

United States Delegation

For Annex to Statute
Elements Related to Article on Crimes Against Humanity

Crimes Against Humanity

1. A person commits a crime against humanity when :

a. he commits one of the acts¹ described in paragraph 2; and

[b. that act is part of a widespread and systematic attack against a civilian population.]²

[b. he commits that act [knowing it is part of] [with the intent to further] a widespread and systematic attack against a civilian population.]

2. Acts constituting a crime against humanity when committed as part of a widespread and systematic attack against a civilian population are the following:

a. Murder [willful killing]³, meaning intentionally or knowingly causing the death of another person, or [causing the death of another person under circumstances manifesting extreme indifference to human life.]⁴

¹ The enumerated conduct should constitute "acts" rather than omissions, save where liability arises out of command responsibility. Assuming command responsibility is treated in the general part, it should not be necessary to refer to liability for failure to act by commanders here.

² The two versions of subparagraph b are meant to pose the question whether the fact that an act is part of a widespread and systematic attack should be only a circumstance to be proven factually, or whether it should be part of the mental element of the offense, i.e., that the accused either knew or intended that it was part of or would further such an attack. If it is only a factual circumstance, those who act as agents of the planners of the attack will be liable whether or not they share the knowledge or intent of the planners. If, on the other hand, it is to be part of the mental element, knowledge rather than specific intent would seem to be the better choice, with knowledge that one is committing a serious offense, knowing it to be part of a widespread and systematic attack on civilians sufficient for criminal liability.

³ In the Genocide Convention, the term "willful killing" is used rather than murder. "Willful killing" may be preferable if it would avoid argument that the proscribed killing under genocide is meant to differ from that under crimes against humanity (which it does not appear to be) or if it will avoid unnecessary disagreement arising from different meanings for the legal term of murder among national legal systems.

⁴ In addition to intentional killing, many legal systems appear to recognize murder or willful homicide to extend to situations where the accused knowingly or intentionally caused conditions likely to result in death (see, e.g., Siracusa draft), including intentionally causing grave bodily injury, and death in fact results. The particular formula expressed here is drawn from the Model Penal Code of the American Law Institute.

- a. Extermination, meaning --
 - (1) mass murder; or
 - (2) intentionally inflicting conditions of life [calculated to] [which the accused knew or had reason to know would] bring about the physical destruction of a defined segment of the population.⁵
- c. Enslavement, meaning intentionally placing or maintaining a person in a condition in which any or all of the powers attaching to the right of ownership are exercised over him.⁶
- d. Deportation, meaning mass deportation or forced transfer of persons from the territory of a State [or from an area within a State] of which such persons are nationals or lawful permanent residents, except where the acts constituting deportation or transfer are for purposes of an evacuation for safety or other legitimate and compelling reasons. ⁷

⁵ The concept of creating conditions of life “calculated to” bring about the physical destruction of a group is taken from the Genocide Convention. Again, the question arises whether the accused must have know or intended this result, or only that he intentionally engaged in conduct which had this characteristic. It is also noted that this prong of “extermination “ requires that the conduct be directed towards a defined segment of the population, whereas no such additional element of proof is required for “mass murder,” the sheer scale of the offense being sufficient for its inclusion as a crime against humanity.

⁶ This definition is taken from the 1926 anti-slavery convention. It has been suggested that this definition, which reaches conditions in which “any or all” of the powers attaching to the right of ownership, may be sufficient to reach conduct constituting “forced labor.”

⁷ Two aspects of this provision should be noted for further discussion. First, we note that some texts refer only to deportation, which we understand to mean removal or forced departure from the territory of the State, while this formula also includes forcible transfer of persons within the territory of a particular State.

Second, since deportations under some (if not many) circumstances are perfectly lawful, it will be necessary to define those deportations (or transfers) which, when committed as part of a widespread and systematic attack, should be considered crimes against humanity. Referring to “unlawful” deportations is not entirely satisfactory, both because it seems to avoid the very problem of definition which we are seeking to address, and because it raises the question of how to deal with laws which are enacted in an attempt to legitimize the very deportations (or other acts) which are being pursued as part of the attack on the civilian population. Some tests attempt to deal with the problem of distinguishing deportations that should appropriately be considered crimes against humanity by inserting a requirement that the deportation be committed on social, political, etc. “grounds.” The Siracusa draft deals with this problem by referring to “discriminatory and arbitrary” deportations. These same sorts of concerns arise when trying to define the type of “imprisonment” that should be considered a crime against humanity, since imprisonment, like deportation, is lawfully imposed in many circumstances.

- e. Imprisonment, meaning the forcible confinement of a person for a prolonged or indefinite period of time in manifest and gross violation of governing legal norms regarding arrest and detention.⁸
 - f. Torture, meaning the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the accused's custody or physical control; except that torture shall not include pain and suffering arising only from, inherent in or incidental to, lawful sanctions.⁹
 - g. Rape, meaning causing a person to engage in or submit to a sexual act by force or threat of force.
 - h. Enforced prostitution, meaning intentionally placing or maintaining a person in circumstances in which the person is expected or directed to engage repeatedly over time in sexual acts, and the person's capacity or freedom to refuse has been substantially negated because of the force or threat of force, the circumstances, loss of physical liberty, mental impairment, or prolonged periods of serious mental or physical abuse.¹⁰
 - [i. Persecution, meaning the intentional and severe deprivation of fundamental rights, without lawful justification, on a national, political, ethnic, racial, or religious group [in connection with any other crime within the jurisdiction of the court].]¹¹
 - [j. Other inhumane acts which cause grave injury to body or health.]
3. Definitions.
- a. as used in the phrase "widespread and systematic attack, "

⁸ See the second paragraph of note 7, above .

⁹ Note this formula does not carry forward from the Torture Convention the requirement that the accused be a government official or otherwise acting under color of law.

¹⁰ We were unable to find any available precedent for this term and would welcome suggestions from other delegations on how it might be improved.

¹¹ A core problem in finding an adequate definition for persecution is to exclude acts which , although they may constitute a reprehensible deprivation of rights and may even have been committed on a systematic basis, nonetheless do not rise to such an level of egregious conduct that they should constitute "crimes against humanity." If this problem is not carefully addressed, the "persecution" prong of crimes against humanity could criminalize discrimination or human rights violations not previously contemplated as being "crimes against humanity." The double-bracketed language, which requires a nexus between the conduct of "persecution" and some other crime within the Court's jurisdiction, has been suggested as one way of narrowing the definition of persecution to address such concerns.

(1) the term “widespread” means the attack is massive in nature and directed against large numbers of individuals; and

(2) the term “systematic” means the attack constitutes, or is part of, consistent with, or in furtherance of, a policy or concerted plan, or repeated practice over a period of time.