Rome Statute of the International Criminal Court

Ambos

4. Auflage 2022
ISBN 978-3-406-74384-9
C.H.BECK

umfassendes Spezialsortiment im Bereich Recht, Steuern und Wirtschaft mit rund 700.000 lieferbaren Fachbuchtiteln.

Statute: Human Dignity, Autonomy and Consent', (2001) 32 *ColumHumRtsLRev* 625; Booysen, H., 'Convention on the Crime of Apartheid', (1976) 2 *SouthAfricanYbIL* 56; Clark, R.S. 'Apartheid', in: Bassiouni, *ICL I* (2008) 599; Boulesbaa, A., *The UN Convention on Torture and the Prospects for Enforcement* (Martinus Nijhoff 1999); Brady, H. and Liss, R., 'The Evolution of Persecution as a CaH', in: Bergsmo *et al*., *Origins III* (2015); Brody, R., 'Commentary on the Draft UN Declaration on the Protection of All Persons from Enforced or Involuntary Disappearance', (1990) 8 *NQHR* 381; Buchard, C., 'Torture in the Jurisprudence of the *Ad Hoc* Tribunals: A Critical Assessment' (2008) 6 *JICJ* 159; Byrnes, A., 'Torture and Other Offences Involving the Violation of the Physical or Mental Integrity of the Human Person', in: McDonald and Swaak-Goldman, *ICL I* (2000) 197; Carpenter, R.C., 'Recognizing Gender-Based Violence against Civilian Men and Boys in Conflict Situations', (2006) 37 (1) *Sec. Dialogue* 83; Chappell, L., 'Women's Rights and Religious Opposition: The Politics of Gender at the ICC', in: Abu-Laban, Y. (ed.), *Gendering the Nation State: Canadian and Comparative Perspectives* (2008) 139; Chetail, V., 'Is There Any Blood on My Hands? Deportation as a Crime of International Law', (2016) 29 *LJIL* 917; Chinkin, C., 'Rape and Sexual Abuse of Women in International Law', (1994) 5 *EJIL* 326; Chuang, J., 'Redirecting the Debate over Trafficking in Women: Definitions, Paradigms and Contexts', (1998) 11 *HarvHumRtsJ* 65; Cullen., A., 'Defining Torture in International Law: A Critique of the Concept Employed by the ECtHR', (2003–2004) 34 *CaIWILJ* 29; Davidson, J.S., 'No More Broken Bodies: The Definition of Torture in the Late Twentieth Century', (1995) 6 *CanterburyLRev* 5; Davidsson, E., 'Economic Oppression as an International Wrong or as CaH', (2005) 23 (2) *NethQHumRts* 173; Dawson, G. and Farber, S., *Forcible Displacement Throughout the Ages: Towards an International Convention for the Prevention and Punishment of the Crime of Forcible Displacement* (BRILL 2012); DeFalco, R.C., 'Accounting for Famine at the ECCC: The CaH of Extermination, Inhumane Acts and Persecution', (2011) 5 *IJTJ* 142; De Wet, E., 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary International Law' (2004) 15 *EJIL* 97; De Zayas, A.M., 'International Law and Mass Population Transfers', (1975) 16 *HarvILJ* 207; Dolgopol, U. and Paranjape, S., *Comfort Women: An Unfinished Ordeal* (International Commission of Jurists 1994); Dugard, J., Human Rights and the South African Legal Order (Princeton Legacy Library 1978); Dugard, J. and Reynolds, J., 'Apartheid, International Law, and the Occupied Palestinian Territory', (2013) 24 *EJIL* 867; Durney, J., 'Crafting a Standard: Environmental Crimes as CaH Under the ICC', (2018) 24(2) *Hastings Environmental Law Journal* 413; Eden, P., ' The Role of the Rome Statute in the Criminalization of Apartheid' (2014) 12 *JICJ* 171; Farrior, S., 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live up to its Potential', (1997) 10 *HarvHumRtsJ* 213; Fischer, H., 'The Suppression of Slavery in International Law', (1950) 3 (28) *ILQ* 503; Gallagher, A. T., *The International Law of Human Trafficking* (CUP 2010); Garraway, C., 'Elements of the Specific Forms of Genocide', in: Lee, *ICC* (2001) 49; Giorgou, I., 'State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute', (2013) 11 *Jicj* 1001; Global Justice Center, *Submission to the ILC: The Need to Integrate a Gender-Perspective into the Draft Convention on CaH*, 8 Nov. 2018, 6; Goldman, R.K., 'Codification of International Rules on Internally Displaced Persons – An Area where Both Human Rights and Humanitarian Law Considerations Are Being Taken into Account', (1998) 325 *IRevRC* 749; Goodfellow, N.A., 'The Miscategorization of "Forced Marriage" as a CaH by the SCSL', (2011) 11 *ICLRev* 831; Goodwin-Gill, G.S., *International Law and the Movement of Persons between States* (Clarendon 1978); Graefrath, B., 'Apartheid – Ein internationales Verbrechen', (1974) 28 *NJ* 192; *id.,* 'Convention against the Crime of Apartheid', (1972) 11 *German Foreign Policy* 395; *id.,* 'The Crime of Apartheid: Responsibilities and Reparations', (1981) *RevContemporaryL* 31; Grey, R., 'The ICC's First "Forced Pregnancy" Case in Historical Perspective' (2017) 15 JICJ 905; *id*., 'Conflict Interpretations of "Sexual Violence" in the ICC', (2014) 29 *Australian Feminist Studies* 273; Grupo Iniciativa, *La desaparición forzada como crimen de lesa humanidad: El "Nunca más" y la comunidade internacional: instrumentos juridicos internacionales para la prevención y contra la impunidade* (Coloquio de Buenos Aires, 10 al 13 de ocutubre de 1988); Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2 (17 Apr. 1998); *id*., O'Donohue, J., Rosenthal, I. and Llanta D., 'Gender-based Persecution as a CaH: The Road Ahead', (2019) 17 *JICJ* 957; *id*., *Prosecuting Sexual and Gender-Based Crimes at the ICC: Practice, Progress and Potential* (CUP 2018); Guest, I., *Behind the Disappearances: Argentina's Dirty War Against Human Rights and the UN* (PennPress 1990); Guzman, F.-A., 'The Draft of International Convention on the Protection of All Persons from Forced Disappearance', (2001) 62–63 *ICJRev* 73; Haenen, I., 'The Parameters of Enslavement and the Act of Forced Marriage', (2013) 13 *ICLRev* 895; *id*., 'Classifying Acts as CaH in the Rome Statute of the ICC', (2013) 14 *GermanLJ* 796; Hall, C.K., 'The First Five Sessions of the UN PrepCommis for the ICC' (2000) 94 *AJIL* 773; Hamilton, R.J., 'Jesner v. Arab Bank' (2018) 112 *AJIL* 720; Hanum, H., *The Right to Leave and Return in International Law and Practice* (Nijhoff 1987); Hayes, N., 'Sisyphus Wept: Prosecuting Sexual Violence at the ICC', in: Schabas *et al*., *ICL* (2013); Heine, G. and Vest, H., 'Murder/Wilful Killing', in: McDonald and Swaak-Goldman, *ICL I* (2000) 175; Horder, J., *Homicide Law in Comparative Perspective* (Hart 2007); Jacques, M., *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons*

under IHL (CUP 2012); Jain, N., 'Forced Marriage as a CaH: Problems of Definition and Prosecution', (2008) 6 *JICL* 1013; Kälin, W., 'Guiding Principles on Internal Displacement: Annotations', (2000) 32 *StudiesTransnatLPol;* Kaye, M., *1807–2007: Over 200 Years of Campaigning against Slavery* (Anti-Slavery International 2005); Kramer, D. and Weissbrodt, D., 'The 1980 UN Commission on Human Rights and the Disappeared', (1981) 3 *HumRtsQ* 18; Kuschnik, B., 'Humaneness, Humankind and CaH', (2010) 2 *GoJIL* 501; La Haye, E., 'The Elements of War Crimes – Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilisation and Sexual Violence', in: Lee, *ICC* (2001) 184; Lassen, N., 'Slavery and Slaverylike Practices: United Nations Standards and Implementation', (1988) 57 *NordicJIL* 197; Lambert, C., 'Environmental Destruction in Ecuador: CaH Under the Rome Statute?', (2017) 30 *LeidenJIL*, 707; Lavoyer, J.-P., 'Guiding Principles on Displacement – A few Comments on the Contribution of IHL', (1998) *324 IRevRC* 467; Lingaas, C., *The Concept of Race in ICL* (Routledge 2019); *id.*, 'The Elephant in the Room: The Uneasy Task of Defining "Racial" in ICL' (2015) 15 *ICLRev* 485; MacKinnon, C.A., 'Rape, Genocide, and Women's Human Rights', (1994) 17 *HarvWomen'sLJ* 5; May, L., 'Targeted Killings and Proportionality in Law: Two Models', (2013) 11 *JICJ* 47; Meron, T., 'Rape as a Crime under IHL', (1993) 87 (3) *AJIL* 424; Mouthaan, S., 'Sexual Violence Against Men and International Law – Criminalising the Unmentionable' (2013) 13 *ICLRev* 665; Namgalies, C., 'Apartheid on Trial', (2004) 15 (3) *CLF* 349; Nanda, V.P. and Bassiouni, M.C., 'Slavery and Slave Trade: Steps toward Eradication', (1972) 12 *SantaClaraL* 424; Niarchos, C.N., 'Women, War, and Rape: Challenges Facing the ICTY', (1995) 17 *HumRtsQ* 649; Obokata, T., 'Trafficking of Human Beings as a CaH: Some Implications for the International Legal System', (2005) 54 *I&CompLQ* 445; Oosterveld, V., 'Forced Marriage and the SCSL: Legal Advances and Conceptual Difficulties', (2011) 2 *JILS* 127; *id*., 'Gender, Persecution, and the ICC: Refugee Law's Relevance to the CaH of Gender-Based Persecution' (2006) 17 *DukeJComp&IL* 49; Ott, L., *Enforced Disappearance* (Intersentia 2011); Pejic, J., 'Procedural safeguards for internment/administrative detention in armed conflict and other situations of violence', (2005) 858 *IRevRC* 375; Phuong, C., *The International Protection of Internally Displaced Persons* (CUP 2004); Pirker, B. and Smolka, J., 'The ICC PTC's Reading of "or" in the Myanmar Jurisdiction Ruling: On the Relevance of Linguistics to Interpretation', (2018) *EJIL: Talk!*, <https://www.ejiltalk.org/category/international-criminal-court/page/11/?pagenum=15> accessed 23 Sep. 2020; Pocar, F., 'Human Trafficking: A CaH', in: Savona, E. and Stefanizzi, S. (eds.), *Measuring Human Trafficking: Complexities and Pitfalls* (Springer 2007); Prosperi, L., and Terrosi, J., 'Embracing the "Human Factor": Is There New Impetus at the ICC for Conceiving and Prioritizing Intentional Environmental Harms as CaH?', (2017) 15 *JICJ* 181; Ratner, S.R., Abrams, J.S. and Bishoff, J.L., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (OUP 3rd edition 2009); Refugee Law Project, *Into the Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict* (2014); Roberts, K., 'The Law of Persecution Before the ICTY', (2002) 15 *LeidenJIL* 623; Robinson, D., 'Article 7 (1) (a) – CaH of Murder', in: Lee, *ICC* (2001) 80; Robinson, P., 'The Missing Crimes', in: Cassese *et al.*, *Rome Statute I* (2002) 497; Rodley, N., 'The Definition(s) of Torture in International Law', (2002) 55 *Current Legal Problems* 467; *id.*, *The Treatment of Prisoners under International Law* (OUP 3rd edition 2009); Rosenne, S., *Essays on International Law and Practice* (Nijhoff 2007); Rottensteiner, C, 'Denial of Humanitarian Assistance as a Crime under International Law', (1999) 835 *IRevRC* 555; Salzman, T.A., 'Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural and Ethical Responses to Rape Victims in the Former Yugoslavia', (1998) 20 *HumRtsQ* 348; Scheinert, J., 'Refusal to Save Lives: A Perspective from ICL', (2013) 13 *ICLRev* 627; Schirer, W., *The Rise and Fall of the Third Reich* (1959); Schomburg, W. and Peterson, I., 'Genuine Consent to Sexual Violence under ICL', (2007) 101 *AJIL* 121; Seiderman, I.D., *Hierarchy in International Law: The Human Rights Dimension* (Intersentia 2001); Sellers, P.V., 'The Context of Sexual Violence: Sexual Violence as Violations of IHL', in: McDonald Swaak-Goldman, *ICL I* (2000) 247; *id.*, 'Wartime Female Slavery: Enslavement?', (2011) 44 *CornILJ* 115; Sellers, P.V., and Kestenbaum G., 'Missing in Action: The International Crime of Slave Trade', (2020) 18 *JICJ* 517; Sembacher, A., 'The Council of Europe Convention on Action Against Trafficking in Human Beings', (2006) 14 *TulaneJI&CompL* 435; Sivakumaran, S., 'Sexual Violence Against Men in Armed Conflict', (2007) 18 *EJIL* 253; *id.,* 'Prosecuting Sexual Violence Against Men and Boys' in: de Brouwer, A.-M., Ku, C., Römkens, R. and van den Herik, L. (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013); Swaak-Goldman, O., 'Persecution', in: McDonald and Swaak-Goldman, *ICL I* (2000) 247; *id.,* 'The Crime of Persecution in ICL', (1998) 11 *LeidenJIL* 145; Tavakoli, N., 'A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime', (2009) 9 *ICLRev* 77; Thomas, H., *The Slave Trade: The History of the Atlantic Slave Trade: 1440–1870* (Sirnon & Schuster 1997); Toepfer, S.F. and Wells, B.S., 'The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women', (1994) 2 *MichJGender&L* 83; Tayler, W., 'Background to the elaboration of the draft ICPPED', (2001) 32 *ICJRev* 63, Van der Wilt, H., 'Trafficking in Human Beings, Enslavement, CaH: Unravelling the Concepts', (2014) 13 *ChineseJIL 297*; Ventura, M.J., 'Prosecuting Starvation under ICL: Exploring the Legal Possibilities', (2019) 17 *JICJ* 781; Weis, P., *Nationality and Statelessness in International Law*

(Sijthoff & Noordhoff 2nd edition 1979); Whitaker, B., Report on Slavery, UN. Doc. E/CN.4/Sub.2/1982/20/Rev.l, UN Sales No. E.84.XIV.1.

Note by the editor: the former items 6–9 (Decisions of the ICTY and ICTR, Decisions of national courts, national legislation) have not been continued and can be consulted in the previous edition at pp. 149–151.

Content

A. Introduction/General remarks*

1 The definition of Crimes against Humanity ('CaH') has evolved and become further clarified since this concept first received explicit international legal recognition in the *St.*

* Kai Ambos acknowledges the important research assistance of Jacopo Governa.

Petersburg Declaration of 1868 limiting the use of explosive or incendiary projectiles as 'contrary to the laws of humanity'.[1] The concept received further recognition when the First Hague Peace Conference in 1899 unanimously adopted the Martens Clause as part of the Preamble to the *Hague Convention respecting the Laws and Customs of War on Land*.[2] The Martens Clause has been incorporated virtually unchanged in most subsequent humanitarian law treaties.[3] The first formal reference to some of the crimes which would be included in the concept of CaH was given in the *Declaration of France, Great Britain and Russia* on 24 May 1915 denouncing the massacres by the Ottoman Empire of Armenians in Turkey as 'crimes against humanity and civilisation for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres'.[4] The novelty was, of course, that the crimes were committed by citizens of a State against their own fellow citizens, not against those of

[1] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 11 Dec. 1868. (The parties agreed to draw up additional instruments 'in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity'). There were earlier uses of the phrase, but often the link with the twentieth century concept of CaH is either tenuous or non-existent. For example, in 1794, Maximilien de Robespierre called Louis XVI a 'criminal toward humanity', but most of 'crimes' of the 'tyrant' – primarily his conspiracy in league with foreign countries against the government that deposed him, were not specifically identified in his speech and are far removed from the current understanding of what constitutes CaH. Robespierre, in: Bryan, *Orations* (1906) 380. – More likely, the concept owes more to natural law thinking in some of the early writings on international law, such as Grotius's views on the natural law limits on the use of armed force in *De Jure Belli Ac Pacis* (On the Law of War and Peace) and Emmerich de Vattel's concept of 'offices of humanity', binding men and nations alike, which were founded on the laws of nature, *The Law of Nations or the Principles of Natural Law* (1758) Book II, Ch. 1, para. 2. In the early 19th century, a U.S. Attorney General, citing Grotius, declared that acts of 'extreme atrocity' involved 'crimes against mankind', 1 Opinion. Attorney General (1821) 509, 513. The Reverend T. Parker in 1854 called the US Fugitive Slave Bill a new CaH (Parker, *The New CaH* (1854)). In 1874, the American editor and leading proponent of public reform, G.W. Curtis, also called slavery a 'CaH', in: Norton, *Orations* (1894) 208. In 1906, in an article that was not published until 1921, R. Lansing, later U.S. Secretary of State and participant in the Versailles Peace Conference (see below fn. 6), stated that the slave trade, along with piracy, was an example of a 'CaH' over which any State could exercise universal jurisdiction (Lansing (1921) 15 *AJIL* 13, 25).

[2] Hague Convention respecting the Laws and Customs of War on Land of 1899, Preamble ('Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that, in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience'). The Martens Clause is named after the Russian diplomat who drafted it, see Bassiouni, *CaH* (2011) 88, fn. 7; Lippman (1997) 17 *BCThirdWorldLJ* 171, 173; Meron, *Humanisation IL* (2006) 16 ff.; Hankel, in: Hankel, *Macht* (2008) 414, 428–9; Salter and Eastwood (2011) 2 *JIHumLStud* 216, 251 ff.; *id.,* in: Behrens and Henham, *Genocide* (2013) 20; Stahn, *Introduction ICL* (2019) 52 ff.

[3] See, *e.g.*, Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907, Preamble, para. 8; Article 63 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First GC), 12 Aug. 1949, 6 UST 3114, 75 UNTS 31; Article 62 Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second GC), 12 Aug. 1949, 6 UST 3217, 75 UNTS 85; Article 142 Convention Relative to the Protection of Prisoners of War (Third GC), 12 Aug. 1949, 6 UST 3316, 75 UNTS 135; Article 158 Convention Relative to the Protection of Civilian Persons in Time of War (Fourth GC), 6 UST 3516, 75 UNTS 287; Article 1(2) Add. Prot. I; Preamble Add. Prot. II.

[4] Declaration of France, Great Britain and Russia, 24 May 1915, quoted in Schwelb (1946) 23 *BYbIL* 178, 181. The date of 28 May 1915 in this article is a misprint. Dadrian (1989) 14 *YaleJIL* 221, 262, fn. 129. The history of the drafting of the Declaration remains to be fully explored, but the concept appears to reflect in part the similar justifications advanced by Western countries for earlier diplomatic protests and military humanitarian interventions to protect minorities in Lebanon, Romania and Turkey. See *U.S. v. Altstötter (Justice Trial)*, Judgment, U.S. Military Tribunal, Nuremberg, Germany, 4 Dec. 1947, 4 LRTWC 1 (HMSO 1947). See also UNWCC, *History* (1948) 35; Cerone (2008) 14 *NewEngJI&CompL* 191, 191–2.

another State.[5] The 1919 Versailles Peace Conference Commission supported individual criminal responsibility for violations of 'the laws of humanity', including murders and massacres, systematic terrorism, putting hostages to death, torture of civilians, deliberate starvation of civilians, rape, abduction of girls and women for the purposes of enforced prostitution, deportation of civilians, internment of civilians under inhuman conditions, forced labour of civilians in connection with the military operations of the enemy, imposition of collective penalties and deliberate bombardment of undefended places and hospitals.[6] In 1920, Turkey agreed in the Treaty of Sèvres to bring to justice those responsible for such crimes against Armenians which were committed after the outbreak of the First World War and recognised the concurrent jurisdiction of the courts of the Allies over these crimes; it also conducted several trials of Turkish officials for these crimes.[7] Historically, the relevant conduct has been understood broadly, perhaps even going so far as to treat CaH in an equivalent manner to human rights and encompassing a wide range of conduct, performed by either State or non-State actors, and in times of war or peace.[8] In any case, it is fair to argue in light of the instruments just mentioned that CaH had already been embedded in CIL before the Nuremberg trials.[9]

2 Since WW II, CaH have been repeatedly recognised in international instruments as part of international law;[10] in 2013, the ILC started to work on a comprehensive

[5] Similarly, in the Nuremberg trials 'CaH' were dealt with as crimes committed by Germans against fellow Germans; *cf.* Article 6(c) IMT Charter, as amended by the Prot. to Agreement and Charter, London, 6 Oct. 1945; see also Clark, in: Ginsburgs and Kudriavtsev, *Nuremberg* (1990) 177, 195–8.

[6] Commission of the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, Versailles, March 1919, Conference of Paris, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Annex, which recommended the establishment of a high tribunal to try persons belonging to enemy countries who were guilty of 'offences against the laws and customs of war or the laws of humanity'. Somewhat ironically, in the light of his then unpublished article of 1906 (Lansing (1921) 15 *AJIL* 13, 25), Robert Lansing, as an American member of the Commission, joined his fellow US member, James Brown Scott and the two Japanese members in dissenting from this conclusion on the ground that the particular acts listed were not recognised as crimes under international law.

[7] Arts. 226, 230 Treaty of Peace Between the Allied Powers and Turkey (Treaty of *Sevrès*), 10 Aug. 1920, reprinted in (1921) 15 *AJIL* 179 (Supp.). Although this treaty was signed by Turkey and 21 other countries, it was never put into effect and was replaced by the Treaty of Lausanne, which did not provide for such prosecutions. See Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), 24 Jul. 1923, 28 LNTS 11, reprinted in (1924) 18 *AJIL 1* (Supp.). For an account of these trials, see Dadrian (1989) 14 *YaleJIL* 221, 291–334.

[8] *Cf.* Paust, in: Paust *et al.*, *ICL* (2013) 777.

[9] *Cf.* Robinson (1999) 93 *AJIL* 43, 44; Mettraux, *CaH* (2020) 1.2.

[10] The relevant provisions adopted *before 1998* include: Article 6(c) IMT Charter; Article II (1)(c) Allied CC Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity (Allied CC Law No. 10), 20 Dec. 1945; Article II (1)(c), Official Gazette of the CC for Germany, No. 3, Berlin, 31 Jan. 1946; Article 5(c) IMTFE Charter; Principle VI(c) of the 1950 Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (Nuremberg Principles), ILC Report on Principles of the Nuremberg Tribunal, 29 Jul. 1950, 5 UN GAOR Supp. (No. 12) 11, UN Doc. A/1316 (1950); Article 2(10) (inhuman acts) ILC Draft Code 1954; Article 1(b) Convention on the Non-Applicability of Statutory Limitations for War Crimes and CaH, adopted by GA Res. 2391 (XXIII) of 26 Nov. 1968; the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted in GA Res. 3068 (XXVIII), 30 Nov. 1973; Article 5 ICTY Statute; Article 3 ICTR Statute and Article 18 ILC Draft Code 1996. Since the Rome Statute's adoption in 1998, CaH have been included in Article 5, UNTAET Reg. 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor), 6 Jun. 2000; Article 2 SCSL Statute; Article 5 ECCC Law; Article 3 *Loi organique No. 15.003 portant création organisation et fonctionnement de la cour pénale spéciale de la République Centrafricaine* (Law of the Special Criminal Court of the CAR), 3 Jun. 2015; Article 13 KSC Law, 3 Aug. 2015. The increase in the number of acts expressly listed as CaH is less an expansion of the scope of CaH than the giving of more precise definitions to conduct that was or would

Convention on CaH.[11] Definitions in the different instruments are, however, vague and, in many respects, inconsistent with regard to, for instance, the different approaches as to whether the CaH are linked to an armed conflict,[12] or are to be considered as mere peace crimes.[13] The scope of these definitions and their interpretation by international and national tribunals and courts will be discussed below.

B. Analysis and interpretation of elements

I. Paragraph 1: List of crimes

1. Chapeau

Article 7 represents both a 'codification' and a 'progressive development' of international law within the meaning of Article 13 UN Charter.[14] It unites the distinct legal features which may be thought of as the 'common law' of CaH.[15] The *chapeau* of para. (1) of Article 7 establishes the jurisdictional threshold of the Court over CaH under the Statute, while subpara. (2)(a) defines this threshold in greater detail (see below mn. 200 ff.).[16] It captures the essence of such crimes, namely that they are acts which occur during a widespread or systematic attack on any civilian population in either times of war or peace. The drafting history of this provision reveals that little consensus existed in respect of most of these elements before the Diplomatic Conference in Rome. **3**

Thus, a more in-depth scrutiny going beyond the mere analysis of the positive law is required in order to understand the **rationale** of CaH. Historical facts suggest conceptualizing them as State crimes in a broad sense.[17] This definition is problematic, however, for two reasons. First, it is limited to the classical relation between a State and its citizens residing in its own territory, leaving out other extraterritorial State-citizen relations and relations between a State and foreign citizens;[18] second, it does not account for non-State actors, at least not explicitly. Replacing 'State' by 'non-State actor' to accommodate the concept to the now recognised standing of the latter as a potential perpetrator of CaH seems inadequate, however, since there is clearly a difference

have been considered in the category of other inhumane acts under the Nuremberg IMT Charter or were identified as such, in the Peace Conference Commission Report 1919.

[11] See for the work in progress Murphy (2018) 16 *JICJ* 679, 680–1; Sadat (2018) 16 *JICJ* 683, 689 ff.; Kreß and Garibian (2018) 16 *JICJ* 909, 909 ff. ('solid groundwork has been laid'). The (first) Draft was adopted at the 69th session of the ILC (ILC, Report sixty-ninth session, 1 May- 2 Jun. and 3 Jul.-4 Aug. 2017, A/72/10, Aug. 2017, 9) and the UN GA noted the completion of the first reading of the draft articles on 7 Dec. (A/RES/72/116).

[12] See Article 5 ICTY Statute and Article 6(c) IMT Charter.

[13] See Article 3 ICTR Statute.

[14] See also Clark, in: Clark *et al.*, *Russia* (2001) 139, 139–156.

[15] Luban (2004) 29 *YaleJIL* 85, 93 ff., summarizing these legal features as follows (at 108): 'CaH are international crimes committed by politically organised groups acting under color of policy, consisting of the most severe and abominable acts of violence and persecution, and inflicted on victims because of their membership in a population or group rather than their individual characteristics'.

[16] The ILC Draft Statute 1994 did not include any definition for CaH, which had been proposed as a crime within the Court's jurisdiction in Article 20.

[17] *Cf.* Richard Vernon's classical definition in Vernon (2002) 10 *JPolPhilosophy* 231, 233, 242, 245: 'a moral inversion, or travesty, of the State', 'an abuse of State power involving a systematic inversion of the jurisdictional resources of the State', 'a systematic inversion: powers that justify the State are, perversely, instrumentalised by it, territoriality is transformed from a refuge to a trap, and the modalities of punishment are brought to bear upon the guiltless'.

[18] See the convincing criticism of Luban (2004) 29 *YaleJIL* 85, 94, fn. 28.

between a State's obligation under international law to guarantee the rule of law and protect its citizens and a similar (emerging) duty of a non-State actor over the territory under its control. Therefore, a concept of CaH which does not deny their eminent political connotation, but yet downplays the focus on the entity behind these crimes is more convincing.[19] 'CaH', understood in this way, intend to provide penal protection against the transgression of the most basic laws protecting our individuality as political beings and our social entity as members of political communities. They protect both, being international crimes, the collective legal interests of international peace and security,[20] but also more concrete individual legal interests such as life, bodily integrity, liberty, and personal autonomy and thus ultimately human dignity.[21]

That also answers another unresolved question since the inception of the concept of CaH, namely whether they were crimes that were particularly inhumane or crimes against a collective body of individuals. Probably the best answer is that they are both,[22] a double assault on individuality (the individual and political 'quality of being human', 'humanness') and groups ('the set of individuals', 'sociability', 'humankind').[23] There was no fundamental disagreement over the prerequisite that the acts must be committed as part of an attack on any civilian population.[24] However, it was unresolved whether these acts needed to take place during armed conflict, and if they had to occur on discriminatory grounds.[25] It is evident from the *chapeau* of Article 7 that the State delegates finally decided not to include either of these requirements.[26]

4 Another point of divergence arose over whether the attack had to be both **widespread** *and* **systematic**, or only one *or* the other.[27] It seems to clearly follow from the *chapeau* that the matter was resolved in favour of the alternative formulation. Indeed, this was also the approach taken by the UNWCC speaking of crimes 'which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied … endangered the international community or shocked the conscience of

[19] Ambos, *Treatise ICL II* (2014) 47, fn. 14 and main text.

[20] See the Preamble of the ICC Statute, para. 3.

[21] Further on the protected legal interests, see Ambos, *Treatise ICL II* (2014) 48–9, with further references; Werle and Jessberger, *Principles ICL* (2020) 379; Satzger, *ICL* (2018) § 14, mn. 32; *id.*, *Internationales Strafrecht* (2018) § 16, mn. 32.

[22] The following two examples suffice to illustrate the divide. On the one hand J.G. Barsegov, a member of the International Law, noted during the 1989 session that '[i]n Russian as in English and French, the term 'humanity' could mean both 'mankind' and the moral concept whose antonym was 'inhumanity'. That terminological ambiguity clearly showed that there was a conceptual problem. In order to remove the ambiguity, it was necessary to go back to the sources.' See in the 24 May 1915 Declaration by France, Great Britain and Russia (above fn. 4) the crimes in question had been characterised as 'CaH' in the sense of 'crimes against mankind' 1 *YbILC* 10 (1989) (overlooking the use of the term 'laws of humanity' in the St. Petersburg Declaration 1868 and the Martens Clause of 1899 which can be seen as emphasizing the concept of humaneness rather than the idea of an attack against 'mankind'. On the other hand, Cassese emphasizes the former concept in: Cassese *et al.*, *Rome Statute I* (2002) 353, 360 ('They are particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more human beings').

[23] See Luban (2004) 29 *YaleJIL* 85, 86 ff.; Vernon (2002) 10 *JPol'lPhilosophy* 231, 237 ff., while critical of the element of humanness (see 237), shares the idea of an attack on humankind in the sense of entity and diversity; on humanity as the basis of CaH see Nollez-Goldbach, in: Kastner, *ICL* (2018) 94 ff.; for good overview of the theoretical justifications Stahn, *Introduction ICL* (2019) 53 ff.; see also Ambos, *Treatise ICL II* (2014) 48, fn. 18–20.

[24] *Ad Hoc* Committee Report, paras. 77–80; PrepCom I 1996, paras. 82–90; PrepCom Decisions Feb. 1997, 4–6; PrepCom Draft 1998, 30–3.

[25] *Ibid*.

[26] Article 3 of the ILC Draft of 2017, follows this approach adopting the ICC definition. Note however that the crime of persecution requires that the acts be committed on certain discriminatory grounds (Article 7(1)(h) ICC Statute).

[27] See below mn. 19 ff.