace or in time of war' in the chapeau of the provision about crimes against humanity. This proposal, however, did not survive in the 1998 Draft Statute adopted by the Preparatory Committee.[108] In the Draft Statute, one alternative of the definition of crimes against humanity retains the phrase 'in armed conflict' in a bracket.[109]

At the 1998 Rome Conference, opinions of States were divided on the issue of a nexus with an armed conflict. The majority of States supported the view that crimes against humanity can be committed both in wartime and in peacetime.[110] The UK clearly stated that 'in international customary law, no such nexus [between crimes against humanity and armed conflict] exists', remarks that were endorsed by other States.[111] Some States wished to limit the provision to crimes against humanity in the context of international armed conflict,[112] while some others claimed that this concept also applied to non-international armed conflict.[113] Some States in the latter group insisted on the nexus requirement,[114] but it is unclear whether others in this group also shared this view. In later discussions, negotiations focused less on the

106 United States Delegation, 'Crimes Against Humanity, Lack of a Requirement for a Nexus to Armed Conflict' (26 March 1996).

107 UN Press Release, UN Doc GA/L/2763 (26 March 1996).

108 UN Doc A/51/22 (1996), Vol II, p 66.

109 'Draft Statute for the International Criminal Court', in 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998), UN Doc A/CONF.183/2, pp 20-21. For a detailed analysis of the Preparatory Committee's drafts, see Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 170.

110 UN Doc A/CONF.183/SR.1, paras 6-7 (Italy), UN Doc A/CONF.183/SR.8, para 62 (Ecuador); UN Doc A/CONF.183/C.1/SR.3, paras 21 (Germany), 36 (Czech Republic), 40 (Malta), 51 (Brazil), 55 (Denmark), 58 (Lesotho), 77 (Republic of Korea), 81 (Poland), 84 (Trinidad and Tobago), 87 (Australia), 89 (UK), 92 (Argentina), 95] (France), 101 (Cuba), 108 (Thailand), 109 (Slovenia), 112 (Norway), 114 (Côte d'Ivoire), 117 (South Africa), 120 (Egypt), 124 (Mexico), 133 (Colombia), 136 (Iran), 138 (US), 147 (Spain), 149 (Romania), 152 (Senegal), 154 (Sri Lanka), 158 (Venezuela), 162 (Italy), 167 (Ireland); UN Doc A/CONF.183/C.1/SR.4, paras 2 (Canada), 4 (Guinea), 7 (Switzerland), 8 (Sweden), 11 (Portugal), 12 (Yemen), 13 (Vietnam), 14 (Netherlands), 15 (Bahrain), 16 (Benin), 17 (Japan), 18 (Bangladesh), 19 (Niger), 20 (Austria), 21 (Uruguay), 23 (Sierra Leone), 25 (Israel), 27 (Chile), 29 (Kenya); UN Doc A/CONF.183/C.1/SR.5, para 51 (Venezuela); UN Doc A/CONF.183/C.1/SR.34, para 15 (Jamaica).

111 Arguing for no nexus with an armed conflict under customary law, see UN Doc A/CONF.183/C.1/SR.3, paras 89 (UK), 92 (Argentina), 109 (Slovenia); UN Doc A/CONF.183/C.1/SR.4, paras 2 (Canada), 25 (Israel).

112 UN Doc A/CONF.183/C.1/SR.3, paras 22 (Syria), 24 (United Arab Emirates), 27 (Bahrain), 28 (Lebanon), 31 (Saudi Arabia), 34 (Tunisia), 39 (Morocco), 42 (Algeria), 68 (Sudan), 86 (Iraq).

113 UN Doc A/CONF.183/C.1/SR.3, paras 28 (Jordan), 30 (Belgium), 53 (Costa Rica), 66 (Malawi), 74 (China), UN Doc A/CONF.183/C.1/SR.4, paras 5 (Russia Federation), 9 (Ukraine), 10 (Syria).

114 UN Doc A/CONF.183/C.1/SR.3, para 74 (China); UN Doc A/CONF.183/C.1/SR.4, para 10 (Syria); UN Doc A/CONF.183/C.1/SR.27, para 64 (Vietnam).

nexus issue of crimes against humanity.[115] The Discussion Paper prepared by the Bureau of the Committee of the Whole formulated the notion of crimes against humanity.[116] After informal consultation, an updated version of this concept was developed in the Recommendation of the Coordinator.[117] Both documents omitted the 'armed conflict' nexus. The Bureau Proposal further confirmed the omission of armed conflict.[118] A large number of States expressed their satisfaction with the absence of the armed conflict nexus.[119] Meanwhile, other States did not openly complain about this.[120] Two States insisted on maintaining the reference to 'armed conflict' in the definition but admitted that crimes against humanity could be committed in peacetime.[121] A few States insisted on the retention of the armed conflict nexus for crimes against humanity.[122]

These observations show that article 7 of the Statute should be interpreted as not requiring a nexus with an armed conflict. The preparatory works also show that States widely accepted the absence of the nexus with an armed conflict at the Rome Conference. However, the text of article 7, the structure of the Statute as well as the preparatory works do not evidence a preliminary finding that article 7 of the Statute was declaratory of customary law on the absence of a nexus.

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115 UN Doc A/CONF.183/2/Add.1 and Corr.1; 'United States of America: proposal regarding an annexe on definitional elements for part 2 crimes' (19 June 1998), A/CONF.183/C.1/L.10.

116 'Discussion Paper prepared by the Bureau' (6 July 1998), UN Doc A/CONF.183/C.1/L.53, pp 204-05.

117 UN Doc A/CONF.183/C.1/L.44 and corr.1, 7 July 1998, pp 221-22.

118 'Proposal prepared by the Bureau' (11 July 1998), UN Doc A/CONF.183/C.1/L.59 and Corr.l, pp 212-13.

119 UN Doc A/CONF.183/C.1/SR.25, paras 8 (South Africa), 39 (Mozambique), 41 (Sweden), 74 (Botswana), 76 (Croatia), 78 (Australia), 79 (Senegal); UN Doc A/CONF.183/C.1/SR.26, paras 34 (Uruguay), 35 (Turkey), 48 (Brazil), 63 (Ghana); UN Doc A/CONF.183/C.1/SR.27, paras 19 (Nicaragua), 74 (Sri Lanka); UN Doc A/CONF.183/C.1/SR.34, para 15 (Jamaica).

120 UN Doc A/CONF.183/C.1/SR.25, paras 22 (Belgium), 27 (Japan), 34 (China), 46 (Syria), 61 (Azerbaijan); UN Doc A/CONF.183/C.1/SR.26, paras 100 (Iran), 118 (Lesotho), 122 (Greece); UN Doc A/CONF.183/C.1/SR.27, paras 2 (Iraq), 57 (Congo), 60 (Indonesia), 61 (Comoros); UN Doc A/CONF.183/C.1/SR.28, paras 72 (Tunisia), 84 (Qatar), 87 (Saudi Arabia), 94 (Nigeria), 104 (Libya); UN Doc A/CONF.183/C.1/SR.34, paras 32 (Spain), 70 (Cuba), 73 (Jordan); UN Doc A/CONF.183/C.1/SR.35, paras 19-20 (Burundi), 38 (Finland), 53 (Liechtenstein), 64 (Iraq); UN Doc A/CONF.183/C.1/SR.36, paras 6 (Libya), 13 (Congo), 30 (Slovenia), 24 (Peru).

121 See UN Doc A/CONF.183/C.1/SR.3, para 27 (Bahrain), UN Doc A/CONF.183/C.1/SR.4, para 15 (Bahrain), UN Doc A/CONF.183/C.1/SR.27, para 22 (Bahrain); UN Doc A/CONF.183/C.1/SR.4, para 13 (Vietnam), UN Doc A/CONF.183/C.1/SR.27, para 64 (Vietnam). Bahrain and Vietnam supported crimes against humanity committed in peacetime, but they also intended to limit the jurisdiction of the Court over this crime in the context of 'international' armed conflict or in 'armed conflict'.

122 UN Doc A/CONF.183/C.1/SR.28, paras 8 (Pakistan), 11 (Kuwait), 90 (Oman). Arguing for a nexus with an armed conflict under customary law, see UN Doc A/CONF.183/SR.9, 17 July 1998, para 38 (China).

4.4.2 A nexus with an armed conflict and its disappearance in custom

In order to determine whether article 7 was declaratory of custom on the nexus issue, it is necessary to discuss the removal of the nexus with a conflict under customary law. For this purpose, this subsection briefly analyses the jurisprudence and authorities after World War II to show whether a nexus with an armed conflict was a legal element of crimes against humanity under customary law and when the nexus disappeared under customary law before 1998.

4.4.2.1 The nexus with an armed conflict

Scholars differ concerning whether a nexus with an armed conflict was a legal element. On the one hand, commentators argue that the link with an armed conflict was never a legal but rather a jurisdictional requirement imposed by the Nuremberg Charter for the purposes of the IMT. On the other hand, some other commentators hold that the nexus with an armed conflict was a legal requirement before the IMT. The second view seems to be the appropriate interpretation of the nexus issue.

According to article 6(c) of the Nuremberg Charter, the definition of crimes against humanity was linked to 'any crime within the jurisdiction of the Tribunal'.[123] It is understood that the phrase 'any crime within the jurisdiction of the Tribunal' refers to crimes against peace and war crimes.[124] In practice, ill-treatment and murder of non-German civilians in concentration camps committed by Germans during the war were charged mostly as both crimes against humanity and war crimes.[125] In addition, as Robert Jackson addressed at the London Conference in 1945:

> The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.[126]

Streicher and von Schirach were found guilty only of crimes against humanity. But the IMT judgment also established that the two defendants' conducts were associated with war crimes committed by others.[127] Thus, article 6(c) of the Nuremberg Charter required a link with crimes against peace or war crimes.

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123 Nuremberg Charter, art 6(c).

124 'The Charter and Judgment of the Nürnberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General', UN Doc A/CN.4/5 (1949), pp 68-69.

125 *Flick* case, (1948) 6 TWC 8, pp 1187-212; *Hostage* case, (1948) 11 TWC 759; *Zyklon B* case, (1947) 1 LRTWC 93; *Belsen* case, (1947) 2 LRTWC 1.

126 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 331.

127 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 302-04, 318-20.

One may note that the phrase 'before or during the war' in article 6(c) of the Nuremberg Charter permits prosecutions of crimes against humanity before the war.[128] According to the IMT: '[t]o constitute Crimes against Humanity', the acts 'relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal'.[129] In addition, the IMT held that since many of actions committed before the war were not proved in connection with any crime, it could not 'make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter'.[130] Therefore, it was potentially possible for the IMT to prosecute crimes against humanity before the war, but only if a nexus existed between the acts and aggressive wars.[131] The IMT in some specific instances also referred to some acts before the war and admitted their connection with the planning of aggressive wars. Nevertheless, the IMT in practice only considered atrocities committed 'during the war' in connection with the aggressive wars as crimes against humanity.[132] Von Schirach was largely found guilty of crimes against humanity for acts after the beginning of the war, which acts were in connection with Austria's occupation.[133] In the IMT, the essence of the linkage with war crimes or crimes against peace, in fact, was a connection with aggressive wars.[134] For instance, in differentiating war crimes from crimes against humanity during the war, the IMT said:

> […] from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.[135]

128 Schwelb, 'Crimes against Humanity', 188, 193-95, 204.
129 *France et al v Göring et al*, (1948) 1 TMWC 171, p 254.
130 Anatole Goldstein, 'Crimes against Humanity: Some Jewish Aspects' (1948) 1 *Jewish Ybk Intl L* 206, 221.
131 'Report of the International Law Commission', GAOR 5th Session Supp No 12, UN Doc A/1316 (1950), para 122.
132 *France et al v Göring et al*, (1948) 1 TMWC 171, p 254; *Flick* case, (1948) 6 TWC 8, p 1212. Anatole Goldstein, 'Crimes against Humanity: Some Jewish Aspects' (1948) 1 *Jewish Ybk Intl L* 206, 221.
133 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 302-04, 318-20; Schwelb, 'Crimes against Humanity', 205, noting that 'Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity'.
134 Schwelb, 'Crimes against Humanity', 204; Dinstein, 'Case Analysis: Crimes against Humanity after *Tadić*', 383-84.
135 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 254-55.

These observations indicate that only concrete acts committed in connection with an armed conflict would constitute crimes against humanity, regardless of whether they occurred before or during the war. The reference to the phrase 'before the war' does not imply that acts committed in peacetime without any connection to the subsequent wars would constitute crimes against humanity at that time.

Nevertheless, some commentators consider that the nexus with aggressive wars was intentionally inserted by the four powers to limit the jurisdiction of the IMT over individuals of Axis countries.[136] Egon Schwelb and Roger Clark argued that the armed conflict linkage requirement in the Nuremberg Charter was a jurisdictional limit rather than an inherent substantive element of crimes against humanity.[137] In addition, the definition of crimes against humanity in the Nuremberg Charter was almost replicated in article 5(c) of the Tokyo Charter. According to the former Judge Röling of the IMTFE, 'the connection did not restrict *the scope of the crime*, but only *the scope of our jurisdiction*'.[138] Furthermore, the US and the ECCC also once argued that the nexus never existed. By citing the work of the UN War Crimes Commission, the US delegation in 1996 once also stated that '[t]he record of the development of the Nuremberg and Tokyo Charters does not […] indicate that the drafters believed that the nexus was required as a matter of law'.[139] Moreover, a Chamber of the ECCC in the *Duch* case referred to the ICTY's *Tadić* Appeals Chamber Decision on Jurisdiction to justify an argument that a nexus never existed.[140]

Clark first pointed out that in article II of the 1948 Genocide Convention, a nexus with aggressive wars was not required for the crime of genocide, which is closely related to the persecution type of crimes against humanity in the Nuremberg Charter.[141] In addition, he noted that the connection to the 'initiation of war and war crimes' was omitted in Control Council Law No. 10.

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136 Roger Clark, 'History of Efforts to Codify Crimes against Humanity' in L.N. Sadat (ed), *Forging a Convention for Crimes against Humanity* 11; United States Delegation, 'Crimes against Humanity, Lack of a Requirement for a Nexus to Armed Conflict' (26 March 1996).

137 Clark, 'History of Efforts to Codify Crimes against Humanity', 11; Schwelb, 'Crimes against Humanity', 188, 194-95.

138 Bernard V.A. Röling, edited and with an Introduction by Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Cambridge: Polity Press 1993) 56 (italic in original).

139 United States Delegation, 'Crimes against Humanity, Lack of a Requirement for a Nexus to Armed Conflict' (26 March 1996), p 2 and fn 4.

140 *KAING Guek Eav alias Duch* (Trial Judgment) 001/18-07-2007/ECCC/TC (26 July 2010), para 292.

141 Clark, 'History of Efforts to Codify Crimes Against Humanity', 12; Roger S. Clark, 'Crimes against Humanity at Nuremberg' in G. Ginsburgs and V.N. Kudriavtsev (eds), *The Nuremberg Trial and International Law* (The Hague: Martinus Nijhoff Publishers 1990) 190-92.

Last, Clark clarified that in the original English and French texts of article 6(c) of the Nuremberg Charter adopted in August 1945, a semi-colon existed between 'before or during the war' and 'or persecutions'. However, in the original Russian text, a comma was used.[142] This semi-colon in the English and French texts was later amended to a comma in the 'Semi-colon Protocol' in October 1945.[143] Given the modification of this semi-colon, Clark concluded that the phrase 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' was only a requirement for persecutions. With regard to crimes against humanity, acts of 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population' are not required to be linked with the war. As for acts of persecution, the 'crimes' mentioned in the phrase 'link with any crimes' refer to the murder type of underlying offences, such as 'murder, extermination or enslavement', instead of 'crimes against peace and war crimes' or aggressive wars. In his view, a link with these underlying offences is confirmed by the Rome Statute, which requires persecution to be 'in connection with any act referred to in this paragraph'.[144] Accordingly, Clark argued that the Nuremberg Charter did not acknowledge a substantive link with aggressive wars or an armed conflict for crimes against humanity in international law.[145]

A different argument, however, is also tenable by reference to these same sources.[146] It is argued that the nexus with an armed conflict in the Nuremberg Charter was a substantive legal element rather than a jurisdictional limit for the following reasons. Firstly, it is the wording 'trial and punishment of the major war criminals of the European Axis' in article 1 and in the chapeau of article 6 of the Nuremberg Charter, rather than the nexus with war, that was inserted to limit the jurisdiction of the IMT.[147] Secondly, the semi-colon in the English and French texts has not been found in preceding drafts and where it came from is a puzzle. The 'Semi-colon Protocol' amended the semi-colon two months later. This slight revision has a high impact on the definition of crimes against humanity, which required all prohibited murder type acts to be linked to war. It is not persuasive to argue that the reviewers changed it mistakenly and failed to consider the impact of the revision. Thirdly, persecution as a crime against humanity requires a link with the underlying murder-type acts. Such a link for persecution does not exclu-

142 '[c]rimes against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war [;][,] or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.' See Clark, 'History of Efforts to Codify Crimes against Humanity', 11.

143 'Protocol Rectifying Discrepancy in Text of Charter, Drawn up by the Governments who has concluded the Agreement of 8th August' (6 October 1945), (1948)1 TMWC 17.

144 1998 Rome Statute, art 7(1)(h).

145 Clark, 'History of Efforts to Codify Crimes against Humanity', 11.

146 Schwelb, 'Crimes against Humanity', 195.

147 'Minutes of Conference Session of July 24, 1945', in *Report of Robert H. Jackson* 361.

sively exclude an alternative requirement of a link with any crime within the jurisdiction of the ICC (war crimes, genocide, and aggression). This link builds a relationship between murder type offences and persecution type offences. But this link between the two types of offences cannot justify the view that the concept of crimes against humanity in the Nuremberg Charter substantively required no link with war.

Fourthly, the US delegation might have mixed 'the context of war or peace' with 'the nexus with aggressive wars'. The Legal Committee of the UN War Crimes Commission once declared that '[i]t was irrelevant whether a crime against humanity had been committed before or during the war'.[148] By referring to the Nuremberg and Tokyo Charters,[149] the UN War Crimes Commission confirmed this clarification.[150] Nevertheless, the Legal Committee concluded that 'the inhumane acts committed against any civilian population before the war of which Sepp Dietz was charged fall under crimes against humanity' because the purpose of these clashes was in connection with the contemplated invasion of Czechoslovakia.[151] Thus, crimes against humanity committed before the war (in peacetime) were required to be connected with the later aggressive war. In fact, the ILC in its 1950 *Nuremberg Principles* deleted the phrase 'before or during the war' in defining crimes against humanity, while it specifically referred to the connection with war crimes and aggressive wars. In its commentary to Principle VI(c), the ILC emphasised that crimes against humanity 'need not be committed during a war', but it maintained that 'such crimes may take place also before a war in connexion with crimes against peace'.[152] This is the correct reading of the Nuremberg Charter and the IMT judgment.[153]

On the other hand, the text of Control Council Law No. 10 did not refer to the nexus with war.[154] In practice, except for the *Justice* and the *Einsatzgruppen* cases, subsequent tribunals applying that law required a connection with the aggressive wars for acts committed before and during the war.[155] Suspects in the *Flick* and *Ministries* cases were charged with crimes against humanity committed in peacetime.[156] However, the tribunals in the two cases held that it would not contemplate offences committed before the

148 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 178-79.
149 ibid, 522-24.
150 ibid, 192-93.
151 ibid, 178-79.
152 UN Doc A/1316 (1950), para 123.
153 Dinstein, 'Case Analysis: Crimes against Humanity after *Tadić*', 384.
154 *US vs Altstötter et al* [*Justice* case], (1948) 3 TWC 3, pp 972-73; *US v Ohlendorf* [*Einsatzgruppen* case], (1948) 4 TWC 3, p 499.
155 *Flick* case, (1948) 6 TWC 8, pp 1212-13; *US v Krupp* [*Krupp* case], (1948) 9 TWC 1; *US v Pohl* [*Pohl* case], (1948) 5 TWC 195, pp 991-92; *Ministries* case, (1948) 12 TWC 1. See also Kevin J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: OUP 2011) 236-42.
156 *Flick* case, in NMT Indictment Case No. 5, para 13; *Ministries* case, in NMT Indictment Case No. 11, para 30.

war and having no connection with the war.[157] As shown above, the fact that crimes against humanity might be committed before the war does not indicate that the nexus with aggressive wars was not required. The US delegation went too far to argue that there was no nexus with an armed conflict in the Nuremberg Charter.[158]

Fifthly, the *Tadić* Appeals Chamber of the ICTY, in fact, supported a reading that a nexus with an armed conflict was a legal requirement in the Nuremberg Charter. Article 5 of the ICTY Statute provides a notion of crimes against humanity committed in 'armed conflict'.[159] In the *Tadić* Appeals Chamber Decision on jurisdiction, the Chamber held that:

> […] the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 [*sic*] General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II (1)(c) of Control Council Law No. 10 of 20 December 1945.[160]
>
> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. […] [C]ustomary international law may not require a connection between crimes against humanity and any conflict at all. […] the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. [161]

The literal meaning of the first paragraph is a bit ambiguous. By referring to 'peculiar to the jurisdiction of the Nuremberg Tribunal', the Chamber seems to imply that a nexus with an armed conflict for the crimes against humanity was not a substantive but a jurisdictional requirement in the IMT. At the same time, the Appeals Chamber said that the nexus requirement had been 'abandoned in subsequent state practice' and referred to Control Council Law No. 10 to indicate that the notion of crimes against humanity began to change on 20 December 1945. If the nexus with an armed conflict was not a substantive requirement, how could it be 'abandoned in subsequent State practice'?

In the second paragraph cited above, with reference to 'no connection to international armed conflict' as 'a settled' customary rule, on the one hand, the Appeals Chamber held that the nexus with an armed conflict was

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157 *Flick* case, (1948) 6 TWC 8, p 121; *Ministries* case, (1948) 13 TWC, p 116 and (1948) 14 TWC 1, p 557. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 236-42.

158 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 170.

159 1993 ICTY Statute, art 5 states that the 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'.

160 *Tadić* Appeals Chamber Decision on Jurisdiction, para 140.

161 ibid, para 141. For an analysis of the case concerning the nexus requirement, see Dinstein, 'Case Analysis: Crimes against Humanity after *Tadić*', 386-87.

expanded to include a nexus with non-international armed conflict.[162] On the other hand, the Appeals Chamber held that the text of crimes against humanity with a nexus in article 5 of the ICTY Statute[163] was narrower than what customary law required. The Appeals Chamber acknowledged that a nexus requirement existed, but it said it was 'obsolescent'.[164] There is a cross-reference to the two paragraphs cited, confirming the relationship between them. The Appeals Chamber stated that 'customary international law no longer requires any nexus between crimes against humanity and armed conflict […], Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal.'[165] The expressions of 'no longer' and of 'reintroduce' further discredit the idea that a nexus with an armed conflict was never a requirement. The clarification of the *Tadić* Appeals Chamber Decision demonstrates that a link with an armed conflict was a legal element; at the same time, this clarification also indicates that the chamber of the ECCC in *Duch* misunderstood the *Tadić* case. Therefore, the ECCC decision in *Duch* is also less valuable on the interpretation of the nexus issue.

As the Secretary-General summarised, the nexus with war is a compromise between two ideas.[166] One is the traditional principle that the treatment of nationals is a matter of domestic jurisdiction. The competing principle is that inhumane treatment of human beings is wrong even if it is tolerated or practised by their States, in peace and war, and this wrong should be penalised in the interest of the international community. Without abandoning the traditional principle, the latter idea of guaranteeing a minimum standard of fundamental rights to all human beings was qualified by the nexus requirement at that time.[167] In other words, since aggressive wars affect the rights of other States, the nexus with an armed conflict justifies an international prosecution. A construction of no nexus at that time means that acts of their governmental leaders against their citizens in peacetime might be charged with crimes against humanity. It would be going too far to conclude that States aimed to create the notion of crimes against humanity without any association with war.

The four powers knew that they were creating a new regime that would be binding on all States in the future. The American delegate Jackson stated that:

> If certain acts and violations of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.[168]

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162 *Tadić* Appeals Chamber Decision on Jurisdiction, para 142.
163 1993 ICTY Statute, art 5.
164 *Tadić* Appeals Chamber Decision on Jurisdiction, para 140.
165 ibid, para 78.
166 UN Doc A/CN.4/5 (1949), pp 70-72.
167 ibid.
168 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 330.

> […] ordinarily we do not consider that the acts of a government toward its own citizens warrant our interference. We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or to states only because the concentration camps and the deportations were in pursuance of a common plan or enterprise of making an unjust or illegal war in which we became involved. We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.[169]

These statements demonstrate that without a link with aggressive wars, the leaders of those countries that created the IMT might be at a real risk for murder or persecution of their own civilian populations. The UK Chief Prosecutor Hartley Shawcross shared this view of the nexus with war. The prosecutor believed that acts, not associated with aggressive wars, committed by a government against their civilian populations should not constitute crimes against humanity as a distinct international crime.[170]

As shown above, the nexus with aggressive wars was required for crimes against humanity in the Nuremberg Charter and IMT. Meanwhile, this nexus was not a jurisdictional link but a substantive element of crimes against humanity.[171] The IMT focused on the need to show a connection to aggressive wars.[172] This idea was confirmed by the ILC in its 1950 Nuremberg Principles and its 1950 Draft Code of Offenses.[173] As Schabas noted: '[t]he nexus between armed conflict and crimes against humanity that existed at Nuremberg was part of the original understanding, and was only removed at some point subsequent to 1945'.[174]

4.4.2.2 The disappearance of the nexus with an armed conflict

Currently, the notion of crimes against humanity does not require a nexus with an armed conflict under customary law. However, scholars also differ with respect to the disappearance of a nexus with an armed conflict as a legal element. As for commentators arguing for the nexus as a jurisdictional requirement in the Nuremberg Charter, it is not necessary to assess when

169 ibid, 333.

170 *France et al v Göring et al*, Sir Hartley Shawcross Makes Final Speech on behalf of Prosecution (26 July 1946), (1948) 19 TMWC 433, pp 470-71. In his view, 'the Charter merely develops a preexisting principle' and the crimes against humanity in the jurisdiction of the IMT 'are limited to this extent-they must be crimes the commission of which was in some way connected with, in anticipation of or in furtherance of the crimes against the peace or the war crimes *stricto sensu* with which the defendants are indicted.'

171 Schabas, *Unimaginable Atrocities* 60; Editors, 'Jurisdiction: Universal Jurisdiction–War Crimes and Crimes against humanity' (1991) 13 *Australian Ybk Intl L* 239, 246.

172 *France et al v Göring et al*, (1948) 1 TMWC 171, p 184.

173 'Formulation of the Nuremberg Principles, Report by Jean Spiropoulos, Special Rapporteur', UN Doc A/CN.4/22 (1950), p 187; 'Text of a Draft Code of Offenses against the Peace and Security of Mankind suggested as a working paper for the International Law Commission', UN Doc A/CN.4/SER.A/1950/Add.1.

174 Schabas, *Unimaginable Atrocities* 59.

this link disappeared, since it never existed. For other commentators deeming the nexus a substantive legal element, the nexus with an armed conflict disappeared at some time. As observed above, the second viewpoint is the appropriate interpretation. A nexus with an armed conflict was a substantive legal requirement for crimes against humanity. A further question here is determining when that link with an armed conflict disappeared under customary law.

The disappearance of the nexus remains crucial for tribunals in prosecuting crimes against humanity committed in the past if no relevant treaty or national criminal prohibitions existed at the relevant time. Indeed, national courts can and indeed do prosecute crimes against humanity that occurred decades ago, for instance, the International Crimes Tribunal in Bangladesh. According to the amended *International Crimes (Tribunals) Act* 1973, the International Crimes Tribunal in Bangladesh was created in 2010 to deal with international crimes including crimes against humanity committed since the liberation war of 1971. In the absence of prohibitions in Bangladesh from 1971 to 1973, how can the tribunals prosecute crimes against humanity without violating the principle of non-retroactivity? The existing customary international rules play a vital role in this circumstance. It is essential to analyse whether crimes against humanity still required the armed conflict nexus under customary law at the material time. The following paragraphs survey post-Nuremberg instruments, jurisprudence and the attitude of the UN organs to show the existing confusion about determining the moment of the disappearance of the nexus.

As shown above, the text of Control Council Law No. 10 did not refer to the nexus with war. However, in the application of Control Council Law No. 10, the Subsequent Proceedings required a link with an armed conflict. In addition, violations of Common Article 3 of the 1949 Geneva Conventions might constitute crimes against humanity.[175] It should be stressed that this article only applies in 'internal' and 'international' armed conflict. The drafters of the 1949 Geneva Conventions neither discussed nor contemplated the criminalisation of violation of Common Article 3 as crimes against humanity without a link to war.[176]

Additionally, the ILC's Nuremberg Principles adopted in 1950 also upheld the requirement that the underlying acts of crimes against humanity, before or during the war, be connected to aggressive wars. The formulation of crimes against humanity in the 1951 Draft Code of Offences required that '[i]nhuman acts […] are committed in execution of or in connexion with other

175 UN Doc S/1995/134, para 12 and fn 8.

176 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Vol III (Geneva: ICRC 1952) 422.

offences defined in this article'.[177] This formulation did not substantively remove the armed conflict nexus requirement.[178] The definition in the 1954 Draft Code of Offences, however, did not follow the essence of the 1951 version on the nexus issue but enlarged the scope of crimes against humanity to cover acts not committed in connection with other offences.[179] Article 1(b) of the 1968 Convention on the Non-Applicability of Statutory Limitations referred to '[c]rimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the Nuremberg International Military Tribunal'.[180] Given its very ratification by States, article 1(b) of the Convention is less significant evidence to justify that a nexus was not required under customary law in 1968.

Jurisprudence of international and internationalised tribunals also does not show consistency on when the armed conflict nexus disappeared for crimes against humanity. The 2006 *Kolk* and *Kislyiy v Estonia* case before the ECtHR concerned the punishment against two individuals by Estonia based on the 2002 Estonia *Penal Code* for crimes against humanity committed in peacetime in 1949. The ECtHR declared that the application was inadmissible because article 7 of the European Convention on Human Rights prohibited retroactive application of crimes under national or international law. The Chamber of the ECtHR implicitly upheld that by virtue of international law, the prosecution of crimes against humanity committed in peacetime in 1949 was not a violation of non-retroactive application of the law. In its logic, international law in 1949 did not require a nexus with an armed conflict for crimes against humanity.[181]

177 1951 'Draft Code of Offences against the Peace and Security of Mankind', UN Doc A/CN.4/SER.A/1951, p 136, art 2(10) reads: 'Inhuman acts by the authorities of a State or by private individuals against any civilian population, such as murder, or extermination, or enslavement, or deportation, or persecutions on political, racial, religious or cultural grounds, when such acts are committed in execution of or in connexion with other offences defined in this article.'

178 ibid, pp 59, 136.

179 1954 'Draft Code of Offences against the Peace and Security of Mankind', UN Doc A/CN.4/SER.A/1954/Add.1, p 150, art 2(11) reads: 'Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities'.

180 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968, 11 November 1970, 754 UNTS 73, 55 Parties and 9 Signatories.

181 *Kolk and Kislyiy v Estonia* (Decision, Fourth Section Court) ECtHR Application No. 23052/04 (17 January 2006).

Antonio Cassese criticised the decision in the *Kolk* and *Kislyiy v Estonia* case and argued that the link with war was an indispensable element for prohibited acts of crimes against humanity before 1949. In his view, it is 'only later, in the late 1960s, that a general rule gradually began to evolve, prohibiting crimes against humanity even when committed in time of peace'.[182] By contrast, the Grand Chamber of the ECtHR in the 2008 *Korbely v Hungary* case held that the link with an armed conflict 'may no longer have been relevant by 1956'.[183] Also, a Chamber of the ECCC found that 'customary international law between 1975 and 1979 required that crimes against humanity be committed in the context of an armed conflict.'[184] The observation on case law shows that different views exist about when the nexus with an armed conflict was or was not relevant.

The UN Secretary-General and the Security Council considered that the nexus with an armed conflict was not required for crimes against humanity under customary law in 1993. In 1993, the Report of the UN Secretary-General on the establishment of the ICTY stated that:

> Crimes against humanity were first recognised in the Charter and the Judgement of the Nuremberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.[185]

A plain reading indicates no nexus with an armed conflict. The Secretary-General held that the nexus with an armed conflict is not required for punishable acts constituting crimes against humanity under customary law.[186] The Secretary-General, however, proposed interpreting article 5 of the draft statute of the ICTY by restricting the crime 'when committed in armed conflict, whether international or internal in character'. The Secretary-General may have intentionally 'defined the crime in Article 5 more narrowly than necessary under customary international law'.[187] The UN Security Council adopted the draft statute of the ICTY without modification.[188] In its interpretative clarification of the ICTY Statute, the UK delegation also stated that:

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182 Antonio Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law: *The Kolk and Kislyiy v Estonia* Case before the ECHR' (2006) 4 *JICJ* 410, 413.

183 *Korbely v Hungary* (Merits and Just Satisfaction, Grand Chamber) ECtHR Application No. 9174/02 (19 September 2008), para 82.

184 *Co-Prosecutors v Ieng Sary* (Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order) 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146) (15 February 2011), para 144.

185 UN Doc S/25704 (1993), para 47 (citations omitted).

186 ibid, para 34.

187 *Tadić* Appeals Chamber Decision on Jurisdiction, para 141.

188 UN Doc S/RES/827 (1993).

> Articles 2 to 5 of the draft [ICTY] Statute describe the crimes within the jurisdiction of the Tribunal. The Statute does not, of course, create new law, but reflects existing international law in this field. […] Article 5 covers acts committed in time of armed conflict.[189]

This statement demonstrates that a notion of crimes against humanity in non-international and international armed conflicts reflects part of 'existing international law'. In addition, the possibility that acts committed in peacetime constitute crimes against humanity under customary law at that time is not excluded.[190] The Security Council then implicitly confirms the absence of the nexus requirement in adopting the 1994 ICTR Statute.[191]

The 1995 *Tadić* Appeals Chamber Decision has a significant impact on the clarification of the absence of nexus in custom. As mentioned above, the Appeals Chamber in the *Tadić* decision on jurisdiction observed that the practice of States began to abandon the nexus requirement. The Appeals Chamber was confident in claiming no connection to an armed conflict under customary law in 1993. In its view, offences with no connection to an armed conflict constituted crimes against humanity in 1993, whereas the ICTY only has jurisdiction over crimes against humanity committed in armed conflicts or linked geographically and temporally with an armed conflict.[192] Subsequent ICTY cases upheld the view that there was no nexus with an armed conflict under customary law, at least at the material time in 1993.[193] The preparatory works of article 7 of the Rome Statute, as observed above in section 4.4.1, also demonstrate that States generally recognised the definition of crimes against humanity committed without association with an armed conflict at the 1998 Rome Conference.

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189 UN Doc S/PV.3217 (Provisional) (1993), p 19 (UK).

190 See also UN Doc S/25704 (1993), para 47 and fn 9: 'In this context, it is to be noted that the International Court of Justice has recognised that the prohibitions contained in common article 3 of the 1949 Geneva Convention are based on 'elementary considerations of humanity' and cannot be breached in an armed conflict, regardless of whether it is international or internal in character.'

191 But see Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 169.

192 *Kunarać* Appeals Chamber Judgment, para 83; *Prosecutor v Šešelj* (Decision on the Interlocutory Appeal Concerning Jurisdiction) ICTY-03-67-AR72.1 (31 August 2004), para 14; *Prosecutor v Šešelj* (Decision on Motion for Reconsideration of the 'Decision on the Interlocutory Appeal Concerning Jurisdiction' Dated 31 August 2004) ICTY-03-67-AR72.1 (15 June 2006), para 25.

193 *Furundžija* Trial Judgment, para 59; *Tadić* Appeals Chamber Judgment, paras 249, 251; *Prosecutor v Kunarać* (Judgement) ICTY-96-23-A (12 June 2002), paras 82-83; *Prosecutor v Šešelj* (Decision on the Interlocutory Appeal Concerning Jurisdiction) ICTY-03-67-AR72.1 (31 August 2004), para 13; *Prosecutor v Šešelj* (Decision on Motion for Reconsideration of the 'Decision on the Interlocutory Appeal Concerning Jurisdiction' Dated 31 August 2004) ICTY-03-67-AR72.1 (15 June 2006), para 21; *Stanišić* & *Simatović* Trial Judgment, para 960.

To sum up, instruments and jurisprudence after World War II and the view of the UN organs further justify that the nexus with an armed conflict was a legal element in the Nuremberg Charter, leaving the moment of its disappearance more confusing in 1949, 1951, 1956, the 1960s, 1968 or later in 1993. For lack of practice in prosecuting crimes against humanity, it is inappropriate to conclude at what moment the customary rule of crimes against humanity was modified by dismissing the armed conflict nexus. However, it is reasonable to argue that the nexus requirement was removed, at the very latest, in 1998 at the Rome Conference. Article 3 of the Statute of the SCSL further provides that the existence of an armed conflict is not a precondition for crimes against humanity. To date, national legislation of almost 60 States, including the UK, the US, Canada, Germany, Australia, New Zealand, the Philippines, and Vietnam as well as some African States, does not require a link with an armed conflict for crimes against humanity.[194] The ILC also endorsed the view of no nexus with an armed conflict in its recent draft convention on crimes against humanity.[195]

4.4.3 Assessment and conclusions

Article 7 of the Rome Statute provides that underlying offences disassociated from an armed conflict constitute crimes against humanity.[196] These post-World War II cases and instruments show that the armed conflict nexus requirement was a substantive element for the notion of crimes against humanity in the Nuremberg Charter. Later on, the nexus with an armed conflict was disassociated from crimes against humanity under customary law. It remains unclear when this nexus disappeared under customary law. In conclusion, article 7 of the Rome Statute restated or, at the very least, crystallised the notion of crimes against humanity under customary law by excluding the armed conflict nexus. Article 7 was and is declaratory of custom on the nexus element of crimes against humanity. The following section examines the policy issue of crimes against humanity.

194 Vietnam, Penal Code 1999, art 342; National Implementing Legislation Database.

195 UN Doc A/72/10 (2017), paras 45-46, draft article 2 and commentary, pp 25-28; UN Doc A/70/10 (2015), para 117, p 59.

196 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 146-47; Amnesty International, 'The International Criminal Court: Making the Right Choices', Part I (1997) 33.

4.5 The policy element: was and is article 7(2)(a) declaratory of custom?

After the insertion of the word 'policy' in article 7(2)(a) of the Rome Statute, debates continued as to whether policy should be or is a legal requirement for crimes against humanity under customary law.[197] The issue of whether policy should or should not be a legal element goes beyond the focus of this section. This section analyses whether article 7(2)(a) of the Rome Statute was and is declaratory of custom on the policy element of crimes against humanity. Before analysing the main question, another issue arising here is whether the policy is a distinct element of crimes against humanity in the Rome Statute.[198] This section first examines the concept of policy in the Rome Statute and then discusses the issue of the policy element under customary law.

4.5.1 Policy as a legal element in article 7(2)(a) of the Rome Statute

Article 7(2)(a) of the Rome Statute states that an 'attack directed against civilian population means a course of conduct […] against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack'. This provision contains a threshold for crimes against humanity, requiring that the attack be pursuant to or in furtherance of 'a State or organisational policy'. The following paragraphs answer whether policy is a legal element for crimes against humanity as defined in article 7 of the Rome Statute. For this purpose, it is necessary to first briefly clarify the meaning of policy as well as the phrase 'State or organisational policy'.

197 For policy as an independent element, see Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference', 48-52; William A. Schabas, 'State Policy as an Element of International Crimes' (2008) 98 *J Crim L & Criminology* 953; M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (New York: CUP 2011) 14-19; Christopher Hall and Carsten Stahn, 'Article 7' in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* 157-58. *Contra* see Guénaël Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda' (2002) 43 *Harvard Intl LJ* 237; Leila N. Sadat, 'Preface' in L.N. Sadat (ed), *Forging a Convention for Crimes against Humanity*, xxii; Göran Sluiter, '"Chapeau Elements" of Crimes Against Humanity in the Jurisprudence of the UN *ad hoc* Tribunals' in L.N. Sadat (ed), *Forging a Convention for Crimes against Humanity* 108; David Hunt, 'The International Criminal Court: High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges' (2004) 2 *JICJ* 56, 65; Cassese *et al* (eds), *Cassese's International Criminal Law* 107.

198 Guénaël Mettraux, 'The definition of crimes against humanity and the question of a "policy" element' in L.N. Sadat (ed), *Forging a Convention for Crimes against Humanity* 156-66.

4.5.1.1 The notion of policy

The Rome Statute does not define the word 'policy' in article 7(2)(a). The *Oxford English Dictionary* defines 'policy' as 'senses related to public or politic practice'.[199] The Trial Chamber in *Bemba* held that policy need not be formalised and that it may be inferred from other factors. These factors include:

> (i) that the attack was planned, directed or organised; (ii) a recurrent pattern of violence; (iii) the use of public or private resources to further the policy; (iv) the involvement of the State or organisational forces in the commission of crimes; (v) statements, instructions or documentation attributable to the State or the organisation condoning or encouraging the commission of crimes; and/or (vi) an underlying motivation.[200]

In addition, it is doubtful whether the policy for crimes against humanity is limited to the policy of 'States'.

A plain reading of the phrase 'State or organisational policy' in article 7(2)(a) seems to suggest that a State is not the solo policy-making entity involving in offences of crimes against humanity. The English text 'organisational policy', however, does not require the policy to be authored by an entity of an 'organisation', but the policy is in essence organised and planned. By contrast, the French, Spanish and Arabic texts indicate policy to be adopted by an 'organisation'.[201] The Chinese text '组织的政策' shares the same meaning as the latter three equally authentic texts. The texts of the Rome Statute, therefore, do not provide guidance concerning the interpretation of the phrase 'State or organisational policy'.

It is also hard to know how the drafters understood 'State or organisational policy' by simply referring to their statements at the Rome Conference.[202] Reflections of scholars attending the Conference provide guidance to understand the meaning of organisation, but real intention and the purpose of Rome Statute's drafters on this phrase remain doubtful.[203] The Elements of Crimes, however, provides that the policy requires the 'State or organisation' to 'actively promote an attack'.[204] According to the ICC's jurisprudence, the

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199 OED, the now usual sense is: 'A principle or course of action adopted or proposed as desirable, advantageous, or expedient; *esp*. one formally advocated by a government, political party, etc'.

200 *Bemba* Trial Judgment, para 160 (citations omitted).

201 *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul), para 38.

202 UN Press Release, UN Doc GA/L/2787 (12 April 1996); UN. Doc A/CONF.183/C.1/SR.27, para 74 (Sri Lanka); States did not comment on the meaning of organisational policy, see 'Discussion Paper prepared by the Bureau' (6 July 1998), UN Doc A/CONF.183/C.1/L.53, p 204.

203 M.C. Bassiouni and W.A. Schabas (eds), *The Legislative History of the International Criminal Court* (2nd revised and expanded edn, Leiden: Brill|Nijhoff 2016) 169-70; Schabas, 'State Policy as an Element of International Crimes', 972-74; Bassiouni, 'Revisiting the Architecture of Crimes Against Humanity', 57.

204 Elements of Crimes, in 'Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court', ICC-ASP/1/3 and Corr.1, p 108, UN Doc PCNICC/2000/1/Add.2, art 7, introduction, para 2.

phrase 'State or organisational policy' includes two concepts: 'policy of State' and 'policy of organisation'.[205] Debates at the ICC on the standard of qualifying a non-State actor as an organisation have further endorsed this interpretation implicitly.[206] These interpretations merit discussion but go beyond the focus of this research.[207] This brief clarification sets out the basic understanding of policy. The following paragraphs analyse whether a 'policy' in general is a legal element for crimes against humanity under article 7.

4.5.1.2 Policy as a legal element in the Rome Statute

The legal effect of the reference to 'policy' in article 7 of the Rome Statute is not self-explanatory as to whether the policy is an independent legal element for crimes against humanity. Nevertheless, the Rome Statute leaves no room to argue against the policy element at the ICC. The Elements of Crimes explicitly notes that 'policy to commit such attack requires that the State or organisation actively promote or encourage such an attack against a civilian population' and 'in exceptional circumstances, [policy may] be implemented

205 *Bemba* Decision on Confirmation of Charges 2009, para 115; *Kenya* Authorisation Decision 2010, para 89; *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul), para 38; *Katanga* Trial Judgment, para 1108; *The Prosecutor v Laurent Gbagbo* (Decision on the confirmation of charges against Laurent Gbagbo, PTC I) ICC-02/11-01/11-656-Red (12 June 2014) [*Laurent Gbagbo* Decision on Confirmation of Charges], para 216. For further discussions, see UN Doc A/72/10 (2017), para 46, pp 40-41, §§ (28)-(31).

206 For capacity test, see *Kenya* Authorisation Decision 2010, paras 90-92; *The Prosecutor v Muthaura et al* (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, PTC II) ICC-01/09-02/11-382-Red (23 January 2012) [*Muthaura et al* Decision on Confirmation of Charges], paras 112-14; *Ruto et al* Decision on Confirmation of Charges, para 184; *The Prosecutor v Katanga* (Judgment pursuant to Article 74 of the Statute, TC II) ICC-01/04-01/07-3436-tENG (27 March 2014) [*Katanga* Trial Judgment], paras 1119-20; *Bemba* Trial Judgment, para 149. For State-like organisation test, see *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul), para 51; *The Prosecutor v Ruto et al* (Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang') ICC-01/09-01/11-2 (15 March 2011), paras 2-15; *The Prosecutor v Muthaura et al* (Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali') ICC-01/09-02/11-3 (15 March 2011), paras 2-15; *Ruto et al* Decision on Confirmation of Charges (Dissenting Opinion by Judge Hans-Peter Kaul), paras 8-10; *Muthaura et al* Decision on Confirmation of Charges (Dissenting Opinion by Judge Hans-Peter Kaul) ICC-01/09-02/11-382-Red (26 January 2012), paras 8-10.

207 ibid.

by a deliberate failure to take action, which is consciously aimed at encouraging such attack'.[208]

The preparatory works of article 7 also indirectly clarify the distinct status of the policy element in discussing the relationship between the 'widespread or systematic' test and the policy element.[209] The Preparatory Committee considered 'a policy, plan, conspiracy or a campaign' as a potential element of crimes against humanity.[210] In its report, the Preparatory Committee summarised that:

> There was general support for the widespread or systematic criteria to indicate the scale and magnitude of the offences. The following were also mentioned as elements to be taken into account: an element of planning, policy, conspiracy or organisation; a multiplicity of victims; acts of a certain duration rather than a temporary, exceptional or limited phenomenon; and acts committed as part of a policy, plan, conspiracy or a campaign rather than random, individual or isolated acts in contrast to war crimes. Some delegations expressed the view that this criterion could be further clarified by referring to widespread and systematic acts of international concern to indicate acts that were appropriate for international adjudication; acts committed on a massive scale to indicate a multiplicity of victims in contrast to ordinary crimes under national law; acts committed systematically or as part of a public policy against a segment of the civilian population; acts committed in application of a concerted plan to indicate the necessary degree of intent, concert or planning; acts committed with the consent of a Government or of a party in control of territory; and exceptionally serious crimes of international concern to exclude minor offences, as in article 20, paragraph (e). Some delegations expressed the view that the criteria should be cumulative rather than alternative.[211]

At the Rome Conference, delegations agreed that 'not every inhumane act amounts to a crime against humanity' and a threshold is required.[212] Similar to the situation at the Preparatory Committee, views of State delegations were divided as to the relationship between the two qualifiers 'widespread' and 'systematic': a conjunctive test, i.e., widespread and systematic; or a disjunctive test, i.e., widespread or systematic.[213] By referring to the jurisprudence of the two UN *ad hoc* tribunals and the ICTR Statute, a large number

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208 Elements of Crimes, UN Doc PCNICC/2000/1/Add.2, p 5 and fn 6: '[a] policy which has a civilian population as the object of the attack would be implemented by State or organisational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organisational action'.

209 The ICC's jurisprudence affirmed that the conditions of 'widespread' and 'systematic' in art 7 of the Rome Statute are disjunctive. See *Kenya* Authorisation Decision 2010, para 94; see also *Bemba* Decision on Confirmation of Charges 2009, para 82.

210 UN Doc A/51/22 (1996), Vol I, para 85.

211 ibid.

212 ibid, para 84.

213 Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference'; Christopher K. Hall, 'The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court' (1998) 91 *AJIL* 180.

of delegations favoured the disjunctive test.[214] In contrast, many other delegations supported a conjunctive test.[215] Supporters of the conjunctive test doubted whether the 'widespread' test was sufficient to exclude unrelated crimes, such as serial killings, from crimes against humanity. Delegations favouring a disjunctive test responded that this doubt was addressed by the phrase 'an attack directed against any civilian population'. Despite their different positions, State delegations acknowledged that the two qualifiers were not sufficient to define the scope of crimes against humanity. Another qualifier is required under the disjunctive test. Those objecting to the disjunctive test proposed describing the third qualifier explicitly. Article 7(2)(a) was therefore drafted during the Rome Conference, and only two States objected to the inclusion of the third qualifier, the policy.[216] Accordingly, if the attack is not shown to be systematic, the policy requirement serves to exclude widespread but unrelated acts from the scope of crimes against humanity.

Discussions at the Rome Conference indicate political compromise between those worrying about the limitation of national sovereignty and those working for a definition reflecting positive developments.[217] The insertion of the policy paragraph in article 7(2)(a) shares this feature. The final threshold with the policy element in article 7, as Darryl Robinson has noted, is the 'middle ground' between the too restrictive conjunctive test and the too extensive disjunctive test. Judge Kaul pointed out that 'drafters of the Rome Statute confirmed in 1998 in article 7(2)(a) of the Statute the policy requirement […] as a decisive, characteristic and indispensable feature of crimes against humanity'.[218] 'It is a fundamental rationale of crimes against

214 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole', UN Doc A/CONF./183/C.1/SR.3, paras 21 (Germany); 36 (Czech Republic), 61 (Greece), 66 (Malawi), 77 (Korea), 88 (Australia), 93 (Argentina), 109 (Slovenia),112 (Norway), 114 (Côte d'Ivoire), 117 (South Africa), 124 (Mexico), 130 (Finland), 148 (Spain), 150 (Romania), 158 (Venezuela), 162 (Italy), 168 (Ireland); UN Doc A/CONF.183/C.1/SR.4, paras 7 (Switzerland), 8 (Sweden), 11(Portugal), 13 (Vietnam), 14 (Netherlands), 18 (Bangladesh), 20 (Austria), 23 (Sierra Leone), 27(Chile); UN Doc A/CONF./183/C.1/SR.25, paras 27(Japan), 78 (Australia), 118 (Lesotho); UN Doc A/CONF./183/C.1/SR.27, para 57 (Congo).

215 The 1996 Japan Proposal on the Crimes against humanity supported the conjunctive idea; 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole', UN Doc A/CONF./183/C.1/SR.3, paras 45 (India), 90 (UK), 96 (France), 108 (Thailand), 120 (Egypt), 136 (Iran), 144(Indonesia), 172 (Turkey); UN Doc A/CONF.183/C.1/SR.4, paras 5 (Russian Federation), 15 (Bahrain), 17 (Japan), 21 (Uruguay), 30 (Peru); UN Doc A/CONF./183/C.1/SR.25, para 46 (Syria); UN Doc A/CONF./183/C.1/SR.27, paras 11 (Uruguay), 22 (Bahrain).

216 'Discussion Paper prepared by the Bureau' (6 July 1998), UN Doc A/CONF.183/C.1/L.53; 'Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole', UN Doc A/CONF.183/C.1/SR.34, para 15 (Jamaica); UN Doc A/CONF.183/C.1/SR.36, para 13 (Congo).

217 *Tadić* Opinion and Judgment, para 654; Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference'.

218 *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul), para 63.

humanity to protect the international community against the extremely grave threat emanating from such policies.'[219] The ICC's jurisprudence further confirms that the policy is an independent requirement for the crimes against humanity, directly or indirectly.[220] Judge Kaul also stated that 'there is little doubt that the attack as a contextual component pertaining to State or organisational policy forms *de lege lata* a constitutive contextual requirement of the concept of crimes against humanity as defined in the Statute'.[221] The ICC in *Bemba* upheld this view and found that the course of conduct 'must reflect a link with the State or organisational policy'.[222] The policy is a threshold to exclude 'spontaneous or isolated acts of violation' from the ambit of crimes against humanity.[223]

It should be noted that some commentators argue that only if the requirement of either widespread or systematic attack is satisfied, may offences constitute crimes against humanity. In their view, the 'widespread or systematic' disjunctive test is sufficient 'to exclude isolated offences from crimes against humanity'.[224] Some tribunals held that the policy is an evidentiary factor in establishing a systematic character of an attack.[225] These interpretations are contestable as to article 7 of the Rome Statute. As shown above, an independent status of the policy element was established by the

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219 ibid.

220 *Ongwen* Decision on Confirmation of Charges, para 63; Office of the Prosecutor, 'Situation in Honduras, Article 5 Report', October 2015, para. 103; *Katanga* Trial Judgment, para 1112; *Laurent Gbagbo* Decision on Confirmation of Charges, paras 211-12, 215; *The Prosecutor v Laurent Gbagbo* (Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute', A Ch) ICC-02/11-01/11-572 (16 December 2013), paras 51, 53; *The Prosecutor v Laurent Gbagbo* (Decision adjourning the hearing on the confirmation of charges pursuant to Article 61(7)(c)(i) of the Rome Statute, PTC I) ICC-02/11-01/11-432 (3 June 2013), para 36; *Muthaura et al* Decision on Confirmation of Charges, para 111; *Ruto et al* Decision on Confirmation of Charges, paras 181-221; *The Prosecutor v Mbarushimana* (Decision on the confirmation of charges, PTC I) ICC-01/04-01/10-465-Red (16 December 2011) [*Mbarushimana* Decision on Confirmation of Charges], paras 263; *Situation in the Republic of Côte d'Ivoire* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, PTC III) ICC-02/11-14-Corr (15 November 2011), paras 96-101; *Kenya* Authorisation Decision 2010, paras 83-93; *Katanga & Ngudjolo* Decision on Confirmation of Charges, paras 396, 398.

221 *Kenya* Authorisation Decision 2010 (Dissenting Opinion by Judge Hans-Peter Kaul), para 26.

222 *Bemba* Trial Judgment, para 161; *Katanga* Trial Judgment, para 1097.

223 *Bemba* Decision on Confirmation of Charges 2009, para 81.

224 Mettraux, 'The definition of crimes against humanity and the question of a "policy" element', 163; Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law* (Oxford: OUP 2014) 345; *Ntakirutimana* Appeals Chamber Judgment, para 93 and fn 883; *Kordić & Čerkez* Appeals Chamber Judgment, para 93; *Blaškić* Appeals Chamber Judgment, para 98; *Kunarac et al* Appeals Chamber Judgment, para 97.

225 *The Prosecutor v Muhimana* (Judgement) ICTR-95-1B-T (28 April 2005), para 527; *Semanza* Trial Judgment and Sentence, para 512; *Semanza v The Prosecutor* (Judgement) ICTR-97-20-A (20 May 2005) [*Semanza* Appeals Chamber Judgment], para 269.

drafters of the Statute. The jurisprudence of the ICC has repeatedly clarified that policy is not interchangeable with 'systematic'.[226] If policy were only an evidentiary factor of the systematic test, the 'widespread' practice of gang activities would be considered as a crime against humanity in international law.[227] The element of policy still serves the function of excluding ordinary national crimes committed by individuals, for example, serial killings, from being considered as crimes against humanity.[228]

All these observations indicate that policy is an independent element for crimes against humanity set out in article 7 of the Rome Statute. The element of policy is considered as a distinct legal element, rather than an evidentiary factor in identifying the systematic character of an attack.

4.5.2 Policy as a legal element of crimes against humanity in custom

Based on the finding that policy is an independent legal element, the task of this subsection is to determine whether article 7(2)(a) was or is declaratory of custom on the element of 'policy'. The first issue arising is whether policy was a distinct element for crimes against humanity under customary law before the adoption of the Rome Statute in 1998. [229] If the answer is affirmative, then a second issue is whether it continues to be an element for crimes against humanity under customary law. Thirdly, if policy was not a distinct element under customary law before 1998, another question is whether the element of policy stipulated in article 7(2)(a) has subsequently developed into customary law.

The examination of the preparatory works of article 7 provides no preliminary indication of whether the element of policy was declaratory of customary law in 1998. The texts and the structure of the Rome Statute also offer no hint on this point. This subsection endeavours to analyse post-World War II instruments and cases as well as the jurisprudence of the two UN *ad hoc* tribunals to assess whether article 7(2)(a) was and is declaratory of custom on the element of policy.

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226 *Katanga* Trial Judgment, para 1112; *Laurent Gbagbo* Decision on Confirmation of Charges, para 208.

227 Bassiouni, 'Revisiting the Architecture of Crimes against Humanity', 54.

228 Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference'; Darryl Robinson, 'Chapter 11: Crimes against Humanity' in R. Cryer *et al*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: CUP 2014) 229, 239; Hall and Stahn, 'Article 7', 157-58.

229 Schabas, 'State Policy as an Element of International Crimes', 972-74, 982; Gerhard Werle and Boris Burghardt, 'Do Crimes Against Humanity Require the Participation of a State or a "State-like" Organisation?' (2012) 10 *JICJ* 1151, 1169.

4.5.2.1 Policy as a legal element before 1998

Several instruments have been referred to in arguing for or against policy as a distinct element under customary law.[230] These documents include article 6(c) of the Nuremberg Charter, the judgment of the IMT, the Report of the Secretary-General on the establishment of the ICTY, the draft ICTY Statute, various versions of the Draft Code of Crimes, as well as national cases of Australia, Israel, Canada and Yugoslavia.[231] Analysis of whether the policy was a distinct element of this crime in these instruments mostly overlaps with the identification of its customary status because many of these authorities also evidence the formation process of a customary rule. The following paragraphs mainly focus on these instruments and cases to show whether the element of policy was generally recognised before the adoption of the Rome Statute.

Both the Nuremberg and Tokyo Charters did not expressly refer to a plan or policy. However, the absence of an express reference to 'policy' does not lead to the conclusion that policy was not a requirement. A literal reading approach should be adopted carefully. For instance, based on a literal reading, it might be said that the 'widespread or systematic' test, which was not explicitly contained in the ICTY Statute, is not a requirement for crimes against humanity.[232] This idea is not correct. Therefore, a further examination of the two Charters is required on the issue of policy.

Three main points deserve attention. It should be first noted that the Nuremberg and Tokyo Charters were illustrative rather than exhaustive attempts at definition, which means that they may not provide a complete definition of crimes against humanity. Second, the drafters of the Nuremberg Charter designed crimes against humanity, as observed above, connected with an armed conflict, as a part of 'a plan' for aggressive wars committed by Germany against German nationals. At the London Conference, Robert Jackson said:

> The reason that this program of extermination of Jews and destruction of the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. […] They were a part of the preparation for war or for the conduct of the war in so far as they occurred inside of Germany and that makes them our concern.[233]

230 Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', 270-82.

231 *Kunarac et al* Appeals Chamber Judgment, para 98 and fn 114.

232 *Tadić* Opinion and Judgment, para 656.

233 'Minutes of Conference Session of July 23, 1945', in *Report of Robert H. Jackson* 331.

Third, the two Charters were adopted to deal with crimes committed by the aggressive regimes of Germany and Japan. The existence of the policy of aggressive wars was not an issue in the two tribunals.[234] The IMT did state that:

> The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt.[235]

The IMT, therefore, recognised the existence of a 'policy of persecution and murder' of political opponents and Jewish population for crimes against humanity. The historical reality that most crimes against humanity were committed in furtherance of a plan or policy might justify that the drafters of the Nuremberg Charter considered this contextual element in creating the notion of crimes against humanity.[236]

Two examples are frequently referred to argue for the non-existence of the element of policy in the Nuremberg Charter. Streicher and Von Schirach were convicted only of crimes against humanity by the IMT. Stretcher as a Nazi propagandist was found guilty of crimes against humanity for his incitement to persecution, which was connected with war crimes committed by others.[237] Von Schirach was found guilty of crimes against humanity for his participation in the deportation plan in occupied Austria since 1940.[238] The two examples in effect indicate the existence rather than the non-existence of the policy element because the policy of aggressive wars was the background for all charges of crimes against humanity before the IMT. In the British *Belsen* Trial, the military tribunal also stated that 'the concentration camp system was in any case intended to further the German war effort'.[239] On the whole, the 'policy' underlying crimes against humanity was implicit in the Nazi Party policy of aggressive wars.[240]

One different view should be addressed. Some commentators argue that the reference to policy simply recognises a form of criminal participation, by which the furtherance of policy is equally applied to war crimes and crimes against peace.[241] Jean Graven explained that:

234 Schabas, 'State Policy as an Element of International Crimes'.
235 *France et al v Göring et al*, (1948) 1 TMWC 171, p 254.
236 But see deGuzman, 'Crimes against Humanity', 121-38.
237 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 318-20.
238 ibid, pp 302-04.
239 *Belsen* case, (1947) 2 LRTWC 1, pp 1-2, 73.
240 'Minutes of Conference Session of July 24, 1945', in *Report of Robert H. Jackson* 361.
241 Mettraux, 'The definition of crimes against humanity and the question of a 'policy' element', 165.

> The confusion of the 'conspiracy' condition resulted from the last paragraph of article 6 of the Nuremberg Charter, stipulating that '[l]eaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.' However, it does not mean that the perpetrator of crimes against humanity is punishable only if a crime results from such a plan.[242]

This argument has some merit. According to Graven, the reference to a 'plan' stipulated in the concluding paragraph of article 6 of the Nuremberg Charter concerns individual responsibility of leaders and members of an organisation for acts in execution of a plan. In the *Justice* case, the military tribunal applying Control Council Law No. 10 considered participation in a conspiracy to commit crimes against humanity as a mode of liability.[243] By referring to a 'plan', the focus of the authority is the attribution of liability.[244] Simply put, the existence of the 'plan/policy' is regarded as an essential factor for the assessment of individual contributions to offences of crimes against humanity, war crimes and crimes against peace, rather than a unique requirement for crimes against humanity. Therefore, the existence of policy is not a contextual element to convict a person of crimes against humanity.[245] This idea reveals an alternative function of a plan/policy as a material element of the complicity liability.[246] Yet, this function of policy does not lead to a conclusive finding that policy does not serve as an element of crimes against humanity. An alternative function of policy neither confirms nor challenges the view that policy is or is not a legal element.

The Nazi and Japanese policies of aggressive wars were not only the background facts. Further evidence tends to enhance this viewpoint and develop the notion of crimes against humanity under customary law. By referring to definitions of crimes against humanity in the Nuremberg and Tokyo Charters, as well as Control Council Law No. 10, the UN War Crimes

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242 Jean Graven, 'Les Crimes contre l'Humanité' (1950) 76 *Recueil des cours* 427, 560 and fn 4. 'La confusion et la généralisation de cette condition sont dues sans doute à l'alinéa final de l'article 6 du Statut de Nuremberg, disposant que 'les chefs, les organisateurs, les instigateurs et les complices qui participèrent à l'élaboration ou à l'exécution d'un plan commun ou complot destiné à commettre l'un des susdits crimes – crimes contre l'humanité compris – sont responsables des actes de toute personne ayant exécuté un tel plan ou complot.' Cela ne veut toutefois pas dire que l'instigateur ou l'exécutant d'un crime contre la paix ne soit punissable que si le crime résulte d'un tel complot'.

243 *Justice* case, (1948) 3 TWC 1, pp 954, 1063.

244 ibid.

245 Graven, 'Les Crimes contre l'Humanité', 560, 'En revanche, s'il est naturel et juste de punir « entente » active et agissant en vue du crime, il est erroné de subordonner l'existence et la punition du crime lui-même à là préexistence d'une entente ou d'un « complot », comme on a voulu le faire souvent à la suite du statut et du jugement de Nuremberg. C'est là, juridiquement, une confusion que rien ne justifie et dont il faut désormais absolument se garder'.

246 Some trials have stressed the significance of policy in other different perspectives, see *Poland v Goeth* [*Goeth* case], (1948) 7 LRTWC 1; *Poland v Hoess Commandant of the Auschwitz Camp* [*Hoess* case], (1948) 7 LRTWC 11, p 24; *Ministries* case, (1948) 12 TWC 1.

Commission concluded that '[n]ot only the ringleaders, but also the actual perpetrators of crimes against humanity were criminally responsible'.[247] This statement implies that the drafters of the Nuremberg Charter stressed the leaders' role in shaping and formulating the policy of aggressive war, a top-to-bottom perspective. To constitute crimes against humanity, authorities' involvement is the initially designed requirement.

In addition, the ILC's Drafts Code of Crimes implicitly endorsed the element of policy in its drafts of 1951, 1954, 1991 and 1996. For instance, the words 'by the authorities of a State or by private individuals' were added in the 1951 Draft Code of Crimes.[248] The phrase 'private individuals' initiated a debate about whether this crime requires a connection to a State or group, which is a 'threshold requirement'[249] in recent discussions that was not used in the 1950s debates. The 1954 formulation of crimes against humanity confirmed the reference to 'authorities of a State or private individuals' and added the phrase 'acting at the instigation or with the toleration of such authorities'.[250] This new insertion shows great strength of a plan or policy as a contextual element. The 1991 and 1996 Drafts included the new phrase of 'instigation by Government, organisation and groups'.[251] This phrase is a modified version of the State involvement requirement. The phrase 'involvement or toleration of State authorities' was introduced for the notion of crimes against humanity.[252] The drafting committee and commentaries on the 1996 *Draft Code of Crimes* explained that this new phrase was added to exclude random acts or an isolated inhumane act.[253] In short, a logical conclusion is that the existence of policy was a contextual legal element for the crimes against humanity in the Nuremberg Charter.

Several post-World War II cases also deemed policy as a legal element for the crimes against humanity. The military tribunal in the *Justice* case expressly stated that only criminals who consciously participated in 'systematic governmentally organised or approved procedures' would be punished for crimes against humanity.[254] The tribunal in *Ministries* held that 'governmental participation is a material element of crimes against humanity.'[255] Additionally, the French Court of Appeal in the *Barbie* case stated that crimes against humanity within the meaning of article 6(c) of the

247 UNWCC (ed), *History of the UNWCC and the Development of the Laws of War* 178-79.
248 1951 'Draft Code of Offences against the Peace and Security of Mankind', UN Doc A/CN.4/SER.A/1951, art 2 (9).
249 See observations above in section 4.5.1.1.
250 1954 'Draft Code of Offences against the Peace and Security of Mankind', UN Doc A/2693, in UN Doc A/CN.4/SER.A/1954/Add.1, Vol II, p 150.
251 1996 Draft Code of Crimes, art 18.
252 1954 Draft Code of Offences, art 2; ibid, art 18.5.
253 Schabas, 'State Policy as an Element of International Crimes'.
254 *Justice* case, (1948) 3 TWC1, pp 954, 982, 984.
255 *Ministries* case, (1948) 14 TWC 1, p 984.

Nuremberg Charter are 'inhuman acts and acts of persecution committed by the State pursuing a policy of ideological supremacy in a systematic way against individuals'.[256] In contrast, the Australian High Court held that with respect to 'systematic governmental procedures', the idea in the *Justice* case 'had not been accepted as an authoritative statement of customary international law'.[257] This decision, however, does not discredit the view of policy as a legal element. The purpose of the High Court was not to reject the element of policy but rather to include the policy of other non-state actors. All other cases or claims, aiming to extend the scope of policy-making entities or dissatisfying with a narrow scope of policy-making entities, implicitly acknowledged that the element of policy was required for crimes against humanity.

Further confirmation of the element of policy in international law can be found in recent national laws and courts prosecuting crimes against humanity or genocide committed before 1998. The Dutch Supreme Court in the *Menten* case interpreted that the element of policy is embedded in the definition of article 6(c) of the Nuremberg Charter.[258] The Iraqi High Tribunal in the *Al-Dujail* case affirmed the policy requirement for crimes against humanity in 1982.[259] A Panama court recognised the policy requirement for crimes against humanity committed from 1968 to 1989.[260] The Argentine Supreme Court confirmed the existence of the element of policy by referring to a report,[261] which asserted that during the 'Dirty War' between 1976 and 1983 'a series of acts were committed as a part of a common criminal

256 *Advocate General v Klaus Barbie* (Judgement, Court of Cassation, France) 86-92714 (25 November 1986) 3. 'Les actes inhumains et les persécutions qui, au nom d'un Etat pratiquant une politique d'hégémonie idéologique, ont été commis de façon systématique, contre les personnes'. See also *Advocate General v Klaus Barbie* (Judgement, Court of Cassation, France) 85-95166 (20 December 1985) 14-15, (1985) 78 ILR 124, holding that Jews and members of the Resistance persecuted in a systematic manner in the name of a State pursuing a policy of ideological supremacy can equally be the victims of crimes against humanity; *Advocate General v Touvier* (Judgment, Court of Cassation, France), (1995) 100 ILR 337.

257 *Polyukhovich* case, [1991]172 CLR 501.

258 *Public Prosecutor v Menten* (Judgment, Supreme Court, the Netherlands), (1981) 75 ILR 331, 362-63.

259 *The Public Prosecutor in the High Iraqi Court et al v Saddam Hussein Al Majeed et al* (Opinion, Iraqi High Tribunal, Appeals Commission) 29/c/2006 (26 December 2006) 7-8.

260 *Cruz Mojica Flores* Case (Appeal motion, Supreme Court, Panama) (List of Judgments 11.c), in Ximena Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol I (Washington DC: Due Process of Law Foundation 2010) 37.

261 'Doctrinal Report on the distinction between the crimes of genocide and crimes against humanity' (Brussels: Equipo Nizkor 2007), quoted in Ximena Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol II (Washington DC: Due Process of Law Foundation 2013) 6. This report requires acts of crimes against humanity with widespread and systematic nature.

plan'.[262] Colombia and Chile in the *Pinochet* cases also endorsed the necessity of policy.[263] A Peruvian court held that '[t]he murders and severe bodily harm inflicted in Barrios Altos and La Cantuta also constitute crimes against humanity, fundamentally because they were committed within the framework of a State policy for the selective but systematic elimination of alleged members of subversive groups.'[264] The Canadian Supreme Court in the *Finta* case affirmed that the policy was an element of crimes against humanity.[265]

In national law before the adoption of the Rome Statute, there is more discrepancy than consistency concerning the policy requirement. The criminal laws of some States referred to a premeditated plan.[266] Australia, Bangladesh and other States' criminal codes did not refer to the wording 'policy' or 'plan'.[267] As analysed above, the texts of these national law with no reference to policy do not exclusively demonstrate State practice and attitude towards the element of 'policy' for crimes against humanity under customary law. There is a need for further interpretation and application of these provisions from an international law perspective. This argument is also true in cases where national laws refer to a plan/policy. For instance, the Australian Criminal Code did not refer to the term policy, but Australian courts

262 *Victorio Derganz and Carlos Jose Fateche* case (Juan Demetrio Luna, accused) (Judgement, Supreme Court, Argentina) Case No. 2203, in Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol II, 6-7: (List of Judgments 1.e, Whereas IV); *Jorge Rafaél Videla* case (Motion submitted by the defence of Jorge Rafaél Videla, Incident of res judicata and lack of jurisdiction, Supreme Court, Argentina) Record V.34.XXXVI (21 August 2003) in *Digest of Latin American Jurisprudence on International Crimes*, Vol I, 40: (List of Judgments 1.a, Whereas 13)

263 *José Rubén Peña Tobón et al* case (Ruling and motion for comprehensive reparations, Colombia) 1 December 2011 (List of Judgments 2.b), in Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol II, 4-5; *Clandestine Detention Centres of DINA* case (Application for revocation of immunity of Augusto Pinochet Ugarte, Supreme Court, Chile) 21 April 2006 (List of Judgments 3.c), Whereas 3, in Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol I, 38-39 and fn 39. Pinochet was alleged responsible for acts of State-sponsored torture and illegal detention at the Villa Grimaldi from 1973 to 1978 and his immunity was revoked by the Chilean Supreme Court in September 2006. However, following the issuance of an arrest warrant, he died in December 2006 putting an end of all legal procedures in Chile.

264 *Prosecutor v Alberto Fujimori* (Judgment, Supreme Court of Justice, Special Criminal Chamber, Peru) A.V 19-2001 (7 April 2009) (List of Judgments 13.j), in Medellín-Urquiaga, *Digest of Latin American Jurisprudence on International Crimes*, Vol I, 40: whereas 717.

265 *R v Finta* (Judgment, Supreme Court), [1994] 1 SCR 701, paras 814, 823. For comments on this case, see Mettraux, 'The definition of crimes against humanity and the question of a 'policy' element', 166, noting that the Supreme Court in this case cited no precedents but exclusively relied on the view of Professor Bassiouni.

266 Cambodia, Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period 1992, art 188; Albania, Criminal Code 1995, art 74; Spain, Criminal Code 1995, art 607*bis*; Finland, The Penal Code 1996, Chapter 1, § 7(3) and (4).

267 Australia, Criminal Code Act 1995, §§ 268.8-268.23; Canada, Criminal Code 1985, subsection 7(3.76); Croatia, Criminal Code 1998, art 157 a; Latvia, Criminal Law 1998, § 71.2; Bangladesh, International Crimes (Tribunals) Act 1973, § 1(2)(a), amended 2009, § 3(2)(a).

supported the element of policy.[268] On the other hand, despite a reference to 'premeditated plan' in the definition of crimes against humanity, the Bangladesh International Tribunals argued for no policy in custom by directly citing the ICTY *Kunarac et al* Appeals Chamber judgment.[269] This observation goes to show that these national laws alone are less valuable for the assessment of the existence of the element of policy.

It is true that the policy in the definition of crimes against humanity was first explicitly mentioned in the Rome Statute. However, as shown above, these post-World War II authorities indicate that evidence of practice and opinions at the international and national levels support policy as an element for crimes against humanity. The work of the ILC tends to require the policy element in its draft codes of offences.[270] The drafting of article 7 of the Rome Statute mentioned above further provides evidence of *opinio juris* as to the development of custom when recommendations of States were adopted in 1998. The preparatory works of the Statute show that States attending the Rome Conference widely recognised this element. Canada's lawmakers also upheld the element of policy under customary law. A recent instance can be found in the 2000 *Crimes against Humanity and War Crimes Act* of Canada, which provides that '[a]rticle 7 of the Rome Statute is customary international law since 1998'.[271] Thus, article 7 of the Statute crystallised the element of policy for crimes against humanity under customary law at the very least in 1998. Overwhelming evidence shows that the element of policy was required for crimes against humanity. Robinson argues that 'the applicability of the policy element is supported by the bulk of authority [including decisions of national courts] since Nuremberg'.[272] Schabas also claims that sufficient authorities confirm policy as an element of crimes against humanity.[273] These authorities seem to reveal that policy was a distinct element under customary law before 1998.

4.5.2.2 Policy as a legal element in the jurisprudence of the two UN ad hoc tribunals

Attention must also be drawn to the jurisprudence of two UN *ad hoc* tribunals. Their judgments have also been relied on by some national courts in determining the policy element for crimes against humanity in international

268 *Polyukhovich* case, [1991] 172 CLR 501.

269 *Chief Prosecutor v Delowar Hossain Sayeedi* (Judgment, International Crimes Tribunal-1) ICT-BD 01 of 2011 (28 February 2013), para 30(4); *Chief Prosecutor v Salauddin Quader Chowdhury* (Judgment, International Crimes Tribunal-1) ICT-BD 02 of 2011 (1 October 2013), para 36(4). All subsequent judgments subscribe to this position.

270 UN Doc A/72/10 (2017), paras 45-46, draft article 3 and commentary, pp 37-42.

271 Canada, Criminal Code 1998, art 459 c.1; Canada, Crimes Against Humanity and War Crimes Act 2000, amended 2013, arts 4(3) and 6(4).

272 Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *AJIL* 43, 48.

273 ibid; Schabas, 'State Policy as an Element of International Crimes', 972-74.

law.[274] The following paragraphs analyse the jurisprudence of the ICTY and the ICTR to show whether this indicates that article 7(2)(a) was not declaratory of custom on the element of policy. Most of these decisions were delivered after the adoption of the Rome Statute, but they dealt with crimes committed prior to 1998.

The jurisprudence of the ICTY shows two trends on the issue of policy. At the outset, the ICTY case law required the 'policy' element for crimes against humanity. In interpreting the phrase 'attack against any civilian population', the Trial Chamber in the *Tadić* case confirmed that 'there must be some form of a governmental, organisational or group policy to commit these acts'.[275] The Chamber considered policy as a distinct requirement aside from the widespread and systematic tests.

The Trial Chamber in the *Blaškić* case held that policy was a legal element implied in the 'systematic' requirement.[276] The *Blaškić* Trial judgment led subsequent Chambers to doubt the independent status of the element of policy. For instance, the *Kupreškić* Trial Chamber held that 'there is some doubt as to whether [policy] is strictly a *requirement*, as such, for crimes against humanity.'[277] By endorsing the *Kupreškić* decision, the *Kordić* Trial Chamber concluded that 'the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity'.[278]

In the *Kunarac et al* case, the Trial Chamber commented that 'there has been some difference of approach […] as to whether a policy element is required under existing customary law'. In that case, the defendants were held responsible for crimes against humanity for sexual assault or rape of detained Muslim women performed by themselves and their subordinates. Deeming that the policy requirement was satisfied, the Trial Chamber did not decide on this issue in that case. However, in a footnote, the Chamber wrote that 'it was open to question whether the [...] sources often cited by Chambers of the ICTY and of the ICTR support[ed] the existence of such a requirement'.[279] Later on, by citing this sentence quoted and without providing further interpretations, the Trial Chamber in the *Krnojelac* case asserted

274 For instance, the Canada's 1994 *Finta* decision has been overruled by the Supreme Court in 2005. See *Mugesera v Canada* (Minister of Citizenship and Immigration), [2005] 2 SCR 100, para 158.

275 *Tadić* Opinion and Judgment, para 644.

276 *Blaškić* Trial Judgment, paras 203-05, 254; *Prosecutor v Blaškić* (Judgement) ICTY-95-14-A (29 July 2004) [*Blaškić* Appeals Chamber Judgment], paras 119-20.

277 *Kuprešić et al* Trial Judgment, para 551 (emphasis in original).

278 *Prosecutor v Kordić & Čerkez* (Judgment) ICTY-95-14/2-T (26 February 2001), paras 181-82.

279 *Prosecutor v Kunarac et al* (Judgement) ICTY-96-23-T and ICTY-96-23/1-T (22 February 2001), paras 432, 479 and fn 1109.

that 'there is no requirement under customary international law that the acts of the accused person […] be connected to a policy or plan'.[280]

A door was opened at the Appeals Chamber in *Kunarac et al* to consider policy as an evidentiary factor in establishing the systematic character of an attack instead of an independent legal requirement. The Appeals Chamber in the *Kunarac et al* case concluded that:

> […] the attack [does not need] to be supported by any form of 'policy' or 'plan'. There was nothing in the [ICTY] Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes.[281]

According to the Chamber:

> […] proof that the attack was directed against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.[282]

After the *Kunarac et al* Appeals Chamber judgment, the jurisprudence of the ICTY did not support the element of policy for crimes against humanity under customary law.[283] The ICTY Chambers deemed the 'policy' an evidentiary factor rather a distinct element of crimes against humanity.[284]

The jurisprudence of the ICTR followed in the same footsteps as the ICTY on the issue of the element of policy.[285] Its earlier decisions held that '[a] systematic attack is one carried out pursuant to a preconceived policy

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280 *Prosecutor v Krnojelac* (Judgment) ICTY-97-25-T (15 March 2002) [*Krnojelac* Trial Judgment], para 58.

281 *Kunarac et al* Appeals Chamber Judgment, paras 98, 101.

282 ibid, para 98.

283 *Prosecutor v Vasiljević* (Judgement) ICTY-98-32-T (29 November 2002), para 36; *Simić et al* Trial Judgment, para 44; *Galić* Trial Judgment, para 147; *Blaškić* Appeals Chamber Judgment, paras 119-20; *Brđanin* Trial Judgment, para 137; *Prosecutor v Kordić & Čerkez* (Judgment) ICTY-95-14/2-A (17 December 2004), para 98; *Blagojević & Jokić* Trial Judgment, para 546; *Limaj et al* Trial Judgment, para 212; *Krajišnik* Trial Judgment, para 706.

284 *Limaj et al* Trial Judgment, para 212; *Galić* Trial Judgment, para 147; *Simić et al* Trial Judgment, para 44; *Blagojević & Jokić* Trial Judgment, para 546; *Limaj et al* Trial Judgment, paras 184, 212; *Prosecutor v Martić* (Judgement) ICTY-95-11-T (12 June 2007), para 49; *Perišić* Trial Judgment, para 86; *Prosecutor v Tolimir* (Judgement) ICTY-05-88/2-T (12 December 2012), para 698; *Prosecutor v Stanišić & Župljanin* (Judgement) ICTY-08-91-T (27 March 2013), Vol, para 28; *Stanišić & Simatović* Trial Judgment, para 963.

285 *Akayesu* Trial Judgment, paras 579-80; *Kayishema & Ruzindana* Trial Judgment, paras 122-24 and fn 28; *Rutaganda* Trial Judgment and Sentence, paras 69, 71; *Musema* Trial Judgment and Sentence, para 204; *The Prosecutor v Ruggiu* (Judgement and Sentence) ICTR-97-32-T (1 June 2000), para 20; *Bagilishema* Trial Judgment, paras 77-78.

or plan',[286] and that the element of policy effectively excludes acts carried out outside of a broader policy or plan for purely personal motives.[287] By endorsing the *Kunarac et al* Appeals Chamber judgment of the ICTY, its later cases abandoned the view of policy as a legal requirement.[288] Similar to the jurisprudence of the ICTY, subsequent trials of the ICTR treated policy as an evidentiary factor for the assessment of attack.[289] It is worthwhile noting that these Rwanda cases are insignificant on the issue of policy because the existence of a policy was never in doubt. However, the *Kunarac et al* Appeals Chamber judgment of the ICTY is substantial because in that case no policy existed in the background.[290]

According to the *Kunarac et al* Appeals Chamber, the element of policy for crimes against humanity never existed under customary law. This view has been subscribed to not only by the ICTR but also by other tribunals, for example, the SCSL.[291] Some national courts also simply referred to the *Kunarac et al* Appeals Chamber judgment to argue for no policy element for crimes against humanity.[292] The Appeals Chamber only briefly explained its argument in a footnote, which said: 'although there has been some debate[s] in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity; [t]he practice […] overwhelmingly supports the contention that no such requirement exists under customary international law'.[293] These authorities addressed in the footnotes include:

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286 *Akayesu* Trial Judgment, paras 579-80. Followed by *Mugesera v Canada* (Minister of Citizenship and Immigration), [2003] FCA 325, para 52; *Bukumba v Canada* (Minister of Citizenship and Immigration), [2004] FC 93, para 15.

287 *Kayishema & Ruzindana* Trial Judgment, paras 122-24 and fn 28.

288 *Semanza* Trial Judgment and Sentence, para 329; *Semanza* Appeals Chamber Judgment, para 269; *The Prosecutor v Kajelijeli* (Judgment and Sentence) ICTR-98-44A-T (1 December 2003), para 872; *Kamuhanda* Trial Judgment, para 665; *Ntagerura et al* Judgment and Sentence, para 698; *The Prosecutor v Gacumbitsi* (Judgement) ICTR-01-64-T (17 June 2004), para 299; *Gacumbitsi v The Prosecutor* (Judgement) ICTR-2001-64-A (7 July 2006), para 512; *Seromba* Trial Judgment, para 356; *The Prosecutor v Seromba* (Judgement) ICTR-01-66-A (12 March 2008), para 149; *Nahimana et al v The Prosecutor* (Judgement) ICTR-99-52-A (28 November 2007), para 922.

289 *Semanza* Trial Judgment and Sentence, para 329; *Semanza* Appeals Chamber Judgment, para 269.

290 *Kunarac et al* Appeals Chamber Judgment, para 75.

291 *Prosecutor v Brima et al* (Judgment) SCSL-04-16-T (20 June 2007), para 215; *Prosecutor v Fofana & Kondewa* (Judgment) SCSL-2004-14-T (2 August 2007), para 113; *Prosecutor v Fofana & Kondewa* (Judgment) SCSL-2004-14-A (28 May 2008), para 246; *Prosecutor v Sesay et al* (Judgment) SCSL-04-15-T (2 March 2009), para 79.

292 See *Mugesera v Canada* (Minister of Citizenship and Immigration), [2005] 2 SCR 100, para 158; *Chief Prosecutor v Delowar Hossain Sayeedi* (Judgment, International Crimes Tribunal-1) ICT-BD 01 of 2011 (28 February 2013), para 30(4); *Chief Prosecutor v Salauddin Quader Chowdhury* (Judgment, International Crimes Tribunal-1) ICT-BD 02 of 2011 (1 October 2013), para 36(4).

293 *Kunarac et al* Appeals Chamber Judgment, para 98 and fn 114.

> Article 6(c) of the Nuremberg Charter; Nuremberg Judgement […]; Article II(1)(c) of Control Council Law No 10; *In re Ahlbrecht*, ILR 16/1949, 396; *Ivan Timofeyevich Polyukhovich v The Commonwealth of Australia and Anor*, (1991) 172 CLR 501; Case FC 91/026; *Attorney-General v Adolph Eichmann*, District Court of Jerusalem, Criminal Case No 40/61; *Mugesera et al v Minister of Citizenship and Immigration*, IMM-5946-98, […]; *In re Trajkovic*, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), […]; *Moreno v Canada* (Minister of Employment and Immigration), […]; *Sivakumar v Canada* (Minister of Employment and Immigration). See also […], S/25704, 3 May 1993, paras 47-48; Yearbook of the International Law Commission (ILC), 1954, Vol II, 150; […] (UN Doc No A/46/10), 265-266; […] (UN Doc No A/49/10), 75-76; […] (UN Doc No A/51/10), 93 and 95-96. The Appeals Chamber reached the same conclusion in relation to the crime of genocide […]. Some of the decisions which suggest that a plan or policy is required in law went, in that respect, clearly beyond the text of the statute to be applied (see e.g., *Public Prosecutor v Menten*, […]). Other references to a plan or policy which have sometimes been used to support this additional requirement in fact merely highlight the *factual* circumstances of the case at hand, rather than impose an independent constitutive element (see, e.g., […]). Finally, another decision, which has often been quoted in support of the plan or policy requirement, has been shown not to constitute an authoritative statement of customary international law (see *In re Altstötter*, ILR 14/1947 […]).[294]

The Chamber, however, failed to provide a detailed explanation as to how the evidence supports its position. Some commentators have endorsed its conclusion by referring to similar authorities.[295]

In contrast, Bassiouni pointed out that this Chamber

> […] misapplied the law with respect to a State policy […] on the basis of a misstatement of precedential authority. […] [T]he Tribunal relied on precedents that held to the contrary of the proposition of which these precedents were cited.[296]

As analysed above, the authorities cited in the *Kunarac et al* Appeals Chamber judgment have been misinterpreted. Some authorities are not closely relevant to the issue of policy, while some authorities recognise policy as a legal element for crimes against humanity.[297] The Appeals Chamber in *Kunarac et al* cited three Canadian cases from lower courts but ignored the 1994 Supreme Court *Finta* case. The *Kunarac et al* Appeals Chamber judgment is less persuasive on the point of policy.[298] The fact that the *Kunarac et al* Appeals Chamber judgment has repeatedly been endorsed by later jurisprudence cannot make it a convincing authority. Thus, the element of policy was a legal requirement under customary law.

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294 ibid (emphasis in original).

295 Mettraux, 'Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda'; David Hunt, 'The International Criminal Court-High Hopes, Creative Ambiguity and an Unfortunate Mistrust in International Judges' (2004) 2 *JICJ* 56.

296 Bassiouni, 'Revisiting the Architecture of Crimes against Humanity', 54.

297 Charles C. Jalloh, 'What Makes Crimes against Humanity Crimes against Humanity?' (2013) 28 *Am U Intl L Rev* 381, 400-01.

298 ibid; Schabas, 'State Policy as an Element of International Crimes', 959-64.

In sum, the two UN *ad hoc* tribunals confirmed policy as an element of crimes against humanity in their early jurisprudence. The two tribunals in their subsequent decisions held that customary law requires no policy for crimes against humanity. The *Kunarac et al* Appeals Chamber judgment is the turning point on the issue of the element of policy. The fact that subsequent jurisprudence of the ICTY repeatedly subscribed to this view in the *Kunarac et al* Appeals Chamber judgment does not guarantee that the debate about the element of policy is well settled under customary law. The above observations tend to support the initial jurisprudence of the two UN *ad hoc* tribunals. Therefore, article 7(2)(a) was declaratory of customary law on the element of policy.

4.5.2.3 Policy as a legal element in customary international law after 1998

Regardless of whether the *Kunarac et al* Appeals Chamber judgment is convincing, it is worthwhile noting that this judgment is not conclusive evidence for the status of customary law on the element of policy at present.[299] The *Kunarac et al* Appeals Chamber reached its conclusion by qualifying the time 'at which the crimes occurred' in 1992 to 1993, although subsequent cases citing this decision did not cautiously restate this phrase. These ICTY decisions were delivered after the adoption of the Rome Statute,[300] but they did not examine the text of article 7(2)(a) of the Rome Statute. Meanwhile, chambers of these decisions also did not analyse the impact of article 7(2)(a) on the formation of customary international law as other chambers did in other judgments.[301] Therefore, by merely referring to the *Kunarac et al* Appeals Chamber judgment, it is unclear whether the policy element outlined in the Rome Statute is declaratory of a customary rule now. The following paragraphs address this issue.

At the present time, the Rome Statute has been adopted and signed by more than two-thirds of the States in the world.[302] The ICC itself has interpreted policy as an element of crimes against humanity. After the adoption of the Rome Statute, most national implementation legislation further supports policy as a legal element for crimes against humanity. Much of the imple-

299 *Furundžija* Trial Judgment, para 227.

300 It was delivered on 12 June 2002. The Rome Statute was adopted on 17 July 1998 and 60 ratifications for its entry into force had been reached on 11 April 2002.

301 *Furundžija* Trial Judgment, paras 227, 231, *actus reus* of aiding and abetting under customary law requires that the assistance substantially rather than essentially affects the perpetration of the crime; *Tadić* Appeals Chamber Judgment, paras 222-23, 255-71, concerning joint criminal enterprise and purely personal motive for a crime against humanity under customary law; *Blaškić* Appeals Chamber Judgment, para 653, fn 1366, concerning the use of human shields as war crimes; *Prosecutor v Šainović et al* (Appeal Judgement) ICTY-05-87-A (23 January 2014) [*Šainović et al* Appeals Chamber Judgment], paras 1626-50, concerning the specific direction as a requirement of aiding and abetting under customary law.

302 123 ratifications and 30 signatures.

mentation legislation refers to policy. Some legislation refers to the phrase 'instigated or directed by a State or an organisation' in the 1996 version of the Draft Code of Crimes.[303] Some others directly or indirectly incorporate article 7(2)(a) of the Rome Statute into their national law with small revisions.[304] In addition, many other national laws merely incorporate the definition set out in article 7(1). Thus, they do not refer to the policy requirement as provided for in article 7(2)(a) of the Statute.[305] Furthermore, most legislation supports policy as a legal requirement for crimes against humanity as to underlying acts. For example, the Swiss Criminal Code provides that the act of enforced disappearance of persons should be committed on behalf of or with the acquiescence of a State or political organisation.[306] However, different views remain. The Turkish Criminal Code regards plan as factual evidence to show the existence of specific intent for acts of persecution.[307] Some of these national laws should not be given too much weight to discredit the element of policy under customary law. A plain reading should be carefully

303 Estonia, Penal Code 2001, Chapter 6 Division 2, para 89; Greece, Law on the adaptation of internal law to the provisions of the ICC Statute 2002, amended 2011, art 8.

304 Bosnia and Herzegovina, Criminal Code 2003, art 172; Ireland, International Criminal Court Act 2006; Liechtenstein, Law on Cooperation with the International Criminal Court and other International Tribunals 2004, art 3; Malta, International Criminal Court Act 2003, Preliminary, 2 (1); Mauritius, International Criminal Court Act 2011, preliminary 2 and Part I of the Schedule; Lithuania, Criminal Code of the Republic of Lithuania 2000, art 100; Republic of Korea, Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court 2007, art 9; Kenya, The International Crimes Act 2008; Netherlands, 270 Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act), § 2(4); New Zealand, International Crimes and International Criminal Court Act 2000, Part 2, § 10(2); Samoa, International Criminal Court Act 2007, art 6; Slovakia, Criminal Code 2005, § 425; South Africa, Implementation of the Rome Statute of the International Criminal Court 2002, Chapter 1, § 1, and schedule 1; Uganda, International Criminal Court Act 2010, art 8; UK, International Criminal Court Act 2001, schedule 8; UK, International Criminal Court (Scotland) Act 2001.

305 Georgia, Criminal Code 1999, art 408; Costa Rica, Criminal Prosecution to Punish War Crimes and Crimes Against Humanity 2002, art 2; Australia, International Criminal Court (Consequential Amendments) Act 2002, Subdivision C; Azerbaijan, Criminal Code 1999, arts 105-113; Belgium, Act of 5 August 2003 on Serious Violations of International Humanitarian Law, Chapter II Amendments to the Criminal Code, art 7; Canada, Crimes against Humanity and War Crimes Act 2000, arts 4(3), 6(3) and 6(5); Fiji, Crimes Decree 2009, Part 12, Division 3; Germany, Act to Introduce the Code of Crimes against International Law 2002, art 1(7); Latvia, Criminal Law 1998, § 71.2; Lesotho, Penal Code Act 2012; Montenegro, Criminal Code 2003, art 427; Philippine, Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity 2009, § 6; Romania, Criminal Code 2005, art 175 (1); Slovenia, Criminal Code 2008; Timor-Leste, Criminal Code 2009, art 124; Trinidad and Tobago, International Criminal Court Act 2006, § 10.

306 Switzerland, Criminal Code 1937, amended 2017, art 264a(1)(E). For similar provision, see Norway, Penal Code 2008, Chapter 16, §§ 101-10; Portugal, Adaptation of Criminal Legislation to ICC Statute 2004, art 9.

307 Turkey, Criminal Code 2004, art 77(1); see also Cassese *et al* (eds), *Cassese's International Criminal Law* 126.

employed. Instances in national legislation where there is no reference to policy do not exclusively amount to substantial evidence of *opinio juris* on the issue of the element of policy. These laws do not weaken the view that crimes against humanity require the element of policy under customary law.

In contrast to national laws, some national cases have taken a clear position on the issue of policy. In interpreting article 7(2)(a) of the Rome Statute, the Supreme Court of Argentina concluded that the facts of the case must be linked with a sort of 'policy', understanding this term as directions and guidelines followed by an entity's practice on a specific ground.[308] An Indonesian court reaffirmed the policy element in 2002 by saying that 'the accused had knowledge of, and sympathised with, the policy to carry out crimes [against humanity], and this is an essential element that distinguishes him from an ordinary criminal'.[309] The court in Bosnia and Herzegovina requires an attack 'pursuant to or in furtherance of a State or organisational policy'.[310] It seems that the idea of the element of policy in customary law is further enhanced following the adoption of the Rome Statute. The ILC's recent work on the proposed Convention on crimes against humanity also supports the policy element.[311]

On the other hand, other evidence implies that the element of policy is not a part of customary law at a particular moment. By citing article 7(2)(a) of the Rome Statute, the Supreme Court of Canada in 2005 once concluded that 'it seems that there is currently no requirement in customary international law that a policy underlies [sic] the attack, though we do not discount the possibility that customary international law may evolve over time so as to incorporate a policy requirement'.[312] Following its logic, article 7 of the Statute was not declaratory of custom on the element of policy in 1998; in addition, the element of policy had not developed into customary law in 2005. However, the position of the Supreme Court should be given less weight for its reference to the *Kunarac et al* Appeals Chamber judgment and its inconsistency with Canada's law. In contrast to the Supreme Court, Canada's legislation maintains that the element of policy has been crystallised into custom since 1998.

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308 *René Jesús Derecho* case (Decision about incidental proceeding on the extinguishment of a criminal complaint, Supreme Court, Argentina) Case No. 24079 (11 July 2007) 10-12; *René Jesús Derecho* case (Judgment, Argentina) Case No. 24079 (29 November 2011).

309 *Prosecution v Abílio Soares* (Judgment, Indonesian *Ad Hoc* Human Rights Court for East Timor, Central Jakarta District Court) 01/PID.HAM/AD.Hoc/2002/ph.JKT.PST (14 August 2002).

310 *Prosecutor's Office v Rašević and Todović* (First Instance Verdict, Court of Bosnia and Herzegovina) (28 February 2008) pp 37-38. This case was cited in *Prosecutor's Office v Bundalo et al* (Second Instance Verdict, Court of Bosnia and Herzegovina, Section I for War Crimes, the Appellate Division Panel) X-KRŽ-07/419 (28 Jan 2011), para 289.

311 UN Doc A/72/10 (2017), paras 45-46, draft article 3 and commentary, pp 37-42.

312 *Mugesera v Canada* (Minister of Citizenship and Immigration), [2005] 2 SCR 100, para 158 (citations omitted).

To sum up, the element of policy continues to be a legal element for crimes against humanity in international law. Alternatively, even if policy as a legal element was not a pre-existing norm in 1998, further evidence after the adoption of the Rome Statute shows that it has developed into a customary rule. At present, the element of policy as a requirement is widely recognised. This leads to the conclusion that article 7(2)(a) is declaratory of custom on the issue of the element of policy.

4.5.3 Conclusions

To conclude, the wording 'policy' was explicitly inserted in article 7(2)(a) of the Rome Statute. Policy is considered a distinct legal requirement for crimes against humanity. The Rome Statute did not depart from customary international law but declared existing customary law with respect to the issue of policy. The *Kunarac et al* Appeals Chamber judgment of the ICTY, which deemed policy an evidentiary factor in establishing an attack, is not persuasive on this point. The Elements of Crimes providing that a 'policy of committing such attack' requires that 'the State or organisation actively promote or encourage such an attack against a civilian population' further confirmed this idea.[313] Sufficient evidence suggests that the element of policy was embedded in customary international law in 1998 and that it continues to be a legal element of crimes against humanity under customary law. In short, article 7(2)(a) was and is declaratory of customary law about the policy requirement.

4.6 Concluding remarks

Crimes against humanity was a new type of international crime in the Nuremberg Charter. However, before the adoption of the Rome Statute, which provides for crimes against humanity in its article 7, this crime, in general, had already been recognised as a crime under customary law. This Chapter critically analysed two contextual requirements in article 7, the removal of the nexus with an armed conflict and the element of policy. This Chapter first argues that the texts and the preparatory works of the Rome Statute preliminarily show that article 7 was declaratory of customary law on the nexus issue. Second, this research observes that the armed conflict nexus requirement was a substantive element for the notion of crimes against humanity in the Nuremberg Charter. Later on, as a departure from pre-existing customary law, the link with an armed conflict disassociated itself from crimes against humanity. It remains unclear when this nexus disappeared under customary law, but it indeed occurred before 1998. Article 7 of the Rome Statute codified or, at the very least, crystallised crimes against

313 Elements of Crimes, PCNICC/2000/1/Add.2, p 5.

humanity under customary law by excluding the nexus with an armed conflict. Chapter 4 concludes that article 7(1) of the Statute was and is declaratory of custom concerning the disassociation with an armed conflict for crimes against humanity.

In addition, Chapter 4 looked into the notion of policy, arguing that policy is a legal element articulated in article 7 of the Rome Statute. The texts and the preparatory works do not assist in answering whether article 7 was declaratory of custom on the issue of the element of policy. Authorities after World War II indicate that policy was always in the background of prosecution as a contextual element. The *Kunarac et al* Appeals Chamber judgment of the ICTY deemed policy an evidentiary factor instead a distinct legal element to establish an attack. The authorities prior to this judgment, however, do not assist its conclusion. Its reasoning is not convincing on the policy point. In short, Article 7(2)(a) of the Rome Statute was declaratory of pre-existing custom on the issue of policy. Far from indicating a trend towards removal of the element of policy under customary law, practice since the adoption of the Rome Statute confirms its validity. Therefore, article 7(2)(a) is declaratory of custom about the element of policy.